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1996]

PRESERVING THE FUNDAMENTAL RIGHT TO FAMILY
UNITY: CHAMPIONING NOTIONS OF SOCIAL CONTRACT
AND COMMUNITY TIES IN THE BATTLE OF PLENARY
POWER VERSUS ALIENS' RIGHTS

LINDA KELLY*

But the fact of the matter is the Constitution of the United States obligates—it doesn't ask—it obligates the President and Congress to defend the states of the American union from foreign invasion. And when you have one, two, three million people walking across your border a year, breaking your laws, you have an invasion.¹

Our progress in degeneracy appears to me pretty rapid. As a nation, we began by declaring that "all men are created equal." We now practically read it "all men are created equal, except negroes." When the Know-Nothings get control, it will read "all men are created equal, except negroes, and foreigners, and Catholics." When it comes to this I should prefer emigrating to some country where they make no pretence of loving liberty—to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocrisy.²

I. INTRODUCTION

IMMIGRATION law, always the unwanted child of constitutional jurisprudence, has survived renewed efforts to further her estrangement. In the summer of 1995, Representative Lamar Smith (R-TX), the Chairman of the House Subcommittee on Immigra-

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1. Pat Buchanan, *Statement at Arizona Republican Presidential Debate*, Feb. 23, 1996, available in LEXIS, Cmpgn Library, Elct 96 File.

2. Letter from Abraham Lincoln to Joshua Speed (Aug. 24, 1855), reprinted in 2 THE COLLECTED WORK OF ABRAHAM LINCOLN 320, 323 (R. Basler ed., 1953).

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tion, introduced House Bill 2202.³ The original version of the bill proposed radical and sweeping changes in the current immigration system. House Bill 2202 would have reduced legal immigration by over thirty percent, reducing family sponsored visas from 480,000 to 330,000.⁴ This reduction would have restricted certain family categories while eliminating other categories.⁵ The proposed bill would have placed greater restrictions on the rights of lawful permanent residents to be with their spouses or children, placed restrictions on the rights of United States citizens to be with their parents where no restrictions currently exist, eliminated the rights of United States citizens and lawful permanent residents to be with their adult children and eliminated the right of United States citizens to be with their brothers or sisters.⁶

Despite the fact that the provisions restricting legal immigration were stripped from House Bill 2202⁷ and efforts in the Senate to limit legal immigration were rejected,⁸ the current wave of anti-immigrant sentiment did not subside. On April 24, 1996, in signing

3. H.R. 2202, 104th Cong. (1995).

4. Immigration and Nationality Act of 1952 (INA) §§ 201-204, 8 U.S.C. §§ 1151-1154 (1994). See also T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION: PROCESS AND POLICY 125-28, 150-92 (3d ed. 1995) (discussing cases and problems involving admission and exclusion of immigrants); IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 448-86 (5th ed. 1995) (outlining issues raised by family based immigration); STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY 129-80 (1992) (discussing problems arising in INA with regard to quotas).

5. H.R. 2202.

6. See *House Committee Approves Major Reform Bill, Floor Action Next*, 72 INTERPRETER RELEASES 1503 (1995) (discussing House amendments and future of bill); *House Judiciary Committee Continues Work on Major Reform Bill*, 72 INTERPRETER RELEASES 1371 (1995) (discussing mark-up of House bill); *House Judiciary Committee Begins Considering Major Reform Bill*, 72 INTERPRETER RELEASES 1303 (1996) (same); Stephen A. Holmes, *Congress Plans Stiff New Curb on Immigration*, N.Y. TIMES, Sept. 25, 1995, at A1 (noting Congress's plans to limit immigration); Lamar Smith, *Immigration Reform Urgency*, WASH. TIMES, Sept. 25, 1995, at A16 (stating "[n]ow is the time to pass comprehensive immigration reform"); *Immigration Legislation 1995: Information and Analysis* (American Immigration Lawyer's Assoc.) (undated material) (discussing H.R. 2202's effect on families).

7. The version of House Bill 2202 which the House passed on March 21, 1996 by a 333-87 vote mostly focuses on efforts to limit illegal immigration. *House Approves Immigration Bill After Removing Legal Immigration Restrictions*, 73 INTERPRETER RELEASES 349 (1996); Carolyn Skorneck, *House Passes Immigration Bill*, BOSTON GLOBE, Mar. 22, 1996, at 3.

8. By a vote of 20-80, the Senate rejected Senator Simpson's amendment to Senate Bill 1664 which would have set an annual cap of 480,000 on family based immigration. *Senate Approves Omnibus Immigration Bill After Removing Exclusion Provisions*, 73 INTERPRETER RELEASES 601, 602 (1996). While no current family preference categories would have been eliminated, the practical effect of such a cap would have been to make visas unavailable in certain preference categories. *Id.*; *Immigration: Senate Judiciary Approves Immigration Reform Legislation*, Daily Lab. Rep. (BNA), Mar. 22, 1996, at 56, D4; *Senate Committee Splits Immigration Reform Bill*,

the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),⁹ President Bill Clinton acknowledged that the bill “makes a number of major, ill-advised changes to our immigration laws having nothing to do with fighting terrorism.”¹⁰ Yet as the 1996 presidential election drew closer, two other pieces of legislation further curtailing immigrant rights were enacted—the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA)¹¹ and the Personal Responsibility and Work Opportu-

House Floor Action Is Next, 73 INTERPRETER RELEASES 313, 315-16 (1996); *Senate Rejects Amendment to Cut Legal Immigration*, 73 INTERPRETER RELEASES 570 (1996).

9. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

10. See *President Signs Terrorism Bill into Law, Congress Passes Correction Measures*, 73 INTERPRETER RELEASES 568 (1996) [hereinafter *President Signs Terrorism Bill*]. One of the most troubling provisions of the anti-terrorism legislation was § 414 which subjects any individual who has entered the United States without inspection (“EWI”) to exclusion, rather than deportation proceedings, no matter how long such individual has been in the United States. AEDPA § 414(a). While Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), Pub. L. No. 104-208, § 308(d)(2)(D), 110 Stat. 3009 (1996) (to be codified in scattered sections of 8 U.S.C.), repealed AEDPA § 414, IIRAIRA § 301 declares aliens who arrived in the United States without inspection to be inadmissible and subject to removal. IIRAIRA § 301 (to be codified at INA § 212 (a)(6)(A), 8 U.S.C.).

AEDPA § 422 also created “expedited exclusion” proceedings for individuals who at the point of entry do not have the appropriate entry documents. *President Signs Terrorism Bill*, *supra* at 569. Again consistent with AEDPA’s intent, while IIRAIRA § 308(d)(5) repealed AEDPA § 422, IIRAIRA § 302 allows for the “expedited removal” of most aliens who are determined to be inadmissible at the port of arrival. IIRAIRA § 302 (to be codified at INA § 235, 8 U.S.C.). Such summary processing may also apply to aliens who have not been legally admitted or paroled and cannot affirmatively show that they have been continuously, physically present in the United States for more than two years. *Id.*

These types of changes point out some of the semantics changed through IIRAIRA. Individuals previously considered “excludable” pursuant to INA § 212 are now considered “inadmissible” and subject to “cancellation of removal proceedings” rather than “exclusion proceedings.” IIRAIRA §§ 301(b), 304 (to be codified at INA §§ 212(a)(9), 240A, in scattered sections of 8 U.S.C.). For a further discussion of IIRAIRA, see *infra* note 11 and accompanying text.

As this Article relies on theories published prior to the passage of this significant legislation, in order to “bridge the gap” between the old and new terms, I will use such old terms as “excludable” somewhat interchangeably with its new term “inadmissible” and “entry without inspection” somewhat interchangeably with its new term “arrival without inspection.”

11. Pub. L. No. 104-208, 110 Stat. 3009 (1996) (to be codified in scattered sections of 8 U.S.C.). On September 30, 1996, President Clinton signed the IIRAIRA. Among the most severe measures is a provision replacing suspension of deportation under INA § 244(a) and INA § 212(c) relief with “cancellation of removal,” a new form of relief which bears a higher burden of proof. IIRAIRA § 304 (to be codified at INA § 240A, 8 U.S.C.). For example, cancellation of removal creates a higher standard than required for the most typical suspension of deportation claims which were advanced pursuant to INA § 244(a)(1) as (a) cancellation of removal requires ten years of continuous physical presence; (b) a showing of “exceptional and extremely unusual hardship” to a United States citizen or lawful permanent resident spouse, parent or child; and (c) a showing of good moral character for ten years. IIRAIRA § 304 (to be codified at INA § 240A(b)(1), 8

nity Reconciliation Act of 1996 ("Welfare Act").¹² Supporters of severe immigration restrictions, such as those contained in the AEDPA, the IIRAIRA and the Welfare Act, will be sure to return to their efforts to limit legal immigration through family unification.¹³

U.S.C.); see also IIRAIRA § 308(a)(7) (repealing INA § 244). By contrast, suspension of deportation had required only (a) seven years good moral character; (b) seven years continuous physical presence; and (c) a showing of extreme hardship to the qualifying family member or to the alien himself. INA § 244(a)(1), 8 U.S.C. § 1254(a)(1). While suspension of deportation has only been available to those who are deportable, cancellation of removal is, however, stated to be available both to those who are inadmissible or deportable. IIRAIRA § 304, (to be codified as INA § 240A, 8 U.S.C.).

With the enactment of IIRAIRA § 304(b), relief under INA § 212(c) has also been repealed and replaced with "cancellation of removal." IIRAIRA § 304 (to be codified at INA § 240A(a), 8 U.S.C.). This relief is more restrictive than INA § 212(c) as it is not available to anyone convicted of any aggravated felony, and it requires that five of the seven years of continuous residence be spent as a lawful permanent resident. As this form of cancellation of removal is available, however, to lawful permanent residents who are either inadmissible or deportable, this change appears to solve the disparity revealed by *Matter of Hernandez-Casillas*. 20 Int. Dec. 262 (BIA 1990, A.G. 1991), *aff'd*, *Hernandez-Casillas v. INS*, 983 F.2d 231 (5th Cir. 1993) (stating INA § 212(c) relief only available in deportation proceedings when there is comparable ground of exclusion).

Another troubling measure of IIRAIRA creates a 10 year ban on admission to certain individuals unlawfully present for one year or more and a three year bar on admission to certain individuals unlawfully present for more than 180 days. IIRAIRA § 301 (to be codified at INA § 212(a)(9)(B), 8 U.S.C.). No similar bars have previously existed within the INA. There has been much discussion surrounding the passage of IIRAIRA. See *Bill to Block Illegal Immigration Passed, Signed: Controversial Education Measure Cut*, FACTS ON FILE, Oct. 3, 1996, available in LEXIS, News File (discussing passage of new legislation); William Branigin, *Congress Finishes Major Legislation: Immigration; Focus Is Borders, Not Benefits*, WASH. POST, Oct. 1, 1996, at A1 (same); *House OKs Bills Targeting Illegal Immigrants*, CHICAGO TRIB., Sept. 26, 1996, at 6 (same); Eric Pianin & Helen Dewar, *Immigration, Budget Agreement Reached*, WASH. POST, Sept. 29, 1996, at A1 (same); Eric Schmitt, *Bill Tries to Balance Concerns on Immigration*, N.Y. TIMES, Sept. 29, 1996, § 1, at 28 (same); *Text on President Clinton's Statement on Omnibus Appropriations and Immigration Reform Bill*, U.S. NEWSPAPER, Oct. 2, 1996, available in LEXIS, News File (same).

