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Anti-Immigrant Backlash and the Role of the Judiciary: A Proposal for Heightened Review of Federal Laws Affecting Immigrants Comment.

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COMMENTS

ANTI-IMMIGRANT BACKLASH AND THE ROLE OF THE JUDICIARY: A PROPOSAL FOR HEIGHTENED REVIEW OF FEDERAL LAWS AFFECTING IMMIGRANTS*

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* While the needs of illegal immigrants for legal protection are real and pressing, this Comment will only focus on "legal" immigrants and how the Welfare Reform Act affects their constitutional rights. The federal government differentiates between "aliens" or legal immigrants by classifying them into many subgroups. *See* Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. (1976 & Supp. II 1978) (explaining all classifications of "aliens"). Aliens are first considered either "immigrants" or "nonimmigrants." *Id.* § 1101(a)(15) (1976 & Supp. II 1978). The federal government differentiates between illegal aliens (those aliens living illegally in the United States), immigrant aliens (those aliens with intent to become American citizens), and non-immigrant aliens (those aliens who can only legally reside in the United States for a set period of time). *Id.* For purposes of this Comment, the term legal immigrant refers to "immigrant aliens."

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The term "person," used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.[1]

I. INTRODUCTION

Anti-immigrant sentiment, fueled by the increase in the number of immigrants entering the United States during the 1980s,[2] is once again on the rise in America.[3] This sentiment has manifested itself in the acts of

1. Wong Wing v. United States, 163 U.S. 228, 242 (1896) (Field, J., concurring in part, dissenting in part).

2. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. 1990 CP-2-1, 1990 CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS, UNITED STATES 13 (1993) (listing statistics in Table 13 that show entry of foreign-born persons increasing from 4,869,415 in 1970s to 8,663,627 in 1980s).

3. *See, e.g.*, Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467, 1468–69 (1996) (describing examples of anti-immigrant backlash, including, presidential contender Patrick Buchanan's anti-immigrant campaign rhetoric, anti-immigration bills passed by Congress, and resurgence of "English-only" laws); John O. Calmore, *Exploring Michael Omi's "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free,"* 15 LAW & INEQ. J. 25, 71–72 (1997) (contending that restrictive immigration policies and anti-Asian violence mark revival of anti-immigrant sentiment, especially in states heavily populated with immigrants like California and Texas); Stephen H. Legomsky, *E Pluribus Unum: Immigration, Race, and Other Deep Divides*, 21 S. ILL. U. L.J. 101, 102–03 (1996) (commenting on how immigrants are "under fierce attack today" on both state and national levels); *Recent Legislation, Welfare Reform—Treatment of Legal Immigrants—Congress Authorizes States to Deny Public Benefits to Noncitizens and Excludes Legal Immigrants from Federal Aid Programs—Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105*, 110 HARV. L. REV. 1191, 1191 (1997) (explaining that anti-immigrant sentiment fueled "political attacks from candidates seeking to capitalize on voter anxiety" during 1996 election); *cf.* Norman Matloff, *How Immigration Harms Minorities*, PUB. INTEREST, June 1, 1996, at 61 (arguing that immigrants themselves fuel anti-immigrant backlash and quoting 1993 survey stating that "half of the immigrants in New York agreed with the statement, 'Immigration has made this city a worse place in which to live'").

private citizens[4] and through the passage of federal and state laws that have a discriminatory impact on all immigrants.[5] One commentator, Pe-

4. *See English As Official Language: Hearings on S. 356 Before the Comm. on Governmental Affairs*, 104th Cong., 1st Sess. 92 (1996) (written statement of Karen K. Narasaki, Executive Director of National Asian Pacific American Legal Consortium) (relating increase of hate crimes in California as result of xenophobia and bigotry). While these incidents of hate crimes are fueled by anti-immigrant sentiment, the victims of these xenophobic hate crimes are not limited to immigrants. *See id.* (reporting Asian Americans and Indian Americans as victims of anti-immigrant backlash). One Asian American man in Sacramento was violently stabbed by a white man who claimed he was "defend[ing] our country." *Id.* Another Asian American man was attacked by a white man with a bat who screamed, "You're in my country—Get Out! Go back to your country, this is America." *Id.* In Pennsylvania, a band of young white males attacked an Indian American student and yelled, "Go home, f_ing Iranian, you f_ing Asian sh-t. Go home foreigner." *Id.*

5. *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act), Pub. L. No. 104–193, 110 Stat. 2105 (codified as amended in scattered sections of 8 and 42 U.S.C.) (calling for elimination of public welfare to legal immigrants, subject to certain exceptions); CAL. EDUC. CODE § 48215 (West 1996) (preventing illegal immigrants from attending public elementary and secondary schools); CAL. HEALTH & SAFETY CODE § 130 (West 1996) (prohibiting illegal immigrants from receiving publicly funded health care). Various states have also proposed similar limitations on public welfare benefits to legal immigrants. *See* S.B. 34, 1997–98 Reg. Sess. (Cal. 1997) (proposing that California follow provisions of federal Welfare Reform Act, subject to few modifications), *available in* Westlaw, at 1997 CA S.B. 34 (SN); S. 2274, 15th Leg., Reg. Sess. (Fla. 1996) (proposing bill that would prohibit illegal immigrants from attending public schools or from receiving public benefits), *available in* Westlaw, at 1996 FL S.B. 2274 (SN). In addition to laws that deny education, welfare, and health care, many states have passed nationalistic "English-only" laws, making English the "official language" of their states. *E.g.*, ALA. CONST. amend. 509; ARIZ. CONST. art. XXVIII, § 1; CAL. CONST. art. III, § 6; COLO. CONST. art. II, § 30a; FLA. CONST. art. II, § 9; NEB. CONST. art. I, § 27; ARK. CODE ANN. § 1–4–117 (Michie 1996); IND. CODE ANN. § 1–2–10–1 (Michie 1996); KY. REV. STAT. ANN. § 2.013 (Michie 1996); MISS. CODE ANN. § 3–3–31 (1991); MONT. CODE ANN. § 1–1–510 (1995); N.H. REV. STAT. ANN. § 3–C:1 (Supp. 1996); N.C. GEN. STAT. § 145–12 (1995); N.D. CENT. CODE § 54–02–13 (1989); S.C. CODE ANN. § 1–1–696 (Law Co–op. Supp. 1995); S.D. CODIFIED LAWS ANN. § 1–27–20 (1995); TENN. CODE. ANN. § 4–1–404 (1995); VA. CODE ANN. § 7.1–42 (Michie Supp. 1993). Although claiming to make English the "official language," many of these statutes have exceptions for the purpose of sidestepping constitutional issues. *See* ARIZ. CONST. art. XXVIII, § 3 (creating exceptions, such as allowing employees to speak other languages to students who cannot speak English and allowing other languages to be spoken by employees in order to comply with federal laws); COLO. REV. STAT. § 1–7–112 (Supp. 1996) (permitting election judge, upon request, to provide assistance to any elector who cannot speak English); N.H. REV. STAT. ANN. § 3–C:2 (Supp. 1996) (allowing other language besides English to be spoken in public proceeding with Quebec, in foreign language instruction, in classes designed to help students unable to speak English, in promoting "international commerce, tourism, and sporting events," in safeguarding "public safety, health, or emergency services," in complying with "needs of the justice system," and in testifying as expert witness or other type of witness); N.H. REV. STAT. ANN. § 3–C:4 (Supp. 1996) (prohibiting any interpretation of "English-only" statute that would "infringe on the rights of citizens under the state constitution or the Constitution of the United States in the use of language in activities or functions con-

ter Schuck, documents immigrant growth, noting that more legal immigrants entered the United States during the 1980s than in any other decade since 1910.[6] In fact, Schuck posits that if reported immigration figures included illegal immigration, the total immigration rate during the 1980s would be the highest in American history.[7] However, this influx of immigrants is not the sole factor precipitating the rise in anti-immigrant sentiment among United States citizens and legislatures. Anti-immigrant sentiment is largely due to the disproportionate concentration of immigrants in a few states[8] and generally within metropolitan areas,[9] spurring

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ducted in the private sector"). Although the Arizona legislature attempted to by-pass the Constitution by creating exceptions to the "English-only" statute, its statute prohibiting other languages from being spoken by government employees was held unconstitutional. *See* Yniguez v. Arizonans for Official English, 69 F.3d 920, 947 (1995) (striking statute for being overbroad and for violating First Amendment), *vacating as moot*, 117 S. Ct. 1055 (1997).

6. *See* Peter H. Schuck, *The Evolving Civil Rights Movement: Old Civil Rights and New Immigration*, CURRENT, Jan. 1, 1994, at 13 (commenting on demographic change in United States), *available in* 1994 WL 13196627, at *3.

7. *Id.* While illegal immigration figures are unreliable, Mr. Schuck contends that if one uses pre-Immigration Reform and Control Act of 1986 (IRCA) statistics, an estimated 200,000 illegal immigrants enter the United States annually and remain permanently. *Id.* He then assumes, as does the Census Bureau, that illegal immigration is now back to its pre-IRCA levels. *Id.* Thus, according to Mr. Schuck's analysis, more than two million illegal immigrants entered and remained in the United States during the 1980s, more than any other decade. *Id.* Additionally, Mr. Shuck calculates that the percentage of foreign-born population in the United States increased from 6.2% in 1980 to 7.9% in 1990. *Id.*

8. *See* Evelyn Iritani, *Proposition 187 Is the Spark for Immigrant Control Efforts*, SEATTLE POST-INTELLIGENCER, Dec. 21, 1994, at A1 (reporting that of estimated 3.5 million illegal immigrants in United States, almost 50% live in California), *available in* 1994 WL 6128743, at *3; Jeffrey S. Passel & Michael Fix, *Myths About Immigrants*, FOREIGN POL'Y, June 22, 1994, at 151 (contending that during 1980s, three of every four immigrants settled in either California, Texas, New York, Florida, New Jersey, or Illinois), *available in* 1994 WL 13288247, at *5; Peter H. Schuck, *The Evolving Civil Rights Movement: Old Civil Rights and New Immigration*, CURRENT, Jan. 1, 1994, at 13 (indicating that in 1991, seven of eight immigrant applicants for legalization resided in only five states), *available in* 1994 WL 13196627, at *4. The citizens of these states are understandably concerned about the effect of such drastic demographic changes associated with increased immigration. *See* Evelyn Iritani, *Proposition 187 Is the Spark for Immigration Control Efforts*, SEATTLE POST-INTELLIGENCER, Dec. 21, 1994, at A1 (reporting that although Washington ranks 10th in United States in number of illegal immigrants, incidents of anti-immigrant backlash have increased because of perception that immigrants are migrating to Washington from California because "they heard it was better [there]"), *available in* 1994 WL 6128748, at *3; Yeh Ling-Ling, Viewpoint, *Unchecked Immigration Too Costly*, L.A. DAILY NEWS, Oct. 27, 1996, at V1 (opining that influx of immigration is too costly on public services in California, especially public schools), *available in* 1996 WL 6578895, at *1. Contributing to this anti-immigrant sentiment is the small percentage of immigrants becoming naturalized citizens. *See* Bureau of the Census, U.S. Dep't of Commerce, Pub. No. 1990 CP-2-1, 1990 CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS, UNITED STATES 13 (1993)

the animosity of urban residents and causing some to retaliate violently against those perceived to be foreign.[10]

(summarizing statistics in Table 13, which demonstrate that of 19,767,316 foreign-born persons living in United States, only about 40% have become naturalized citizens as of 1990).

9. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, Pub. No. 1990 CP-2-1, 1990 CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS, UNITED STATES 13 (1993) (showing in Table 13 that about 93.6% of foreign-born population live in urban areas while only 6.4% live in rural areas); Jeffrey S. Passel & Michael Fix, *Myths About Immigrants*, FOREIGN POL'Y, June 22, 1994, at 151 (arguing in part that immigration problem is distorted because 93% of immigrants choose to live in metropolitan areas within states with largest populations of immigrants), *available in* 1994 WL 13288247, at *5; Peter H. Schuck, *The Evolving Civil Rights Movement: Old Civil Rights and New Immigration*, CURRENT, Jan. 1, 1994, at 13 (relating that not only did over 54% of applicants for legalization reside in California in 1991, but also that half of top ten metropolitan areas populated by immigrants were in California), *available in* 1994 WL 13196627, at *4.

10. The State of California is a prime example of when a disproportionate impact has been felt and an anti-immigrant backlash has ensued. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, Pub. No. 1990 CP-2-1, CP-2-6, 1990 CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS, UNITED STATES, CALIFORNIA § 1, at 13, 166 (1993) (indicating that as of 1990 third of approximately twelve million non-citizens who live in United States live in California). California has reacted to this influx of immigration by passing anti-immigrant legislation. *See, e.g.*, CAL. EDUC. CODE § 48215 (ignoring Supreme Court precedent by prohibiting illegal immigrants from attending public schools); CAL. HEALTH & SAFETY CODE § 130 (leading way for federal Welfare Reform Act by denying publicly funded health care to illegal immigrants); CAL. WELF. & INST. CODE § 10001.5 (West 1996) (prohibiting illegal immigrants from receiving public social services). Recently proposed legislation continues this anti-immigrant legislation trend in California. *See* S.B. 34, 1997-98 Reg. Sess. (Cal. 1997) (proposing that California should follow federal Welfare Reform Act), *available in* Westlaw, at 1997 CA S.B. 34 (SN). Although the bill introduced in the California legislature would generally follow the federal Welfare Reform Act, this bill does create an exception for pregnant immigrants, something forbidden under the Welfare Reform Act. *Id.* Because all persons born in this country are American citizens and because prenatal care saves health care costs in the long-run, this bill gives immigrants, whether illegal or legal, prenatal medical care. *Id.* In addition to legislation, anti-immigrant sentiment pervades many California communities. *See* Editorial, *Keep Politics out of Immigration Policy*, SAN FRANCISCO CHRON., Sept. 10, 1995, at 6 (reporting incident in which patron of grocery store was told by cashier that presenting proof of green card was prerequisite to purchase of groceries), *available in* 1995 WL 5298354, at *1. Other states have also reported incidents of anti-immigrant backlash. In 1993, a series of gun attacks on Asian American shopkeepers in Washington, D.C. was a result of anti-immigrant backlash. Lisa Leff, *Immigrants Weather Winter of Discontent; Asian, Latino Activists See Md. Language Bill As Latest in Series of Blows*, WASH. POST, Mar. 19, 1994, at B1, *available in* 1994 WL 2277120, at *1. Asian Americans are not the only targets of the wave of anti-immigrant backlash felt in Washington, D.C. *See id.* (relating event in which radio host, on air, accused Latinos of "taking over" parts of Washington, D.C.). Similarly in Virginia, many Latinos have reportedly been asked to present proof of their immigration status when applying for a driver's license, even though Virginia law requires no such documentation. *Id.*

The discriminatory attitudes of private citizens toward immigrants has affected politicians seeking to appease their constituents, particularly those politicians seeking election and re-election.[11] However, unlike citizens who have the right to vote, legal and illegal immigrants[12] cannot vote; thus, they possess little influence over politicians and can do little to counteract the anti-immigrant sentiment expressed by the voting public.[13]

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11. *See* Paul Pringle, *Wilson, Feinstein Retain Seats: Anti-Immigrant Plan Overwhelmingly OK'd*, DALLAS MORNING NEWS, Nov. 10, 1994, at 27A (reporting that Governor Wilson won re-election by overcoming "worst job-approval ratings on record [in California]" by capitalizing on "mood of an angry, bitter and distrustful electorate"), *available in* 1994 WL 6867025, at *1; Daniel B. Wood, *California's Immigration Revolt*, CHRISTIAN SCI. MONITOR, Nov. 10, 1994, at 1 (stating that Governor Wilson made Proposition 187 "pillar of his campaign" in order to win re-election), *available in* 1994 WL 8788795, at *2. *But see* Editorial, *Proposition 187 Keep out of Arizona*, ARIZ. REPUBLIC, Nov. 14, 1994, at B4 (calling Arizona Governor Symington "admirable and courageous" for opposing measures like Proposition 187 in Arizona because of his stance against "divisive ballot measure" that won "by a landslide" in California), *available in* 1994 WL 6337664, at *1. Jack Kemp learned how his opposition to Proposition 187 could lose him votes when he visited his home state of California and faced angry crowds. *See* Robert D. Novak, Editorial, *Prop. 187 Fervor Is Still Intense*, SAN FRANCISCO CHRON., Dec. 6, 1994, at A21 (reporting that Californian Republicans have "neither forgotten nor forgiven Kemp for publicly declaring opposition" to Proposition 187), *available in* 1994 WL 4097014, at *1.

