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The Congruence Principle Applied: Rethinking Equal Protection
Review of Federal Alienage Classifications After Adarand Constructors, Inc. v. Peña

Founded on the ideal of equality under the law for all people, the United States has long prided itself as a nation of immigrants. From the welcoming words of Lady Liberty\(^1\) to the metaphor of the "melting pot,"\(^2\) America's history is replete with images of an inclusive society dedicated to the proposition that all parties to its social contract are free and equal citizens. Indeed, the Fourteenth Amendment specifically guarantees that all persons are entitled to equal treatment under the law.\(^3\)

\(^1\) The inscription on the pedestal of the Statue of Liberty reads:

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore,
Send these, the homeless, tempest-tossed to me:
I lift my lamp beside the golden door.

Hodge v. United States Dep't of Justice, 929 F.2d 153, 159 (5th Cir. 1991) (Goldberg, J., dissenting) (citing poem by Emma Lazarus, \textit{The New Colossus, in America Forever Now} (1968)).


\(^3\) "Nor shall any State . . . deny to any person . . . the equal protection of the laws." U.S. Const. amend. XIV, § 1.
However, just as vivid in this nation’s history are the many manifestations of xenophobia, racism, and outright hatred visited upon noncitizens through the centuries. While there have been periods of unrestricted entry into the United States, there appear to have been just as many years of virtual border closure, often accompanied by strong anti-immigrant sentiment.

The United States Congress is charged with the unenviable task of creating a coherent immigration policy in the shadow of the nation’s historical mood swings vis-à-vis noncitizens. Hand in hand with its power over foreign relations, Congress has long enjoyed “plenary power” over immigration policy; this power stems from the belief that a sovereign nation should have broad discretion in determining who it admits to and excludes from its polity.

4 I use the term “noncitizen” or “immigrant” in place of “alien,” and “undocumented immigrant” in place of “illegal alien.” While I recognize that the term “alien” is one of art that has a legal meaning under the Immigration Code, 8 U.S.C. § 1101(a)(3), I believe that referring to noncitizens as “aliens” is pejorative and calls attention to their perceived “foreignness.” See Victor C. Romero, Equal Protection Held Hostage: Ransoming the Constitutionality of the Hostage Taking Act, 91 Nw. U. L. Rev. 573, 573 n.4 (1997) [hereinafter “Romero, HTA”]; Victor C. Romero, Note, Whatever Happened to the Fourth Amendment?: Undocumented Immigrants’ Rights After INS v. Lopez-Mendoza and United States v. Verdugo-Urquidez, 65 S. Cal. L. Rev. 999, 999 n.1 (1992); see also Roy L. Brooks et al., Civil Rights Litigation: Cases and Materials 976 (1995) (observing that “illegal alien” is pejorative and tends to dehumanize the undocumented); Gerald L. Neuman, Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine, 42 UCLA L. Rev. 1425, 1428 (1995) (stating that referring to noncitizens as “aliens” “calls attention to their ‘otherness,’ and even associates them with nonhuman invaders from outer space”). I must attest to some sensitivity on my part having been an “alien” myself until 1995. See Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 Yale L.J. 545, 547 n.4 (1990) (noting a feeling of “hypersensitivity” to the term “alien,” as author was once one himself). Nonetheless, I do not advocate “political correctness” for its own sake, but because I believe that the terms I have chosen are preferable substitutes which are consistent with the idea of equality for all. Finally, I favor the term “alienage classification” rather than “citizenship classification” because the former captures the dehumanizing nature of such categorizations and supports the thesis that such classifications should generally be strictly scrutinized, whether enacted by Congress or the states. See infra Part II.B.

5 See infra Part II.B.1 (describing history of anti-immigrant sentiment in the United States and the intersection of race and alienage).

6 The United States Constitution authorizes Congress to create a “uniform Rule of Naturalization.” U.S. Const. art. I, § 8, cl. 4.

7 Peter H. Schuck, The Transformation of Immigration Law, 84 Colum. L. Rev. 1, 1-2 (1984) (“Immigration law often implicates the nation’s basic foreign policy objectives, a circumstance that has sometimes provoked the Supreme Court, even in nonimmigration contexts, to be less scrupulous in safeguarding constitutional values and more deferential to the other branches of government.”); see also infra Part I.
Supreme Court has consistently held that any congressional action that unduly burdens noncitizens, be it in the narrower context of immigration law (concerning the admission to and exclusion from the United States) or in alienage law more broadly (encompassing the law of immigrants' rights generally), should be accorded the greatest deference and should be upheld against equal protection challenge so long as Congress is able to articulate a rational basis for the law.

Conversely, the Court has determined that any state statute that discriminates against noncitizens must survive strict scrutiny. The Court has reasoned that because states do not enjoy plenary sovereign power over national immigration, any state laws burdening noncitizens' rights must be justified by a compelling state interest and must be narrowly tailored to further that interest. The only exception to this broad rule is that a state may reserve key occupations of a sufficiently political nature to its citizens as long as the classification survives rational basis scrutiny.

Thus, under prevailing equal protection law developed in the shadow of over a century's adherence to the plenary power doctrine, Congress may largely burden noncitizens' rights with impunity, while states may not. Many legal scholars have called for a

8 I use the term "immigration law" as Professor Motomura has, referring to "the body of law governing the admission and expulsion of [noncitizens]. It should be distinguished from the more general law of [noncitizens'] rights and obligations, which includes, for example, their tax status, military obligations, and eligibility for government benefits and certain types of employment." Motomura, supra note 4, at 547. Like Professor Michael Scaperlanda, I use the term "alienage law" to describe the more general area of immigrants' rights law. See Michael Scaperlanda, Partial Membership: Aliens and the Constitutional Community, 81 Iowa L. Rev. 707, 713 (1996). Another convention is to use the terms "inside" and "outside" immigration law. Thus, "inside" immigration law is synonymous with "immigration law," and "outside" immigration law refers to the general law of immigrants' rights. See also Linda S. Bosniak, Membership, Equality, and the Difference That Alienage Makes, 69 N.Y.U. L. Rev. 1047, 1058 (1994) (criticizing the conventional distinction the cases make between "inside" and "outside" immigration law).

9 See infra Part I.

10 See infra Part I.

11 Under the "political function" doctrine, a state may exclude noncitizens from occupying certain state government jobs to the extent that such positions "go to the heart of representative government." Sugarman v. Dougall, 413 U.S. 634, 647 (1973). See also Foley v. Connellie, 435 U.S. 291 (1978) (holding that New York could bar employment of noncitizens as state troopers); Ambach v. Norwick, 441 U.S. 68 (1979) (holding that New York may refuse to employ as primary and secondary school teachers noncitizens who are eligible for citizenship but who refuse to seek naturalization); Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (sustaining California requirement that all "peace officers" be citizens).
revision of this dual standard of review, contending that there is no sound reason to continue with the legal fiction of the plenary power doctrine and to grant substantial deference to Congress on matters of immigration, specifically, and immigrants’ rights, generally.¹²

This Article takes a slightly different approach to this argument. It suggests that the Supreme Court’s 1995 decision in Adarand Constructors, Inc. v. Peña¹³ constitutes a starting point

¹² See, e.g., T. Alexander Aleinikoff, Federal Regulation of Aliens and the Constitution, 83 Am. J. Int’l L. 862, 870 (1983) (suggesting that rather than invoking Congress’s plenary power, “courts ought to examine the justifications offered on behalf of federal regulations based on alienage to see if they meet traditional constitutional standards of permissibility,” and should also more strictly review regulations burdening fundamental constitutional rights); Gilbert Paul Carrasco, Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection, 74 B.U. L. Rev. 591, 603 & n.52 (1994) (arguing that the Court has failed to articulate a viable reason for why state and federal laws would be subject to different levels of scrutiny); Michael J. Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1062 (1979) (arguing that a classification cannot be suspect when the states employ it, yet not suspect when invoked by the federal government); David F. Levi, Note, The Equal Treatment of Aliens: Preemption or Equal Protection?, 31 Stan. L. Rev. 1069, 1089 (1979) (same); Stephen H. Legomsky, Immigration Law and the Principle of Plenary Congressional Power, 1984 Sup. Ct. Rev. 255, 303, 305 (foretelling the demise of the plenary power doctrine); Gerald M. Rosberg, The Protection of Aliens From Discriminatory Treatment by the National Government, 1977 Sup. Ct. Rev. 275, 316-36 (arguing that constitutional limits on classification by alienage should apply to federal as well as state government).