12. Pub. L. No. 104-193, 110 Stat. 2105 (1996). On August 22, 1996, the Welfare Act was signed into law. Amongst other provisions, the Welfare Act severely curtails the public benefits which have been available to lawful permanent residents. Such public benefits include not only the traditional welfare programs, but also restrictions on access to professional and commercial licenses and the earned income tax credit. Charles Wheeler, *The New Alien Restrictions on Public Benefits: The Full Impact Remains Uncertain*, 73 INTERPRETER RELEASES 1245 (1996) (discussing welfare provisions); see also Deborah Billings, *Welfare Reform: Clinton Signs Welfare Reform Measure; Says It Creates Second Chance System*, Daily Lab. Rep. (BNA), Aug. 23, 1996, 164, at D11 (discussing welfare benefits); Francis X. Clines, *Clinton Signs Bill Cutting Welfare*, N.Y. TIMES, Aug. 23, 1996, at A1 (same); John F. Harris & John E. Yang, *Clinton to Sign Bill Overhauling Welfare*, WASH. POST, Aug. 1, 1996, at A1 (same).

13. Some limitation was made on family unification through IIRAIRA. Beginning in the fiscal year 1999, the number of family-sponsored immigrant visas subjected to numerical limitation will include a reduction for certain parolees. IIRAIRA § 603 (amending INA § 201(c), 8 U.S.C. § 1151(c)). Another IIRAIRA

These attempts to curtail family unity reveal troubling questions about America's true commitment to the family, even within its existing immigration law. Historically, the federal government has claimed to base U.S. immigration policy upon a commitment to family unification.¹⁴ Society's emphasis upon family makes family values such an important ideal that public figures across the political spectrum fight to identify themselves with this notion.¹⁵ Forget the economy. "It's values, stupid."¹⁶

The United States Supreme Court also recognizes the importance of family. In *Moore v. City of East Cleveland*,¹⁷ the Supreme Court determined that an extended family's desire to live together involved a fundamental liberty interest protected under the Due Process Clause of the Fourteenth Amendment.¹⁸ The *Moore* Court's

provision demands that the affidavit of support provided by an individual sponsoring an alien's request for residency be executed as a contract, be legally enforceable against the sponsor and that such sponsor demonstrates an annual income 125% above the federal poverty lines. IIRAIRA § 551 (to be codified at INA § 213A, 8 U.S.C.).

14. See generally ALENIKOFF ET AL., *supra* note 4, at 40-63 (giving brief history of immigration to United States); John Guendelsberger, *The Right to Family Unification in French and United States Immigration Law*, 21 CORNELL INT'L L.J. 1, 7-25 (1988) (explaining basis and history of U.S. immigration) [hereinafter Guendelsberger, *Family Unification*].

15. See, e.g., Susan Baer, *Pace of Congress Tests Family Values*, BALTIMORE SUN, Dec. 11, 1995, at 1A (noting recent divorce trend with new members of Congress); Sandi Dolbee, *Family Values to Dominate Presidential Election, Black Baptists Told*, SAN DIEGO UNION-TRIB., June 22, 1995, at A14 (stating that presidential campaign will include struggle over meaning of "family values"); *Family Values Still More Hypocrisy*, CHARLESTON GAZETTE, Dec. 5, 1995, at 4A (criticizing Republican Party's use of "family values" slogan as political weapon); Marianne Means, *House GOP Finds "Family Values" Are Easier to Preach than to Practice*, SACRAMENTO BEE, Dec. 8, 1995, at B11 (stating that politicians "love to rhapsodize about the virtues of traditional family"); Alison Mitchell, *On Issue of Family Values, Clinton Unveils an Agenda of His Own*, N.Y. TIMES, July 29, 1995, § 1, at 6 (noting that President Clinton will not allow Republicans alone to define family values).

Regarding the Christian Coalition's contract, Ralph Reed, executive director, remarked, "[i]t is a pro-family agenda, and it is supported by the vast majority of the American people, Republican and Democrat, Christian and Jew, black and white, Protestant and Catholic." *Family Values II: The Christian Coalition Signs on the Dotted Line*, BOSTON GLOBE, May 21, 1995, at 45. Discussing the Christian Coalition's contract, House of Representatives Speaker Newt Gingrich declared: "Here are some key values that matter the most to most Americans. We are committed to keeping our faith with the people who helped the Contract With America." Adelle M. Banks, *Coalition's 'Contract' Focuses on Families*, TIMES-PICAYUNE, May 20, 1995, at A21.

16. David Clark Scott, *'It's Values, Stupid,' Political Essayist Argues*, CHRISTIAN SCI. MONITOR, Dec. 6, 1995, at 14 (noting that most important touch tone for today's voters is values).

17. 431 U.S. 494 (1977) (plurality opinion).

18. *Id.* at 499 (invalidating zoning ordinance which defined family through limited categories of related individuals); see also Frederick E. Dashiell, *The Right to*

recognition of family rights is consistent with previous decisions recognizing the right of individuals related by “blood, adoption or marriage” to live together.¹⁹ Through a host of cases, the Court acknowledges that a “private realm of family life [exists] which the state can not enter.”²⁰ The Constitution “protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”²¹ With family a foundation of civilization,²² the Court’s protection of family promotes “family needs” and “family values.”²³

Yet, when examining family-based immigration law in light of the constitutional protection awarded family unity in *Moore* and other cases, it is not clear that the right to family unity withstands attack by U.S. immigration law. In the immigration arena, the goal of family unity is not always awarded the “preferred position” it enjoys in other areas of the law.²⁴ Considering this apparent inconsistency between the fundamental right of family unity and the restrictions placed on this right within existing and proposed family immigration policies, the question becomes whether the federal government can constitutionally limit family unity through laws regulating immigration.

The federal political branches traditionally have enjoyed “plenary power” over U.S. immigration law, thereby allowing this area of law to develop outside of constitutional boundaries.²⁵ Notwith-

Family Life: *Moore v. City of East Cleveland*, 6 BLACK L.J. 288 (1980) (addressing reasoning and significance of *Moore*).

19. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding village zoning ordinance as valid land use regulation).

20. *Moore*, 431 U.S. at 499 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)); *see, e.g., Zablocki v. Redhail*, 434 U.S. 374, 399-400 (1978) (discussing protection of rights of family); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (same); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (same); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972) (same); *Eisenstadt v. Baird*, 405 U.S. 438, 446-47 (1972) (same); *Wisconsin v. Yoder*, 406 U.S. 205, 231 (1972) (same); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (same); *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (same); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (same); *Poe v. Ullman*, 367 U.S. 497, 542-44, 549-55 (1961) (Harlan, J., dissenting) (same); *May v. Anderson*, 345 U.S. 528, 533 (1953) (same); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (same); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (same); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (same).

21. *Moore*, 431 U.S. at 503.

22. *Griswold*, 381 U.S. at 496 (Goldberg, J., concurring).

23. *Belle Terre*, 416 U.S. at 9.

24. *See Moore*, 431 U.S. at 511 (Brennan, J., concurring) (quoting Appellant’s Brief at 26, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (No. 73-191)) (discussing preference for family unity).

25. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (holding alien’s right to enter United States depends on congressional will); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (explaining that aliens

standing the immigration law arena, aliens enjoy the protection of certain rights through what is known as the aliens' rights tradition.²⁶ Cracks, however, have developed in both the plenary power doctrine and the aliens' rights tradition.²⁷ Critics of the plenary power doctrine versus aliens' rights distinction offer alternative theories to explain the foundation of U.S. immigration policy and its treatment of aliens. Professor David Martin focuses on member-

have vested right of entry into United States); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (holding right to exclude or expel all aliens within congressional power); *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581 (1889) (holding immigration act excluding Chinese laborers constitutional). See generally ALEINIKOFF ET AL., *supra* note 4, at 1-40 (explaining sources of federal immigration power through Chinese Exclusion Case); Stephen H. Legomsky, *Immigration Law and the Principle of the Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (discussing plenary power doctrine and theories on which it is based) [hereinafter Legomsky, *Immigration Law and Plenary Power*]; Michael Scaperlanda, *The Life and Jurisprudence of Justice Thurgood Marshall: Justice Thurgood Marshall and the Legacy of Dissent in Federal Alienage Case*, 47 OKLA. L. REV. 55, 69 (1994) (recognizing majorities in plenary power cases consistently conclude that political branches are totally free to set whatever immigration rules they choose) [hereinafter Scaperlanda, *Marshall's Jurisprudence*]. For a further discussion of the federal political branches' plenary power, see *infra* notes 38-68 and accompanying text.

26. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that temporary U.S. residents are entitled to constitutional protection); see also T. Alexander Aleinikoff, *The United States Constitution in its Third Century: Foreign Affairs: Rights—Here and There: Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 865-66 (1989) (stating that resident aliens, refugees and asylees are accorded nearly all federal benefits) [hereinafter Aleinikoff, *Federal Regulation of Aliens*]; Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 14-18 (1985) (discussing extension of due process rights and protections to resident aliens) [hereinafter Henkin, *Constitution as Compact and Conscience*]. For a further discussion of the aliens' rights tradition, see *infra* notes 69-87 and accompanying text.

27. See generally *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that Fourth Amendment protection against search and seizure does not extend to nonresident aliens); *Landon v. Plasencia*, 459 U.S. 21 (1982) (holding that resident alien is entitled to due process at exclusionary hearing); Linda S. Bosniak, *Membership, Equality and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1059-65 (1994) (discussing difference in rights accorded to aliens inside and outside of immigration law); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 930-37 (1995) (discussing expansion of exceptions to plenary power in lower courts) [hereinafter Legomsky, *Ten More Years*]; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (examining decline of plenary power doctrine) [hereinafter Motomura, *Phantom Norms*]; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) (examining difference between substantive and procedural rights afforded aliens) [hereinafter Motomura, *Procedural Surrogates*]; Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1135-39 (1995) (discussing conflict between plenary power doctrine and aliens' rights tradition). For a further discussion of the conflict between the plenary power doctrine and aliens' right tradition, see *infra* notes 88-120 and accompanying text.

ship in the national community to answer questions regarding due process.²⁸ Responding to Martin, Professor Alexander Aleinikoff widens the focus to include an evaluation of community ties.²⁹ While Martin and Aleinikoff predominantly discuss the constitutional rights of aliens in the United States, Professor Gerald Neuman advances mutuality notions in looking at the rights of aliens "outside the United States who have never been inside the United States."³⁰ This Article relies on these theories in developing a "constitutionally humane" approach toward creating policies which affect aliens. Applying this theory to the question of family-sponsored immigration will allow for a proper evaluation of the rights of all individuals who may be influenced by our immigration laws.

In Part II, this Article will address the plenary power doctrine and its evolution.³¹ Part III will discuss the history of the aliens' rights tradition.³² After highlighting the difficulties in applying these approaches through a discussion of recent cases and criticisms in Part IV, the alternative theories suggested by David Martin and Alexander Aleinikoff will be discussed in Part V.³³ Cases indicating the courts' attention to these doctrines will be reviewed in Part VI.³⁴ To remedy a flaw in the approaches of Martin and Aleinikoff which is noted in this discussion, Gerald Neuman's theory will be evaluated in Part VII.³⁵ Part VIII will suggest how aspects

28. David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983) (Professor Martin, currently on leave from academia, now serves as Immigration and Naturalization Service (INS) General Counsel). For a further discussion of Professor Martin's focus on membership in the national community, see *infra* notes 121-26 and accompanying text.

29. T. Alexander Aleinikoff, *Strangers to the Constitution: Immigrants in American Law: Aliens, Due Process, and "Community Ties:" A Response to Martin*, 44 U. PITT. L. REV. 237, 244 (1983) [hereinafter Aleinikoff, *Community Ties*]. For a further discussion of Professor Aleinikoff, see *infra* notes 127-33 and accompanying text.

30. Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 981 (1991). For a further discussion of Professor Neuman's mutuality approach, see *infra* notes 203-214 and accompanying text.

31. For a further discussion of the plenary power doctrine and its evolution, see *infra* notes 38-68 and accompanying text.

32. For a further discussion of the history of the aliens' rights tradition, see *infra* notes 69-87 and accompanying text.

33. For a further discussion of recent cases and criticisms, see *infra* notes 88-120 and accompanying text. For a further discussion of the alternative theories suggested by David Martin and Alexander Aleinikoff, see *infra* notes 121-33 and accompanying text.