12. Although outside the scope of this Comment, the United States government often distinguishes between immigrants and citizens when creating legislation. *See, e.g.*, 10 U.S.C. § 5571 (1976) (conditioning appointment as officer in Navy or Marine Corps on American citizenship); 12 U.S.C. § 619 (1976) (restricting investments and businesses of immigrants); 26 U.S.C. § 6851(d) (1976) (requiring aliens but not citizens to show proof of compliance with tax laws before leaving United States); 28 U.S.C. § 1391(d) (1976) (allowing persons to sue aliens in any federal district). Similarly, the Supreme Court routinely distinguishes between "legal" and "illegal" immigrants for purposes of reviewing the constitutionality of legislation. *Compare* Plyler v. Doe, 457 U.S. 202, 212, 219 n.19 (1982) (holding that illegal immigrants are protected under Fourteenth Amendment but are not "suspect class"), *with* Graham v. Richardson, 403 U.S. 365, 372 (1971) (holding that classifications based on alienage with respect to legal immigrants are "inherently suspect").

13. *See, e.g.*, Lisa Leff, *Immigrants Weather Winter of Discontent; Asian, Latino Activists See Md. Language Bill As Latest in Series of Blows*, WASH. POST, Mar. 19, 1994, at B1 (reporting that anti-immigrant sentiment most likely accounted for passage of bill to make English official language of Maryland, since for eleven years prior to passage, bill had never successfully passed out of committee), *available in* 1994 WL 2277120, at *1. Although the Maryland bill would make English the state's official language, it does contain exceptions to ensure compliance with the United States Constitution. *See id.* (explaining that other languages may be used to satisfy federal voting laws, to protect criminal defendants' rights and public health, and to help English-impaired students). Because of these broad exceptions to the bill, many argue that the effect of the bill will be negligible. *See id.* (noting disagreement by supporters and opponents of bill about its potential impact). Supporters of the bill believe that the potential impact is irrelevant because the bill is meant to be symbolic. *See id.* (paraphrasing George Manis, lobbyist for U.S. English, who said bill is "largely" symbolic and was "intended to send a message to immigrants that they need to learn English"). However, many condemn the bill as a vehicle to further fuel

Consequently, federal and state legislatures have responded to voters' intolerance of immigrants by passing laws that deliberately discriminate against all immigrants without fear of repercussion.[14] In fact, both federal and state politicians have been quick to jump on the anti-immigrant bandwagon in order to bolster their chances of winning re-election.[15] For example, the House Republicans who signed the Contract with America in 1994 and California Governor Pete Wilson both successfully campaigned for re-election partly by promising the American people that new restrictions would be placed on immigration.[16]

Citizens have responded to politicians who campaign on anti-immigrant sentiment. For example, in 1994, California voters passed Proposition 187 by an overwhelming majority.[17] As codified, this law

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anti-immigrant sentiment in Maryland. *See id.* (quoting Reverend Mark Poletunow who said in response to bill, "There is a flagrant expression of prejudice and of racism being permitted throughout the country because it's being projected onto an acceptable scapegoat," and quoting Jose Ruiz, director of Maryland's Commission on Hispanic Affairs who said, "This isn't about language, it's about fear").

14. *See* Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 636 (1995) (arguing that although many lobby groups actively pursue legislation to protect immigrants, politicians ignore such groups and instead listen to their voting constituency); Gerald L. Neuman, *Aliens As Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1428 (1995) (asserting that because immigrants possess no right to suffrage, political processes ignore their interests).

15. *See* Editorial, *Dole Goes for the Wedge Long Career of Fairness and Honesty by Taking Up the Immigrant-Bashing Cudgel at This Late Election Date*, FRESNO BEE, Oct. 26, 1996, at B10 (claiming that Dole raised anti-immigrant issues in hopes of gaining votes from people with anti-immigrant sentiments in same way that Governor Wilson did in 1994), *available in* 1996 WL 13890191, at *1; Jeffrey Rosen, *The War on Immigrants: Why the Courts Can't Save Us*, NEW REPUBLIC, Jan. 30, 1995, at 22 (arguing that public opinion polls showing "rising hostility to aliens" persuade politicians to speak in anti-immigration rhetoric), *available in* 1995 WL 12434068, at *1.

16. *See* NEWT GINGRICH ET AL., CONTRACT WITH AMERICA 54–58 (Ed Gillespie & Bob Schellhas eds., 1994) (arguing for new restrictions on immigration in hopes of decreasing illegal immigration); Jeffrey Rosen, *The War on Immigrants: Why the Courts Can't Save Us*, NEW REPUBLIC, Jan. 30, 1995, at 22 (discussing nativist campaign promises and results), *available in* 1995 WL 12434068, at *1. Before the ink dried on the Welfare Reform Act, Governor Wilson, apparently trying to appease the supporters of the anti-immigrant movement in California, signed an executive order enacting many of the provisions of Proposition 187. *See* Mark Katches, *Wilson Limits Aliens' Benefits State Agencies Ordered to Cut Wide Range of Services to Illegal Immigrants*, L.A. DAILY NEWS, Aug. 28, 1996, at N1 (reporting that Governor Wilson's executive order prevents illegal immigrants from receiving state services like student loans for higher education, nonemergency health care, state contracts, housing assistance, retirement benefits, and commercial licenses), *available in* 1996 WL 6571395, at *1.

17. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 786 (C.D. Cal. 1995) (declaring that 1994 passage of Proposition 187 constituted "overwhelming ap-

seeks to sever public benefits to illegal immigrants[18] and, if upheld by the courts,[19] will deny public education,[20] health care,[21] and social services[22]

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proval" by California voters of initiative and reflected voters' "frustration with the federal government's inability to enforce the immigration laws effectively"); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 632 & 632 n.18 (1995) (stating that Proposition 187 passed by 59%–41% margin (citing Tony Miller, Acting California Secretary of State)); Editorial, *Proposition 187 Keep out of Arizona*, ARIZ. REPUBLIC, Nov. 14, 1994, at B4 (reporting that Proposition 187 won "by a landslide" in California), *available in* 1994 WL 6337664, at *1; Daniel B. Wood, *California's Immigration Revolt*, CHRISTIAN SCI. MONITOR, Nov. 10, 1994, at 1 (noting that Proposition 187's "overwhelming approval . . . signals a conclusive win for anti-immigrant forces"), *available in* 1994 WL 8788795, at *1.

18. *See* CAL. EDUC. CODE § 48215 (excluding illegal immigrants from public elementary and secondary schools); CAL. EDUC. CODE § 66010.8 (West 1996) (prohibiting illegal immigrants from attending public post-secondary educational institutions); CAL. GOV'T CODE § 53069.65 (West 1996) (mandating that Attorney General of California cooperate with United States Immigration and Naturalization Service (INS) by informing them about suspected illegal immigrants); CAL. HEALTH & SAFETY CODE § 130 (denying publicly funded health care to illegal immigrants); CAL. PENAL CODE § 114 (West 1996) (making felony punishable by 5 years imprisonment or by fine of $25,000 to use false documents in order to hide "true citizenship or resident alien status"); CAL. PENAL CODE § 834(b) (West 1996) (requiring that law enforcement agencies cooperate with INS by notifying Attorney General of California and INS of illegal aliens' whereabouts); CAL. WELF. & INST. CODE § 10001.5 (West 1996) (excluding illegal immigrants from public social services).

19. Although California voters passed the initiative, Proposition 187 has yet to be enacted into law. *See League of United Latin Am. Citizens*, 908 F. Supp. at 787–91 (ordering preliminary injunction of certain sections of Proposition 187 because of federal government's preemption power in matters of immigration). California filed an appeal that demanded implementation of the enjoined sections of Proposition 187, but the United States Court of Appeals for the Ninth Circuit denied the appeal. *See* Gregorio T. v. Wilson, 59 F.3d 1002, 1004–05 (9th Cir. 1995) (denying appeal because district court did not abuse its discretion in granting preliminary injunction). On the one hand, given that Proposition 187 directly defied Supreme Court precedent by prohibiting illegal alien children from attending public schools, that provision of Proposition 187 should be held unconstitutional by the courts. *See Plyler*, 457 U.S. at 239 (5–4 decision) (Powell, J., concurring) (declaring Texas statute that denied public education to illegal immigrant children unconstitutional because denying immigrants public education would create "an underclass of future citizens and residents"). On the other hand, some academics have predicted that *Plyler* will be overruled and that Proposition 187 will be found consistent with the Constitution. *See, e.g.*, Gregory J. Ehardt, *Why California's Proposition 187 Is a Decision for the U.S. Supreme Court*, 3 TULSA J. COMP. & INT'L L. 293, 304 (1996) (contending that advocates of Proposition 187 believe new conservative members of Court will allow their initiative to pass constitutional muster); Peter H. Schuck, *The Message of Proposition 187*, 26 PAC. L.J. 989, 990–95 (1995) (declaring legal challenge "to Proposition 187 is not nearly as solid as many say" and then propounding arguments as to why Supreme Court may uphold initiative); Carolyn S. Salisbury, Comment, *The Legality of Denying State Foster Care to Illegal Alien Children: Are Abused and Abandoned Children the First Casualties in America's War on Immigration?*, 50 MIAMI L. REV. 633, 651 n.115 (1996) (arguing that proponents of Proposition 187 hope Court will reverse *Plyler* and quoting co-author of

to all illegal immigrants.[23] Although initially proposed as a measure designed to preserve scarce state resources for its citizens, Proposition 187, instead, reflects the growing anti-immigrant sentiment in California.[24] In fact, reports of discrimination and acts of racism that occurred throughout southern California in 1994, following the passage of Proposition 187, testify more to this sentiment than to the concern for the preservation of resources.[25] Ironically, while Proposition 187 sought to decrease illegal immigration, the majority of victims of immigrant back-

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Proposition 187, Alan Nelson who stated that "[t]he purpose of the initiative is to have the Court revisit and reconsider the *Plyler* decision. Passage of the initiative will provide that vehicle.").

20. CAL. EDUC. CODE §§ 48215, 66010.8.

21. CAL. HEALTH & SAFETY CODE § 130.

22. CAL. WELF. & INST. CODE § 10001.5.

23. In addition to precluding receipt of any type of public service, Proposition 187 also contains a law enforcement provision that requires law enforcement agencies to report illegal immigrants to state and federal authorities. CAL. PENAL CODE § 834(b).

24. *See, e.g.*, Robert D. Novak, Editorial, *Prop. 187 Fervor Is Still Intense*, SAN FRANCISCO CHRON., Dec. 6, 1994, at A21 (contending that anti-immigrant sentiment increased after 1994 election), *available in* 1994 WL 4097014, at *1; Paul Pringle, *Wilson, Feinstein Retain Seats: Anti-Immigrant Plan Overwhelmingly OK'd*, DALLAS MORNING NEWS, Nov. 10, 1994, at 27A (stating that people supported Proposition 187 because they "blamed California's estimated 1.6 million undocumented immigrants for draining state coffers, taking jobs from legal residents and contributing disproportionately to the crime rate"), *available in* 1994 WL 6867025, at *3; Daniel B. Wood, *California's Immigration Revolt*, CHRISTIAN SCI. MONITOR, Nov. 10, 1994, at 1 (predicting anti-immigrant backlash might fuel other state and federal legislation because, as one analyst at Center for Immigration Studies in Washington, D.C. stated, "The passage of Prop. 187 and election of [Gov.] Peter Wilson sen[t] an irrefutable message to Congress and Bill Clinton that the American public won't tolerate inaction any longer on a host of immigrant issues"), *available in* 1994 Wl 8788795, at *1.

25. *See* Nancy Cervantes et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1, 8–9 (1995) (reporting that, following passage of Proposition 187, hate crimes against Latinos increased by 23.5%, as documented by Los Angeles County Commission on Human Relations). Moreover, the Los Angeles County Commission on Human Relations believes that this increase in hate crimes is mostly attributable to anti-immigrant sentiment. *Id.*

lash were United States citizens or *legal* immigrants,[26] not the illegal immigrants targeted by the initiative.[27]

Following California's lead in passing anti-immigrant legislation, the federal government has legitimized the voting public's prejudices by passing the Welfare Reform Act,[28] which partially seeks to exclude legal immigrants from being eligible for public services.[29] Under this Act, legal

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26. *See* Editorial, *Keep Politics out of Immigration Policy*, SAN FRANCISCO CHRON., Sept. 10, 1995, at 6 (reporting incident in which Hispanic woman was refused admittance onto public bus by San Francisco bus driver who stated, "We don't have to take 'wetbacks' anymore" and reporting another incident in which Chinese family at amusement park was assaulted and told to go home to China), *available in* 1995 WL 5298354, at *1. Another example of this "vigilantism" occurred in California: after a neighbor's dog bit her child, a Latina woman was told by that neighbor that she had no right to medical compensation "because Pete Wilson said so." *Id.* Other examples of this discriminatory behavior include private citizens telling Latinos, some of whom were United States citizens, to return to Mexico, and businesses and police officers indiscriminately demanding to see identification from Latinos. *See* Nancy Cervantes et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1, 10–20 (1995) (reporting specific instances of discrimination against Latinos, many of whom are American citizens, by private individuals, banks, grocery stores, restaurants, and even law enforcement officials). Proposition 187 is not the only legislation fueling vigilantism by private citizens; "English as official language" laws have also contributed to discrimination against immigrants. *See* Lisa Leff, *Immigrants Weather Winter of Discontent; Asian, Latino Activists See Md. Language Bill As Latest in Series of Blows*, WASH. POST, Mar. 19, 1994, at B1 (contending that passage of "English as Official Language" Bill has resulted in discriminatory acts by citizens who believe they should enforce law, resulting in so-called "language vigilantism"), *available in* 1994 WL 2277120, at *3. For example, in Florida, two children speaking Spanish to each other were scolded by their school bus driver who believed that they should speak only English. *Id.*

27. *See* Nancy Cervantes et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1, 10–20 (1995) (summarizing incidents of discrimination attributed to anti-immigrant sentiment and finding that 60% of 157 cases of discrimination were against citizens or legal immigrants); *see also* Tanya Broder, *A Street Without an Exit: Excerpts from the Lives of Latinas in Post-187 California*, 7 HASTINGS WOMEN'S L.J. 275, 277–78 (1996) (criticizing Proposition 187 because although measure was aimed at illegal immigrants, "the initiative's effect has extended far beyond the intended target, giving license to expressions of hatred against Latinos and Asians, including legal residents and United States citizens").

28. Pub. L. No. 104–193, 110 Stat. 2105 (codified as amended in scattered sections of 8 U.S.C. and 42 U.S.C.).

29. *See* Welfare Reform Act § 401, 110 Stat. at 2261 (stating that legal immigrants are ineligible for federal public benefits unless otherwise provided); *see also* Balanced Budget Act of 1997, Pub. L. No. 105–33, 1997 U.S.C.C.A.N. (111 Stat.) 251 (amending portions of Welfare Reform Act). A federal public benefit is defined by section 401(c)(1) of the Welfare Reform Act as:

> (A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and (B) any retirement, welfare, health, disability, public or assisted housing, post-secondary education, food assistance, unemployment benefit, or any other similar benefit for

immigrants are no longer eligible for federal contracts, professional licenses, commercial licenses, grants, loans, retirement programs, public welfare assistance, public health assistance, disability assistance, public or assisted housing, post-secondary education, food assistance, or unemployment benefits.[30] However, unlike Proposition 187, which only excludes illegal immigrants from receiving public benefits, the Welfare Reform Act purports to exclude *legal immigrants* from nearly all public programs.[31] With this Act, the federal government has institutionalized a more dis-

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which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

Welfare Reform Act § 401, 110 Stat. at 2262. Although the Act prohibits legal immigrants from receiving federal benefits, section 402 provides that if an immigrant is a permanent resident alien and has worked 40 quarters under the Social Security Act, is a refugee, is granted asylum, has had deportation withheld, is a veteran or is on active duty in the military, or is the spouse or dependent of a veteran or of an active duty person, then the immigrant is eligible to receive the same federal public benefits as an American citizen. *Id.* at 2262–65. However, even in these categories, limitations apply. *See id.* (limiting benefits to legal immigrants who have received *honorable* discharge from military) (emphasis added). In August of 1997, Congress amended section 402 of the Welfare Reform Act by expanding the exceptions to the Act. Aliens who are lawfully residing in the United States and who were receiving benefits on August 22, 1996 are eligible to receive supplemental security income (SSI) benefits. *See* Balanced Budget Act of 1997 § 5301(a), 111 Stat. at 597 (amending section 402(a)(2) of the Welfare Reform Act to include new subparagraph (E)). In addition, disabled aliens lawfully residing in the United States on August 22, 1996 are also eligible to receive SSI benefits. *See id.* § 5301(b) (amending section 402(a)(2) of the Welfare Reform Act by adding subparagraph (F)). If a legal immigrant does not fall within one of these exceptions, then under section 401, the immigrant can only receive emergency medical assistance (except if such emergency requires an organ transplant), short-term, non-cash, in-kind emergency disaster relief, public assistance for immunizations, testing and treatment of communicable diseases, certain programs, counseling, or assistance defined by the Attorney General, and certain public housing assistance as specified by the Secretary of Housing and Urban Development. Welfare Reform Act § 401, 110 Stat. at 2261. Furthermore, section 412 of the Welfare Reform Act gives the individual states the authority to determine which legal immigrants are eligible to receive state and local public benefits. *Id.* at 2269–70.