Historically, the plenary power doctrine involved congressional power only over foreign relations and immigration law—not immigrants’ rights law generally. Thus, there was no judicial review of congressional action challenged through an equal protection claim. See, e.g., The Chinese Exclusion Case, 130 U.S. 581 (1889). However, the Court has invoked the plenary power doctrine in immigrants’ rights cases, tempering the doctrine somewhat by requiring Congress to establish a rational basis for any law that unduly burdens noncitizens’ equal protection rights. Mathews v. Diaz, 426 U.S. 67, 75 (1976). See infra Part I.B.2.

¹³ 515 U.S. 200 (1995). My use of the Adarand decision in this Article and in my prior work does not imply that I agree with the Court’s opinion in that case. At the simplest level, the replacement of Justice Marshall with Justice Thomas led to the Metro Broadcasting dissenters’ acquisition of the crucial fifth vote for the proposition that government programs should be color-blind, blurring the distinction between benign and invidious race-based classifications. Compare Adarand, 515 U.S. 200, with Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). See also Paul J. Mishkin, Foreword: The Making of a Turning Point: Metro and Adarand, 84 Cal. L. Rev. 875, 879 (1996) (attributing Court’s change of heart to change in its composition). At another level, I disagree with the Adarand majority’s assertion that it is difficult to discern whether a governmental program serves a meritorious or discriminatory purpose. However, I do not weigh in on this debate in this Article. Indeed, my motives are more Machiavellian: I intend to take what I perceive to be an incorrect decision and extract from it a useful principle that could help yield salutary results in a different context. I intend to show that Justice O’Connor’s congruence
for a renewed dialogue on the intersection of race, noncitizens' rights, and immigration law. In *Adarand*, the Court held that race-based classifications by the federal government should be subject to the same level of scrutiny as those enacted by the states—a principle Justice O'Connor describes as "congruence." This Article contends that the principle of congruence should be applied to alienage classifications so that federal alienage classifications are scrutinized in the same manner as state alienage classifications. Specifically, courts should strictly scrutinize all federal alienage classifications that affect immigrants' rights in the alienage law context. In addition, courts should strictly scrutinize such classifications within immigration law that impair fundamental rights. However, courts should defer to congressional classifications within immigration law that do not impinge upon fundamental rights.

This modified *Adarand* model is superior to the current equal protection approach in at least three ways. First, the principle of congruence ensures that noncitizens' rights are protected when burdened by either the state or the federal government. Second, this modified approach balances Congress's constitutional mandate to create a viable immigration policy with the right of noncitizens to be treated equitably. And third, this model places the issue of immigrants' rights in its proper context by acknowledging the nation's historical and, indeed, current bias against imm-

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14 *Adarand*, 515 U.S. at 224.

15 I first explored the idea of using *Adarand* as a springboard for this model in an earlier article. *See* Romero, *HTA*, supra note 4, at 599-600. However, that article examined the use of the congruence principle in a much narrower context, specifically as a method for criticizing current federal court analysis of the alienage classification in the federal Hostage Taking Act. *Id.*; *see also* 18 U.S.C. § 1203 (1984) (text of the Hostage Taking Act).

migrants, especially nonwhite immigrants.

Part I of this Article examines the historical foundations of the plenary power doctrine up to the current dichotomy between judicial review of state and federal alienage classifications under equal protection. Part II reviews the Adarand decision, arguing that Justice O'Connor's congruence principle provides the bulwark for a revision of judicial review of federal legislation, especially in light of the historical and continuing perception of Asian- and Latino-Americans as noncitizens. The Article briefly concludes that underlying the proposed model is the well-established tenet that the equal protection guarantee stands as the vanguard of minority rights against systematic government discrimination.

I

THE CURRENT MODEL: EQUAL PROTECTION ANALYSIS OF FEDERAL AND STATE ALIENAGE CLASSIFICATIONS

A. The History of the Federal Plenary Power Doctrine

The plenary power doctrine emerged from the fiction of national sovereignty. In The Chinese Exclusion Case, the Supreme Court held that Congress had absolute power to exclude Chinese nationals from reentry into the United States on the basis of a perceived economic and social threat from the growing numbers of "unassimilable" Chinese who immigrated to California seeking their fortunes in the gold rush of the late nineteenth century. In upholding the exclusion law, the Court established the federal government's unfettered power to bar noncitizens from the United States as an incident of the nation's sovereign jurisdiction, free from judicial review:

That the government of the United States, through the action


18 130 U.S. 581 (1889).

19 Professor Motomura notes that the Supreme Court's candidly racist and nativist decision may not be so surprising when viewed in its historical context: "We must bear in mind that this was an earlier era of constitutional law, when equal protection was well on its way to 'separate but equal,' and judicial recognition of the substantive and procedural rights of individuals was still far beyond the constitutional horizon." Motomura, supra note 4, at 551. See also Plessy v. Ferguson, 163 U.S. 537 (1896) (approving the "separate but equal" doctrine).
of the legislative department, can exclude [noncitizens] from its territory 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. If it could not exclude [noncitizens] it would be to that extent subject to the control of another power. If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject.

Interestingly, while the Court described Congress's exclusionary power as "part of those sovereign powers delegated by the constitution," the text of the Constitution does not explicitly confer this power, limiting the federal government's reach to establishing a "uniform Rule of Naturalization." Nonetheless, Congress's plenary power over immigration was born.

Since it was first introduced in The Chinese Exclusion Case, the plenary power doctrine has been surprisingly resilient. Despite the inherent tension in embracing an American judicial concept that holds the rights of the sovereign consistently superior to those of the individual, albeit a noncitizen, the Court has often invoked Congress's plenary power, inevitably resulting in the sacrifice of immigrants' rights in favor of the exercise of unrestrained sovereign power by the federal government.

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20 U.S. CONST. art. I, § 8, cl. 4. See also Legomsky, supra note 12, at 274; Motomura, supra note 4, at 551; Wani, supra note 17, at 67.
21 The Chinese Exclusion Case, Chae Chan Ping v. United States, 130 U.S. at 603-04, 609 (citations added).
22 Id. at 609.
23 U.S. CONST. art. I, § 8, cl. 4.
24 Professor Gabriel Chin notes that, ironically, The Chinese Exclusion Case and its progeny would likely be decided differently today because of the modern Court's belief in the unconstitutionality of race-based discrimination. Gabriel J. Chin, Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration 84-88 (unpublished manuscript on file with author). See also Michael Scaperlanda, Polishing the Tarnished Golden Door, 1993 Wis. L. REV. 965, 976-77 ("The Court [in The Chinese Exclusion Case] did not address the question of whether exclusion of chinese nationals on racial grounds violated the Constitution.").
25 See Schuck, supra note 7, at 3 ("Classical immigration law proved to be remarkably durable.").
26 Id. (discussing the inherent tension between liberalism and restrictive nationalism).
27 See, e.g., Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) (holding that decision to subject 25-year resident noncitizen to entry rules rather than deportation rules is subject to deference under plenary power doctrine); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) (holding that power to exclude German wife of U.S. national is fundamental to sovereignty); The Japanese Immigrant Case, 189 U.S. 86 (1903) (holding that noncitizens inside U.S. may invoke
Despite the durability of the plenary power doctrine, the Court has occasionally endorsed greater protection for immigrants’ rights within both immigration law specifically and alienage law, more generally. First, within immigration law, the Court has noted that, in spite of the doctrine, noncitizens are entitled to greater procedural due process rights when the government seeks to deport them than when they initially seek entry into the country. Second, within alienage law, the Court has held that noncitizens are entitled to several constitutional protections beyond procedural due process. Indeed, immigrants’ rights are closely guarded when a state attempts to discriminate against noncitizens. Thus, the Court has felt compelled to draw back from the absolute deference accorded Congress by the plenary greater constitutional protection than those seeking admission); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (invoking plenary power doctrine to uphold deportation of resident noncitizens and concluding that no distinction exists between deportation and exclusion in terms of constitutional safeguards); Nishimura Ekiu v. United States, 142 U.S. 651 (1892) (upholding administrative officer’s exclusion of resident noncitizen based on plenary power doctrine). Time and again, the Court has emphasized that Congress’s immigration power is incident to its sovereignty and inextricably intertwined with its power over foreign relations. See, e.g., Fiallo v. Bell, 430 U.S. 787, 792 (1977) (“Our cases have long recognized the power to expel or exclude [noncitizens] as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (“[A]ny policy toward [noncitizens] is vitally and intricately intertwined 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) (“Consequently the regulation of [noncitizens] is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, ‘the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.’”) (citation omitted); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909) (“over no conceivable subject is the legislative power of Congress more complete than it is over [the admission of noncitizens]”).