34. For a further discussion of cases indicating the courts' attention to these doctrines, see *infra* notes 134-201 and accompanying text.

35. For a further discussion of Professor Neuman's theory, see *infra* notes 203-14 and accompanying text.

of each of these theories can combine to create a "constitutionally humane" approach for the United States to follow in exercising its authority over aliens.³⁶ Finally, Part IX will apply this "constitutionally humane" approach to the question of family unity through immigration law in an attempt to illustrate how U.S. immigration law can be fairly established.³⁷

II. THE PLENARY POWER DOCTRINE

The federal government's power to regulate immigration began with *Chae Chan Ping v. United States (Chinese Exclusion Case)*.³⁸ In confirming Congress's absolute authority to prevent aliens from entering the United States, the *Chinese Exclusion Case* set the stage for an area of law exempt from constitutional scrutiny and protection.³⁹

This "plenary power" the federal government enjoys in immigration matters is extracted from the federal government's recognized right to sovereignty—the right to possess full control over U.S. territory and foreign affairs.⁴⁰ In the *Chinese Exclusion Case*, the Supreme Court rationalized that because the United States certainly had the right to protect itself from invading armies, it naturally followed that it also had the right to protect itself from "vast hordes of [a foreign] people crowding in upon us."⁴¹ Thus, despite

36. For a further discussion of the "constitutionally humane" approach for the United States to follow in exercising its authority over aliens, see *infra* notes 240-42 and accompanying text.

37. For a further discussion of applying the "constitutionally humane" approach to the question of family unity through immigration law, see *infra* notes 243-85 and accompanying text.

38. 130 U.S. 581 (1889). Petitioner had been a lawful permanent resident of the United States for 12 years. *Id.* at 582. After leaving the United States with a certificate to re-enter, petitioner was denied re-entry when Congress amended the Chinese Exclusion Act declaring these certificates "void and of no effect." *Id.* at 599.

39. Aleinikoff, *Federal Regulation of Aliens*, *supra* note 26, at 862; Taylor, *supra* note 27, at 1128.

40. *Chinese Exclusion Case*, 130 U.S. at 603-04; see also T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9, 10-12 (1990) (discussing inherent power of Congress to expel or exclude aliens) [hereinafter Aleinikoff, *Citizens, Aliens, Membership*]; Henkin, *Constitution as Compact and Conscience*, *supra* note 26, at 25 (discussing holding of *Chinese Exclusion Case*). For a discussion of the transformation of the notion of sovereignty, suggesting a diminution in the government's right to absolute sovereignty since the *Chinese Exclusion Case* and thereby a weakening in the plenary power doctrine as a result of U.S. adherence to customary and conventional international law, see Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WISC. L. REV. 965 [hereinafter Scaperlanda, *Polishing the Golden Door*].

41. *Chinese Exclusion Case*, 130 U.S. at 606; see also Aleinikoff, *Federal Regulation of Aliens*, *supra* note 26, at 863 (discussing Supreme Court's analogy between invad-

the constitutional principle that the federal government be limited to its enumerated powers,⁴² the Supreme Court found Congress's power to control immigration inherent within its sovereign right to control U.S. territory and to protect its borders.⁴³ The Supreme Court held that the "power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution."⁴⁴

In creating the federal political branches' plenary power over immigration from the sovereignty perspective, the Constitution and the rights of the people essentially are ignored.⁴⁵ Since the *Chinese Exclusion Case*, immigration law has continued to fester, with a disregard for fundamental rights and values. Four years after the *Chinese Exclusion Case*, in *Fong Yue Ting v. United States*,⁴⁶ the Court approved Congress's power to deport resident aliens.⁴⁷ Thus, the Court awarded the federal government not only the authority to prevent people from entering, but also the full discretion to demand an individual's departure.⁴⁸ According to the Court, the right to deport foreigners, like the right to exclude them, was "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare."⁴⁹ The only softening, which came early in the development of the severe principles of the plenary power doctrine, resulted from *Yamataya v. Fischer (Japanese Immigrant Case)*.⁵⁰ As a result of the *Japa-*

ing armies and aliens in *Chinese Exclusion Case*); Taylor, *supra* note 27, at 1128-29 (discussing Supreme Court's rationale in *Chinese Exclusion Case*).

42. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); see also Henkin, *Constitution as Compact and Conscience*, *supra* note 26, at 25 (noting that "[t]he power to control immigration is not one of the enumerated powers of Congress").

43. *Chinese Exclusion Case*, 130 U.S. at 609.

44. *Id.*

45. Aleinikoff, *Federal Regulation of Aliens*, *supra* note 26, at 863.

46. 149 U.S. 698 (1893).

47. *Id.* at 713. In *Fong Yue Ting*, as a result of an amendment to the Chinese Exclusion Act, a Chinese resident could be deported if he or she had not obtained a certificate of residence or could not show "through testimony of one credible white witness" that he or she was a lawful U.S. resident. *Id.* at 727.

48. See *id.* at 731 (holding that question of whether aliens are permitted to remain in United States is determined by Congress).

49. *Id.* at 711; see also Aleinikoff, *Federal Regulation of Aliens*, *supra* note 26, at 863 (noting Supreme Court's use of dire terms in reaching its conclusion); Taylor, *supra* note 27, at 1128-29 (discussing Supreme Court's extension of Congress's plenary power to deport resident aliens in *Fong Yue Ting*).

50. 189 U.S. 86 (1903).

nese Immigration Case, procedural due process has been required in deportation proceedings.⁵¹

While the laws challenged in the *Chinese Exclusion Case* and *Fong Yue Ting* reflect the country's racist motivations at the turn of the century, these types of laws, if passed today, could arguably be upheld through the plenary power doctrine.⁵² Over the past 100 years, the Court has pronounced significant individual rights which include what are currently considered basic constitutional rights of due process and equal protection.⁵³ This respect for individual rights is not, however, reflected within the Court's review of immigration law. The Court continues to show great deference to Congress's plenary power to control immigration.⁵⁴

Less than fifty years ago, the Supreme Court upheld the United States Attorney General's power to exclude the wife of a United States citizen without a hearing in *United States ex rel. Knauff v. Shaughnessy*.⁵⁵ Three years later, in *Shaughnessy v. United States ex rel. Mezei*,⁵⁶ the Court "accomplished the improbable feat of render-

51. *Id.* at 101; see also Aleinikoff, *Community Ties*, *supra* note 29, at 238 (discussing sharp scrutiny Supreme Court gives procedure in deportation cases).

52. Taylor, *supra* note 27, at 1128-29. In *Fong Yue Ting*, the testimony of a white witness was required because it was believed that a Chinese witness was more likely to possess "loose notions" regarding the obligation of an oath. 149 U.S. at 729-30 (citing *Chinese Exclusion Case*, 130 U.S. 581, 598 (1889)).

53. See Aleinikoff, *Federal Regulation of Aliens*, *supra* note 26, at 864 (noting that Supreme Court recognized important rights in late nineteenth century); Henkin, *Constitution as Compact and Conscience*, *supra* note 26, at 15 (discussing Supreme Court's recognition of important individual rights).

54. See Taylor, *supra* note 27, at 1129-33 (noting that Supreme Court's recognition of plenary powers doctrine continued throughout Cold War era).

55. 338 U.S. 537 (1950). The Attorney General's power to exclude Knauff, based solely upon the Attorney General's statement that her admission "would be prejudicial to the interests of the United States," was beyond review by the Court. *Id.* at 539-40, 543. Knauff was paroled from Ellis Island only after a public outcry of support. Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 955-64 (1995). After being afforded a hearing before the Board of Special Inquiry which found her excludable as a threat to national security, the Board of Immigration Appeals (BIA) reversed, holding that uncorroborated hearsay evidence without more, was not sufficient to support an order of exclusion. See generally ELLEN KNAUFF, *THE ELLEN KNAUFF STORY* (1952) (relating injustice inflicted on Ellen Knauff).

56. 345 U.S. 206 (1953). In *Mezei*, the husband of a U.S. citizen who had lawfully resided in the United States for 25 years was excluded and detained without a hearing after leaving the United States and returning 19 months later from visiting his dying mother in Rumania, where he had trouble securing an exit permit. *Id.* at 208. The Attorney General declared Mezei to be a threat to national security and could have been "detained indefinitely, perhaps for life, for a cause known only to the Attorney General." *Id.* at 220 (Jackson, J., dissenting). The Supreme Court reversed the lower court's grant of habeas corpus, finding that, in reviewing Mezei's due process claim, he should be "treated as if stopped at the border." *Id.* at 215. The Court found his detention did not constitute an entry

ing the *Knauff* outcome even more severe.”⁵⁷ In an unrivaled demonstration of timidity, the Court in *Mezei* extended the holding in *Knauff* by finding that a returning lawful permanent resident’s rights were as minimal as the rights of first time entrants, like *Knauff*.⁵⁸ Affirming the language in *Knauff*, the *Mezei* Court held that for a returning resident, “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”⁵⁹ More recently, the Court indicated that it has some “limited judicial responsibility” with respect to Congress’s power to regulate the admission and exclusion of aliens.⁶⁰ Yet, its application of this principle has been criticized as “toothless.”⁶¹ For many commentators, the *Knauff-Mezei* doctrine still forms the basis

into the United States and therefore, exclusion proceedings were proper and he was not entitled to procedural due process rights. *Id.* at 213-15. Moreover, his 25 years of residency in the United States did not entitle him to greater due process protection. *Id.* at 213-14. This aspect of the *Mezei* holding was modified by *Landon v. Plasencia*, 459 U.S. 21 (1982), which held that a returning resident, while placed in exclusion proceedings, is entitled to procedural due process protection. *Landon*, 459 U.S. at 34. *Mezei* was ultimately afforded a hearing after the Supreme Court upheld his exclusion. Weisselberg, *supra* note 55, at 964-84. While the Board of Special Inquiry upheld the charges of his membership in the Communist party, it made an off the record recommendation for his release and he was paroled after four years of detention. *Id.* at 982.

57. ALEINIKOFF ET AL., *supra* note 4, at 385 (discussing *Knauff* decision).

58. *Mezei*, 345 U.S. at 212.

59. *Id.* (quoting United States *ex rel.* *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)). Courts have criticized the reasoning used in *Knauff* and *Mezei*, which suggests excludable aliens may never invoke constitutional due process protections. See Jean v. Nelson, 472 U.S. 846, 874 (1985) (Marshall, J., dissenting). At an extreme, this would allow the Attorney General to invoke legitimate immigration goals to stop feeding excludable aliens in detention. *Id.* For a discussion of cases criticizing the use of the plenary power doctrine to allow for abysmal detention conditions, see Taylor, *supra* note 27, at 1132 n.232.

One year after *Mezei*, in 1954 the Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954). Despite the boldness the Court demonstrated in *Brown*, that same year the Court maintained that in regards to immigration policies, “we are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors,” indicating it would continue to defer to Congress. Galvan v. Press, 347 U.S. 522, 531 (1954); see also Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 860-61 (1987) (noting Court’s deference to Congress in *Galvan* is confusing in lieu of *Brown*); Kikuyo Matsumoto-Power, *Aliens, Resident Aliens, and U.S. Citizens in the Never-Never Land of the Immigration and Nationality Act*, 15 U. HAW. L. REV. 61, 77 (1993) (noting discussion by Louis Henkin regarding *Chinese Exclusion Case*).

60. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977) (noting acceptance of limited judicial responsibility in regulating admission and exclusion of aliens); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (suggesting that due process places some restrictions on congressional power).