30. *Id.* at 2262. The Welfare Reform Act contains one limited exception to the prohibition of non-citizens receiving government contracts, professional licenses, or commercial licenses: *nonimmigrants*, i.e., aliens who can legally reside in the United States for a definite period of time, who have visas that are related to employment requiring a contract, professional license, or commercial license, are exempt from the prohibitions of the Welfare Reform Act. *Id.*

31. *Compare* CAL. WELF. & INST. CODE § 10001.5 (eliminating state benefits to illegal immigrants), *with* Welfare Reform Act § 402, 110 Stat. at 2262–65 (denying federal benefits to legal immigrants unless immigrant qualifies under exceptions). Significantly, some of these programs cost taxpayers nothing, such as the granting of a professional license or the awarding of a federal contract. *See* Welfare Reform Act § 401, 110 Stat. at 2262 (defining "federal public benefit" to include granting of federal contracts and professional licenses).

criminatory policy than the State of California. At the very least, both the Welfare Reform Act and Proposition 187 show that legislation passed by the federal and state governments discriminate against immigrants in some fashion.[32]

While both the Welfare Reform Act and Proposition 187 discriminate against immigrants, an individual challenging these statutes under the Equal Protection Clause[33] will obtain different results. The federally promulgated Welfare Reform Act will only be subject to rational-basis review because of Congress's plenary power over immigration, while Proposition 187 will be subject to heightened-judicial scrutiny.[34] Because

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32. California, taking up the offer presented by the federal Welfare Reform Act, is already debating which classes of immigrants will be excluded from public benefits. *See* S.B. 34, 1997–98 Reg. Sess. (Cal. 1997) (limiting public benefits to immigrants who would qualify under federal Welfare Reform Act, but creating exception for prenatal care for pregnant immigrants), *available in* Westlaw, at 1997 CA S.B. 34 (SN); Richard C. Reuben, *The Welfare Challenge: States Face Tough Choices and Lawsuits Under New Act*, A.B.A. J., Jan. 1997, at 34 (reporting that Governor Pete Wilson's emergency regulation implementing federal Welfare Reform Act will prohibit permanent legal immigrants from receiving food stamps and will prohibit undocumented pregnant immigrants from receiving prenatal care). In addition to laws denying public benefits to immigrants, a popular trend with politicians to appease their constituents is to enact laws purporting to make English the official language of their state. *E.g.*, ARIZ. CONST. art. XXVIII, § 1; CAL. CONST. art. III, § 6b; COLO. CONST. art. II, § 30a; FLA. CONST. art. II, § 9; NEB. CONST. art. I, § 27; ARK. CODE ANN. § 1–4–117. Opponents of these "English-only" laws and other allegedly discriminatory policies argue that such laws only increase anti-immigrant sentiment among the public. *See English As Official Language: Hearings on S. 356 Before the Comm. on Governmental Affairs*, 104th Cong., 1st Sess. 92 (written testimony of Karen K. Narasaki, Executive Director of National Asian Pacific American Legal Consortium) (reporting that National Asian Pacific Legal Consortium, nonprofit organization that protects legal rights of Asian Americans, found "35% increase in anti-Asian violence incidents in 1994 because government officials legitimized anti-immigrant sentiments perpetuated by proponents of Proposition 187 in California"). Opponents claim no purpose is served by such laws except to "institutionalize discrimination against [immigrants] by ensuring that they will not have effective access to government services or information." *Id.* Furthermore, opponents contend that immigrants do not need incentive to learn English because immigrants have overwhelmingly tried to learn English. *See id.* (reporting long waiting lists for immigrants wanting to enroll in English-as-second-language courses). If any type of legislation is needed, according to opponents, it is money to fund more classes for immigrants. *Id.*

33. Note that the Equal Protection Clause is only implicated by proving that the state actor intended to act in a discriminatory manner. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (explaining that only intentional discrimination by state is unconstitutional). The Welfare Reform Act satisfies this intent requirement because it is discriminatory on its face. That is, the text of the Act explicitly excludes legal immigrants from receiving public benefits. *See* Welfare Reform Act § 401, 110 Stat. at 2261 (denying legal immigrants from being eligible for federal public benefits subject to limited exceptions).

34. *Compare Graham*, 403 U.S. at 383 (holding unconstitutional state statute that made residency requirement condition to receiving welfare benefits under strict-scrutiny

the Supreme Court interprets the plenary power doctrine[35] as not only giving Congress exclusive authority over immigration, but also as limiting the Court's ability to review legislation in immigration cases,[36] the Welfare Reform Act will receive minimal scrutiny and will easily pass constitutional muster.[37] Two cases, decided nearly one hundred years apart, demonstrate this deferential view towards immigration matters. In *Fong Yue Ting v. United States,*[38] decided in 1893, the Supreme Court upheld the Chinese Exclusion Act because as a sovereign nation, the United States has the right to exclude anyone from entering its borders.[39] In upholding the Act, the Court cautioned itself not to "pass upon political questions" in deference to Congress's plenary power over immigration.[40] The cases following *Fong Yue Ting* expanded the application of the plenary power doctrine, and in 1976, in *Mathews v. Diaz,*[41] the Court held that the doctrine not only applied to legislation purporting to exclude foreign-born individuals from entering the United States, but also encompassed federal laws that restricted immigrants' rights to obtain welfare benefits.[42] Thus, within the span of one-hundred years, the Supreme Court broadened the scope of the plenary power doctrine to include nearly all matters relating to immigrants.

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standard), *with* Mathews v. Diaz, 426 U.S. 67, 87 (1976) (upholding federal law that conditioned Medicare benefits on residency requirement under rational-basis standard).

35. *See* Evangeline G. Abriel, *Rethinking Preemption for Purposes of Aliens and Public Benefits*, 42 UCLA L. REV. 1597, 1613 n.91 (1995) (quoting Professor Charles D. Weisselberg, Abriel defines plenary power doctrine as: "a collection of several separate but related principles: first, that the immigration authority is reposed in the federal government and not the states; second, that the authority is allocated in some fashion between the executive and legislative departments of the federal government; and, third, that the judicial branch has an extremely limited role in reviewing the executive's immigration decisions if, indeed, the judiciary may review those decisions at all" (citing Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PENN. L. REV. 933, 939 (1995))).

36. *See* Oceanic Stream Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909) (acknowledging that plenary power of Congress over immigration is so "complete" that judicial review of federal immigration laws should be extremely limited); *see also* Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952) (recognizing that federal immigration laws are so "vitally and intricately interwoven" with foreign policy, and so entrusted to "the political branches of government as to be largely immune from judicial inquiry or interference").

37. *See* Abreu v. Callahan, 971 F. Supp. 799, 826 (S.D.N.Y. 1997) (upholding denial of federal benefits to legal immigrants under equal protection challenge).

38. 149 U.S. 698 (1893).

39. *See Fong Yue Ting*, 149 U.S. at 731–32 (upholding Chinese Exclusion Act that prohibited Chinese immigrants from entering United States because such decisions are beyond judicial wisdom and should be left to political branches of government).

40. *Id.* at 712.

41. 426 U.S. 67 (1976).

42. *Mathews*, 426 U.S. at 83.

While the scope of the plenary power doctrine is broad, the Supreme Court should not be so complacent in its review of the Welfare Reform Act.[43] By enacting the Welfare Reform Act, Congress has chosen to discriminate against legal immigrants;[44] consequently, the Welfare Reform Act, like any discriminatory legislation, should be subject to heightened-judicial scrutiny.[45] In the past, the Supreme Court has upheld federal immigration laws under the plenary power doctrine on the basis that these laws involved foreign policy considerations.[46] However, the Welfare Reform Act contains no discernible foreign policy interest.[47] Therefore, it becomes increasingly unclear why federally-enacted immigration laws, like the Welfare Reform Act, should continue to be exempt from heightened-judicial review.[48]

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43. *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (arguing that "discrete and insular minorities" should be protected from prejudice through "more searching judicial inquiry").

44. By passing the Welfare Reform Act, Congress has enacted legislation far more draconian than California's Proposition 187. *Compare* Welfare Reform Act §§ 401–02, 110 Stat. at 2161–65 (denying federal, state, and local public benefits to illegal and legal immigrants except in limited categories), *with* CAL. WELF. & INST. CODE § 10001.5 (denying public social services to illegal immigrants, but maintaining benefits for legal immigrants).

45. *Cf. Graham*, 403 U.S. at 372, 376 (applying strict scrutiny to state law that discriminated against legal immigrants).

46. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) (emphasizing that immigration legislation enacted by Congress is "political" in character, involving federal government's power as sovereign and should receive little, if any, judicial scrutiny); Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976) (stressing political nature of immigration law and quoting *Fong Yue Ting* for proposition that immigration affects international relations); *Harisiades*, 342 U.S. at 588–89 (observing that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government"); Hines v. Davidowitz, 312 U.S. 52, 66 (1941) (asserting that immigration laws "provoke questions in the field of international affairs"); *Fong Yue Ting*, 149 U.S. at 713 (declaring power to exclude and expel aliens is "a power affecting international relations" that is "vested in the political departments of the government").

47. *See* Welfare Reform Act § 400, 110 Stat. at 2260 (listing two compelling governmental interests of Act: encouraging aliens to be more self-reliant and removing incentive for illegal immigration).

48. *See id.* (declaring governmental interests of maintaining fiscal integrity of welfare system and encouraging immigrants to be more self-sufficient, but stating no governmental interest directly affecting sovereignty of United States). Without such an interest, the federal government should not be allowed to discriminate against a politically powerless group absent careful judicial scrutiny, especially considering the Supreme Court has protected other politically powerless groups from the laws of various states by reviewing such laws under strict scrutiny. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988) (subjecting classifications based on illegitimacy to intermediate review); Craig v. Boren, 429 U.S. 190, 197 (1976) (labeling classifications based on gender as quasi-suspect and subjecting such laws to intermediate review); Korematsu v. United States, 323 U.S. 214, 216 (1944) (subjecting all classifications based on race or national origin to strict scrutiny). The Court has

Although subjecting the federal government's actions regarding immigrants to heightened review might seem to be a radical step,[49] this Comment will explain why such a move is necessary. Part II discusses historical justifications for subjecting state and federal laws affecting immigrants to different levels of scrutiny under equal protection. Part III presents arguments for labeling immigrants a "suspect" class. Part IV considers the constitutionality of the Welfare Reform Act under strict-scrutiny review and concludes with a proposal that future federal immigration laws such as the Welfare Reform Act be subject to heightened review.

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already declared alienage a suspect class like national origin and race in the context of state immigration laws. *See* Bernal v. Fainter, 467 U.S. 216, 219 (1984) (explaining that state law which discriminates "on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny"); Sugarman v. Dougall, 413 U.S. 634, 642 (1973) (reiterating that aliens are "prime example of a 'discrete and insular' minority" (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938))); *Graham*, 403 U.S. at 376 (labeling classifications based on alienage "inherently suspect" and subjecting them "to strict scrutiny whether or not a fundamental right is impaired"). Immigrants are not so different from these other groups that laws affecting them should be, in essence, exempt from judicial scrutiny. *See Carolene Prods. Co.*, 304 U.S. at 152–53 n.4 (contending that judiciary should protect politically powerless from discriminatory policies). The federal judiciary should now take responsibility for protecting the unempowered and subject federal immigration laws to heightened scrutiny.

49. The Supreme Court has rarely applied heightened scrutiny to a congressional immigration law. *See Hampton*, 426 U.S. at 100–01 (casting doubt on federal immigration laws being immune from judicial review if such laws are "arbitrarily defined"); Gastelum-Quinones v. Kennedy, 374 U.S. 469, 480 (1963) (requiring substantial evidence before upholding deportation of resident alien); *cf.* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (finding that all racial classifications must be subject to strict scrutiny without regard to whether law was imposed by federal, state, or local government). Although the Ninth Circuit applied heightened scrutiny to regulations enacted by congressional administrative agents seen by the Court as overstepping their authority, it was reversed by the Supreme Court, which based its decision solely on statutory grounds. *See* National Ctr. for Immigrants' Rights v. I.N.S., 913 F.2d 1350, 1373 (9th Cir. 1990) (invalidating federal regulation because in formulating regulation, federal agency went beyond congressional intent), *rev'd*, 502 U.S. 183 (1991); I.N.S. v. National Ctr. for Immigrants' Rights, 502 U.S. 183, 188 (1991) (reversing Ninth Circuit's decision on statutory rather than constitutional grounds).

II. History and Development of Judicial Review in Alienage Cases

A. *Judicial Review of State Laws Classifying Aliens: Invalidating the Special Public Interest Doctrine and Limiting the Political Function Exception*

The Fourteenth Amendment of the United States Constitution declares that "[n]o State shall . . . deny to any *person* within its jurisdiction the equal protection of the laws."[50] Despite holding that non-citizens have rights under the Fourteenth Amendment, the Supreme Court has emphasized that the Constitution routinely distinguishes between "citizens" and "persons."[51] For example, only citizens are protected under the Privileges and Immunities Clauses of the Constitution,[52] while all "persons" within the boundaries of the United States are entitled to protection from double jeopardy.[53] Because the Constitution at times refers specifically to "citizens" and at other times to "persons," the Supreme Court has reasoned that the Framers of the Constitution intended certain provisions to apply solely to American citizens, while other provisions were also intended to apply to non-citizens.[54] Therefore, because the Fourteenth Amendment explicitly protects persons rather than citizens, the Supreme

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50. U.S. Const. amend. XIV, § 1 (emphasis added).

51. *Compare* U.S. Const. amend. V (giving persons right to be indicted by grand jury in capital cases and right not to be tried twice for same offense), *and* U.S. Const. amend. XIV, § 1 (giving all persons right to due process and equal protection under laws), *with* U.S. Const. amends. XV, XIX, XXIV, XXVI (allowing only citizens to vote in elections), *and* U.S. Const. art. II, § 1, cl. 5 (permitting only natural born citizens to be President of United States).

52. *See* U.S. Const. art. IV, § 2, cl. 1 (entitling all citizens of each state to "all Privileges and Immunities of Citizens in the several States"); U.S. Const. amend. XIV, § 1 (stating that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States").

53. *See* U.S. Const. amend. V (prohibiting federal government from trying person twice for same offense); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that aliens are "persons" entitled to protection under Fifth Amendment's Due Process Clause); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (stating that any constitutional provisions referring to "persons" apply to aliens). Moreover, immigrants receive the same protection from double jeopardy under the Fourteenth Amendment. *See* Benton v. Maryland, 395 U.S. 784, 796 (1969) (applying Fifth Amendment double jeopardy rule to states through Fourteenth Amendment).

54. *See Yick Wo*, 118 U.S. at 369 (explaining that certain constitutional rights apply equally to citizens and non-citizens, such as Fourteenth Amendment's mandate regarding protection of person's life, liberty and property from state's attempted denial of such without due process of law).