28 The Japanese Immigrant Case, 189 U.S. 86 (1903) (holding that noncitizens inside U.S. may invoke greater constitutional protection than those seeking admission).


30 See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that the equal protection clause applies to all individuals within the U.S., including noncitizens); Graham v. Richardson, 403 U.S. 365, 376 (1971) (“[Noncitizens] like citizens pay taxes and may be called into the armed forces. [They] may live within a state for many years, work in the state and contribute to the economic growth of the state.”) (internal citation omitted).
power doctrine within immigration and alienage law because of a growing respect for the sanctity of certain individual rights.31

B. The State/Federal Dichotomy in Equal Protection Law Regarding Alienage Classifications

The limited recognition of immigrants' rights described in the previous section is clearly illustrated by the Court's equal protection jurisprudence regarding alienage classifications. This subpart will outline the Court's approach to the equal protection rights of noncitizens with respect to both state and federal alienage classifications.

1. State Alienage Classifications

The guarantee of equal protection of the laws is found most prominently in the text of the Fourteenth Amendment: "Nor shall any State... deny to any person... the equal protection of the laws."32 As plainly stated in its text, the Fourteenth Amendment requires that individual states ensure that all persons are treated equally under the law. Initially adopted as an anti-racial discrimination measure, the Equal Protection Clause's shining, and perhaps most famous, moment came with the high Court's school desegregation decision in *Brown v. Board of Education.*33 The doctrine of equal protection has also been used to challenge unconstitutional government classifications on the basis of gender,34 illegitimacy,35 and mental retardation.36

The Court first extended equal protection to noncitizens in

31 In addition, the Court's decision to hold individual constitutional rights supreme over governmental powers is consistent with the idea of a limited federal government—a concept that the Court has strongly endorsed in the past. See, e.g., *Reid v. Covert,* 354 U.S. 1, 5-6 (1956) (describing the federal government to be "entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.") (footnotes omitted).

32 U.S. CONST. amend. XIV, § 1.

33 347 U.S. 483 (1954) (declaring the doctrine of "separate but equal" violative of the Fourteenth Amendment's equal protection clause).

34 See, e.g., *Craig v. Boren,* 429 U.S. 190, 197 (1976) (holding that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"). *But see United States v. Virginia,* 116 S. Ct. 2264, 2274 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action.") (internal citation omitted).


**Yick Wo v. Hopkins.** Specifically, the Court held unconstitutional as applied a municipal building ordinance enforced exclusively against Chinese nationals on the ground that such enforcement deprived the petitioners of the equal protection of the laws. It stated that the term "persons" in the Fourteenth Amendment's equal protection clause included noncitizens as well as United States citizens. Almost a century later, in *Graham v. Richardson,* the Court struck down a state statute depriving noncitizens of welfare benefits, stating that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." In the span of time between *Yick Wo* and *Graham,* the Court expanded the equal protection rights of individual noncitizens against the states by acknowledging immigrants' enjoyment of this freedom and by holding that any state-sanctioned discrimination would subject the offending law to severe judicial scrutiny. Thus, the development of the Fourteenth Amendment's equal protection jurisprudence generally favored the individual noncitizen over the state government.

In the area of state employment, however, the Court has recognized a narrow exception to this strict scrutiny rule. Under the so-called "political function" doctrine, a state may exclude noncitizens from occupying certain state government jobs to the extent that such positions "go to the heart of representative government." Thus, in *Cabell v. Chavez-Salido,* the Court sustained a California requirement that all "peace officers" be citizens; therefore, the permanent resident petitioners could be properly excluded from service. Two years later, in *Bernal v. Fainter,* Justice Marshall explained that:

> The focus of our inquiry has been whether a position was such

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37 118 U.S. 356 (1886).
38 Id. at 373.
39 Id. at 368-69.
40 403 U.S. 365 (1971).
41 Id. at 372.
43 *Cabell,* 454 U.S. at 447.
that the officeholder would necessarily exercise broad discretionary power over the formulation or execution of public policies importantly affecting the citizen population—power of the sort that a self-governing community could properly entrust only to full-fledged members of that community.\textsuperscript{44}

Nonetheless, outside the area of state government jobs of political significance, all state alienage classifications are strictly scrutinized under the Equal Protection Clause.

2. **Federal Alienage Classifications**

Federal alienage classifications, however, do not receive the careful examination given state laws. The Court, invoking the plenary power doctrine, has consistently deferred to the desires of Congress at the expense of immigrants' rights.\textsuperscript{45} Indeed, as long as Congress acts solely within immigration law, affecting only the entry and deportation of noncitizens, its plenary power ensures that there will be no judicial review of Congressional alienage classifications on equal protection grounds.\textsuperscript{46} This result has some appeal: a sovereignty charged with naturalization powers must make distinctions between citizens and noncitizens in order to create a coherent immigration policy, and, to this end, Congress must establish alienage classifications in immigration law. As Professor Peter Schuck has concluded, citizens and noncitizens are therefore not similarly situated under immigration law, so noncitizens cannot claim the same status as citizens under immigration law.\textsuperscript{47}

Noncitizens fare only slightly better when Congress creates alienage classifications in non-immigration law contexts. Equal protection jurisprudence reflects that the Court favors Congressional plenary power over the equal protection rights of noncitizens for at least two major reasons, one textual and one contextual. Textually, the Due Process Clause of the Fifth Amendment, unlike that of the Fourteenth Amendment, does not specifically contain an equal protection component to curb the federal government's action against noncitizens.\textsuperscript{48} As will be

\textsuperscript{45} See supra text accompanying notes 18-31.
\textsuperscript{46} See Motomura, supra note 4, at 564-66; T. Alexander Aleinikoff, Citizens, Aliens, Membership and the Constitution, 7 CONST. COMMENTARY 9, 10 (1990) (“Immigration policy, conceived of as membership rules, is thought to lie at the core of national self-determination and self-definition.”).
\textsuperscript{47} Schuck, supra note 7, at 24.
\textsuperscript{48} The Fifth Amendment provides that “no person shall . . . be deprived of life,
explained in Part II, this textual hurdle is arguably not problematic after the Court's opinion in *Adarand*.49

However, the contextual justification is more deeply entrenched and has yet to be denounced by the Court. Because Congress has long been regarded as having plenary power over immigration and foreign relations, and the individual states have not, the Court has been willing to grant more deference to Congressional enactments within alienage law when challenged on equal protection grounds. In *Mathews v. Diaz*,50 the Court upheld a federal alienage classification leading to the denial of Medicare benefits to some noncitizens. Despite its earlier statement in *Graham* that alienage classifications, like those based on race, were inherently suspect,51 the Court played the plenary power card and pointed to Congress's inherent power over immigration and foreign relations as necessitating judicial deference.52 Instead of reviewing the legislation through the lens of strict scrutiny, the Court in *Mathews* upheld the federal alienage classification because it reasonably furthered a legitimate governmental interest—one which the judiciary felt it lacked the expertise to review.53 As the Court concluded:

> In this case, since appellees have not identified a principled basis for prescribing a different standard than the one selected by Congress, they have, in effect, merely invited us to substitute our judgment for that of Congress in deciding which

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49 *See infra* Part II.
52 *Mathews*, 426 U.S. at 84-85. "The equal protection analysis ... involves significantly different considerations because it concerns the relationship between [noncitizens] and the States rather than between [noncitizens] and the Federal Government."
53 In finding that the classification furthered a legitimate governmental interest, the Court stated:

> it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and duration of his residence. Since neither requirement is wholly irrational, this case essentially involves nothing more than a claim that it would have been more reasonable for Congress to select somewhat different requirements of the same kind.