61. *Fiallo*, 430 U.S. at 805 (Marshall, J., dissenting).

for judicial deference to Congress's plenary power over immigration.⁶²

Thus, while the language of the Fourteenth Amendment clearly states that the "due process" and "equal protection" provisions apply to "all persons," the development of the *Knauff-Mezei* doctrine draws distinctions among different classes of persons.⁶³ The suggestion that excludable aliens are "nonpersons" within the meaning of the Constitution, and thus not deserving of constitutional protection was explicit in the case of *Kwong Hai Chew v. Colding*,⁶⁴ decided one month before *Mezei*. The Court starkly framed the issue in *Kwong Hai Chew* to be whether Kwong could be stripped of "[h]is status as a person within the meaning and protection of the Fifth Amendment."⁶⁵ Although finding that Kwong himself could be recognized as a "person," the Court seemed to imply that "genuine excludable aliens" could be treated as nonpersons who are not entitled to the same constitutional protections provided to "persons."⁶⁶

The prior discussion suggests that the political branches have nearly complete control over aliens.⁶⁷ Not all laws affecting aliens are, however, limited to such minimal judicial scrutiny. It is generally recognized that the plenary power doctrine governs cases chal-

62. See ALEINIKOFF ET AL., *supra* note 4, at 402-05 (noting numerous analyses and interpretations of *Mezei* doctrine); Aleinikoff, *Federal Regulation of Aliens*, *supra* note 26, at 866 (arguing that immigration regulators should be subject to judicial scrutiny accorded to other exercises of federal power); Henkin, *Constitution as Compact and Conscience*, *supra* note 26, at 25-27 (noting that flourish of individual rights has not shaken legacy of *Chinese Exclusion Case*). The "expedited removal" procedures which became law through IIRAIRA § 302 perhaps signify the demand for even greater deference to the *Knauff-Mezei* doctrine and the political branch's absolute control over immigration. See IIRAIRA § 302, Pub. L. No. 104-208 (1996) (to be codified at INA § 235, 8 U.S.C.) (discussing expedited removal procedures). For a further discussion of these procedures, see *supra* note 11.

For a further discussion of whether the plenary power belongs to Congress or to both the Congress and the Executive, and a criticism of the plenary power doctrine's resurfacing in the detention cases of the 1980s, see Taylor, *supra* note 27, at 1140-43, 1146 n.301.

63. See Martin, *supra* note 28, at 176 (noting that *Knauff-Mezei* doctrine implies excludable aliens are not persons for constitutional purposes).

64. 344 U.S. 590 (1953).

65. *Id.* at 601.

66. *Id.* The *Kwong* decision made a limited exception to *Knauff* in requiring that a lawful permanent resident, who had been gone from the United States for four months as a crewmen, be entitled to a true hearing before the INS with full disclosure of adverse information. *Id.* at 600-01. But see Martin, *supra* note 28, at 176 (noting that excludable aliens have the status of nonpersons). For a further discussion of *Kwong*, see *infra* notes 102-03 and accompanying text.

67. For a further discussion of the political branches' control over immigration, see *supra* notes 38-66 and accompanying text.

lenging immigration law, that is "the body of law governing the admission and expulsion of aliens."⁶⁸ Yet, this doctrine does not fully reveal the courts' treatment of aliens. In other cases, aliens have successfully asserted their individual rights. Developing concurrently with cases governed by the plenary power doctrine was a line of cases which would define the doctrine of the aliens' rights tradition.

III. THE ALIENS' RIGHTS TRADITION

Prior to the Civil War, the Supreme Court had not addressed questions regarding who was protected by the Bill of Rights and the other limited individual rights within the body of the original Constitution.⁶⁹ Yet, the ratification of the Fourteenth Amendment in 1868, brought a significant change in focus.⁷⁰ This amendment established the requirements of citizenship and sought to protect those privileges from state intrusion through the Privileges and Immunities Clause.⁷¹ The Fourteenth Amendment also suggested that all persons, be they citizens or not, would enjoy the protections provided in the Due Process and Equal Protection Clauses.⁷² This reading of the Fourteenth Amendment is consistent with the plain language of the Fifth Amendment which also suggests that due process should be afforded to all individuals, not just citizens.⁷³

68. Aleinikoff, *Federal Regulation of Aliens*, *supra* note 26, at 864-65. For Aleinikoff, at the end of the nineteenth century the power over aliens was divided into two parts: (1) cases of expulsion and admission, where Congress possessed "plenary" power "virtually unfettered" by the Constitution (with the exception of due process in deportation proceedings) and (2) situations where U.S. citizens could invoke constitutional protections and where resident aliens were entitled to the same. *Id.* at 864-66; *see also* Legomsky, *Immigration Law and Plenary Power*, *supra* note 25, at 305 (discussing future of plenary power doctrine); Motomura, *Phantom Norms*, *supra* note 27, at 547 (defining immigration law); Taylor, *supra* note 27, at 1134 (noting that plenary power doctrine governs admission, exclusion and deportation of aliens).

69. Henkin, *Constitution as Compact and Conscience*, *supra* note 26, at 14-15.

70. U.S. CONST. amend XIV. The Fourteenth Amendment provides:
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

71. Henkin, *Constitution as Compact and Conscience*, *supra* note 26, at 15.

72. *Id.*; *see also* Matsumoto-Power, *supra* note 59, at 81-82 (noting that language of Fourteenth Amendment is not limited to U.S. citizens).

73. *See* U.S. CONST. amend. V (stating "[nor] shall any person . . . be deprived of life, liberty, or property, without due process of law"); *see also* Henkin, *Constitution as Compact and Conscience*, *supra* note 26, at 14-15 (stating that Fourteenth Amendment established criteria for protection of individual rights).

Shortly after the enactment of the Fourteenth Amendment, it was embraced by an alien living in the United States to strike down a state law denying equal protection to persons of Chinese descent in *Yick Wo v. Hopkins*.⁷⁴ The *Yick Wo* Court found:

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences in race, or color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.⁷⁵

Yick Wo became the foundation of the aliens' rights tradition.⁷⁶ This case led a line of cases which held that when a legal challenge involving aliens' rights does not intrude upon the realm of immigration law, courts would review the claim with the same degree of judicial scrutiny afforded a U.S. citizen.⁷⁷ With the Fourteenth Amendment phrase "any person" found to include aliens, shortly after the *Yick Wo* decision the Supreme Court found that aliens are included within the meaning of "person" as identified in the Due Process Clause of the Fifth Amendment, which safeguards a person's life, liberty or property against deprivation by the federal government.⁷⁸ Aliens also fall within the definition of "people" in the

74. 118 U.S. 356, 373-74 (1886); see also Henkin, *Constitution as Compact and Conscience*, *supra* note 26, at 15-16 (discussing procedural background of *Yick Wo*); Taylor, *supra* note 27, at 1133 (discussing Supreme Court's holding in *Yick Wo*).

75. *Yick Wo*, 118 U.S. at 369.

76. Henkin, *Constitution as Compact and Conscience*, *supra* note 26, at 16.

77. See, e.g., Aleinikoff, *Federal Regulation of Aliens*, *supra* note 26, at 865-66 (noting cases outside of immigration law which have afforded aliens constitutional protections); Henkin, *Constitution as Compact and Conscience*, *supra* note 26, at 16-18 (noting that state discrimination against aliens is subject to sharp judicial scrutiny); Taylor, *supra* note 27, at 1133-35 (noting that cases have extended Fourth and Fifth Amendment protection to aliens).

78. See, e.g., *Wong Wing v. United States*, 163 U.S. 228 (1896) (holding that Constitution precludes punishment of aliens for being in United States unlawfully except pursuant to trial in accordance with Fifth and Sixth Amendments). In *Wong Wing*, the Court invalidated a section of the 1892 immigration statute which provided for "infamous punishment at hard labor" or the confiscation of property of any Chinese national found by executive authorities to be here illegally. *Id.* at 237. The statute's deportation provisions had been approved in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). In *Wong Wing*, the Court reaffirmed these individuals could be deported, but it found the imprisonment or confiscation of property to be punitive and that it was invalid without "a judicial trial to establish the guilt of the accused." *Wong Wing*, 163 U.S. at 237. The *Wong Wing* decision heralded the beginning of a line of aliens' rights cases which were successfully argued as outside the realm of immigration law and in the realm of criminal law, thus entitling aliens to assert Fifth and Sixth Amendment protection in criminal pro-

Fourth Amendment, and therefore, are allowed "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁷⁹ Additionally, aliens are guaranteed the protection of the First Amendment⁸⁰ and are provided the procedural safeguards and immunities of other amendments.⁸¹

Yet, even within the aliens' rights tradition, the courts make a distinction between a state's limitation on individual rights and the

ceedings. See *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 492 (1931) (holding that property of alien friends may not be taken for public purposes without just compensation); *United States v. Henry*, 604 F.2d 908, 914 (5th Cir. 1979) (holding that aliens are entitled to *Miranda* warnings during custodial interrogation); *United States v. Casimiro-Benitez*, 533 F.2d 1121, 1124-25 (9th Cir. 1976) (holding that defendant's Fifth Amendment right to counsel was not violated during police interrogation); see also DAVID M. O'BRIEN, *CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES* 1503-05 (2d ed. 1995) (discussing Supreme Court's classification of aliens); Aleinikoff, *Federal Regulation of Aliens*, *supra* note 26, at 864-65 (noting that "legacy of *Yick Wo* has . . . survived and flourished in the 20th century"); Bosniak, *supra* note 27, at 1094-1101 (discussing *Wong Wing* and alien rights tradition); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 742-43 (1996) [hereinafter Scaperlanda, *Partial Membership*]; Taylor, *supra* note 27, at 134 n.240 (noting that cases following *Wong Wing* tradition extend Fifth and Sixth Amendment protections to aliens in criminal proceedings). The equal protection derived from the notion of due process as stated in the Fifth Amendment is also provided to aliens. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976) (holding Civil Service Commission's denial of employment to resident aliens amounted to deprivation of due process); see also Henkin, *Constitution as Compact and Conscience*, *supra* note 26, at 16 (noting that after *Yick Wo*, Supreme Court considered aliens persons for purposes of due process). For a further discussion of the phrase "any person," see *supra* note 72-73 and accompanying text.

79. See *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (applying Fourth Amendment protection against searches and seizures where alien was defendant); see also Henkin, *Constitution as Compact and Conscience*, *supra* note 26, at 16 (noting that court decisions following *Yick Wo* have held aliens among "people" entitled to Fourth Amendment protections). *But see* *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that Fourth Amendment does not apply to seizure of nonresident alien's property in foreign country). For a further discussion of aliens' Fourth Amendment rights, see *infra* notes 108-13 and accompanying text.

80. See *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (discussing First Amendment); see also Aleinikoff, *Federal Regulation of Aliens*, *supra* note 26, at 868 (discussing the protection of First Amendment rights in immigration context); Henkin, *Constitution as Compact and Conscience*, *supra* note 26, at 16 n.42 (discussing protection under Fourth, Fifth and Fourteenth Amendments). *But see* *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (protecting citizen's First Amendment right to personally communicate with alien); *American Arab Anti-Discrimination Comm. v. Meese ("ADC")*, 714 F. Supp. 1060 (C.D. Cal. 1989), *aff'd in part and rev'd in part on other grounds*, 940 F.2d 445 (9th Cir.), *vacated* 970 F.2d 501 (9th Cir. 1991) (stating aliens enjoyed full First Amendment rights in deportation context). For a further discussion of *Mandell*, see *infra* notes 198-200 and accompanying text. For a discussion of *ADC*, see *infra* note 153.

81. Henkin, *Constitution as Compact and Conscience*, *supra* note 26, at 16.

federal government's limitation on identical rights.⁸² Historically, the states are held to a higher level of judicial scrutiny than the federal government, therefore entitling aliens to greater protection against discriminatory state and local practices.⁸³ State discrimination against aliens creates "suspect classifications."⁸⁴ Such discrimination is sharply scrutinized and is upheld only if it serves a "compelling state interest."⁸⁵ By contrast, Congress is held to the

82. Aleinikoff, *Federal Regulation of Aliens*, *supra* note 26, at 864; Taylor, *supra* note 27, at 1133 n.235.

83. Aleinikoff, *Federal Regulation of Aliens*, *supra* note 26, at 865 n.20-22; Taylor, *supra* note 27, at 1133 n.235.

84. *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *see also* Henkin, *Constitution as Compact and Conscience*, *supra* note 26, at 17 (noting that discriminating against aliens creates suspect classifications which will be scrutinized).

85. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 203 (1982) (stating right of undocumented children to go to public school); *Graham v. Richardson*, 403 U.S. 365 (1971) (invalidating state law excluding aliens from public program). Other cases have invalidated provisions which prevented aliens from receiving economic opportunities in the private sector. *See, e.g.*, *Bernal v. Fainter*, 467 U.S. 216, 227-28 (1984) (ruling state statute requiring U.S. citizenship to be notary unconstitutional); *Toll v. Moreno*, 458 U.S. 1, 16-17 (1982) (invalidating state university policy prohibiting G-4 aliens and dependents from acquiring in-state status); *Examining Bd. of Eng'rs v. Flores DeOtero*, 426 U.S. 572, 605 (1976) (holding Puerto Rico's statute prohibiting aliens from engaging in private practice of engineering deprived aliens of rights); *In re Griffiths*, 413 U.S. 717, 729 (1973) (denying citizenship requirement to take bar exam); *Sugarman v. Dougall*, 413 U.S. 634, 645-46 (1973) (ruling unconstitutional state statute requiring U.S. citizenship to be part of state civil service).

States can, however, still use alienage classifications to deny employment and political rights if related to the exercise of an important government function. The *Sugarman* Court held that this exception was the result of a state's obligation "to preserve the basic conception of a political community." *Sugarman*, 413 U.S. at 647 (citing *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)). The Court has noted that citizenship "denotes an association with the polity," and that it creates a "bond" of "special significance." *Ambach v. Norwick*, 441 U.S. 68, 75 (1979) (upholding exclusion of aliens from employment as teachers). Furthermore, the Court stated that "[t]he exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition." *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982) (upholding exclusion of aliens from employment as parole officers); *see also* *Moreno*, 458 U.S. at 12 n.17 (limiting participation of noncitizens in states' political and governmental functions); *Foley v. Connelie*, 435 U.S. 291 (1978) (upholding exclusion of aliens from employment as police officers). Yet, it has been noted that "laws excluding permanent resident aliens from political participation or government benefits are dramatically over- and under-inclusive if they are justified in terms of loyalty, competence, or identification with 'American values.'" Aleinikoff, *Citizens, Aliens, Membership*, *supra* note 40, at 14; *see also* Aleinikoff, *Federal Regulation of Aliens*, *supra* note 26, at 865 n.21 (discussing excluding aliens from employment as parole officers); Henkin, *Constitution as Compact and Conscience*, *supra* note 26, at 17 (arguing discrimination is not suspect discrimination when it substantially affects community members); Martin, *supra* note 28, at 196-99 (allowing states to disqualify noncitizens from jobs as police officers, teachers and deputy probation officers). For a discussion of the similarities between the states' "political function" exception and the federal government's generally low standard

lower standard of requiring only a "facially legitimate and bona fide reason" for discriminating against aliens.⁸⁶ This allows Congress to successfully use the arguments of national sovereignty, war and peace, and international relations to justify disparate treatment in areas where the states are prohibited from making similar distinctions.⁸⁷

IV. THE PLENARY POWER DOCTRINE VERSUS THE ALIENS' RIGHTS TRADITION: A CRITICISM OF THE BATTLE

With the concurrent development of the plenary power doctrine and the aliens' rights tradition, legal challenges by aliens have been decided after forcibly being characterized as involving "immigration law" or "nonimmigration law."⁸⁸ Victim to this *Fong Yue Ting* versus *Yick Wo* phenomenon, the special equities of a case are virtually ignored.⁸⁹ Critics of this "inside/outside" immigration law characterization argue that it does not properly emphasize distinctions between the status of aliens in cases "outside" of immigration law and between the status of aliens in cases "inside" immigration

of scrutiny which impacts on both membership and the definition of the political community, see Bosniak, *supra* note 27, at 1110-15.

86. See *Fiallo v. Bell*, 430 U.S. 787, 799 (1977) (holding it is not judiciary's role in cases of this sort to probe and test justifications for legislative decisions); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 99-105 (1976) (requiring legitimate basis for preserving federal rule was that it intended to serve interest); *Mathews v. Diaz*, 426 U.S. 67, 81-83 (1976) (stating that those who qualify under Congress's test may reasonably be presumed to have greater affinity to the United States); *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (allowing lesser standard of scrutiny when Congress delegates power to Executive); see also O'BRIEN, *supra* note 78, at 1503-05 (noting state and federal laws have discriminated against aliens); Mitchell Kurfis, *The Constitutionality of California's Proposition 187: An Equal Protection Analysis*, 32 CAL. W. L. REV. 129, 137 (1995) (noting "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it").

87. Compare *Diaz*, 426 U.S. at 67 (ruling federal government is able to distinguish between lawful permanent residents and citizen in allocating federal welfare), with *Richardson*, 403 U.S. at 365 (prohibiting Pennsylvania and Arizona from denying aliens welfare benefits). An analogy of *Diaz* and *Graham* "is so powerful that the Court's heavy reliance on the unique nature of federal authority over immigration sounds wholly irrational." Matsumoto-Power, *supra* note 59, at 90; see also Henkin, *Constitution as Compact and Conscience*, *supra* note 26, at 17 (arguing that Supreme Court never held that congressional act discriminated against aliens in violation of equal protection).

88. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1953).

89. See *Mezei*, 345 U.S. at 216 (failing to take into account special equities); *Knauff*, 338 U.S. at 547 (same). For example, *Knauff's* marriage to a U.S. soldier and *Mezei's* lengthy residence in the United States were completely discounted once the Court characterized these cases as challenges to immigration law and therefore, beyond judicial review. For a discussion of *Knauff* and *Mezei*, see *supra* notes 55-63 and accompanying text.

law.⁹⁰ Apart from these criticisms, difficulties with this distinction arise because it does not explain recent "immigration law" cases in which the federal government's plenary power was challenged successfully.⁹¹ It also does not explain cases seemingly outside the realm of immigration law in which aliens' rights, while expected to be protected, were ultimately not protected.⁹² Some commentators offer theories for the "blur" between the plenary power doctrine and the aliens' rights tradition.⁹³ By virtually ignoring the plenary power versus aliens' rights distinction, however, alternative theories can be offered to explain a developing pattern. These theories are illustrated best in the cases of *Landon v. Plasencia*⁹⁴ and *United States v. Verdugo-Urquidez*.⁹⁵

A. *Landon v. Plasencia: Defeating the Plenary Power Doctrine*

The Supreme Court in *Plasencia* held that a lawful permanent resident returning to the United States is entitled to the same due process protections as a resident who never left.⁹⁶ In so modifying

90. Bosniak, *supra* note 27, at 1063-65; Scaperlanda, *Partial Membership*, *supra* note 78; Scaperlanda, *Polishing the Golden Door*, *supra* note 40, at 991-1002.

91. See *Landon v. Plasencia*, 459 U.S. 21, 41 (1982) (holding government cannot present case without opposition when permanent resident alien's substantial interest in remaining in country is at stake); *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (preventing government from saying alien intended to depart after taking brief trip); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (holding Attorney General has no authority to deny entry to permanent resident alien of United States). For a further discussion of *Plasencia*, see *infra* notes 94-100 and accompanying text.

92. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (holding no Fourth Amendment warrantless "search and seizure" protection for nonresident alien's foreign property); *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (limiting Social Security benefits to permanent residents living in United States for at least five years); *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972) (limiting First Amendment rights of U.S. citizens who want to bring known Marxist to United States to speak); *Flemming v. Nestor*, 363 U.S. 603, 608 (1960) (ruling deportee is not entitled to Social Security benefits).

93. See Motomura, *Phantom Norms*, *supra* note 27, at 607 (noting misdirected judicial review as problem for unpredictable solutions); Motomura, *Procedural Surrogates*, *supra* note 27, at 1646 (noting Court's readiness to recognize procedural due process as formal exception to plenary power doctrine stood in tension with its unwillingness to give procedural due process requirement any real content); Taylor, *supra* note 27, at 1134-35 (noting boundary between plenary power doctrine and aliens' rights is not easily marked).

94. 459 U.S. 21 (1982).

95. 494 U.S. 259 (1990).

96. *Plasencia*, 459 U.S. at 21. In *Plasencia*, the Court modified part of the holding in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) and extended procedural due process protection in exclusion proceedings to returning lawful permanent residents who had only been gone for a few days. *Plasencia*, 459 U.S. at 34. For a further discussion of *Mezei*, see *supra* notes 56-63 and accompanying text. *Plasencia* did, however, reverse the understanding of *Rosenberg v. Fleuti*, 374 U.S.

the *Mezei* holding, the *Plasencia* Court reasoned that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."⁹⁷ In determining that an individual like *Plasencia* is entitled to due process protection, the Court remanded the case for a determination of what process was due as an initial matter consistent with the considerations set forth in *Mathews v. Eldridge*.⁹⁸

The *Plasencia* decision marked the firm establishment of the notions of community ties and membership in determining what due process was owed to aliens.⁹⁹ According to *Plasencia*, if an individual challenging an immigration law can demonstrate ties binding him or her to the national polity, that individual will receive greater protection.¹⁰⁰ This development was the culmination of a line of cases which began with the minority voices of *Fong Yue Ting v. United States*.¹⁰¹ Although more restrictive than *Plasencia*, the plaintiff's special equities were also taken into consideration in *Kwong Hai Chew v. Colding*.¹⁰² Kwong Hai Chew's brief departure from the United States did not trigger a statutory entry upon his

449 (1963), that returning residents be placed in deportation proceedings and instead found that proper determination of the due process question should be in exclusion proceedings. *Plasencia*, 459 U.S. at 32.

97. *Plasencia*, 459 U.S. at 32.

98. 424 U.S. 319 (1976).

99. *Plasencia*, 459 U.S. at 32-37. The *Plasencia* Court stated:

In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.

Id. at 34 (relying on *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)). For a further discussion of the *Eldridge* test, see *infra* note 132 and accompanying text.

100. *Plasencia*, 459 U.S. at 34-35. The Court in *Plasencia* further stated: *Plasencia's* interest here is, without question, a weighty one. She stands to lose the right "to stay and live and work in this land of freedom." Further, she may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual . . . [T]he courts must evaluate the particular circumstances and determine what procedures would satisfy the minimum requirements of due process on the reentry of a permanent resident alien.

Id. (citation omitted).

101. 149 U.S. 698 (1893). According to observers, the dissenters in *Fong Yue Ting* suggested that resident aliens should be entitled to some constitutional protection because they have significant ties to the community. Taylor, *supra* note 27, at 1136 n.251 (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 737-38 (1893) (Brewer, J., dissenting); *id.* at 746 (Field, J., dissenting); *id.* at 762 (Fuller, J., dissenting)). This notion also influenced the *Japanese Immigrant Case*, which entitles aliens in deportation proceedings to procedural due process. *Id.* (citing *Japanese Immigrant Case*, 189 U.S. 86, 100-01 (1903)).

102. 344 U.S. 590 (1953).

return, as this seaman, sailing for only four months on an American ship with American security clearance, was "assimilated" to the status of a resident alien who never left for purposes of procedural due process safeguards.¹⁰³ This type of reasoning also was responsible for the development of the *Rosenberg v. Fleuti*¹⁰⁴ doctrine which prevents a permanent resident's brief, casual and innocent trip out of the United States from creating a statutory entry upon return because there is no meaningful interruptive departure.¹⁰⁵

Despite the fact that these cases clearly impacted upon sovereignty, the plenary power doctrine did not prevail.¹⁰⁶ Yet, while aliens were making strides in cases challenging immigration law, victory was not to be found in the nonimmigration arena.¹⁰⁷ The recent decision of *Verdugo-Urquidez* illustrates the losing battle of the aliens' rights theory and reflects the Court's consideration of an individual's membership and ties to the United States in determining what protections are due.