Court has held that immigrants, although not United States citizens, must still receive equal protection and due process of the laws.[55]

Despite such seemingly broad protection under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, before 1948 the Supreme Court upheld most state statutes that discriminated against immigrants under the special public interest doctrine.[56] This doctrine allowed the states to pass discriminatory laws against immigrants under the pretext of a special public interest in either ownership of land,[57] employ-

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55. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371 (1971) (accentuating that aliens have rights under Fourteenth Amendment by stating, "It has long been settled . . . that the term 'person' in [Fourteenth Amendment] context encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside"); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (recognizing protection for aliens under Fourteenth Amendment); Terrace v. Thompson, 263 U.S. 197, 216 (1923) (reiterating that any person within jurisdiction, including alien inhabitants, are entitled to protection under Fourteenth Amendment's Due Process and Equal Protection Clauses); Traux v. Raich, 239 U.S. 33, 39 (1915) (stating that aliens receive protection under Equal Protection Clause because "any person within its jurisdiction, as it has frequently been held, includes aliens"); United States v. Wong Kim Ark, 169 U.S. 649, 695–96 (1898) (recognizing that Equal Protection Clause applies equally to aliens); *Yick Wo*, 118 U.S. at 369 (holding that protections under Fourteenth Amendment are "universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws"). Constitutional protection under the Fifth Amendment is also extended to those people who enter the country illegally. *See* Russian Volunteer Fleet v. United States, 282 U.S. 481, 483, 492 (1931) (implying Constitution protects illegal aliens under Fifth Amendment).

56. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 744 (5th ed. 1985) (contending that special public interest doctrine allowed states to classify immigrants except where state had no obvious interest but "mere hostility toward aliens").

57. *See* Porterfield v. Webb, 263 U.S. 225, 232–33 (1923) (sustaining state statute that excluded "ineligible aliens" from owning land by relying on special public interest doctrine); *Terrace*, 263 U.S. at 224 (upholding Washington Anti-Alien Land Law that prohibited aliens from owning land or from leasing land for extended period of time because law was to protect public safety and public interests). The Terraces, appellants in *Terrace*, were citizens of the State of Washington, and Mr. Nakatsuka was an immigrant with Japanese citizenship. *Id.* at 211. The Terraces wanted to lease their farm land to Mr. Nakatsuka for five years, but the Washington Anti-Alien Land Law prohibited them from leasing land to any alien. *Id.* The Terraces and Mr. Nakatsuka claimed such a prohibition violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment because the Terraces were prevented from using their land and Mr. Nakatsuka was prevented from performing his occupation as a farmer. *Id.* at 216. The Court rejected their constitutional arguments, deferring to the police power given to the State of Washington in the Constitution. *See id.* at 217 (giving more weight to state police power than to appellants' rights under Fourteenth Amendment). Although the Court recognized that both appellants possessed rights under the Fourteenth Amendment, it opined that Washington "has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace and good order of its people." *Id.*

ment,[58] or preservation of natural resources.[59] For example, in *Patsone v. Pennsylvania*,[60] the Court upheld a Pennsylvania statute that prohibited non-citizens from killing any wild animal, except in defense of person or property.[61] Mr. Patsone, an alien, claimed that this statute violated his rights under the Fourteenth Amendment.[62] Although Justice Holmes, in delivering the opinion of the Court, recognized that the statute was under-inclusive because it did not exclude all possible sources of evil to the wild game in the state, he stressed that the "state 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.'"[63] In rejecting Mr. Patsone's constitutional argument, Justice Holmes wrote, "It is to be remembered that the subject of this whole discussion is wild game, which the state may pre-

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Therefore, Washington's exclusion of aliens from owning or leasing land did not violate the Equal Protection Clause because deciding who can own land within its borders is a matter of "highest importance" and "can affect the safety and power" of the state. *Id.* at 221. The Court further endorsed discrimination against aliens by stating, "Reasons supporting discrimination against aliens who may but who will not naturalize are obvious." *Id.*

58. *See* Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392, 396–97 (1927) (upholding city ordinance that required licensing of pool and billiard rooms but prohibited issuance of license to aliens); Crane v. New York, 239 U.S. 195, 198 (1915) (finding New York statute providing criminal repercussions for employers who hired aliens on public works projects non-violative of Fourteenth Amendment); Heim v. McCall, 239 U.S. 175, 194 (1915) (upholding New York law that required employers to hire only American citizens on public works projects and which preferred New York citizens over other American citizens). *But see* Meyer v. Nebraska, 262 U.S. 390, 402–03 (1923) (striking state law that forbade teaching of foreign language as violative of Fourteenth Amendment); *Traux*, 239 U.S. at 40, 43 (1915) (voiding Arizona statute that sought to force employers to hire 80% citizens as unconstitutional under Fourteenth Amendment). *Traux* is distinguishable from the line of cases upholding discriminatory employment statutes against aliens because while those statutes imposed restrictions on employment of immigrants in the *public* sector, the Arizona statute in *Traux* required that *private* employers hire a specified percentage of citizens. *See id.* at 40 (underlining that Arizona statute "is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise."). Thus, statutes preferring employment of citizens that were limited to the public sector were upheld by the Court after *Traux*. *See Crane*, 239 U.S. at 198 (finding no constitutional violation in state statute that penalized employers who hired aliens on public works projects); *Heim*, 239 U.S. at 194 (upholding New York law that discriminated against aliens in context of public works).

59. *See* Patsone v. Pennsylvania, 232 U.S. 138, 145–46 (1914) (allowing Pennsylvania to prohibit immigrants from killing wild animals); McCready v. Virginia, 94 U.S. 391, 397 (1876) (upholding state statute outlawing immigrants from planting shellfish).

60. 232 U.S. 138 (1914).

61. *Patsone*, 232 U.S. at 143.

62. *See id.* (stating that plaintiff challenged state statute's validity under Fourteenth Amendment).

63. *Id.* at 144 (quoting Central Lumber Co. v. South Dakota, 226 U.S. 157, 160 (1912)).

serve for its own citizens if it pleases."[64] Similarly, in *McCready v. Virginia*,[65] the Court upheld a Virginia statute that prohibited non-citizens from planting oysters in Virginia's waters.[66] Treating the state as owner of the property, the Court did not perceive any reason why the state could not discriminate against non-citizens.[67]

In addition to upholding most state laws prohibiting aliens from owning land,[68] the Supreme Court seemed to consider interference with the federal government's preemption power as the only limitation on the special public interest doctrine, with individual rights being quickly disregarded.[69] Hence, the doctrine was interpreted so broadly by the Court that it virtually eviscerated the Equal Protection Clause as it applied to immigrants.

In 1948, however, the Supreme Court began to narrow the special public interest doctrine so heavily relied upon by the states. In *Takahashi v. Fish & Game Commission*,[70] the Court ignored precedent[71] and held a California statute unconstitutional, which prohibited immigrants ineligi-

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64. *Id.* at 145–46; *accord* Geer v. Connecticut, 161 U.S. 519, 529 (1896) (discussing state's right to preserve natural resources that citizens of state own in common), *overruled by* 441 U.S. 322, 325 (1979).

65. 94 U.S. 391 (1876).

66. *See McCready*, 94 U.S. at 397 (holding that state may prohibit planting of oysters).

67. *See id.* at 394, 397 (reasoning that state has right to prohibit anyone it wishes from planting oysters in its Ware River because of its ownership of river).

68. *See Porterfield*, 263 U.S. at 233 (upholding statute that denied ineligible aliens right to ownership of land); *Terrace*, 263 U.S. at 222 (declaring that state statute prohibiting aliens from owning land does not violate Fourteenth Amendment). The Supreme Court also upheld laws that sought to indirectly control alien involvement in land, thereby imposing even further burdens on aliens. *See* Cockrill v. California, 268 U.S. 258, 262–63 (1925) (sustaining state statute that provided for escheat to state if citizen attempted to sell or convey land to alien); Frick v. Webb, 263 U.S. 326, 333–34 (1923) (upholding California law that required escheat of stock in land to state if any citizen tried to sell their stock to "ineligible aliens"); Webb v. O'Brien, 263 U.S. 313, 325–26 (1923) (finding no constitutional violation of statute that forbade citizens from contracting with aliens for food crops).

69. *See Patsone*, 232 U.S. at 144–46 (discussing statute's possible infringement upon federal treaty with Italy but nevertheless affording deference to state legislature, finding that state was more able to determine if aliens were particular source of evil).

70. 334 U.S. 410 (1948).

71. *See, e.g., Porterfield*, 263 U.S. at 233 (relying on holding in *Terrace* to uphold statute that denied ineligible aliens from owning land); *Terrace*, 263 U.S. at 221–22 (holding states have interest of "highest importance" in deciding who owns land within its borders and therefore excluding aliens from owning land does not violate Equal Protection Clause); Blythe v. Hinckley, 180 U.S. 333, 341 (1901) (finding no constitutional violation of state law that restricted aliens from owning land because "[t]his Court has held from the earliest times in cases where there was no treaty that the laws of the State where the real property was situated governed title and were conclusive in regard thereto").

ble for citizenship from obtaining fishing licenses.[72] Although the section of the California Fish and Game Code in question was facially neutral because it excluded all immigrants from obtaining fishing licenses, it disproportionately affected Japanese immigrants[73] and thus violated their constitutional rights. However, unlike past decisions in which the Court found the state's special public interest more important than an immigrant's constitutional rights, the *Takahashi* Court emphasized that California's ownership of fish was inadequate to justify its discriminatory behavior against immigrants.[74] Thus, by placing more emphasis on the constitutional rights of aliens, the Court limited a state's special public interest in land and signaled the doctrine's eventual demise.

In *Graham v. Richardson*,[75] the Court expanded upon *Takahashi* by rejecting a state's special public interest in the distribution of welfare benefits to its citizens.[76] The Court in *Graham* consolidated claims against two state laws: an Arizona law that placed a fifteen-year residency re-

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72. *Takahashi*, 334 U.S. at 415. Mr. Takahashi, a Japanese immigrant who came to the United States in 1907, had been issued a commercial fishing license annually from 1915 to 1942. *Id.* at 413. However, in 1943, during a time of great hostility toward people of Japanese descent, California amended its Fish and Game Code to prohibit "alien Japanese" from obtaining fishing licenses. *See id.* (discussing that during World War II, people of Japanese descent were evacuated from California under military orders); *see also* Korematsu v. United States, 323 U.S. 214, 218, 224 (1944) (upholding exclusion order by federal government that required internment of all persons of Japanese descent because of "unascertain[able] number of disloyal members of the group"). The legislature amended the Fish and Game Code again in 1945 because of its fear that the courts would hold the code unconstitutional, since only people of Japanese descent were excluded under the code. *Takahashi,* 334 U.S. at 413. Under the newly amended code, "persons ineligible to citizenship" were excluded from obtaining licenses. *Id.* In the same year that it decided *Takahashi*, the Court also questioned the future validity of state statutes that restricted land ownership by immigrants, thus further eroding the special public interest doctrine. *See* Oyama v. California, 332 U.S. 633, 646 (1948) (holding California statute that presumed transfers of land title from alien to citizen to be illegal endeavor to transfer property to such alien unconstitutional).

73. *See Takahashi*, 334 U.S. at 412 n.1 (quoting statistics from 1940 census report that Japanese aliens "constituted the great majority of aliens living in the United States then ineligible for citizenship" and consequently were immigrants most affected by state statute).

74. *Id.* Specifically, the Court stated,

> To whatever extent the fish in the three-mile belt off California may be 'capable of ownership' by California, we think that 'ownership' is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so.

Takahashi, 334 U.S. at 421.

75. 403 U.S. 365 (1971).

76. *See Graham*, 403 U.S. at 374 (concluding that "a state that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violated the Equal Protection Clause").

quirement on legal immigrants before they could receive state benefits and a Pennsylvania law that limited welfare benefits to citizens of the United States.[77] The states of Arizona and Pennsylvania both argued that the special public interest in preserving welfare benefits for its citizens justified the use of discriminatory laws.[78] However, the Court deemphasized the special public interest advanced by the two states and instead focused on how classifications based on alienage, like those based on race and on national origin, are "inherently suspect and subject to close judicial scrutiny."[79] Therefore, relying on *Takahashi*, the Court applied strict scrutiny and invalidated the Pennsylvania and Arizona statutes.[80] Specifically, the Court concluded that a "[s]tate's desire to preserve limited welfare benefits for its own citizens is inadequate to justify Pennsylvania's making noncitizens ineligible for public assistance, and Arizona's restricting benefits to citizens and longtime resident aliens."[81] Ultimately, *Graham*'s effect was to prohibit the special public interest doctrine from applying to welfare benefits.

Because the *Graham* Court labeled alienage a "suspect" class and discounted the public interest doctrine, it prevented states from enacting future discriminatory laws against immigrants. Consequently, state alienage classifications are now subject to the strict-scrutiny standard, which is said to be "strict in theory, but fatal in fact."[82] As a direct consequence of the *Takahashi* and *Graham* holdings, states have been forced to enact laws that do not discriminate against immigrants or risk having their laws held unconstitutional by the Supreme Court.[83]

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77. *Id.* at 367–68.

78. *See id.* at 372 (acknowledging that in past Court "upheld state statues that treat[ed] citizens and noncitizens differently" on grounds that "such laws were necessary to protect special interests of the state of its citizens," but noting that since *Takahashi*, states' special public interest arguments were inadequate to justify classifications based on alienage).

79. *Id.* at 371–72 (noting that "aliens are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate" (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938))).

80. *Id.* at 374.

81. *Graham*, 403 U.S. at 374.

82. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring). *But see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (endeavoring to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'").

83. *See* Sugarman v. Dougall, 413 U.S. 634, 645–46 (1973) (declaring state law that required citizenship for civil service position unconstitutional because state interest was not compelling); *Graham*, 403 U.S. at 376 (striking state law conditioning immigrant benefits programs on residency requirement because special public interest was not deemed compelling); *Oyama*, 332 U.S. at 640 (rejecting state law presuming immigrant paid land transfers to citizens as illegal because state interest not compelling).

With a strict-scrutiny standard of review threatening state immigration laws, states attempted to justify the enactment of laws discriminating against immigrants by asserting the political function exception.[84] Under this exception, the state must show that the law is "intimately related to the process of democratic self-government" in order to be upheld.[85] In contrast to strict scrutiny, state laws that discriminate against immigrants on this basis are reviewed under rational-basis review, the lowest form of judicial scrutiny.[86] Rational review requires that the means or classification used by the state bear a rational relationship to a legitimate governmental purpose.[87]

The Supreme Court has interpreted the "intimately related" language of the political function exception to apply to cases in which immigrants have been denied governmental positions involving discretionary authority and control over governmental policies,[88] reasoning that actors in such positions influence the very process of self-government.[89] In *Sugarman v. Dougall*,[90] the Court provided examples of persons possessing such authority: "persons holding state elective or important nonelective executive, legislative, and judicial positions," meaning those officials "who participate directly in the formulation, execution, or review of broad public policy."[91] This exception to strict scrutiny, however, has been signifi-

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84. *See* Bernal v. Fainter, 467 U.S. 216, 220 (1984) (stating that if political function exception applies, Court will review law discriminating against immigrants under rational-basis review rather than under strict-scrutiny analysis).

85. *Id.*

86. *Id.* at 219–20 (holding that although state laws affecting immigrants are usually subject to strict scrutiny, if state law falls within political function exception, it will only be subject to rational-basis review).

87. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 601 (5th ed. 1995) (stating that under rational-review, Court will ask only if "classification bears a rational relationship to an end of government, which is not prohibited by the Constitution").

88. *See* Ambach v. Norwick, 441 U.S. 68, 77–78 (1979) (allowing state to prohibit immigrants from becoming teachers because teachers, like police, possess high degree of responsibility and discretion in fulfillment of basic governmental obligation); Foley v. Connelie, 435 U.S. 291, 297, 300 (1978) (upholding state law that required police to be citizens because police "are clothed with authority to exercise an almost infinite variety of discretionary powers").

89. *See Bernal*, 467 U.S. at 221 (upholding exclusion of immigrants from positions that are "so closely bound up with the formulation and implementation of self-government"); Cabell v. Chavez-Salido, 454 U.S. 432, 440 (1982) (specifying that public function exception only applies to people who are directly involved in formulating, executing, or reviewing public policy).

90. 413 U.S. 634 (1973).