*Id.* at 82-83.
[noncitizens] shall be eligible to participate in the supplementary insurance program on the same conditions as citizens. We decline the invitation.54

In sum, the Court’s current equal protection stance varies little from its overall constitutional view of the proper balance between immigrants’ rights and the sovereign power of the Congress.

Within immigration law, Congress is free to create alienage distinctions as part of its plenary power. Within alienage law, however, Congress’s power weakens while noncitizens’ equal protection rights strengthen somewhat; Congress must provide a rational basis for its decision to treat noncitizens differently from citizens. Still, this deference to the plenary power doctrine denies noncitizens the greater protection they receive against state alienage classifications.

Whether in the context of immigration or alienage law, the Court is reluctant to interfere with what it has perceived, and continues to perceive, as the near-exclusive control of Congress over the regulation of immigrants and foreign relations. On the other hand, except in reviewing state jobs falling under the political function doctrine, the Court casts a stern eye on any similar legislation by the states on the ground that the states do not enjoy Congress’s plenary power over noncitizens. The end result of this constitutional dichotomy is the threat of unbridled federal power visited upon noncitizens protected only by the thin sheath of deferential judicial review. Figure 1 below summarizes the Supreme Court’s equal protection jurisprudence with respect to federal and state alienage classifications.

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**Figure 1: The Current Model of Equal Protection For Alienage Classifications**

The next Part contends that the Court’s recent decision in *Adarand Constructors, Inc. v. Peña*55 provides a precedential basis for overcoming the plenary power presumption when review-

54 *Id.* at 84.
ing equal protection challenges to Congressional alienage classifications. Moreover, a historical review of the plenary power doctrine demonstrates that continuing anti-immigrant sentiment mandates that strict scrutiny be the morally appropriate standard of review.

II
THE POST-ADARAND ALTERNATIVE: STRICT SCRUTINY FOR CONGRESSIONAL ALIENAGE CLASSIFICATIONS

In *Adarand*, the Supreme Court confronted the question of whether strict scrutiny should apply to a federal statute that classifies on the basis of race where a member of a minority group is benefitted by the statute. While this case dealt primarily with racial classifications, the majority's congruence principle provides the theoretical and precedential basis for storming the citadel of plenary power and finally applying strict scrutiny to Congressional classifications, whether within immigration or alienage law.

A. The Adarand Decision

At issue in *Adarand* was a federal statute that created financial incentives for government contractors to subcontract work to statutorily-defined “disadvantaged business enterprises” (“DBE’s”). To qualify, a business had to show it suffered economic and social disadvantage; the statute presumed that members of minority groups were disadvantaged economically and socially.\(^{56}\)

In *Adarand*, Mountain Gravel won a highway construction contract from the Federal Department of Transportation; Mountain Gravel then solicited bids from several subcontractors, including plaintiff Adarand Constructors, Inc. Adarand was the lowest bidder but was not considered statutorily disadvantaged. Therefore, Mountain Gravel awarded the subcontract to Gonzales Construction Company, a DBE, and Mountain Gravel availed itself of the incentive program. Had the program not existed, Mountain Gravel would have awarded the subcontract to Adarand. Adarand sued in federal court, charging that the statute's presumption that minorities qualified under the program

\(^{56}\) *Id.* at 206.
was racially discriminatory and violated the equal protection
guarantee of the Fifth Amendment. The district court granted
the government's summary judgment motion; the Tenth Circuit
affirmed on the ground that the government had satisfied the
heightened scrutiny standard of review.

In a five-to-four decision, Justice O'Connor, writing for the
majority, remanded the case to the district court because strict
scrutiny, and not intermediate scrutiny, was the proper standard
of review for congressional racial classifications. This ruling is
noteworthy in at least two respects. First, Adarand explicitly
overturned the Court's 1990 ruling in Metro Broadcasting, Inc. v.
FCC, to the extent that Metro chose to employ an intermediate
scrutiny standard to race-based classifications that were "be-
nign," such as affirmative action programs. The Court rea-
soned that Metro conflicted with a long line of precedent that
established strict scrutiny as the proper level of judicial review.

Second, and more importantly, the Court reinstated an earlier
position that federal race-based classification schemes were sub-
ject to the same scrutiny as state racial classifications; specifi-

58 Adarand, 515 U.S. at 227. Curiously, the Court never explained how to deter-
mine whether a law is "benign." See id. at 227.
state quota for using minority businesses in contracting against a strict scrutiny stan-
scrutiny to state layoff procedure); Fullilove v. Klutznick, 448 U.S. 448, 492 (1980)
(reaffirming strict scrutiny as the standard of review for state race-based classifica-
tions; Univ. of Cal. Regents v. Bakke, 438 U.S. 265 (1978) (Powell, J.) (stating that
strict scrutiny should be applied in all cases involving racial classifications).
60 Adarand, 515 U.S. at 217 (citing Weinberger v. Wiesenfield, 420 U.S. 636, 638
n.2 (1975) ("[t]his Court's approach to Fifth Amendment equal protection claims
has always been precisely the same as to equal protection claims under the Four-
teenth Amendment"); see also United States v. Paradise, 480 U.S. 149, 166 n.16
(1987) ("the reach of the equal protection guarantee of the Fifth Amendment is
coeextensive with that of the Fourteenth"); Buckley v. Valeo, 424 U.S. 1, 93 (1976)
("Equal protection analysis in the Fifth Amendment area is the same as that under
the Fourteenth Amendment."). Earlier in its opinion, the Court set forth the differ-
ence between the language from which equal protection is derived in the Fifth
Amendment versus the Fourteenth:

Adarand's claim arises under the Fifth Amendment to the Constitution,
which provides that "No person shall . . . be deprived of life, liberty, or
property, without due process of law." Although this Court has always un-
derstood that Clause to provide some measure of protection against arbi-
trary treatment by the Federal Government, it is not as explicit a guarantee
of equal treatment as the Fourteenth Amendment, which provides that
"No State shall . . . deny to any person within its jurisdiction the equal
protection of the laws."
cally, the Court held:

[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.61

Citing a long line of precedent, the Court reaffirmed its earlier decisions holding that equal protection claims under the Due Process Clause of the Fifth Amendment are treated the same as those brought under the Fourteenth Amendment; the Court saw no reason why the federal government should be subject to a lesser constitutional duty than state governments when it enacts racially discriminatory laws.62 While acknowledging a few exceptions where the judiciary properly defers to the political branches of government,63 the Court noted that these uncommon situations did not detract from the general principle of subjecting laws to a single standard of scrutiny.64

Justice O'Connor cited three principles underlying the majority's view of governmental racial classifications: "skepticism," "consistency," and "congruence."65 "Skepticism" requires that the courts critically examine all racial classifications with the keenest eye because "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people."66 "Consistency" demands that "the standard of review under the Equal Protection Clause [not be] dependent on the race of those burdened or benefitted by a particular classification."67 "Congruence" mandates that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."68

With that, the Court concluded that strict scrutiny should apply to all racial classifications, regardless of whether Congress or the

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61 Id. at 213.
62 Id. at 213-18. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 500 (1954) ("In view of [the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.").
63 Adarand, 515 U.S. at 217 (citing Hampton v. Mow Sun Wong, 426 U.S. 88, 100, 101-102 n.21 (1976) (discussing Congress's plenary power over immigration)).
64 Id.
65 Id. at 223-4.
66 Id. (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).
67 Id. at 224 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989)).
68 Id. (quoting Buckley, 424 U.S. at 93)).
states established them and regardless of whether the targeted race is benefited or burdened by the classification. The Court was quick to caution, however, that strict scrutiny is not "strict in theory, but fatal in fact." The Court added, "when race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases." As an example of a valid program, the Court cited to its decision in *United States v. Paradise,* in which all the Justices agreed that the pervasive racial discrimination within the Alabama Department of Public Safety mandated the narrowly-tailored solution adopted by the state government.