B. United States v. Verdugo-Urquidez: *Defeating the Aliens' Rights Tradition*

Writing for the Court in *Verdugo-Urquidez*, Chief Justice Rehnquist found that the Fourth Amendment had no application to the search and seizure by United States agents of property owned by a

103. *Id.* at 596.

104. 374 U.S. 449 (1963).

105. The *Fleuti* Court held that a permanent resident's few hour trip to Mexico was "innocent, casual and brief," and therefore, not meaningfully interruptive departure that would trigger statutory "entry" upon return. *Id.* at 462-63. It appears that INA § 101(a)(13), which has traditionally provided the statutory basis for the *Fleuti* doctrine, has been narrowed to allow only for specific instances in which a lawful permanent resident's departure and return will not be considered a "meaningfully interruptive departure." IIRAIRA § 301(a), Pub. L. No. 104-208 (1996) (amending INA § 101(a)(13), 8 U.S.C.). For a further discussion of IIRAIRA, see *supra* note 11 and accompanying text.

106. Courts have also indicated that they are less inclined to give absolute deference to the federal political branches in those cases which can be characterized as "inside" immigration law. See, e.g., *Jean v. Nelson*, 472 U.S. 846, 857 (1985) (noting INS officials must exercise their discretion under nondiscriminatory parole provisions without regard to race or national origin); *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977) (stating "[o]ur cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens"); *Japanese Immigrant Case*, 189 U.S. 86, 99-100 (1903) (noting administrative officer may not disregard fundamental principles of due process of law); see also *Bosniak*, *supra* note 27, at 1092-94 (noting courts have not absolutely foreclosed use of judicial review of government's substantive immigration decisions).

107. See *Bosniak*, *supra* note 27, at 1095-98 (discussing rights that attach as result of "territorial presence" in case of *Wong Wing v. United States*, 163 U.S. 228, 239 (1896)).

nonresident alien and located in a foreign country.¹⁰⁸ The Court held that Verdugo-Urquidez was not a person within the meaning of the Fourth Amendment.¹⁰⁹ According to Chief Justice Rehnquist, "the people" referred to in the Fourth Amendment are "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."¹¹⁰ In Chief Justice Rehnquist's opinion, the respondent did not exemplify these traits.¹¹¹ While the *Verdugo-Urquidez* decision may arguably have been meant to impact only the rights of nonresident aliens without ties to the United States, the decision already has affected lawful permanent residents of the United States.¹¹² The United States Court of Appeals for the Ninth Circuit recently suggested that lawful permanent residents may not have sufficient ties to the United States to

108. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261, 264-75 (1990). This case involved an alleged Mexican drug lord and murderer of Drug Enforcement Agency (DEA) agent Enrique Camarena Salazar. *Id.* at 262. Verdugo-Urquidez had been seized by Mexican police and delivered to a California border station. *Id.* The next day, while incarcerated in San Diego, DEA agents, along with Mexican police, searched his home in Mexicali, Mexico and found evidence of his narcotics smuggling. *Id.* While the United States Court of Appeals for the Ninth Circuit suppressed the evidence as a violation of the Fourth Amendment warrant clause, the Supreme Court reversed. *Id.* at 263, 275. Additionally, by the time this case reached the Supreme Court, Verdugo-Urquidez, in a separate prosecution, had been convicted for his involvement in the torture-murder of DEA agent Salazar. *Id.* at 262.

Six Justices, in three different opinions, held that the search was not a violation of the Fourth Amendment because the Fourth Amendment had no application to the search of a nonresident alien's property in a foreign country. *Id.* at 275-78. Three Justices dissented. *Id.* at 261. Justice Kennedy, while joining the majority, wrote a concurring opinion which observers suggest so drastically diverges from the majority that the opinion may only speak for a plurality of four. *Id.* at 275; see Neuman, *Whose Constitution*, *supra* note 30, at 972, 974 n.378 (discussing *Verdugo-Urquidez* opinion). The decision in *Verdugo-Urquidez* has resulted in discussion of Fourth Amendment protections and aliens. See *id.* at 912, 971-76 (discussing Fourth Amendment rights and aliens); Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive* *United States v. Verdugo-Urquidez?*, 56 Mo. L. Rev. 213, 217-27 (1991) (questioning applicability of Fourth Amendment to aliens lawfully in United States) [hereinafter Scaperlanda, *Domestic Fourth Amendment Rights*].

109. *Verdugo-Urquidez*, 494 U.S. at 264-66.

110. *Id.* at 265. According to Chief Justice Rehnquist, the First, Second, Ninth and Tenth Amendments would also be inapplicable to the defendant because "[t]he language of these Amendments contrasts with the words 'person' and 'accused' used in the Fifth and Sixth Amendments regulating procedure in criminal cases." *Id.* at 265-66.

111. *Id.* at 274.

112. See *United States v. Barona*, 56 F.3d 1087, 1094 (9th Cir. 1995) (noting it is unclear whether noncitizen defendants are entitled to Fourth Amendment protection after *Verdugo-Urquidez*), *cert. denied*, 116 S. Ct. 813 (1996).

invoke the protections of the Fourth Amendment outside of the U.S. territorial boundaries.¹¹³

Other weaknesses in the aliens' rights doctrine are revealed in cases where the litigants had limited ties to the United States.¹¹⁴ For example, an alien previously deported for past Communist membership was denied Social Security benefits in *Flemming v. Nestor*.¹¹⁵ In addition, the Court restricted a permanent resident's ability to qualify for Social Security, holding that the awarding of benefits applies only to individuals who had been permanent residents for more than five years and therefore, could be considered the "most like citizens," in *Mathews v. Diaz*.¹¹⁶

113. *Id.* The Ninth Circuit noted that even if the Fourth Amendment, as interpreted in *Verdugo-Urquidez*, applies to nonresident aliens, wiretaps of telephone conversations in foreign country, that were conducted as joint operation of both United States and foreign law enforcement officials, satisfied Fourth Amendment's reasonableness requirement, regardless of whether there was probable cause because they were conducted in compliance with law of country in which they took place. *Id.*; see also *Supreme Court Declines Review of Alien's Fourth Amendment Rights in Foreign Seizure*, 73 INTERPRETER RELEASES 138 (1996) (discussing *Verdugo-Urquidez*). But see *Wang Zong Xiao v. Reno*, 81 F.3d 808, 816 (9th Cir. 1996) (noting Fifth Amendment due process rights available to undocumented alien brought to United States as prosecution witness); *Recent Immigration Decisions in the Federal Courts*, 73 INTERPRETER RELEASES 726, 730-31 (1996) (discussing *Wong Zong Xiao*).

114. See *Mathews v. Diaz*, 426 U.S. 67 (1967) (requiring permanent residence of five years to qualify for social security benefits); *Flemming v. Nestor*, 363 U.S. 603 (1960) (denying social security benefits to alien who was formerly communist).

115. 363 U.S. 603 (1960). The Court found that a rational justification existed for the denial of Social Security benefits, and therefore, did not violate the Due Process Clause of the Fifth Amendment. *Id.* at 611. For the Court, a deportee's residence abroad is of "obvious relevance" to justifying the denial of benefits. *Id.* at 612. The deportee's place of residence prevents the benefit of "increased over-all national purchasing power" as he or she cannot spend his or her Social Security check in the United States as can recipients living in the United States. *Id.* Additionally, it cannot "be deemed irrational for Congress to have concluded that the public purse should not be utilized to contribute to the support of those deported." *Id.*; see also *Taylor*, *supra* note 27, at 1137 (noting *Flemming* Court's rationale).

116. *Diaz*, 426 U.S. at 83-84 (discussing resident alien's unsuccessful challenge to Social Security Act provision that imposed five year residence requirement on aliens). Perhaps not so coincidentally, an individual generally needs to be a permanent resident for five years before he or she is entitled to citizenship. INA § 316(a), 8 U.S.C. § 427(a) (1994). Bosniak finds *Diaz* to be one of the "clearest examples" of the suggestion that membership concerns impact upon issues seemingly "outside" immigration law. Bosniak, *supra* note 27, at 1065-67. But see *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (noting ability of states to apply their immigration laws to their alien inhabitants is confined by narrow limits). Contrasting *Graham* and *Diaz*, Bosniak recognizes that the *Graham* decision is based on the "irrelevance" of immigration principles for the states, while the *Diaz* Court found the case involved an extension of the federal government's immigration power through the challenged provisions of the Social Security Act. Bosniak, *supra* note 27, at 1101-10; see also *Taylor*, *supra* note 27, at 1137-38 (discussing *Graham* and *Diaz*).

C. *Commenting on the Battle*

Concern over the rights of individuals arising from cases such as *Verdugo-Urquidez*, *Nestor* and *Diaz* exemplifies a struggle between the aliens' rights tradition and the plenary power doctrine in which the plenary power doctrine prevails.¹¹⁷ It has been suggested that these cases curb the strides of the aliens' rights tradition by allowing judicial deference to any federal action affecting aliens.¹¹⁸ Consequently, attempts are made to fight Congress's plenary power intruding into the aliens' rights arena. Yet, simultaneously a battle is waged to encourage the Court's concern for fundamental rights to cross the border into the immigration arena. These efforts conflict as they encourage maintaining the plenary power versus aliens' rights distinction in cases outside the immigration arena, while arguing for the abolishment of the distinction when presented with challenges to immigration law.

Difficulty in maintaining the plenary power versus aliens' rights boundary suggests that the proper distinction in deciding whether an alien is entitled to constitutional protection is not whether his or her case falls "inside" or "outside" of immigration law.¹¹⁹ Rather, the cases which contradict the premises of the plenary power doctrine and the aliens' rights tradition may be understood more easily if one considers an alien's "ties" or "membership" in the U.S. national community.¹²⁰

For a discussion of the legislative restrictions placed on a lawful permanent resident's right to welfare through the recent Welfare Act, see *supra* notes 12-13 and accompanying text.

117. See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding Fourth Amendment does not apply to search and seizure of alien resident's property); *Mathews v. Diaz*, 426 U.S. 67 (1976) (holding alien cannot receive social security benefits); *Flemming v. Nestor*, 363 U.S. 603 (1960) (same).

118. See Motomura, *Phantom Norms*, *supra* note 27, at 585 (noting that Congress makes rules that would be unacceptable if applied to citizens); Motomura, *Procedural Surrogates*, *supra* note 27, at 1693 (suggesting that Congress's immigration decisions "are largely immune from judicial inquiry or interference"); Neuman, *Whose Constitution*, *supra* note 30, at 972 (discussing Chief Justice Rehnquist's opinion in *Verdugo-Urquidez* which gave three conclusions as to why aliens do not have constitutional rights); Scaperlanda, *Domestic Fourth Amendment Rights*, *supra* note 108, at 231-42 (noting Congress has broad discretion in controlling immigration law); Scaperlanda, *Marshall's Jurisprudence*, *supra* note 25, at 68-69 n.83 (discussing *Verdugo-Urquidez* and its break from exception that aliens are entitled to protection from Bill of Rights); Taylor, *supra* note 27, at 1135-39 (discussing cases giving judicial deference to congressional statutes).

119. For a criticism of the preoccupation with the immigration law versus nonimmigration law distinction, see Bosniak, *supra* note 27, at 1066-67.