91. *Sugarman*, 413 U.S. at 647.

cantly narrowed by the Court.[92] For instance, in *Bernal v. Fainter*,[93] the Court held that the political function exception does not apply to notary publics because they possess no real discretionary power or authority over governmental policies.[94] Thus, given the narrowness of the political function exception and the unpopularity of the special public interest doctrine, states are left with very little means to escape heightened scrutiny when they attempt to enforce laws that discriminate against immigrants. The opposite can be said, however, for the federal government.

B. *Judicial Review of Federal Laws: Why the Special Treatment?*

Although the Equal Protection Clause of the Fourteenth Amendment now clearly restricts *states* from enacting discriminatory legislation against immigrants in most contexts, the question still remains whether the Equal Protection Clause restricts the *federal* government from passing similar discriminatory laws regarding immigration. While the Fifth Amendment,[95] which governs federal action, does not explicitly grant equal protection of the laws to persons within the United States, the Supreme Court has held that an Equal Protection Clause exists implicitly through the Fifth Amendment's Due Process Clause.[96] Hence, the Equal

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92. *See In re* Griffiths, 413 U.S. 717, 729 (1973) (holding citizenship requirement for admission to Connecticut bar unconstitutional); *Sugarman*, 413 U.S. at 646 (invalidating citizenship requirement for position in civil service system). *But see Cabell*, 454 U.S. at 447 (finding California statutory requirement of citizenship for peace officers constitutional); *Ambach*, 441 U.S. at 80–81 (declaring citizenship requirement for position of public school teacher constitutional); *Foley*, 435 U.S. at 299–300 (upholding statute that requires citizenship for position of police officer because police officers are considered important component of self government). The Supreme Court has consistently stated that the political function exception must be narrowly construed, otherwise the exception will eviscerate the goals behind the Equal Protection Clause. *See Bernal*, 467 U.S. at 222 n.7 (emphasizing that "political function exception must be narrowly construed; otherwise the exception will swallow the rule and depreciate the significance that should attach to the designation of a group as a 'discrete and insular' minority for whom heightened judicial solicitude is appropriate").

93. 467 U.S. 216 (1984).

94. *See Bernal*, 467 U.S. at 226 (recognizing that notary publics are distinguishable from those to "whom the political-function exception is properly applied in that the latter are invested with either policymaking responsibility or broad discretion in the execution of public policy that requires the routine exercise of authority over individuals").

95. *See* U.S. CONST. amend. V (stating that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law").

96. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (interpreting Fifth Amendment Due Process Clause in same manner as Fourteenth Amendment Due Process Clause); *Wong Wing*, 163 U.S. at 238 (recognizing *Yick Wo*'s holding and extending same reasoning to Fifth and Sixth Amendments by stating that "even aliens shall not be . . . deprived of life, liberty, or property without due process of law"). *But see* Hampton v. Mow Sun Wong, 426 U.S. 88, 100, 101–02 n.21 (1976) (limiting judicial review over federal immigration laws

Protection Clause, *in theory*, also prevents the federal government from imposing discriminatory classifications.

In practice, however, the federal government, to a greater extent than state governments, regularly treats immigrants differently from American citizens without serious scrutiny by the Court.[97] In fact, due to immigrants' lack of voting power, Congress can pass laws that discriminate against immigrants without concern for the political consequences.[98] However, immigrants have not always been politically powerless. For instance, until the 1920s some states allowed legal immigrants to vote in national and state elections.[99] During the 1920s, however, as jobs became

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because of their political nature and thus calling into question aliens' equal-protection rights under Fifth Amendment). Although the Court in *Hampton* seemed to question aliens' rights under the Fifth Amendment, the Court in *Adarand* contradicted *Hampton*'s proposition by stating,

> 'This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.' . . . We do not understand a few contrary suggestions appearing in cases which we found special deference to the political branches of the Federal Government to be appropriate, *e.g.*, *Hampton v. Mow Sun Wong* . . . to detract from this general rule.

Adarand, 515 U.S. at 217–18.

97. *See* Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) (differentiating between state and federal laws because "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens").

98. Although politicians are likely aware of the plight of immigrants, many politicians turn a deaf ear to their concerns. *See* Karen Brandon, *Backlash Along the Border*, ORANGE COUNTY REG., Nov. 28, 1994, at B7 (reporting that politicians listen to conservatives in favor of Proposition 187 because those people vote and that voting public has remained unchanged in California even though large numbers of immigrants have migrated there), *available in* 1994 WL 4666632, at *2. Among those contemporary politicians who do support more pro-immigrant policies are President Clinton, Jack Kemp, and William Bennett. Editorial, *Keep Politics out of Immigration Policy*, SAN FRANCISCO CHRON., Sept. 10, 1995, at 6, *available in* 1995 WL 5298354, at *2. Jack Kemp has been quoted as saying, "Immigrants are a blessing, not a curse." *Id.* However, even though President Clinton generally supports more rights for immigrants, he signed the anti-immigrant Welfare Reform Act when faced with re-election. *See* Richard C. Reuben, *The Welfare Challenge: States Face Tough Choices and Lawsuits Under New Act*, A.B.A. J., Jan. 1997, at 34 (reporting that, when faced with re-election, President Clinton signed Welfare Reform Act on Aug. 22, 1996).

99. Gerald L. Neuman, *Aliens As Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1428 (1995). One problem associated with calculating exactly how many states allowed immigrants to vote is the lack of knowledge of how the "formal rules of suffrage were translated into practice." Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1094 (1977). For example, while citizenship is now the most basic requirement for suffrage, in Colonial times owning property was the most important qualification. *Id.*; *see* Christopher Collier, *The American People As Christian White Men of Property: Suffrage and Elections in Colonial and Early National America*, *in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY 19, 23 (Donald W. Rogers ed., 1990) (informing that property

more and more scarce, immigrants became the scapegoat of a nation.[100]

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was pivotal condition of suffrage in all 13 Colonies and most common requirement was "the forty pound freehold," that is, property worth forty pounds); Paul Kleppner, *Defining Citizenship: Immigration and the Struggle for Voting Rights in Antebellum America*, *in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY 43, 45 (Donald W. Rogers ed., 1990) (discussing that eligibility to vote in Colonial and Post-Revolutionary America depended on ownership of property and not citizenship because "concepts of citizenship and voting were not linked"). Thus, although women were undeniably able to be American citizens, they were not allowed to vote because of their inability to own property. Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1094 (1977) (maintaining that during Colonial era, no one equated citizen with voter and consequently, women were completely excluded from elections even though their ability to be citizens was not questioned). Similarly, a male immigrant, an "inhabitant" but not a citizen, might have been allowed to vote if he owned property. *See* CHILTON WILLIAMSON, AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY, 1760-1860, at 15 (1960) (discussing requirements for suffrage in colonies as owning property and being inhabitant). For example, South Carolina allowed unnaturalized French Huguenots to vote during the late 1600s and early 1700s. Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1096 (1977). Likewise, in the mid-1700s, Pennsylvania permitted unnaturalized German immigrants to vote. *Id.*; *see* CHILTON WILLIAMSON, AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY, 1760-1860 52 (1960) (informing that unnaturalized Germans "voted and held local office" in 1700s). However, in the early 1800s, as states began to link voting to citizenship, immigrants slowly lost their right to suffrage. *See* Paul Kleppner, *Defining Citizenship: Immigration and the Struggle for Voting Rights in Antebellum America*, *in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY 46 (Donald W. Rogers ed., 1990) (stating that because newly-arrived immigrants were not easily able to assimilate into American culture, mostly because of their sheer numbers, state legislatures responded by first conditioning suffrage on citizenship and then by creating more stringent naturalization requirements); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1097 (1977) (stating that as states were admitted into United States during 1800s, instead of defining elector as "inhabitants" as previous states had done, states began to define electors in their constitutions as "citizens"). At the time Louisiana, Indiana, Mississippi, Alabama, Maine, and Missouri were admitted into the United States, all defined in their respective constitutions "elector" as "citizen." *Id.* Thus, a trend developed among newly-admitted states to exclude immigrants from participation in elections. Similarly, established states began to amend their constitutions with the purpose of no longer allowing suffrage for immigrants. *See id.* (listing Maryland, Connecticut, New York, Massachusetts, Vermont, and Virginia, as examples of states that amended their constitutions to exclude immigrants from elections). However, in states where new settlers were needed, immigrants were still allowed to vote. *See id.* at 1099 (explaining that after Civil War, 13 states in South and West were anxious to lure new settlers and consequently gave immigrants voting privileges). As states no longer needed new settlers and as xenophobia increased throughout the nation, immigrants lost their right to suffrage and were not allowed to vote in any state by the 1920s. *See id.* at 1099–1100 (stating that immigrant suffrage ended when Indiana, Texas, and Arkansas abolished voting rights for immigrants in mid-1920s).

100. *See* Thomas Muller, *Nativism in the Mid-1990s: Why Now?*, *in* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 105, 105 (Juan F. Perea ed., 1997) (examining prior periods of increased anti-immigrant backlash and finding several common conditions including: "(1) economic uncertainty and job inse-

For example, in states with disproportionate immigrant populations, xenophobia allowed passage of state laws that discriminated cruelly against immigrants.[101]

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curity among the nation's population, (2) social, ethnic and cultural disparities between new arrival and the native majority, and (3) a large and sustained immigrant inflow"); Tanya Broder, *A Street Without an Exit: Excerpts from the Lives of Latinas in Post-187 California*, 7 HASTINGS WOMEN'S L.J. 275, 280–81 (1996) (arguing that immigrants are unfairly blamed for nation's economic woes); Kevin R. Johnson, *The Future of the American Mosaic: Issues in Immigration Reform: Fear of an 'Alien Nation': Race, Immigration, and Immigrants*, 7 STAN. L. & POL'Y REV. 111, 111 (1996) (contending that immigrants are easy scapegoats for national woes because of their lack of political power); *see also Oyama*, 332 U.S. at 653–63 (Murphy, J., concurring) (discussing, in-depth, extreme "anti-Oriental" backlash in California from late 1900s to World War II and arguing that California Alien Land Law that prohibited aliens from owning land was "designed to effectuate a purely racial discrimination, to prohibit a Japanese alien from owning land solely because he is a Japanese Alien"); David Cole, *Five Myths About Immigration: The New Know-Nothingism*, NATION, Oct. 17, 1994, at 410 (arguing that high concentration of immigrants in certain locales, combined with economic uncertainty, leads to public believing immigrants take jobs away from citizens), *available in* 1994 WL 13444866, at *2. However, academics disagree as to whether immigrants have a positive or negative effect on the economy. *Compare* Hanna Rosin, *Strange Days*, NEW REPUBLIC, Nov. 6, 1995, at 11 (quoting study by Urban Institute, which concludes that non-refugee immigrants who are able to work are less likely than American citizens to apply for welfare benefits and thus do not have negative impact on economy), *available in* 1995 WL 14509432, at *2, *with* George J. Borjas, *Know the Flow*, NAT'L REV., Apr. 17, 1995, at 44 (arguing that Urban Institute manipulated data for its own ends by omitting immigrants from Mexico and many Central American nations and implying that immigrants have negative impact on American economy), *available in* 1995 WL 12435028, at *6.

101. *See Porterfield*, 263 U.S. at 233 (declaring that California Alien Land Law Act of 1913, which forbade "ineligible aliens" from purchasing or leasing land for extended periods, was not violative of Equal Protection Clause); *Terrace*, 263 U.S. at 221–22 (finding Washington constitution did not violate Equal Protection Clause by prohibiting aliens who had not declared their intention to become citizens from leasing land for agricultural purposes); *cf.* Gong Lum v. Rice, 275 U.S. 78, 87 (1927) (upholding Mississippi law that excluded people of Asian descent from attending white public schools). Discrimination against immigrants during this period can also be seen through a variety of laws enacted by Congress that were more often than not upheld by the Supreme Court. *See* United States v. Bhagat Singh Thind, 261 U.S. 204, 215 (1923) (sustaining federal law that prohibited persons of Asian descent from becoming naturalized citizens); Yamashita v. Hinkle, 260 U.S. 199, 200–01 (1922) (upholding federal law that prohibited immigrants from forming corporations); Ozawa v. United States, 260 U.S. 178, 198–99 (1922) (upholding federal naturalization law that prohibited Japanese immigrant who had lived in United States for 20 years and who had been educated in United States from becoming citizen because people of Japanese descent did not fall within definition of eligible naturalization candidates). Although *Yick Wo v. Hopkins* was decided by the Supreme Court in the late nineteenth century, it exemplifies anti-immigrant backlash in California. While the city ordinance in *Yick Wo* was facially neutral, the effect of the ordinance was to disproportionately impact one group of people. *See Yick Wo*, 118 U.S. at 373–74 (finding that San Francisco ordinance so disproportionately affected one group that it violated Equal Protection Clause).

The federal judiciary's response to discrimination against immigrants varied depending on whether the federal or state government was acting. The judiciary recognized the discriminatory treatment by certain states toward immigrants and sought to protect immigrants from state and local laws by subjecting such laws to a strict equal-protection analysis; thus, the judiciary demanded that the laws be narrowly tailored to a compelling state interest.[102] Conversely, because the Constitution gives the federal government broad power over immigration, the judiciary only requires that federal laws regulating immigration be reasonably related to a rational goal.[103] Therefore, the federal government has been given a great deal of deference in its actions toward immigrants.

The Supreme Court's primary reason for granting such deference to the federal government in alienage cases is Congress's plenary power over immigration.[104] The plenary power doctrine allows the federal government to maintain exclusive control in regulating the admission, exclusion, and deportation of aliens from the United States.[105] The Court has

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The San Francisco ordinance prohibited persons from operating laundries in wooden buildings, thus effectively denying laundry permits to all Chinese "subjects." *See id.* at 362, 374 (criticizing ordinance that prevented all "Chinese subjects" from receiving laundry permits while only rejecting one non-Chinese applicant). This ordinance was most likely passed due to political pressure from the non-Chinese who did not like the competition from the 200 Chinese-operated laundries. *See id.* (presenting evidence that 200 Chinese subjects "applied for laundry permits while 80 non-Chinese subjects" applied for permits). In striking the city ordinance under the Equal Protection Clause, the Court stated it could find no other purpose for the ordinance than "hostility to the race and nationality to which the petitioners belong." *Id.* at 374.

102. *See Graham*, 403 U.S. at 376 (declaring that classifications based on alienage, like those based on nationality or race, are "inherently suspect" and "subject to close judicial scrutiny"); *Takahashi*, 334 U.S. at 420 (declaring that "power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits"). Prior to developing its three-tier scheme of equal-protection analysis, the Supreme Court invalidated many state laws that discriminated against immigrants. *See, e.g.*, Chy Lung v. Freeman, 92 U.S. 275, 281 (1875) (invalidating state law that taxed alien passengers traveling from foreign countries); Henderson v. Mayor of New York, 92 U.S. 259, 268, 275 (1875) (voiding New York statute that had same effect as tax on foreigners entering United States); Passenger Cases, 48 U.S. (7 How.) 283, 406, 408–09 (1849) (holding state law that imposed taxes on immigrants unconstitutional because of Congress's preemption power over regulation of commerce).

103. *See Mathews*, 426 U.S. at 78–85 (applying rational-basis review to federal laws and recognizing different considerations involved in equal-protection analysis when "it concerns the relationship between aliens and the States rather than between aliens and the [f]ederal [g]overnment").

104. *See id.* at 79–80 (discussing deference toward federal laws because of broad grant of constitutional authority under plenary power doctrine).

105. *See* Evangeline G. Abriel, *Rethinking Preemption for Purposes of Aliens and Public Benefits*, 42 UCLA L. REV. 1597, 1613 (1995) (noting that Congress has "virtually unlimited power" over regulation of aliens). Textual support for plenary power is found

broadly interpreted Congress's regulatory authority to be plenary[106] in matters of immigration by reasoning that the decision over who may enter the country affects the sovereignty and the foreign policy of the United States and should, therefore, be exempt from judicial review.[107]

During the nineteenth century, the Court limited Congress's plenary power to laws that established policies regarding who could immigrate to the United States.[108] By reasoning that issues concerning immigration are comparable to political questions,[109] the Court has, over time, ex-

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within Article I, Section Eight of the Constitution. *See* U.S. CONST. art. I, § 8, cl. 4 (granting Congress the power to "establish an uniform Rule of Naturalization").