The next subpart examines how Adarand's congruence principle can be used to argue that the federal courts should primarily review Congressional alienage classifications, in the context of both immigration and alienage law, through the lens of strict scrutiny, just as they examine state laws that discriminate against noncitizens. This subpart shall present the textual and contextual reasons why strict scrutiny should be the single standard for review of most alienage classifications.

**B. An Alternate Model: Applying Adarand's Congruence Principle to Federal and State Alienage Classifications**

Adarand's congruence principle provides the starting point for formulating an alternative to the Court's current equal protection approach to state and federal alienage classifications within both immigration and alienage law. This proposed model appears below in Figure 2.

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69 *Id.* at 235 (quoting *Fullilove,* 448 U.S. at 519).
70 *Id.*
71 480 U.S. at 167.
1. **Within Alienage or Immigration Law Involving Fundamental Right**

Federal courts should apply the Court's current strict scrutiny of state alienage classifications to federal alienage classifications that affect immigrants' rights in the context of alienage law as well as those that affect fundamental rights in the context of immigration law. Aside from fairly ensuring that items such as tax burdens and welfare benefits are properly allocated between citizen and noncitizen whether imposed by the state or federal authorities, this congruence between alienage laws and immigration laws that affect fundamental rights adequately captures the essence of equal protection—the protection of discrete and insular minorities.\(^7^3\)

First, as a starting point, the text of the *Adarand* opinion supports the idea that federal alienage classifications should be viewed with the same strict scrutiny to which state alienage laws are subject. Despite the *Adarand* majority's insistence that the congruence principle does not apply to laws within the expertise of the political branches of government, such as immigration,\(^7^4\) alienage law—the law involving immigrants' rights—bears little constitutional relation for equal protection purposes to immigration law—the law governing noncitizens' entry into and exit from this country. Thus, under Article I, Section 8 of the Constitution, Congress may appropriately distinguish between citizens and noncitizens in determining who is entitled to enter and leave the United States as part of its immigration power. However, one's citizenship may be of significantly less *constitutional* importance when Congress distributes public benefits.\(^7^5\)

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\(^7^4\) *Adarand*, 515 U.S. at 218 (citing *Hampton*, 426 U.S. at 101-2).

\(^7^5\) This is especially true in a country such as the United States, where studies...
is a state or a federal entity that decides to deny a noncitizen public benefits based on that person's status matters very little to the individual affected by the denial.  

In alienage law, a classification distinguishing between citizen and noncitizen onerously burdens the noncitizen, whether it is the state or the federal government that chooses to create it. Professor Kenneth Karst reminds us that it was not long ago that Congress pursued several well-meaning, but ultimately coercive, anti-immigrant measures within alienage law:

In 1918 Congress doubled the income tax on "non-resident aliens"; although it was not clear who would be considered non-resident, thousands of [noncitizens] promptly declared their intention to become citizens. Other measures were proposed and even introduced in Congress, but failed to pass: . . . "suppression of the foreign-language press, mass internments, and the denial of industrial employment to [noncitizens]."  

Last year's welfare reform bill that denies certain benefits even to documented immigrants closely mirrors the anti-immigrant measures of old.  

In addition, even within immigration law, strict scrutiny should be brought to bear on classifications that impair fundamental rights. Professor T. Alexander Aleinikoff suggests, for example, that critical examination should follow the enactment of immigration laws that burden family relationships; he provides the following example regarding the right to marry:

Citizens and permanent [residents] do not enjoy similar opportunities for reuniting with immediate family members lo-

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show that, as a group, noncitizens contribute more than they take by way of public assistance. Dave McCurdy, *The Future of U.S. Immigration Law*, 20 J. LEGIS. 3, 7 (1994). Indeed, contrary to popular belief, a recent study by the Public Policy Institute of California revealed that few undocumented immigrants are lured to the U.S. by government aid programs. Specifically, "as many as half of all Mexican immigrants return home within two years," disqualifying them from many social services programs. Patrick J. McDonnell, *Immigrants Not Lured By Aid, Study Says*, L.A. TIMES, Jan. 29, 1997, at A3.  

One criticism of this argument is that Justice O'Connor's congruence principle could not possibly apply to the immigration law context because Congress has plenary power over immigration and states do not; because these governmental entities have incongruous powers, equal protection guarantees should not restrain the states in the same way it does Congress. However, my proposed model resolves this apparent conflict by subjecting Congress's immigration legislation to more deferential treatment in the same way the Court has scrutinized "political function exception" cases involving state alienage law. *See infra* part II.B.2.  

Karst, *supra* note 2, at 314 (internal citations omitted).  

See *infra* note 121.
cated outside the United States. The entry of the spouse or minor child of a [permanent resident] is subject to a numerical limitation (if the relationship was formed after the [noncitizen] entered the country), while the entry of the spouse or minor child of a U.S. citizen is not. The impact of the statutory scheme is dramatic because the numerical limits have created a waiting list of tens of thousands of [noncitizens]. Thus, if a permanent [resident] marries a Mexican national, the [noncitizen] spouse may have to wait as long as 10 years to be eligible for entry. However, if a U.S. citizen marries a Mexican national, the [noncitizen] spouse may enter as soon as immigration authorities process the paper work.79

Indeed, such an approach would be consistent with the "fundamental rights" strand80 of equal protection analysis which, in Professor Aleinikoff's example invoking the constitutionally-based fundamental right to marry,81 would sadly be subordinated to the plenary power of Congress over immigration matters.

Second, as a practical matter, stricter scrutiny should apply to...


Our constitution allows a state to favor, to some degree, its own residents in the sharing, dividing and distribution of public resources within the state. . . . If a national community can accommodate less than perfect sharing among national citizens, should it not recognize in proper cases that some things must be shared with non-citizens? Or even that some things should be shared first with some non-citizens even to the exclusion of citizens?

Indeed, Professor López describes America's obligation to undocumented Mexican workers as a moral one arising out of the United States and Mexico's long-standing relationship that grows out of, but extends well beyond, their shared border and the history of abuse visited upon undocumented Mexican workers by U.S. employers. Id. at 695-707.

80 See, e.g., Gerald Gunther, INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 490 (5th ed. 1992) (describing the "fundamental rights and interests" strand of equal protection jurisprudence). The Supreme Court has noted that the Equal Protection Clause does not create substantive constitutional rights; rather, a right is fundamental, and therefore afforded equal protection, if it is "explicitly or implicitly guaranteed by the Constitution." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). A specific enumeration of all the fundamental rights that are afforded citizens is beyond this Article's scope. However, I recognize, sadly, that the Supreme Court has yet to afford some citizens certain fundamental rights. See, e.g., Bowers v. Hardwick, 478 U.S. 186 (1986) (denying homosexuals a right to privacy currently afforded heterosexuals).

81 See Zablocki v. Redhail, 434 U.S. 374 (1978) (invalidating Wisconsin law that required any state resident supporting minor children not in resident's custody to first seek court approval before marrying).
The Congruence Principle Applied

federal alienage classifications because the current rational basis test has not had much force when pitted against the ancient plenary power doctrine.\(^8\) Although it has been invoked recently to strike a Colorado constitutional amendment that was patently anti-homosexual,\(^8\) the existing rational basis test rarely has bite\(^8\) to it, much less in its application to federal alienage classifications. In contrast, strict scrutiny will ensure parity in how laws are reviewed.\(^8\) To do otherwise would be to effectively hold that the plenary power of the federal government trumps the rights of all noncitizens. In addition, to characterize the burdens on noncitizens as merely incidental denies the reality that the harm to the noncitizen is the same whether directly or indirectly inflicted.\(^8\) Indeed, the government should be more vigilant when burdens are incidental so that it may properly assess the impact of such burdens on noncitizens' lives.