120. See Aleinikoff, *Federal Regulation of Aliens*, *supra* note 26, at 922 (rejecting plenary power); Aleinikoff, *Community Ties*, *supra* note 29 (noting living with family members is substantial interest); Martin, *supra* note 28, at 172 (noting Due Process

V. NATIONAL MEMBERSHIP AND COMMUNITY TIES

A. *Professor David Martin: Membership in the National Community*

For Professor Martin, due process determinations are a function of one's "membership in the national community."¹²¹ Martin suggests rectifying the disparate treatment of aliens by basing treatment upon degrees of membership, rather than categorizing cases as plenary power or aliens' rights.¹²² For Martin:

[W]e, as a national community, somehow *owe less* in the coin of procedural assurances to the first-time applicant for admission than we do to our fellow citizens or to permanent resident aliens, or even to regular nonimmigrants who have been among us for awhile. This is not necessarily to say that we owe nothing; that would be to repeat the mistakes of *Knauff* and *Mezei*. Instead it is simply to assert that established community ties, which exist to varying degrees with respect to different categories of aliens, ought to count in deciding what process is due. Or perhaps the intuition is more accurately stated the other way around. We *owe more* procedural guarantees—a greater assurance of scrupulous factual accuracy—to citizens and permanent resident aliens than we do to aliens at the threshold of entry into the national community.¹²³

Clause requires as constitutional minimum that aliens establish links to this country). In finding the inside/outside distinction to be an overstated generalization, Bosniak recognizes that even in outside immigration law, alienage is used to accord aliens less "constitutional and subconstitutional" rights and benefits. Bosniak, *supra* note 27, at 1063-65. Discussing Michael Walzer, a political theorist concerned with the political community's "sphere of membership," Bosniak recognizes that there is an increasing convergence of what he refers to as the admissions (or membership) sphere and the political (or equal personhood) sphere. (The spheres mentioned in this article relate to the immigration and nonimmigration arenas, respectively). *Id.* at 1069-87; *see also* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1985) (discussing spheres of justice for aliens). "[A]lienage legitimately matters not merely at the border but for the allocation of rights and benefits in the interior as well." Bosniak, *supra* note 27, at 1086; *see also* Scaperlanda, *Polishing the Golden Door*, *supra* note 40, at 996 (discussing Court's decision allowing aliens to get civil service employment); Taylor, *supra* note 27, at 1136 (discussing *Wing Wong* progeny which extended constitutional protection to aliens in criminal proceedings).

121. Martin, *supra* note 28, at 235; *see also* Aleinikoff, *Federal Regulation of Aliens*, *supra* note 26, at 868 (discussing notions of "membership"); Aleinikoff, *Community Ties*, *supra* note 29, at 242 (same); T. Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 HASTINGS CONST. L.Q. 915, 920-21 (1995) (same); Bosniak, *supra* note 27, at 1068 (same); Matsumoto-Power, *supra* note 59, at 78 (same).

122. Martin, *supra* note 28, at 191.

123. *Id.* at 191-92 (emphasis added).

Martin points out that a large part of what is meant by community, including national community, is that relational obligations exist.¹²⁴ It is not a novel idea to suggest that “special, heightened obligations” attach as a result of special relationships.¹²⁵ Our obligations to the national community are compared by analogy to the obligations which result by being a member of a family or a neighbor in a community.¹²⁶

B. Professor Alexander Aleinikoff: Community Ties

While Martin relies on consideration of community ties in his discussion of membership in the national community, Professor Aleinikoff distinguishes these terms.¹²⁷ In distinguishing the terms, Aleinikoff relies not on the premise of membership in the national community, but solely on the notion of community ties. To Aleinikoff:

It seems that the problem is not so much in accepting Professor Martin’s intuition that we “owe less in the coin of procedural assurances of the first-time applicant for admission than we do to our fellow citizens or to permanent resident aliens.” Rather, it is trying to elaborate on that intuition in terms of membership in a national community. It is my belief that our intuition does not depend upon inchoate notions of membership. I think it is more easily explained as a generalization about the stake that certain groups of aliens have in entering or residing in the United States or in not being returned to their country of origin. In short, whereas Professor Martin would examine the notion of *community*, I would look at *community ties*.¹²⁸

124. *Id.* at 193. This characteristic of community exists for Martin whether one believes that a community has developed for practical reasons (*i.e.*, shared purposes) or if it has developed naturally, through shared history. *Id.* at 195.

125. *Id.* at 193 & n.101. Martin finds support for this idea from various sources. *See id.* (relying on JAMES FISHKIN, *THE LIMITS OF OBLIGATION* 25-38 (1982); JOHN RAWLS, *A THEORY OF JUSTICE* 111-16, 342-50, 375-77 (1971); A. John Simmons, *Moral Principles and Political Obligations* 16-23 (1981); Gorovitz, *Bigotry, Loyalty, and Malnutrition*, in *FOOD POLICY: THE RESPONSIBILITY OF THE UNITED STATES IN LIFE AND DEATH CHOICES* 129, 132-36 (P. Brown & H. Shue eds., 1977); H.L.A. Hart, *Are There Any Natural Rights?*, 64 *PHILA. REV.* 175 (1955); William N. Nelson, *Special Rights, General Rights, and Social Justice*, 3 *Phil. & Pub. Aff.* 410 (1974)).

126. *Id.* at 193. *But see* Aleinikoff, *Community Ties*, *supra* note 29, at 240-41 (criticizing this analogy).

127. Aleinikoff, *Community Ties*, *supra* note 29, at 244-45.

128. *Id.* at 244 (emphasis added).

For Aleinikoff, community ties indicate “the actual relationships the individual has developed with a society: a family, friends, a job, association memberships, professional acquaintances, opportunities.”¹²⁹ In rejecting Martin’s notion, Aleinikoff compares consideration of community ties with community and finds:

“Community” is a more amorphous concept. It connotes a sense of identification with others as a group, a sense of common enterprise, a belief in the value of shared experiences and a shared future. Community ties are almost tangible; we can see interactions among people and membership in complex social and financial arrangements. But to see “community,” we must catch a glimpse of the *Zeitgeist*, we must peer into people’s hearts.¹³⁰

Aleinikoff sees part of an alien’s interest “in entering or remaining within the United States [to be] his or her ability to maintain established ties with the community.”¹³¹ Having characterized these ties as the “private interest” component of the *Mathews v. Eldridge* framework, Aleinikoff suggests that one can only proceed to fully satisfy all due process concerns after analyzing the remaining *Eldridge* components.¹³² Aleinikoff acknowledges that even in using the community ties approach, reasonable people might disagree as to the level of ties of each group and whether there are actual differences between them.¹³³ Left is the implication that evaluating all of the interests at stake will not always lead to the alien’s interests prevailing over the government’s interest.

VI. REVEALING THE COURTS’ USE OF MEMBERSHIP AND COMMUNITY TIES

A. *Applying the Theories*

Despite the plenary power doctrine, numerous challenges to immigration law are successful as the courts consider such equities

129. *Id.*

130. *Id.* at 244-45.

131. *Id.* at 245.

132. *Id.* at 247. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court clearly set out the three elements to be balanced in determining the appropriate due process conferred. *Id.* at 335 These elements include: (1) the private interest at stake; (2) the value of improved procedures to prevent “erroneous deprivation” of the private interest through existing procedures; and (3) the governmental interest involved (including “fiscal and administrative burdens” imposed by any added procedure). *Id.*

133. Aleinikoff, *Community Ties*, *supra* note 29, at 245-46.

as membership in the national community and community ties.¹³⁴ Conversely, aliens, perhaps anticipating victory when challenging a law seemingly within the aliens' rights tradition, do not always succeed when the requisite community ties or national membership are lacking.¹³⁵ The greater a court's reliance upon notions of membership or community ties, the more irrelevant the plenary power versus aliens' rights distinction becomes. Beginning with a discussion of the rights of U.S. citizens, this next section will attempt to demonstrate that the weaker an individual's claim to membership or community ties, the less rights are provided within both the immigration and nonimmigration law arenas.

B. *Citizens and Lawful Permanent Residents*

In applying the premise of either Martin's membership or Aleinikoff's community ties theory to U.S. citizens, one would conclude that citizens deserve the greatest constitutional protection because they occupy the innermost ring of the community and arguably possess the strongest community ties.¹³⁶ Not surprisingly, in cases involving the denaturalization or expatriation of citizens, the courts impose many procedural and substantive safeguards.¹³⁷

134. For a discussion of those cases challenging immigration laws, see *supra* notes 74-80 and accompanying text.

135. For a discussion of the success of challenges under the aliens' rights tradition, see *supra* notes 76-78 and accompanying text.

136. Martin, *supra* note 28, at 208-10. Aleinikoff borrows Martin's concentric circles of membership as "proxies" for the amount and kinds of ties each group has developed and concludes that, "citizens, in the innermost circle, are likely to have the greatest stake in remaining in the United States." Aleinikoff, *Community Ties*, *supra* note 29, at 245. In measuring commitment to national community, Aleinikoff points out that it is not clear that citizens, simply by virtue of their birth, are more committed to the United States than aliens who have overcome great obstacles to reach our shores. *Id.* at 241. Martin recognizes that while it may not seem fair to accord citizens greater due process rights simply by virtue of their birth, persons have to accept some of life's natural injustices. Martin, *supra* note 28, at 216-18 (relying on ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 134 (1975); Anthony Kronman, *Talent Pooling*, in *XXII NOMOS: HUMAN RIGHTS* 58, 77 (1981)).

It should be noted that Martin and Aleinikoff, in the strictest sense, are discussing only the procedural rights of individuals based upon notions of membership or community ties. I am, however, applying their theories more liberally to explain differentiations in both substantive and procedural rights of citizens, lawful permanent residents and others based on their notions of membership and community ties.

137. See *Afroyim v. Rusk*, 387 U.S. 253, 260 (1967). In expatriating proceedings, intent (voluntary renunciation) is required. *Id.* at 265-66; see *Vance v. Terrazas*, 444 U.S. 252, 268 (1980) (noting party claiming expatriation must show intent to relinquish U.S. citizenship). The *Afroyim* Court relied not on the Due Process Clause, but on the citizenship provisions of the Fourteenth Amendment. *Afroyim*, 387 U.S. at 268. The Court in *Rogers v. Bellei*, 401 U.S. 815 (1971), created

Consistent with either Martin's or Aleinikoff's theory, in cases which involve the stripping of a lawful permanent resident's right to membership, the resident is given less protection than the U.S. citizen.¹³⁸ Unlike a U.S. citizen, the government does not need to prove a lawful permanent resident's intent to abandon his status.¹³⁹

an exception to *Afroyim's* holding that citizenship must be voluntarily renounced or relinquished. *Id.* at 835. Subsequent legislation, however, essentially invalidated this exception. See 4 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 100.03[2][a][vi]-[b][i] (1990) (discussing legislation invalidating exception). In expatriating proceedings, the government must meet its burden of proof by a preponderance of the evidence. *Terrazas*, 444 U.S. at 268. Historically, however, this standard was not enforced. For example, in a case later overruled, the Court held that voting in a foreign election qualified as an expatriating act without even assessing the proof of intent to surrender citizenship. *Perez v. Brownell*, 356 U.S. 44 (1958), *overruled by Afroyim*, 387 U.S. at 268. Also, a U.S. citizen, lost her citizenship after marrying a foreigner. *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915). The woman could only regain her citizenship upon termination of the marriage. *Id.* at 307. The Court found that Congress, through its sovereign power, could deem marriage to be an expatriating act. *Id.* at 311-12. This statute, the Citizenship Act of 1907, was later repealed. See Martin, *supra* note 28, at 208-09 (discussing overruling of Citizenship Act by requiring intent to give up citizenship); Matsumoto-Power, *supra* note 59, at 71 (discussing how Congress had power to expatriate).

Denaturalization proceedings also hold the government to a high standard. See *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) (stating "clear, unequivocal and convincing" standard). Naturalized citizens are not more vulnerable to losing their citizenship than born citizens. *Schneider v. Rusk*, 377 U.S. 163, 165-69 (1964). Before a denaturalization decree is issued, there must be a finding of fraud or illegality in the original naturalization process. See generally *Fedorenko v. United States*, 449 U.S. 490, 505-06 (1981) (noting government has heavy burden of proof to divest naturalized citizen of his or her citizenship). The government must prove its allegations by "clear, unequivocal, and convincing evidence." *Schneiderman*, 320 U.S. at 125; see also Martin, *supra* note 28, at 208-10 (discussing government's burden).