106. The "plenary power" doctrine states that "the legislative power of Congress" is so "complete" and exclusive that federal immigration laws should be exempt from real judicial scrutiny. Oceanic Stream Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909); *accord* Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting *Oceanic*, 214 U.S. at 339, and recognizing completeness of Congress's authority over immigration); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (quoting *Oceanic*, 214 U.S. at 339 and Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895) for proposition that Congress's power to exclude and admit aliens is exempt from judicial review); Galvan v. Press, 347 U.S. 522, 531 (1954) (emphasizing that immigration policies are "peculiarly concerned with the political conduct of government" and that "the formulation of these policies [being] entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government"); Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953) (stressing that "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control"); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952) (proclaiming that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign policies" and so entrusted to "the political branches of government as to be largely immune from judiciary inquiry or interference"); Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895) (representing that Congress's power to exclude aliens should be enforced without judicial intervention); *cf.* Chicago & S. Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948) (contending that executive decisions concerning foreign policy are by nature political and should not be "subject to judicial intrusion or inquiry").

107. *See Mathews*, 426 U.S. 67, 81 (1976) (applying rational-basis review because of federal government's foreign policy interest in immigration, by stating that "[a]ny rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution"); *Harisiades*, 342 U.S. at 588–89 (declaring federal policies toward aliens exempt from judicial review); *Wong Wing*, 163 U.S. at 237 (acknowledging Congress's power to deny aliens admittance without judicial review).

108. *See Wong Wing*, 163 U.S. at 235–36 (upholding federal laws that exclude or expel aliens because of Congress's authority in immigration, but finding federal law that would imprison illegal aliens to hard labor unconstitutional); *Fong Yue Ting*, 149 U.S. at 711 (discussing "inherent and inalienable right of every sovereign and independent nation" in context of right to exclude or expel aliens); *Chy Lung*, 92 U.S. at 280 (noting that decision to admit immigrants belongs solely to federal government).

109. *See Mathews*, 426 U.S. at 81 (declaring that "responsibility for regulating the relationship between the United States and our alien visitors has been committed to the polit-

panded Congress's plenary power to all federal laws affecting immigration, including those laws that implicate no foreign policy interest.[110] For example, the Supreme Court in *Mathews v. Diaz*[111] cautioned against judicial review of immigration laws by stating the "reasons that preclude

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ical branches of the [f]ederal [g]overnment"); *Fong Yue Ting*, 149 U.S. at 712–14 (comparing immigration laws to political questions, matters that should be left to political branches of government). Some might argue that states are also sovereigns and should, therefore, possess similar authority over aliens within their boundaries. However, the Supreme Court has not recognized any sovereign authority of states in matters of immigration and constantly emphasizes the federal government's plenary power in immigration. *See Takahashi*, 334 U.S. at 419 (declaring that states cannot impose "discriminatory burdens upon the entrance or residence of aliens lawfully within the United States" because doing so would conflict with authority given to federal government by Constitution); Hines v. Davidowitz, 312 U.S. 52, 68 (1941) (declaring preemptive power of national government over state government in matters affecting aliens); *Traux*, 239 U.S. at 42 (stressing that "the authority to control immigration . . . is vested solely in the [f]ederal [g]overnment"); *Chy Lung*, 92 U.S. at 280 (reasoning that matters of immigration belong only to Congress because otherwise "a single State [could], at her pleasure, embroil [the United States] in disastrous quarrels with other nations"). The Supreme Court reasoned that the Constitution gave the federal government the power to regulate immigration. *See Takahashi*, 334 U.S. at 419 (explaining that Constitution gives federal government authority to decide what type of alien will gain admittance to United States, period of time that these aliens may remain, regulation of their conduct, and conditions of their naturalization); *Hines*, 312 U.S. at 66 (commenting on Congress's preemption power in regulating immigration as given by Constitution). However, the Constitution does not give comparable rights to states. *Takahashi*, 334 U.S. at 419; *accord Hines*, 312 U.S. at 68 (concluding that "any concurrent state power that may exist is restricted to the narrowest of limits" because regulating aliens affects international relations); *Traux*, 239 U.S. at 42 (reiterating that state laws classifying immigrants cannot be broadly written so as to "bring them into hostility to exclusive [f]ederal power"). *But see Terrace*, 263 U.S. at 221 (upholding law that prohibited aliens from owning land because "[t]he quality and allegiance to those who own, occupy and use the farm lands within [the state's] borders are matters of highest importance and affect the safety and power of the state itself"). Thus, because of this lack of constitutional authority, state laws that impose burdens on immigrants will not withstand constitutional muster, while similar federal laws would be perfectly acceptable. *Compare Graham*, 403 U.S. at 376 (holding unconstitutional as violative of Equal Protection Clause state statute that prohibited resident aliens from receiving welfare benefits), *with Mathews*, 426 U.S. at 87 (holding constitutional federal statute that denied resident aliens from receiving welfare benefits). As stated in *Mathews*, the Supreme Court detected no "political hypocrisy" in recognizing that "the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization." *Id.* at 86–87.

110. *See Mathews*, 426 U.S. at 81 (upholding residency requirement on welfare benefits to immigrants). In *Mathews*, the Supreme Court argued that the political branches need "flexibility" in creating immigration laws because such laws potentially could affect foreign policy. *Id.* However, instead of reasoning how *welfare laws* could specifically affect foreign policy, the Court upheld the five-year residency requirement by assuming that all immigration matters were exempt from judicial review. *Id.* at 81, 83–84.

111. 426 U.S. 67 (1976).

judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."[112] In developing such a broad interpretation of Congress's plenary power, the Court has refused to allow any type of heightened-judicial review of federal immigration laws.[113] Such deference by the Supreme Court allows discriminatory actions taken by the federal government to survive judicial review easily, while similar state laws would almost certainly be held unconstitutional.[114]

The plenary power doctrine first appeared in Supreme Court jurisprudence in the "Chinese Exclusion Case," officially known as *Chae Chan Ping v. United States*.[115] In this case, the Court upheld federal laws prohibiting Chinese workers from entering the United States.[116] The Court held that the United States, as a sovereign nation, may exclude any class of immigrants without interference from the Court.[117] The Court stated,

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112. *Mathews*, 426 U.S. at 81–82.

113. *See, e.g., Fiallo*, 430 U.S. at 792, 798–800 (upholding federal law that gives preferential status to immigrants who are mothers of illegitimate American children but not to fathers of illegitimate American children by stressing limited scope of judicial review in federal immigration laws); *Kleindienst*, 408 U.S. at 766 (declaring power of exclusion exempt from judicial scrutiny); *Harisiades*, 342 U.S. at 588–89 (emphasizing that federal immigration laws are "largely immune from judicial inquiry or interference"). *But see Hampton*, 426 U.S. at 100–01 (agreeing with broad federal power over immigration, but denying that "the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens"); Gastelum-Quinones v. Kennedy, 374 U.S. 469, 480 (1963) (refusing to uphold deportation of long-time resident alien who was accused of being member of Communist Party without substantial evidence).

114. *Compare Sugarman*, 413 U.S. at 648–49 (striking state statute that excluded aliens from obtaining any position in state civil services), *with Hampton*, 426 U.S. at 103 (holding that when "[f]ederal [g]overnment asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest"). The Court in *Hampton* "agree[d] with the petitioner's position that overriding national interests may provide a justification for a citizenship requirement in the federal services even though an identical requirement may not be enforced by a state." *Hampton*, 426 U.S. at 101.

115. 130 U.S. 581 (1889).

116. *Chae Chan Ping*, 130 U.S. at 581.

117. *See id.* at 609 (declaring power of exclusion is authority of sovereign power and "any just ground of complaint on the part of China . . . must be made to the political department of our government, which is alone competent to act upon the subject"). The federal government has complete authority over who can enter the United States because

> [t]he power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the

> [This] is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.[118]

In *Fong Yue Ting v. United States*,[119] the Supreme Court further extended the plenary power doctrine by upholding a federal law that called for the deportation of certain Chinese citizens.[120] The Court reasoned that the "right of a nation to expel or deport foreigners, who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as *absolute and unqualified*, as the right to prohibit and prevent their entrance into the country."[121] Because the Court interpreted Congress's plenary power as an *absolute* right given to the Executive and Legislative branches, it refused to review the legislation because of its political nature.[122] Thus, no violation of constitutional rights was found by the Court.[123]

Although *Fong Yue Ting* contained no violation of constitutional rights, it could have been distinguished by subsequent Supreme Court Justices referring to it as precedent. If subsequent Justices had limited the holding in *Fong Yue Ting* to apply only to foreigners "who have not been naturalized, or taken any steps toward becoming citizens of the country,"[124] these Justices could have distinguished *Fong Yue Ting* by holding that immigrants *who have taken steps toward naturalization* enjoy the

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government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.

Id.; *see also* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1839 (1993) (noting that Supreme Court's decision in "Chinese Exclusion Case" shows that Court believed judicial review "had no application to federal immigration policy" and stating that modern Supreme Court jurisprudence likewise only calls for limited judicial review of immigration policies because of "'political' character of immigration regulation and its implications for 'our relations with foreign powers'" (citing *Fiallo*, 430 U.S. at 796)).

118. *Chae Chan Ping*, 130 U.S. at 603.

119. 149 U.S. 698 (1893).

120. *Fong Yue Ting*, 149 U.S. at 732.

121. *Id.* at 707 (emphasis added); *see also* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (declaring that it is "an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe").

122. *See Fong Yue Ting*, 149 U.S. at 731 (classifying question of whether aliens should remain in United States as one to be decided by "political departments of the government" because of lack of judicial "wisdom" in such policies).

123. *See id.* at 732 (affirming lower court's dismissal of writ of habeas corpus).

124. *Id.* at 707.

same protection under the Constitution as American citizens. Thus, if the Supreme Court had limited its holding in cases decided after *Fong Yue Ting*, the plenary power doctrine may not have created a judicial vacuum with respect to federal laws affecting immigration.

Unfortunately, a limitation of *Fong Yue Ting* never materialized in the Supreme Court's jurisprudence. Instead, the Court continued the tradition of an expanded plenary power doctrine into modern Supreme Court jurisprudence.[125] For example, in *Fiallo v. Bell*,[126] the Court used the plenary power doctrine to uphold provisions of the Immigration and Nationality Act, which adversely affected male immigrants and their illegitimate children.[127] Under this Act, immigrants who are "children" or "parents" of American citizens or lawful permanent residents are granted preferential immigration status.[128] The Act's definition of a child-parent relationship includes illegitimate children and their natural mothers, but does not include illegitimate children and their natural fathers.[129] The appellants in *Fiallo* endeavored to persuade the Court to limit the scope of the plenary power doctrine by arguing that prior federal immigration cases were limited to excluding or expelling "groups of aliens that were 'specifically and clearly perceived to pose a grave threat to the national security'[130] . . . 'or to the general welfare of this country.'"[131] However, the Court rejected the appellants' argument and refused to limit the scope of the plenary power doctrine by stating,

> We find no indication in our prior cases that the scope of judicial review is a function of the nature of the policy choice at issue. To the contrary, '[s]ince decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic cir-

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125. *See Fiallo*, 430 U.S. at 799–800 (upholding federal law that had effect of separating alien fathers and their illegitimate children because of plenary power doctrine); *Mathews*, 426 U.S. at 81–84 (refusing to find constitutional violation in federal law that placed residency requirement on aliens receiving federal public benefits, because of plenary power doctrine); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217, 223 (1994) (reasoning that Court defers to federal government because immigration policies affect sovereignty and foreign policy of United States).

126. 430 U.S. 787 (1977).

127. *See Fiallo*, 430 U.S. at 799–800 (implying disagreement with Congress but stating that "decision nonetheless remains one 'solely for the responsibility of the Congress and wholly outside the power of this Court to control'" (quoting *Harisiades*, 342 U.S. at 597 (Frankfurter, J., concurring))).

128. *Id.* at 788.

129. *Id.* at 788–89.

130. *Id.* at 796.

131. *Id.* (quoting Boutilier v. I.N.S., 387 U.S. 118 (1967)).

> cumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary. . . .'[132]

By maintaining the legitimacy of the Immigration and Nationality Act, the Supreme Court validated the unlimited scope of the plenary power doctrine.

The limitless scope of Congress's plenary power may also be seen in *Mathews v. Diaz*.[133] In *Mathews*, the Supreme Court upheld a Social Security Act provision that limits eligibility of federal welfare benefits to those immigrants who have lived in the United States for a five-year period because "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."[134] The holding of *Mathews* illustrates the extreme deference given to federal laws affecting immigrants.

Just five years before *Mathews*, however, in *Graham v. Richardson*,[135] the Court had declared a strikingly similar *state* statute that conditioned immigrants' receipt of public benefits upon a five-year residency requirement unconstitutional.[136] The Court found that a state interest in preserving scarce public benefits for American citizens was not "compelling," a standard required under strict-scrutiny review.[137] While the Supreme Court struck the state statute in *Graham* because of its discriminatory nature against immigrants, the Court upheld a nearly identical federal statute in *Mathews*.[138] As a result, the Supreme Court appears to consider every federal immigration law as one that could affect foreign affairs, even if the law appears only to affect domestic policy as in *Mathews*.[139]

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132. *Fiallo*, 430 U.S. at 796 (quoting *Mathews*, 426 U.S. at 81).

133. 426 U.S. 67 (1976).

134. *Mathews*, 426 U.S. at 81–82.

135. 403 U.S. 365 (1971).

136. *Graham*, 403 U.S. at 374.

137. *Id.* The Court extended *Shapiro v. Thompson*, 394 U.S. 618 (1969), which held that fiscal integrity was not a "compelling" interest, to equal protection cases by stating that the interest of economy was especially unacceptable where immigrants affected had paid taxes like state citizens. *Id.* at 374–75.

138. *See Mathews*, 426 U.S. at 84–85 (distinguishing *Graham* from present case concerning federal law requiring five-year residency requirement because *Graham* concerned "the relationship between aliens and the States rather than between aliens and the [f]ederal [g]overnment").

139. *See Harisiades*, 342 U.S. at 588–89 (declaring policies toward aliens exempt from judicial review). The Court specifically stated that:

> Any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the mainte-

The Court's broad interpretation of the federal government's plenary power has given Congress nearly unlimited authority in matters regarding immigration. In fact, not only has the Court prohibited the judiciary from scrutinizing federal immigration laws, but the states are also preempted from creating laws that infringe upon the federal government's rights under the plenary power doctrine.[140] The Court has stated that federal law preempts state law under the Supremacy Clause,[141] the Commerce Clause,[142] the Necessary and Proper Clause,[143] and the Uniform Rule of Naturalization Clause.[144] Thus, in excluding both the judiciary and the states from intervening in the area of immigration, the Court has created a situation in which there is virtually no check on the federal government's authority over immigration.

C. *The Constitutionality of the Welfare Reform Act Under Rational-Basis Review*

Due to the broad deference granted to federal laws affecting immigrants, the Welfare Reform Act would currently be reviewed under rational-basis review.[145] Thus, the federal government will be asked to

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nance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune to judicial inquiry or interference.

Id.; *see also* Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 602 (1994) (noting that Court is so deferential to Congress that it upholds statutes even when no foreign policy interest is discernible).

140. *See Hines*, 312 U.S. at 73–74 (striking state law because of its infringement on federal government's preemption power in immigration).

141. *See* U.S. CONST. art. VI, cl. 2 (providing that "[t]his Constitution, and the Laws of the United States . . . and all Treaties made . . . shall be the supreme law of the Land"); *Graham*, 403 U.S. at 378 (citing to *Hines* case for discussion about federal government's "superior authority" over states in field of immigration).

142. *See* U.S. CONST. art. I, § 8, cl. 3 (granting Congress power "[t]o regulate Commerce . . . among the several states").

143. *See* U.S. CONST. art. I, § 8, cl. 18 (authorizing Congress "[t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other powers vetoed by this Constitution").

144. *See* U.S. CONST. art. I, § 8, cl. 4 (giving Congress authority "[t]o establish an uniform Rule of Naturalization"). Article I, Section Eight is cited by the Court as the basis for Congress's plenary power. *See Hines*, 312 U.S. at 66 (discussing federal preemption power in immigration cases based on Uniform Rule of Naturalization Clause); *cf.* Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217, 223 (1994) (contending that reason for preemption turns on constitutional provisions and not efficacy).