Third, the dangerous intersection of race and alienage caution greater, rather than lesser, scrutiny of both federal and state alienage classifications. Professors Neil Gotanda and Robert

\(^8\) See infra Part I.A. Indeed, in some contexts outside alienage classifications, the rational basis test has been extremely deferential to the point of not even appearing to constitute judicial review. For example, in *United States Railroad Retirement Board v. Fritz*, the Court stated that it "has never insisted that a legislative body articulate its reasons for enacting a statute." United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980).


\(^8\) Gerald Gunther, *Newer Equal Protection*, 86 Harv. L. Rev. 1, 20 (1972) (arguing that "new bite" could be given to rational basis test by viewing the mere rationality standard as a means-focused and less deferential test).

\(^8\) I hold the majority of the *Adarand* court to its word that strict scrutiny is not fatal. In fact, applying strict scrutiny to federal alienage classifications may help redefine the doctrine so that it does not become fatal in fact. In one sense, equating strict scrutiny to fatal scrutiny blurs the distinction between equal protection and substantive due process to the extent that the former constitutional guarantee does not prohibit the government from creating classifications among peoples; rather, equal protection simply requires that these classifications are constitutionally permissible. See Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). See also infra Part I.B.2.

\(^8\) Professor Michael Dorf warns:

From the perspective of a rightholder, the severity of a law's impact has no necessary connection to whether the law directly or incidentally burdens the right's exercise. Direct burdens can be trivial—for example, a one-penny tax on newspapers that publish editorials critical of the government—whereas conversely, incidental burdens can be extremely harsh—for example, applying a prohibition against wearing headgear in the military to an Orthodox Jew.

Chang have written extensively about how Asian-Americans, unlike blacks or whites, have always been marked as "foreign." Professor Gotanda points to the Court's decision to uphold the wartime internment of all persons of Japanese ancestry in *United States v. Korematsu* as an example of this presumption at work:

The evacuated Japanese-Americans, including U.S. citizens, were presumed to be sufficiently foreign for an inference by the military that such racial-foreigners must be disloyal. Japanese-Americans were therefore characterized as different from the African-American racial minority. With the presence of racial foreignness, a presumption of disloyalty was reasonable and natural.87

Gotanda's words strike a bitter chord in the real world: Racist remarks directed against persons of Asian and Latino descent more likely command the victims to return to their homeland than slurs aimed at blacks. Indeed, immigrant blacks from the West Indies often find a cultural disconnect with native African-Americans and yet are often perceived as part of the indigenous black community.88

Affirming Gotanda's thesis, Chang points out the historical intersection of race and immigration law in the *Chinese Exclusion Case*, in which the Court affirmed Congress's ban on Chinese immigration:

The Court begins by stating that the Chinese are foreigners of a different race, or what Neil Gotanda terms, racialized foreigners.89 These racialized foreigners "will not assimilate with us." Implicit in this is a notion of us or of we in "We the People." The us the Court is talking about is the national community. They, the Chinese, are not us. Further, they will not assimilate with us. And therefore, we will not let them become us. This is justified because they are dangerous to our peace and security. They are the Yellow Peril, threatening our

88 I recall vividly that one college acquaintance, whose family was from Jamaica, could not understand why members of the Black Cultural Club and the Gospel Choir insisted that she join their organizations when she felt that she shared very little of their culture.
The Congruence Principle Applied

sense of the national community. Therefore, Congress must exclude them at the border.  

Chang concludes that Asian-Americans are "perpetual foreigners" whose "[f]oreign-ness is inscribed upon our bodies in such a way that Asian-Americans carry a figurative border with us."  

Latinos and Latinas, especially Mexican-Americans, also suffer the stigma of living with figurative borders. Professor Kevin Johnson notes that, despite public perception of the "illegal alien" as the unskilled, brown-skinned, Mexican male, Mexicans comprised only thirty-nine percent of all undocumented immigrants in the United States in 1992.  

While many more Mexi-

90 Robert S. Chang, A Meditation on Borders, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 244, 247 (Juan Perea ed., 1997) [hereinafter Chang, Meditation]. In his discussion of the Chinese Exclusion Case, Professor Wani eloquently captures how the Court's belief in national sovereignty provides a gloss of objectivity that masks the majority's underlying xenophobia, making the decision, at least in the Court's mind, more palatable and legally justifiable:

There is also a sinister ideological purpose served by the fiction of sovereignty. The Court was undoubtedly caught up in the nativist xenophobia of the era. It laments the desecration of the nation's homogeneity, progress, tranquility and civilization, and derisively refers to the Chinese as untrustworthy, immoral and uncivilized. This prejudice must have had some influence on the Court's judgment. The fiction of sovereignty masked the Court's underlying bigotry by providing the decision with a seemingly objective disinfectant.

Wani, supra note 17, at 83.

91 Chang, Meditation, supra note 90, at 249. See also Robert S. Chang, Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, 81 CAL. L. REV. 1241, 1255-58 (1993) (discussing the concept of "nativistic racism" as racism visited upon Asian Americans and those others who are viewed as foreign).

Professor Chang relates his own experience with the literal and figurative "border":

I thought about the U.S. border guard who stopped me when I tried to return after a brief visit to Canada. My valid Ohio driver's license was not good enough to let me return to my country, even though the guard had just let in a white man with only a driver's license. No passport was asked of him, yet the guard demanded mine.

Chang, Meditation, supra note 90, at 246. I myself am guilty of using "foreignness" as an inappropriate stereotype. When I first arrived in the U.S. from the Philippines, I was very disappointed that my cousins who had grown up in New York and were U.S. citizens did not speak Tagalog and did not appear to value things Filipino. I realize now that I had labeled them "foreign," something I probably would not have done had they been white.


However, the Justice Department's latest statistics indicate that as of October 1996 Mexicans comprise more than half of the
cans are legal immigrants to this country, Mexicans, like Asian-Americans, are marked as perpetually foreign by the color of their skin. Further, just as Asian-Americans have been historically excluded through judicial and legislative action, Mexican-Americans have been similarly targeted by government action, most notably in California.

More importantly, this intersection of race and alienage is not simply a theoretical construct, but is a genuine concern born of the recent influx of nonwhite immigrants. Since the National Origins quota system severely curtailing immigration from predominantly nonwhite nations was abolished in 1965, most recent immigrants have been from Asia and Latin America. Indeed, the top five countries of birth for legal immigrants in 1990 were Mexico, El Salvador, the Philippines, Vietnam, and the Dominican Republic. Because of the larger numbers of nonwhite immigrants, the more Congress and the states create alienage current undocumented immigrant population of approximately five million. Eric Schmitt, *Illegal Immigrants Rose to Five Million in '96*, N.Y. TIMES, Feb. 8, 1997, at 9.

93 Indeed, Mexico was the top country of origin for legal immigrants to the United States in 1960 and in 1990. Michael Fix & Jeffrey S. Passel, *Immigration and Immigrants: Setting the Record Straight* (1994).


95 This system, established by the Immigration and Naturalization Act of 1924, resulted in biased admissions of northern and western Europeans over nonwhite immigrants from "third world" countries. Fix & Passel, *supra* note 88, at 10.


97 Interestingly, Australia had a similar ban on nonwhite immigration which it abandoned in 1973. See Vijay Joshi, *Australian Lawmaker's Ethnic Attacks Find a Following*, OREGONIAN, May 9, 1997, at A8.

classifications, the greater the likelihood that nonwhite immigrants will be unduly burdened by such classifications.

These large numbers make anti-immigration and anti-immigrants' rights law an easy proxy for racism. Through the intersection of race and alienage, nativist sentiment reinforces racist beliefs and vice-versa, making it exceedingly more difficult to discern whether newer alienage classifications merely mask underlying racial prejudice. By invoking strict scrutiny, courts will be able to better ferret out invidious racial discrimination or perhaps even benign neglect. In addition, white and black noncitizens will benefit from the stricter standard even if the border of foreignness does not specifically bound them.