145. *See Mathews*, 426 U.S. at 84–87 (rejecting all possible reasons for heightened review of alien-eligibility provision of federal law and upholding law under rational-basis review). In the recently decided case, *Abreu v. Callahan*, a class of legal immigrants who

present a legitimate governmental interest that is rationally related to its exclusion of certain legal immigrants from federal benefits.[146] Rational-basis review allows the Supreme Court to uphold laws that merely seek to preserve the fiscal integrity of a governmental program.[147] For example, in *Mathews*, the Court held that preserving the fiscal integrity of the federal Medicare program was a legitimate interest.[148]

In promulgating the Welfare Reform Act, Congress presented many governmental policies for limiting the amount of legal immigrants eligible for public benefits, including encouraging immigrants to be self-sufficient[149] by relying "on their own capabilities and the resources of their families, their sponsors, and private organizations" instead of relying on the government.[150] Congress also sought to discourage illegal immigration by reducing the availability of public benefits[151] and to preserve fiscal integrity by decreasing the number of applications for public benefits by immigrants who "have been applying for and receiving public benefits from [f]ederal, [s]tate, and local governments at increasing rates."[152] Congress further justified its position by declaring that current immigra-

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had been eligible for federal benefits prior to the enactment of the Welfare Reform Act challenged the Act's constitutionality under the Fifth Amendment's Equal Protection Clause. Abreu v. Callahan, 971 F. Supp. 799, 803 (S.D.N.Y. 1997). Although the district court recognized the arguments against a broad interpretation of the plenary power doctrine, it held that *Mathews* controlled the issue and as such, the district court was bound by Supreme Court precedent. *See id.* at 808–811 (acknowledging that Supreme Court "arguably has expanded the doctrine beyond actions directly controlling the crossing of our national borders by aliens to actions affecting immigration only more remotely if [at] all," but finding that *Mathews* controlled issue). Because *Mathews* controlled the inquiry, the court applied rational-basis review and upheld the Act. *See id.* at 816–20 (applying rational-basis review and finding governmental interests to be rationally related to legitimate end). Deferring to the plenary power doctrine, the court stated, "The hardship that [the Welfare Reform Act] will inflict on these [immigrants] is undeniable. Under our Constitution, however, the responsibility for making judgments such as these rests principally with Congress. It is in Congress that this troublesome situation must be addressed." *Id.* at 826.

146. *See* Plyler v. Doe, 457 U.S. 202, 216 (1982) (presenting rational-basis review as seeking "assurance that the classification at issue bears some fair relationship to a legitimate public purpose").

147. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 608 (5th ed. 1985) (contending that under rational-basis review, Court will only strike federally-promulgated laws that are "wholly arbitrary").

148. *See Mathews*, 426 U.S. at 83–84 (assuming legitimate governmental interest because Court should defer to congressional judgment in policy choices of this nature).

149. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act), Pub. L. No. 104–193, § 400, 110 Stat. 2105, 2260 (codified as amended in scattered sections of 8 and 42 U.S.C.).

150. *Id.*

151. *Id.*

152. *Id.*

tion policies have "prove[n] [to be] wholly incapable of assuring that individual aliens not burden the public benefits system."[153] In addition, the federal government presented "compelling interests," including enacting "new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy"[154] and removing the incentive for indolence "provided by the availability of public benefits."[155] Congress most likely presented these compelling interests to ensure that similar state laws will be held constitutional by the Court.[156]

When reviewing the Welfare Reform Act, Congress's interests will be given great deference due to the Court's unwillingness to examine congressional motives.[157] In addition to the Court's disinterest in exploring

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153. *Id.*

154. Welfare Reform Act § 400, 110 Stat. at 2269.

155. *Id.*

156. The Welfare Reform Act grants the states the power to create similar restrictive laws limiting the amount of legal immigrants eligible for state public benefits. *See* Welfare Reform Act § 412, 110 Stat. at 2269 (allowing states to "determine the eligibility for any State public benefits of an alien who is a qualified alien . . ., a nonimmigrant under the Immigration and Nationality Act, or an alien who is paroled into the United States"). Furthermore, Congress stated that

> with respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits . . . a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.

Id. at 2260. Thus, by labeling the states' governmental interests as compelling, Congress is attempting to exempt state laws from judicial review. If the Court defers to these congressional findings, the plenary power doctrine will bootstrap state immigration laws, leaving no role for the Courts in immigration cases. *Cf.* Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (holding that Congress possessed authority under Commerce Clause to regulate purely intra-state agriculture activity because of its aggregate effect on interstate commerce). In essence, Congress is endeavoring to eliminate the role of the courts.

157. *See* Perez v. United States, 402 U.S. 146, 156 (1971) (upholding federal law that penalized those who engaged in "organized crime" under Commerce Clause without demanding congressional findings proving that organized crime affected interstate commerce). Although *Perez* involves Congress's authority under the Commerce Clause, the Court's deference toward congressional findings was clearly articulated. The Court will not look for congressional motives in enacting a particular law, and will accept congressional findings at face value. *See id.* (accepting congressional findings regarding loan shark who only did business intrastate as evidence of interstate commerce being affected and stating that acceptance was made "not to infer that Congress need make particularized findings in order to legislate"). *But see* United States v. Lopez, 514 U.S. 549, 567 (1995) (casting doubt as to Court's continued deference toward Congress under Commerce Clause when Congress does not present any congressional findings). The *Mathews* Court explained why the Supreme Court is so reluctant to review federal laws regarding immigration: "Any rule of constitutional law that would inhibit the flexibility of the political

congressional motives, precedent will lead the Court to uphold the Act as being rationally related to the legitimate governmental interest of preserving federal resources. Thus, under rational-basis review, any equal protection challenge to the Welfare Reform Act will most likely fail.

III. IMMIGRANTS: A "SUSPECT" CLASS

A. *"Suspect" Classifications and the Counter-Majoritarian Role of the Court: Some Groups Need Protection from the Government*

Despite the fact that an equal protection challenge to the Welfare Reform Act will most likely fail under rational-basis review, a compelling case can be made for challenging the Act under a strict-scrutiny analysis. Immigrants meet most, if not all, of the Court's traditional criteria for determining whether a discrete group is in need of court protection from the discriminatory acts of the majority.[158] In deciding whether a group needs protection in the form of heightened review, the Court has traditionally considered such factors as historical discrimination against the

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branches of government to respond to changing world conditions should be adopted only with the greatest caution." *Mathews*, 426 U.S. at 81.

158. *See* Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 938–39 (1991) (listing traditional indicia of suspect class as: having history of being subjected "to purposeful, unjustified discrimination," having history of "political powerlessness," being "discrete and insular" class, possessing "disability over which they do not have control," being "stigmatized by society," and "the defining characteristic of the class must bear no rational relation to a legitimate state purpose"). Because immigrants meet most of these factors, the Supreme Court has labeled them a "suspect class" worthy of heightened review, at least in the context of state immigration laws. *See* Bernal v. Fainter, 467 U.S. 216, 219 n.5 (1984) (applying strict scrutiny to state law affecting immigrants because alienage classification is "inherently suspect" (citing Graham v. Richardson, 403 U.S. 365, 372 (1971))). Indeed, immigrants have a vast history of discrimination and are stigmatized by society. *See* Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 314 & n.145 (discussing how immigrants have had long history of discriminatory treatment and stigmatization by both state and federal governments, giving Palmer Raids of 1920 as "one of many possible examples" (citing CHAFEE, FREE SPEECH IN THE UNITED STATES 196–240 (1948))). Xenophobia in the United States finds its roots in times long before Benjamin Franklin criticized allowing German immigrants into colonial Pennsylvania. Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue, in* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 165, 165 (Juan F. Perea ed., 1997). Over time, as immigrants have increasingly included people of color, xenophobia and racism have become intertwined. *See id.* (alluding to racism intensifying anti-immigrant sentiment in America). Immigrants being historically such a target of discrimination in America led the Supreme Court to label them the "prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." *Graham*, 403 U.S. at 372.

group, discreetness and insularity of the group, and immutability of the group.[159]

The need to protect discrete groups has been recognized by the Court since the 1930s,[160] when Justice Reed, in *United States v. Carolene Products Co.*,[161] proposed a counter-majoritarian role of judicial review for the Supreme Court in his famous "footnote four."[162] Specifically, Justice Reed proffered that heightened-judicial scrutiny is required when "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities. . . ."[163] Since the time of Justice Reed's famous footnote, advocates of the counter-majoritarian role of the Supreme Court have filled the pages of academia with the need for protection of certain "discrete and insular" groups.[164]

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159. *See* Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) (listing factors that could label group as suspect and deserving of strict-scrutiny review, including: classifications reflecting "deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," classifications "irrelevant to any proper legislative goal," and classifications that burden groups who have "historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the *majoritarian* political process'" (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973))) (emphasis added).

160. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (introducing notion that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect"); United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (discussing need for protection of "discrete and insular" minorities).

161. 304 U.S. 144 (1938).

162. *Carolene Prods.*, 304 U.S. at 152–53 n.4. Although *Carolene Products* is perhaps the most famous example of the counter-majoritarian interpretation of judicial review, it was not the first Supreme Court opinion to allude to the idea of counter-majoritarianism. *See* South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938) (finding that Commerce Clause prevents state regulations giving those within state advantage at expense of those out of state); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 435–36 (1819) (holding state law that imposed tax on federal bank unconstitutional because doing so would tax part of national population not represented in state government).

163. *Carolene Prods.*, 304 U.S. at 152–53 n.4.

164. *See* John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 485–87 (1978) (advocating type of counter-majoritarianism, "representation-reinforcing," in which judiciary's role, as impartial umpire, is to detect malfunction of political process); Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1174–75 (1977) (recognizing John Hart Ely's argument that minorities should be protected against laws enacted by legislature that is not politically responsible to group). *But see* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 717–18 (1985) (arguing that within next generation counter-majoritarian role of court will no longer be necessary since most minorities will actively participate in political process); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1072–74 (1980) (criticizing counter-majoritarianism because of difficulties involved in determining who is really excluded from political process). Notwithstanding

One of academia's biggest advocates of the counter-majoritarian theory, or as he calls it, a "representation-reinforcing mode of judicial review," is Professor John Hart Ely.[165] Professor Ely argues that a representative democracy such as the United States does not ensure "effective protection of minorities whose interests differ from the interests of most of the rest of us."[166] Many academics chastise him and other advocates of the counter-majoritarian theory as encouraging the Court to act as a super legislature.[167] These critics argue that democracy is inseparable from the concept of majority rule and that counter-majoritarianism interferes with the functioning of democracy.[168] However, Professor Ely views his mode of active judicial review by courts as encouraging democracy by correcting the malfunctioning of the political process through reinforcement of minority group representation in the democratic process.[169] In support of his "representation-reinforcing model of judicial

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Professor Tribe's distrust of categorizing certain groups as "discrete and insular minorities," even he admits that "[a]lienage is properly treated as a classification at least partially suspect, despite its mutable character." *Id.* at 1073 n.52.

165. In his book, Professor Ely outlines his theory of judicial review in a representative democracy. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST 73–104 (1980) (discussing role of judiciary in "[p]olicing the [p]rocess of [r]epresentation").

166. John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 458 (1978).

167. *See* ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 106–07 (1996) (arguing that Supreme Court has gone beyond constitutional limits in creating "suspect classifications" and being "entranced with equality, extended the reach of the [E]qual [P]rotection [C]lause of the Fourteenth Amendment far beyond any conceivable intention of those who made the amendment law and far beyond anything previous Courts had been willing to do"); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1072–74 (1980) (criticizing process-based advocates of creating judiciary that would perform role of legislature by determining which groups need protection from political process). The Supreme Court is sensitive to this type of criticism since the Lochner era, and tries vehemently to escape accusations of "Lochnerizing, that is, substituting its own beliefs for that of the legislature." *See* Lochner v. New York, 198 U.S. 45, 56–57 (1905) (defending Supreme Court's decision by stating that "[t]his is not a question of substituting the judgment of the Court for that of the legislature").

168. *See* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1063 (1980) (describing irony of courts that use process-based theories to "portray" themselves as servants of democracy even as they strike down actions of supposedly democratic governments). *But see* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 772–74 (1991) (describing Ely's defense of his controversial political process theory as consonant with modern democratic governance and those who criticize this theory as unconvincing).

169. *See* John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 486–87 (1978) (advocating judicial intervention in democratic process when "malfunction" of political process requires *objective* assessment of claims that "either by clogging the channels of change or by acting as accessories to simple major-

review," Professor Ely proposes that representative democracy, as the Framers believed it should work, is not based merely on majority rule.[170] He believes that the Framers sought to create a government in "which the majority would govern in the interest of the whole people."[171]

In the past, "We the People"[172] referred, for the most part, to a homogeneous group whose interests were similar[173] and who deliberately excluded some groups from the political process.[174] However, even the Framers of the Constitution realized that those minorities who did not conform to the majority would have to be protected from the tyranny of the majority.[175] The Bill of Rights is one example of the Framers' efforts to prohibit the government from infringing upon individual rights.[176] Another example is, as Ely labels it, a "strategy of pluralism."[177] The Fram-

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ity tyranny, our elected representatives in fact are not representing the interest of those that the system presumes and presupposes they are").

170. *See id.* at 458 (declaring "oft-mentioned republican concern" for Founders was equality for *all* citizens and not merely majority) (emphasis added).

171. *Id.* at 458 (quoting THE FEDERALIST No. 39 (J. Madison) 280–81 (B. Wright ed. 1961)).

172. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

173. *See* John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 459 (1978) (articulating that Framers assumed "the people" were homogeneous group when creating "republic").

174. *See* Ellen Carol DuBois, *Taking Law into Their Own Hands: Voting Women During Reconstruction*, *in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY 67, 69–70 (Donald W. Rogers ed., 1990) (discussing how women empowered themselves in nineteenth century and began to demand suffrage); Eric Foner, *From Slavery to Citizenship: Blacks and the Right to Vote*, *in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY 55, 57 (Donald W. Rogers ed., 1990) (contending that Constitution left voting requirements to states which prohibited African-Americans from voting). Although the Framers were concerned about minorities' voices being heard in the political process, it should be noted that these same Framers ignored one large group, African-Americans, by recognizing slavery in the Constitution. *See* U.S. CONST. art. I, § 2, cl. 3 (describing representation in House of Representative to be determined by "the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, *three fifths of all other Persons*") (emphasis added).

175. *See* John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 459–60 (1978) (providing strategies to protect minority interests including separation of powers and limitations on federal government via Bill of Rights).

176. *See id.* at 459 (identifying method of protecting minorities through Bill of Rights "list" strategy, that is, ensuring rights to all citizens by "itemizing things that cannot be done to anyone, at least by the federal government").

177. *See id.* (citing original Constitution's pervasive strategy guarantying "no single interest group could dominate"). Pluralism is a structuralist theory whose supporters believe that by structuring government so that no one branch of government overpowers another, the public will be protected from an "imperial Presidency" or an "imperial Congress." *See* John Norton Moore, *Do We Have an Imperial Congress?*, 43 U. MIAMI L. REV. 139, 139 (1988) (arguing that Framers of Constitution intended for separation of powers between branches of government so that no one branch could become "corrupted" by

ers employed this strategy by attempting to create a representative democracy in which no single interest group would exercise control over the federal government.[178] As James Madison propounded, "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."[179] The separation of powers doctrine was regarded by the Framers as a bulwark against tyranny. "For if governmental power is fractionalized, and if a given power can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will."[180] Thus, even the Framers foresaw the possibility of the need to protect minority groups from the government.

B. *"Suspect" Factors As Applied to Immigrants*

Immigrants are especially in need of protection from such a tyrannical majority because they are unable to participate in the political process.[181] Professor Ely contends that malfunction of the political process occurs

> whenever the *process* cannot be trusted, whenever: (1) the in's are choking off the channels of political change to ensure they will stay in and the out's will stay out, or (2) though no one is actually denied a voice or a vote, an effective majority, with the necessary and understandable cooperation of its representatives, is systematically advantaging itself at the expense of one or more minorities whose reciprocal support it does not need and thereby effectively denying

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absolute power). In addition to governmental structure, supporters of pluralism advocate that society be structured in a similar manner. *See* John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 459 (1978) (discussing strategy of pluralism would structure society so that no one interest group could dominate and "variety of voices would be guaranteed their say").

178. *See* John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 459–60 (1978) (discussing strategy of pluralism to ensure minority rights).

179. *Id.* at 459 (quoting THE FEDERALIST No. 51, at 357–58 (James Madison) (B. Wright ed., 1961)).

180. United States v. Brown, 381 U.S. 437, 443 (1965) (discussing Framers' intent and quoting James Madison who wrote that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny").

181. *See* John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 *passim* (1978) (discussing need for "participation-oriented, representation-reinforcing approach to judicial review" to ensure protection of "minority" interests).

them the protection afforded other groups by a representative system.[182]

Immigrants are an example of this malfunctioning since they cannot vote and are, therefore, completely denied protection from a representative system.[183] Unlike citizens who can "throw the bums out" if they do not agree with governmental policies, immigrants have no means of effectively voicing their displeasure.[184] Moreover, because of the constant threat of deportation, immigrants are less likely than other groups to "adopt an overtly political role."[185] Consequently, immigrants are left relatively unprotected from the tyrannical majority.

Many individuals have advocated giving immigrants the right to vote so that they can effectively protect themselves from discriminatory governmental policies.[186] Specifically, immigrants should receive voting rights because they are similar in many ways to citizens, and governmental policies affect them in the same manner as citizens.[187] For example, immigrants pay taxes like citizens.[188] In addition, immigrants serve in the

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182. *Id.* at 486–87.

183. *See* U.S. CONST. amend. XXVI (granting only citizens right to vote); *cf.* Graham v. Richardson, 403 U.S. 365, 372 (1971) (labeling alienage classifications as "prime example" of suspect classifications, which need protection from Court).

184. *See* Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 636 (1995) (contending that politicians ignore concerns of immigrants because they cannot vote).

185. Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 314.

186. *See* Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1093 (1977) (advocating that immigrants should be able to vote); Paul Tiao, *Non-Citizen Suffrage: An Argument Based on the Voting Rights Act and Related Law*, 25 COLUM. HUM. RTS. L. REV. 171, 180 (1993) (arguing that citizenship should no longer be requirement to suffrage and lawful permanent residents should be given right to vote).

187. *See* Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453, 1466–67 (1995) (arguing that immigrants are increasingly "possessing various indicia of membership in our society," and society should treat them in same manner as citizens); Paul Tiao, *Non-Citizen Suffrage: An Argument Based on the Voting Rights Act and Related Law*, 25 COLUM. HUM. RTS. L. REV. 171, 209–10 (1993) (arguing that immigrants have ties to their communities as strong as those of citizens and thus, should be able to voice their concerns through suffrage). Mr. Tiao argued that because resident immigrants "own and rent housing, pay taxes, send their children to public schools, are dependent on local police and fire departments, and generally have a strong interest in how the community is governed," it makes little sense not to allow them to vote in local elections. *Id.*

188. *See* Paul Tiao, *Non-Citizen Suffrage: An Argument Based on the Voting Rights Act and Related Law*, 25 COLUM. HUM. RTS. L. REV. 171, 209 (1993) (discussing how immigrants possess many indicia of citizenship, including paying taxes).

armed forces and can be drafted by the federal government.[189] However, unlike citizens, immigrants are not allowed to vote. Not only does this prohibition enable the federal government to tax immigrants without representation, but it allows the federal government to require that immigrants fight for a nation in which they are not represented. In essence, the current government is permitted to behave in direct contradiction to what the Framers intended. Ironically, the Framers fought for their independence because they were taxed by the British Empire without representation in Parliament.[190] Furthermore, during the Vietnam era, Congress passed and the states ratified the Twenty-Sixth Amendment, lowering the voting age requirement to eighteen years[191] of age because fairness required men who fought for our nation during the Vietnam War be allowed to vote.[192] In light of the similarities between legal immi-

189. *See* Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1110 (1977) (discussing how aliens were subject "to conscription under the selective service laws"). Congress has recognized that service in the military carries with it some advantages. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act), Pub. L. No. 104–193, § 402(a)(2)(C), 110 Stat. 2105, 2263 (codified as amended in scattered sections of 8 and 42 U.S.C.) (creating exception from denial of public benefits for immigrants who have served or are currently serving in military). It could be argued that Congress has recognized that some immigrants are similar to citizens when it created this exception. However, the important distinction is that immigrants are *eligible* for the draft at any time Congress so desires, not that some of them now serve in the military. By being eligible, immigrants carry the same burdens as citizens in that regard.

190. *See, e.g.*, WESLEY S. GRISWOLD, THE NIGHT THE REVOLUTION BEGAN: THE BOSTON TEA PARTY, 1773, at 5 (1972) (emphasizing that political leaders of Colonial America did not believe that Parliament had constitutional right to tax them and saw "only taxes devised by themselves for themselves" as legitimate); BENJAMIN WOODS LABAREE, THE BOSTON TEA PARTY 16, 44 (1964) (noting that Colonists objected to Stamp Act and Tea Act, because they believed Parliament had no authority to tax them as long as they were not represented in Parliament); JOHN C. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 25, 31, 138, 212–13, 215, 220 (1943) (reporting that "taxation without representation" rhetoric flourished among Colonists not because of economic concerns as much as because of political concerns relating to Parliament's "invasion of Americans' political rights . . . which inspired the ideals and slogans of the American Revolution").

191. *See* U.S. CONST. amend. XXVI, § 1 (stating that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age").

192. *See, e.g.*, Vikram David Amar, *Jury Service As Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 244–45 (1995) (stressing that debate, which led to passage and ratification of Twenty-Sixth Amendment, concerned fairness of forcing "young adults to fight and die in a war without being able to vote their opposition to it in federal and state elections"); Robert M. Javis et al., *Contextual Thinking: Why Law Students (and Lawyers) Need to Know History*, 42 WAYNE L. REV. 1603, 1607 (1996) (echoing consensus that Twenty-Sixth Amendment is largely attributed to Vietnam war and notion that fairness requires young Americans subject to draft be allowed to vote); Peter M. Shane, *Voting*

grants and citizens, immigrants should receive protection from the Supreme Court notwithstanding the federal government's plenary power. Yet, if the federal government continues to deny immigrants suffrage, it should at least provide heightened judicial protection from a tyrannical majority who discriminates against them. "To withhold the right to vote is to withhold the political power that would enable persons and groups to protect themselves in the legislative forum."[193]

IV. SOLUTION: HEIGHTENED REVIEW OF FEDERAL LAWS

A. *Strict-Scrutiny Review Applied to Federal Immigration Laws: The Welfare Reform Act's Failure to Honor "Least Restrictive Means Possible"*

Allowing federal immigration laws to be reviewed under strict scrutiny will protect immigrants from discriminatory laws.[194] Strict scrutiny re-

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Rights and the "Statutory Constitution," LAW & CONTEMP. PROBS., Autumn 1993, at 243, 255 (contending that key argument for Twenty-Sixth Amendment "lay in the unfairness of conscripting young men to the most serious of civic obligations without entrusting those same individuals with the most basic right of civil participation"); Matthew C. Houchens, Comment, *Killer Party: Proposing Civil Liability for Social Hosts Who Serve Alcohol to Minors*, 30 J. MARSHALL L. REV. 245, 253 (1996) (noting that during 1960s, young men who were being drafted to serve in Vietnam War protested for right to vote).

193. Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1107 (1977).

194. Before the Supreme Court could apply a strict scrutiny standard to federal laws affecting legal immigrants, it would have to overrule *Mathews v. Diaz*. Overruling *Mathews* is no easy task as "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992) (citing Powell, *Stare Decisis and Judicial Restraint*, 1991 J. SUP. CT. HIST. 13, 16). However, "it is common wisdom that the rule of stare decisis is not an 'inexorable command,' and certainly it is not such in every constitutional case." *Id.* (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–11 (1932) (Brandeis, J., dissenting)). In deciding whether to overrule a prior case, the Court may consider: (1) "whether the rule has proven to be intolerable simply in defying practical workability," (2) "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation," (3) "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," or (4) "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id.* at 854–55. In challenging *Mathews*, one should attack the reasoning behind its holding: the plenary power doctrine. The Court created the doctrine to protect Congress's interest in foreign policy and national security. Abreu v. Callahan, 971 F. Supp. 799, 808 (S.D.N.Y. 1997) (citing Chae Chan Ping v. United States, 130 U.S. 581 (1889)). Over time, however, as has been thoroughly described in this Comment, the Court "arguably has expanded the doctrine beyond actions directly controlling the crossing of our national borders by aliens to actions affecting immigration only more remotely if [at] all." *Abreu*, 971 F. Supp. at 808–09. The underlying purpose behind the doctrine has been

quires the government to present a compelling interest substantially related to the discriminatory classification, utilizing the least restrictive means available to accomplish that goal.[195] Because laws affecting suspect classifications are presumptively unconstitutional, the Court should thus view the Welfare Reform Act suspiciously and require the government provide a compelling interest to uphold the legislative Act in question.[196]

Congress, in the Welfare Reform Act, presented two such compelling interests: "assure that aliens be self-reliant"[197] and "remove the incentive for illegal immigration provided by the availability of public benefits."[198] However, under strict scrutiny, the Welfare Reform Act would be held unconstitutional if these interests are not the least restrictive means to accomplishing the government's purported goals.

The Supreme Court should find the Welfare Reform Act unconstitutional under strict scrutiny because denying immigrants federal public benefits is not the *least restrictive means* of encouraging immigrants to be self-sufficient.[199] If it were the least restrictive means available, Congress would deny federal benefits to all citizens because all citizens would then become self-reliant and would never burden the government. Furthermore, Congress's second compelling reason, discouraging illegal immigration by denying immigrants federal public benefits, is also not the least restrictive means of accomplishing its goal. Congress could have limited the provisions of the Welfare Reform Act pertaining to aliens to "illegal" immigrants. As a result, illegal immigrants would not enter the United States for the purpose of obtaining federal benefits, and legal immigrants would not be denied their rights under the Equal Protection Clause. Therefore, because other means were available to Congress other than enacting a discriminatory law against all immigrants, the Court should

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lost to the point that in *Mathews*, no discernible foreign policy interest was implicated. As such, *Mathews* is an aberration in Supreme Court jurisprudence, and the Court should overrule it. Given the conservative composition of the current Court, however, the possibility of *Mathews* being overruled is unlikely.

195. *See* Bernal v. Fainter, 467 U.S. 216, 219 (1984) (stating that state law can pass strict scrutiny test if it advances "a compelling state interest by the least restrictive means available"); Korematsu v. United States, 323 U.S. 214, 216 (1944) (recognizing that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and are subject "to the most rigid scrutiny").

196. *See Bernal*, 467 U.S. at 219 n.6 (stating that "[o]nly rarely are statutes sustained in the face of strict scrutiny").

197. Welfare Reform Act, Pub. L. No. 104–193, § 400, 110 Stat. 2105, 2260 (codified as amended in scattered sections of 8 and 42 U.S.C.).

198. *Id.*

199. *See Bernal*, 467 U.S. at 219 (defining strict scrutiny test as advancing compelling interest by "least restrictive means available").

hold that the Welfare Reform Act violates the Fifth Amendment's Equal Protection Clause.

B. *Protecting Immigrants from Discriminatory Laws While Preserving Foreign Policy Interests*

Although strict-scrutiny review could lead to more federal laws being held unconstitutional, like the Welfare Reform Act, this heightened standard of review should not endanger the federal government's interest in foreign policy. Applying a strict-scrutiny standard will serve the concerns of both the federal government and legal immigrants. Strict-scrutiny analysis will protect legal immigrants from discriminatory laws[200] while maintaining the federal government's interest in matters regarding foreign policy.[201] Because strict-scrutiny review forces the government to present a compelling governmental interest before any federal law affecting immigrants can pass constitutional muster, legal immigrants will be insulated from the majoritarian political process in which they have little influence.[202] Moreover, legislation like the Welfare Reform Act that seeks to preserve financial resources will not threaten immigrants because such a governmental interest is not compelling.[203] Under height-

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200. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (recognizing that since laws, which classify by alienage, race, or national origin "are so seldom relevant to the achievement of any legitimate state interest," they are "subjected to strict scrutiny and will be sustained only if they are suitably *tailored to serve a compelling state interest*") (emphasis added). In subjecting state laws to heightened review, the Supreme Court has protected aliens from discriminatory state laws. *See* Sugarman v. Dougall, 413 U.S. 634, 643 (1973) (holding that New York Civil Service law, which only permitted American citizens to hold permanent positions in competitive class of state civil service, violates Equal Protection Clause, because it "sweeps indiscriminately" and is not narrowly tailored to substantial state interest); Graham v. Richardson, 403 U.S. 365, 376 (1971) (striking state statutes, which denied welfare benefits to resident aliens or to aliens who have not lived in United States for specified period, as violative of equal protection).

201. *See* Haig v. Agee, 453 U.S. 280, 307 (1981) (indicating that foreign policy interest will survive strict scrutiny review as "[i]t is 'obvious and unarguable' that no governmental interest is more *compelling* than the security of the Nation . . . . Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot neatly be compartmentalized.") (emphasis added).

202. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 601–02, 602 n.6 (5th ed. 1995) (noting that rationale behind "suspect classes" and strict scrutiny is some groups, like aliens, need protection from political processes; hence, laws affecting those groups must be subjected to "exacting judicial scrutiny" (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938))).

203. *See Graham*, 403 U.S. at 375 (indicating that laws concerning merely fiscal integrity fail under strict scrutiny because fiscal interest is not compelling).

ened review, legal immigrants will finally be protected from discriminatory federal laws.

While at first glance heightened review seems to eviscerate the federal government's interest in foreign policy, strict-scrutiny analysis should not affect the government's interest in foreign policy because such an interest is compelling.[204] In *Haig v. Agee*,[205] the Court compared the federal government's interest in matters concerning foreign policy to its interest in national security. According to the Court, "no governmental interest is more *compelling* than the security of the Nation"[206] and because "foreign policy and national security considerations cannot neatly be compartmentalized,"[207] the "[p]rotection of the foreign policy of the United States is a governmental interest of *great* importance."[208] If the federal government's interest in foreign policy *is* comparable to the government's interest in national security, a heightened standard of review should not affect foreign policy in any manner. Where a law regulating immigration truly affects the foreign policy of the United States, the Court would uphold the law because of the federal government's compelling interest in foreign policy.[209] However, where the foreign policy of the United States is not implicated, such as in the Welfare Reform Act, the Court would strike the law for unconstitutionally singling out a "suspect class." Thus, if the Court adopted strict scrutiny for federal laws affecting legal immigrants, immigrants would be protected from the majoritarian political process, and the federal government would still possess an absolute right to legislate in matters affecting foreign policy.

V. CONCLUSION

The hostile environment in the United States toward immigrants, as indicated by the Welfare Reform Act and Proposition 187, calls for a

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204. *See Haig*, 453 U.S. at 307 (indicating that foreign policy is compelling interest); *cf.* Kleindienst v. Mandel, 408 U.S. 753, 783–84 (1972) (Marshall, J., dissenting) (labeling "[a]ctual threats to the national security, public health needs, and genuine requirements of law enforcement" as "the most apparent interests that would surely be compelling"); Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964) (implying that national security is compelling state interest by stating that Congress's "power to safeguard our Nation's security is obvious and unarguable"); *Korematsu*, 323 U.S. at 223–24 (upholding racial discriminatory law because of compelling governmental interest in national security during war).

205. 453 U.S. 280 (1981).

206. *Haig*, 453 U.S. at 307 (citing Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964)) (emphasis added).

207. *Id.*

208. *Id.* (emphasis added).

209. *See id.* (noting that foreign policy interest of United States is compelling under constitutional analysis).

more meaningful judicial review of laws affecting immigrants. Although the Supreme Court has labeled legal immigrants a "suspect class" in the context of state laws, the Court has never afforded immigrants protection from federal laws due to its interpretation of the plenary power doctrine. At the time of its inception, the plenary power doctrine applied to laws implicating the foreign policy of the United States. However, over time, it has grown into a broad governmental interest that prohibits the Court from performing its role of judicial review. The Court should now recognize the purpose behind the plenary power doctrine: protecting the foreign policy of the nation. Application of heightened-review standard would not only protect legal immigrants from discriminatory federal laws, but would also preserve the purpose of the plenary power doctrine. Only by subjecting federal laws affecting immigrants to strict scrutiny will all "persons" finally be protected under the Equal Protection Clause.