Ironically, the federal government has been very solicitous of immigrant labor when such labor has served America's economic needs. López, supra note 79, at 656 (citing 1917 immigration act and waiver of taxes for Mexicans). Indeed, during these periods of economic plenty, Mexicans were seen as less troublesome than other immigrant groups. Id. at 656-7.

As several commentators have noted, California's Proposition 187 found much support among those who shared an anti-Latino bent. See supra note 94; Neuman, supra note 4, at 1451; Johnson, Public Benefits, supra note 92, at 1544-46.

As Karen K. Narasaki, Executive Director of the National Asian Pacific American Legal Consortium noted recently in a symposium on immigration law at Georgetown University: "My feeling has been that talking about immigrants is really sort of the last acceptable way to talk about race without actually talking about race." Georgetown Immigration Law Journal, 10th Anniversary Symposium—March 6, 1996 Transcript, 10 GEO. IMMIGR. L.J. 5, 27 (1996).

Indeed, white noncitizens are harmed just as much as nonwhite immigrants with the passage of facially neutral, but latently racial, anti-immigration laws:

These factors are powerful in isolation, but even more so in combination. Hostility toward a particular foreign group may result in discriminatory legislation directed against aliens as a class, even if voters have a more tolerant attitude toward other foreigners. For example, hostility toward Latino immigration can provoke support for anti-alien legislation among voters who have no objection to Canadians. Since Canadians are excluded from the political process, they can easily be sacrificed to confer a facial neutrality on the discriminatory measures.

Neuman, supra note 4, at 1429.

Of course, while white noncitizens may not experience the racism suffered by nonwhites, the former often endure plain, old-fashioned nativism, as demonstrated by these remarks from a Russian immigrant:

No, I don't feel immigrants are persecuted. ... But there is a sense we're not welcome. It's more a sense I sometimes get when people look at me when I pass them on the street. There's just a feeling of being unwelcome, when people seem like they move away from you because you are from Russia.

Charisse Jones, For New York's Newcomers, Anxiety Over Welfare Law., N.Y. TIMES, Aug. 26, 1996, at A1. Unfortunately, the Supreme Court may not readily accept the "alienage as race" argument because it has been reluctant to view proxies such as
Fourth, noncitizens have relatively little political power because they do not have the power to vote. While other minority groups—blacks, women, gays and lesbians—may argue (whether correctly or incorrectly) that they have suffered more historically, these groups have had the benefit of the franchise and access to the political process, while noncitizens have had to rely on the benevolence of citizen-advocacy groups. Unfortunately, such advocacy is hampered by the reality that Congress largely has free rein to discriminate against noncitizens, even on the basis of activity that is not illegal. Further, where Congress enacts laws that only incidentally burden immigrants’ rights, the judiciary should be particularly alert because noncitizens’ advocates may not act as swiftly as they would if the law directly targets noncitizens, notwithstanding the genuine impact on the affected group.


It was this access to the ballot box that caused Justice Scalia to characterize Colorado’s passage of its anti-homosexual legislation, Amendment 2, as simply majoritarian politics at work. Romer, 116 S. Ct. at 1629. (Scalia, J., dissenting):
The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a "bare . . . desire to harm" homosexuals, . . . but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.

According to Professor Kevin Johnson:
Immigrant and refugees rights groups lobby the legislatures and agencies and advocate in the courts to protect noncitizens. These groups, with the assistance of others, have enjoyed some success in convincing Congress to enact laws, such as the Refugee Act of 1980, and at times to override Supreme Court decisions.


Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (upheld deportation of former Communist Party members even though they were no longer members when membership as grounds for deportation became law). The Court invoked the doctrine of plenary power to support its decision: "[A]ny 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." Id. at 588-89.

When discriminatory provisions are enacted incidentally, as part of a program not primarily concerned with aliens or immigration, Congress is less likely to be held politically accountable by members of the electorate concerned with the treatment
Fifth, the United States has long taken pride in promoting the values of diversity, tolerance, and community. We experience diversity in the large influx of nonwhite immigrants into this country; it would be a shame if the salutary effects of the abolition of the National Origins quota system of immigration—itself a triumph of the nation’s commitment to diversity—continue to be diminished by the passing of ever more oppressive anti-immigrant laws subject to minimal judicial scrutiny. Moreover, tolerance is not only the touchstone of the First Amendment free speech right, but also exemplifies the principle underlying the Declaration of Independence. As Thomas Jefferson wrote, “We hold these Truths to be self-evident, that all Men are created equal.” A government that fails to appreciate the equal moral worth of all people—citizen and noncitizen—fails to fully adhere to the historical imperative of tolerance of different people with different views and backgrounds. Finally, the United States has long believed in the principle of community. As stated in the introduction to this Article, the very words inscribed on the Statue of Liberty proclaim America as a welcoming community for those rejected by other nations. To allow federal and state governments to divide the community of America between citizens and noncitizens, and should be most hesitant to defer.” Note, Developments in the Law—Immigration Policy and the Rights of Aliens, 96 HARV. L. REV. 1289, 1421-22 (1983); Rosberg, supra note 12, at 325 (“[T]he government’s legitimate interest in [maintaining a flexible immigration policy] does not require immunity from careful judicial scrutiny for every piece of federal legislation that has some bearing on aliens or immigration.”).

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108 See supra text accompanying notes 91-93. See also Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311-14 (1978) (Powell, J.) (noting that the attainment of a diverse student body is a constitutionally permissible goal stemming from the university’s First Amendment-based interest in promoting academic freedom).


The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent on a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

110 John Isbister, Are Immigration Controls Ethical?, 23 SOCIAL JUSTICE 54, 55 (1996) (citing the Declaration of Independence). Professor Isbister cites the Declaration of Independence along with other American historical documents to support his argument that a moral immigration policy should stem from the proposition that all people, regardless of citizenship, are of equal moral worth. Id.

111 Id.

112 See supra note 1 and accompanying text.
zen and noncitizen in the conferral of benefits without good reason would be to undermine the historical principle of community symbolized so eloquently by Lady Liberty.

In sum, the logic of the congruence principle, the inefficacy of the rational basis test in safeguarding immigrants' rights, the dangerous intersection between race and alienage, the political powerlessness of noncitizens, and America's historical adherence to principles of diversity, tolerance, and community combine to create a powerful case for strictly scrutinizing federal alienage classifications in the same manner as state classifications in the realm of alienage law and fundamental rights.

That notwithstanding, subpart two recognizes the need for some leeway on the part of a Congress charged with creating a viable immigration policy and an executive branch charged with enforcing the policy. Subpart two suggests that the congruence principle can be fairly interpreted to allow for a narrower plenary power doctrine analogous to the political function exception that the courts use to review certain state alienage classifications. Applying a rational basis test in such cases achieves a fair balance between deferring to important governmental power and protecting equally important individual rights.

2. Within Immigration Law, but Not Involving Fundamental Right

Invoking strict scrutiny to review federal alienage classifications would end years of judicial deference to congressional plenary power and, if not properly utilized, could lead to a major upheaval in the federal judicial system. Strictly reviewing congressional acts could subject the thousands of laws pertaining to noncitizens, as well as the entire Immigration and Naturalization Act, to "the most rigid scrutiny," which many would assume to mean "fatal scrutiny." In addition, the prospect of so many laws challenged under strict scrutiny could result in a needless

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115 At least one group of commentators doubts whether the Adarand majority's assurances that strict scrutiny is not fatal are to be believed: "Given a critical mass of juridical animus toward racial preferences, at least as the Court is presently constituted, it is difficult to imagine much constitutional room for overt attention to racial disadvantage in the real world. Heightening that impression is the actuality that the program struck down in Adarand seemed more responsive than previously upheld policies to demands for focus beyond exclusive attention to race and for narrowly tailored initiatives that avoid conferring windfall benefits upon nondis-
waste of judicial resources. Finally, close review of congressional action over immigration may strike some as violating the separation of powers doctrine or as an impermissible review of essentially political questions.

However, this parade of horribles need not ensue if Adarand's congruence principle is followed. Just as the political function exception allows states substantial leeway in creating alienage classifications, an analogous federal exception should also apply to reviewing congressional alienage classifications that genuinely affect our national sovereignty. Because the Constitution requires Congress to determine who may join this political union, the federal courts should appropriately defer to Congress in this area. Deferential review of the many immigration and naturalization laws would ensure that the Immigration and Naturalization Act survives intact and that the already busy federal courts are not further burdened. In addition, this will ultimately defeat the spurious notion that judicial review of every immigration decision necessarily influences American foreign policy.


Professor Michael Scaperlanda views the state political function cases as providing "a model, albeit rather crude, for re-envisioning the tension between communal formation and the rights' claims of the noncitizen." Scaperlanda, supra note 8, at 769. By creating an analogous construct in the area of federal alienage classifications, a similar balance between community and individual rights may be struck.

See supra text accompanying notes 22-23 (describing textual origins of Congress's immigration power).

As Professor Wani has noted:

Although immigration is generally considered a foreign affairs question, it is unlikely that the review of one immigration dispute could either prejudice the country's relations with other nations or undermine the executive's effectiveness as the nation's representative. Immigration decisions usually involve only individual determinations that do not rise to the magnitude of international incidents, especially because every country recognizes the authority to regulate the admission of foreigners. Conversely, even if one accepts the questionable proposition that the executive can use immigration decisions as a foreign policy tool, (for example, denying admission to the citizens of a country to express disapproval or in an attempt to change that country's policy), that decision should not be insulated from judicial review to the extent that it impacts an individual's liberty interests.

The fiction of sovereignty is perpetuated precisely because it provides an impregnable mask that allows the Court to escape the duty to provide reasons for its decisions while, at the same time, appearing perfectly rational. It satisfies the yearning for certainty, objectivity, continuity and consistency, even as it is used to make value judgments about individual claims.
Moreover, applying strict scrutiny to alienage laws and immigration laws involving basic fundamental rights may lead to a salutary redefinition of strict scrutiny so that such rigid review is not tantamount to a fatal blow. In Adarand, Justices Stevens and Ginsburg were quick to point out that, historically, strict scrutiny has almost always led to the inevitable invalidation of laws subjected to its sharp gaze. However, courts should revive the important notion that equal protection doctrine, unlike substantive due process doctrine, acknowledges that laws often create group classifications; equal protection doctrine simply requires that these classifications make constitutional sense. Justice Jackson emphasized this distinction when he wrote:

Invocation of the equal protection clause[, unlike the due process clause,] does not disable any governmental body from dealing with the subject at hand. If merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that [governments] must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. . . . [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.

Thus, following Adarand's congruence principle, the strict scrutiny standard currently applied to state alienage classifications should also apply to federal alienage classifications, tempered by analogous political function exceptions in recognition of the government's role in shaping the political community.

CONCLUSION

Over the past few years, anti-immigration sentiment at the federal and state levels has run particularly high. Last year's passage of the federal welfare bill left the states scrambling,

Wani, supra note 17, at 81, 87-88. See also United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

119 See Adarand v. Peña, 515 U.S. 200, 243 n.2 (1995) (Stevens, J., dissenting) ("[The strict scrutiny] label has usually been understood to spell the death of any governmental action to which a court may apply it."); id. at 275 (Ginsburg, J., dissenting) ("[The majority's] opinion strongly suggests that the strict standard announced is indeed 'fatal' for classifications burdening groups that have suffered discrimination in our society.").

120 Railway Express Agency, 336 U.S. at 112 (Jackson, J., concurring).
sometimes with arguably overzealous glee,\textsuperscript{121} to enforce the law's provision denying certain benefits to \textit{documented}, as well as undocumented, immigrants. This current wave of anti-immigrant action has well-founded historical roots grounded in the dangerous intersection between race and alienage.

To address this constant problem, the \textit{Adarand} Court's "congruence principle" provides an important cornerstone for the creation of a new equal protection model of government alienage classifications, one in which federal as well as state action will be viewed under the same test. Underlying the congruence principle, however, is a more important concept that goes to the heart of equal protection: the protection of perpetually disadvantaged groups from invidious discrimination by the government. In the case of alienage, special scrutiny is particularly important because a readily identifiable group of people, composed mostly of people of color, is deprived of the franchise and hence the opportunity to influence the government through the democratic process. This political powerlessness coupled with the added burden of being foreign and often nonwhite make the noncitizen particularly vulnerable to laws which may, consciously or unconsciously, have been motivated by outmoded and invidious stereotypes.\textsuperscript{122}

\textsuperscript{121} California Governor Pete Wilson, a long-time proponent of immigration curtailment and a staunch supporter of Proposition 187, has been very aggressive in his determination to enforce the new provisions, some of which allow for states to deny welfare benefits to certain public assistance recipients. Tim Golden, \textit{California Governor Acts to End State Aid for Illegal Immigrants}, \textit{N.Y. Times}, Aug. 28, 1996, at A1. Not surprisingly, noncitizen advocacy groups in immigrant-rich states like New York and Texas have been very concerned about the direct effects the bill will have on legal immigrants awaiting naturalization and the indirect effects the federal cuts will have on local economies. \textit{See} Jones, \textit{supra} note 102, at A1; Sam Howe Verhovek, \textit{Texas Immigrants Worry As Cuts in Welfare Loom}, \textit{N.Y. Times}, Sept. 4, 1996, at A1. Aside from California, New York, and Texas, an overwhelming number of immigrants entering in the 1980s live in only three other states: Florida, New Jersey, and Illinois. \textit{Fix \& Passel, supra} note 93, at 29. While Congress recently amended the 1996 bill to restore some benefits to permanent resident immigrants who arrived here before August 22, 1996, many noncitizens fall outside the exempt categories; since September 1, 1997, the non-exempt immigrants have had to rely on state benefits. \textit{See} Rebecca Christie, \textit{Welfare Changes Hit State}, \textit{The Bulletin}, Aug. 29, 1997, at B1. \textit{See, e.g.}, \textit{Balanced Budget Act of 1997}, Pub. L. No. 105-33, § 5301, 111 Stat. 251 (1997) (extending noncitizen eligibility for social security benefits).

\textsuperscript{122} Professor John Hart Ely captured the essence of this "we-they" dichotomy in equal protection analysis:

A decision to distinguish blacks from whites (or women from men) will therefore have its roots in a comparison between a "we" stereotype and a "they" stereotype. They [blacks or women] are generally inferior to or not so well qualified as \textit{we} [whites or men] are in the following respect(s),
Yet the model recognizes that not all classifications are necessarily motivated by nativistic racism.\textsuperscript{123} Both Congress, which is charged with the power to regulate immigration and naturalization, and the states, which are allowed to define their own political communities, must be given leeway in creating policies that necessarily harm noncitizens. However, even in deferring to government power, such deference cannot be total or complete. The government, be it federal or state, must articulate a constitutionally rational basis for the alienage classification before it may proceed further.

Let us not forget that there are people in this nation who exist on the fringe of society because of their noncitizenship and that, as an immigrant nation committed to the proposition of “equality under the law,” we must steadfastly protect their rights lest they continue to be pushed further and further away from society’s core. If we profess to believe in ideals such as tolerance, diversity, and community, we must all be willing to safeguard those principles vigilantly lest they fade into nothingness.\textsuperscript{124}

\textsuperscript{123} See Chang, Meditation, supra note 90, at 245 (“nativism and racism intersect as nativistic racism”).

\textsuperscript{124} As Professor Karst has observed:
The ideological component of our civic culture is thus a major part of the cultural cement that holds American society together. Ideology alone, however, is not enough to make any value a durable part of the civic culture. A necessary ingredient of that durability is the behavior of large numbers of people, from one generation to the next, in accordance with the culture’s norms. Leonard Levy has recently shown that the freedom of the press emerged in America during the revolutionary generation, primarily through the day-to-day exercise by newspaper editors of the freedom they claimed, not through the adoption of the first amendment. So it is with any important societal value or any constitutional right: use it or lose it.

Karst, supra note 2, at 368-69 (citing Leonard Levy, The Emergence of a Free Press 288-89 (1985)).