138. Martin, *supra* note 28, at 210-15. Aleinikoff, however, suggests that, with the exception of voting and political rights, lawful permanent residents should be accorded membership in society equal to that of citizens. Aleinikoff, *Citizens, Aliens, Membership*, *supra* note 40, at 23. Aleinikoff, therefore, questions whether it is defensible to deport residents when the United States would not consider deporting a citizen for a similar offense. *Id.* at 26.

139. See INA § 241, 8 U.S.C. § 1251 (1994) (IIRAIRA § 305 has recodified grounds of deportation so that they will be referred to as (INA § 237)) (providing that lawful permanent residents can be deported for committing certain acts or by failing to commit others against their wishes); *Galvan v. Press*, 347 U.S. 522, 530-32 (1954) (deporting long time permanent residents for earlier Communist membership); *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1952) (noting aliens remain vulnerable to expulsion even after long residence); *KURZBAN*, *supra* note 4, at 81-99. Recognizing the length of one's membership in U.S. society, Martin suggests that these cases yielded bad results because of an unquestioning deference to sovereignty and the political question issue. Martin, *supra* note 28, at 211-12. Martin argues that the protection of lawful permanent residents could have been achieved in these cases without any negative impact on Congress's political power over substantive deportation standards. *Id.* Aliens who have a "lawful unrelinquished domicile of seven consecutive years" or more, however, have traditionally been able to have certain grounds for deportation waived. INA § 212(c), 8 U.S.C. § 1182(c).

Yet, even in these cases, procedural due process is protected.¹⁴⁰ Deportation must be based upon “clear, unequivocal, and convincing evidence.”¹⁴¹ Despite all of its failings, even the *Knauff-Mezei* doctrine recognizes that certain rights attach if an alien has “passed through our gates, even illegally.”¹⁴²

Likewise, in what might be considered nonimmigration law/aliens’ rights cases, constitutional rights are contingent upon demonstrating national membership or community ties.¹⁴³ Again, as in the immigration context, the U.S. citizen occupying the innermost circle of membership is accorded the greatest protection in the nonimmigration arena.¹⁴⁴ For example, the right to vote or hold certain public offices is awarded only to citizens upon a recognition of their status.¹⁴⁵

While there is disagreement regarding the amount of rights which should be accorded lawful permanent residents, the disa-

For a discussion of the “cancellation of removal” relief that will replace INA § 212(c) relief pursuant to IIRAIRA, see *supra* note 11 and accompanying text.

140. See Martin, *supra* note 28, at 212 (discussing protection of lawful permanent residents).

141. *Woodby v. INS*, 385 U.S. 276, 286 (1966); see also IIRAIRA § 304, Pub. L. No. 104-208 (1996) (to be codified at INA § 240(c)(3)(A), 8 U.S.C.) (discussing deportation). For a further discussion of IIRAIRA, see *supra* note 11 and accompanying text.

142. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). Ignoring this widely accepted and long held principal that those who entered without inspection are deportable and can avail themselves of greater procedural protection, the 1996 changes to the INA limit the procedural rights to those here who entered without inspection (EWI) by rendering them inadmissible. Compare IIRAIRA § 301 (to be codified at INA § 212(a)(6)(A)(i), 8 U.S.C.) (stating new ground of admissibility), with INA § 241(a)(1)(B) (stating previous ground of deportability). For a further discussion of EWIs and their rights, and the critiques of Aleinikoff and Martin, see *infra* notes 154-61 and accompanying text.

143. See *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (limiting social security benefits to permanent residents living in United States for at least five years); *Flemming v. Nestor*, 363 U.S. 603, 608 (1960) (ruling deportee is not entitled to social security benefits).

144. See Aleinikoff, *Community Ties*, *supra* note 29, at 245. Aleinikoff argues that “[c]itizens in the innermost circle are likely to have the greatest stake in remaining in the United States.” *Id.*

145. Martin, *supra* note 28, at 197. For a further discussion of an alien citizen’s political rights, see *supra* note 80 and accompanying text. Martin asserts that the voting exception continues because of the intuitive notion that voting is intimately associated with the idea of a national community. Martin, *supra* note 28, at 198. He notes:

Even Gerald Rosberg, after patiently dissecting all the instrumental reasons (such as concerns about fraud, bloc voting, lack of knowledge, or disloyalty) that states might advance to justify excluding resident aliens from the polls, admitted to a lingering intuition about a hard-to-pin-down justification for this exclusion, somehow connected to the notion of membership.

Id. at 198 n.119.

greement simply reflects differing opinions regarding the strength of lawful permanent residents' community ties and membership.¹⁴⁶ Although some courts and commentators suggest that lawful permanent residents should be accorded constitutional protection on par to that accorded citizens,¹⁴⁷ the opposing camp argues that a resident is a lesser member of the community than the citizen and accordingly, should be afforded less protection.¹⁴⁸ For example, the Court in *Mathews v. Diaz* suggested that all permanent residents may not be accorded the same rights as citizens.¹⁴⁹ The Court suggested that only individuals who have been permanent residents for more than five years can be considered the "most like citizens."¹⁵⁰ Serving as Justice, Rehnquist has also suggested that providing protection to noncitizen residents diminishes those rights which should be safeguarded as the rewards of citizenship.¹⁵¹ Only naturalized citizens should be accorded certain rights for demonstrating "the willingness and ability to integrate into our social system . . . [and prove they have] become 'like' a native-born citizen in ways that aliens, as a class, could be presumed not to be."¹⁵² This sentiment, that all aliens, regardless of their residency status, are not entitled to certain rights as they do not fully belong to the national

146. See Martin, *supra* note 28, at 193-204 (discussing arguments surrounding strength of lawful permanent resident's community ties and membership).

147. See *Dixon v. Love*, 431 U.S. 105 (1977) (noting that due process applies to deprivation of license); *Goss v. Lopez*, 419 U.S. 565 (1975) (noting school disciplinary purposes there simply are no meaningful differences between resident aliens and citizens." *Toll v. Moreno*, 458 U.S. 1, 20 (Blackmun, J., concurring). The dissent in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), noted that "[a]n alien, who is assimilated in our society, is treated as a citizen so far as his property and his liberty are concerned." *Id.* at 599 (Douglas, J., dissenting). While recognizing that the greatest due process is reserved for citizens, Martin accepts that in legal matters which do not bear on the resident's membership, lawful permanent residents should be accorded the same due process as citizens. Martin, *supra* note 28, at 210. Aleinikoff suggests supporting equal rights for citizens and lawful permanent residents in all nonfranchise matters. Aleinikoff, *Community Ties*, *supra* note 29, at 244-47; Aleinikoff, *Citizens, Aliens, Membership*, *supra* note 40, at 19-20.

148. See *Diaz*, 426 U.S. at 67 (discussing differences afforded residents and citizens); *Sugarman v. Dougall*, 413 U.S. 634, 649-64 (1973) (Rehnquist, J., dissenting) (same); Martin, *supra* note 28, at 208-34 (discussing various amounts of due process afforded to different members of national community). Similarly, the restrictions imposed on the right to federal benefits through the recent Welfare Act reflect the 104th Congress's belief that lawful permanent residents should be accorded less rights than citizens. For a further discussion of the recent Welfare Act and its restrictions, see *supra* note 12 and accompanying text.

149. *Diaz*, 426 U.S. at 83-84.

150. *Id.* at 83. For a further discussion of *Diaz*, see *supra* note 114 and accompanying text.

151. *Sugarman*, 413 U.S. at 658-61 (Rehnquist, J., dissenting).

152. *Id.* at 661 (Rehnquist, J., dissenting).

community, has been reflected on occasion in other Supreme Court cases.¹⁵³

C. Undocumented Aliens in the United States

In terms of the rights of United States citizens and lawful permanent residents, Martin and Aleinikoff seem in general agreement.¹⁵⁴ Their theories, however, begin to diverge when applied to the next outlying circle, undocumented aliens living in the United States who either evaded inspection by the Immigration and Naturalization Service (INS) upon entering the country or who arrived as nonimmigrants or parolees.¹⁵⁵

153. See *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (noting “those who are excluded cannot assert the rights in general obtained in a land to which they do not belong as citizens or otherwise”); *United States v. Barona*, 56 F.3d 1087, 1094 (9th Cir. 1995) (holding that nonresidents failed to show they were “people of the United States” entitled to all constitutional rights), *cert. denied*, 116 S. Ct. 813 (1996); see also *Matsumoto-Power*, *supra* note 59, at 77-79 (discussing Supreme Court’s concept that aliens are outsiders to U.S. society). Membership concerns have also crossed the immigration/nonimmigration line by limiting a permanent resident’s ability to exercise his or her First Amendment rights. See *American Arab Anti-Discrimination Comm. v. Meese (“ADC”)*, 714 F. Supp. 1060, 1078-81 (C.D. Cal. 1989), *aff’d in part, rev’d in part on other grounds*, 940 F.2d 445 (9th Cir.), *vacated* 970 F.2d 501 (9th Cir. 1991). In ADC, the district court found that it could not tolerate alienage-citizen distinctions which would limit an alien’s First Amendment rights. *Id.* at 1078-79. The court struck down the challenged McCarran-Walter provisions, which proscribed various forms of advocating communist or dictatorship theories, as facially overbroad. *Id.* at 1078-84. The district court’s constitutional holding was reversed and vacated on appeal because the case was not ripe. *American-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 506, 510 (9th Cir. 1991). The McCarran-Walter provisions at issue were ultimately repealed and replaced with other provisions which allowed the deportation of aliens who engaged in terrorist activity. See *American-Arab Anti Discrimination Comm. v. Reno*, 70 F.3d 1045, 1054 (1995) (challenging deportation under terrorism provisions). For a thorough discussion of the American-Arab Anti-Discrimination cases, see *Bosniak*, *supra* note 27, at 1130-37.

154. See Aleinikoff, *Community Ties*, *supra* note 29, at 245 (discussing state of U.S. citizens and lawful permanent residents); Martin, *supra* note 28, at 208-15 (addressing due process for citizens and lawful permanent residents).

155. Aleinikoff, *Community Ties*, *supra* note 29, at 245-47; Martin, *supra* note 28, at 166, 230-34. At the time of Aleinikoff’s and Martin’s writing, the INA defined entry to include EWI. INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1990); see also *Matter of Z*, Int. Dec. No. 3208 (BIA 1993) (discussing entry); *Matter of Patel*, Int. Dec. No. 3157 (BIA 1991) (same). Martin focuses on individuals that he refers to as “clandestine entrants,” but he does not discuss with great specificity the rights of other aliens in the United States who are not permanent residents such as parolees and aliens who have entered the country legally on a valid tourist or other nonimmigrant visa. Martin, *supra* note 28, at 166, 230-34. His thoughts regarding clandestine entrants would likely apply generally to anyone not formally admitted as a permanent resident. Aleinikoff criticizes Martin for not adequately addressing differences within both the circle referred to as first time entrants and undocumented aliens living in the country. Aleinikoff, *Community Ties*, *supra* note 29, at 245-47. The INA has given a legal definition of “entry” stating that entry:

Under Aleinikoff's community ties theory, the undocumented alien who resides in the United States after an entry without inspection would be accorded due process in relation to the community ties he or she has developed.¹⁵⁶ These ties define his or her stake in the community.¹⁵⁷ In relying upon this theory of community ties, as opposed to Martin's notion of membership, one values the stake an individual has made here in determining the amount of due process owed.¹⁵⁸

Martin suggests these "clandestine entrants" should not be given greater constitutional rights than the first time applicant for admission, despite the length of time or other ties they may have in the United States.¹⁵⁹ For Martin, because these individuals did not enter the national community with its permission, the national community was prevented from exercising the right to determine

[M]eans any coming of an alien into the United States, from a foreign part or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having lawful permanent residence in the United States shall not be regarded as making an entry . . . if the alien proves . . . that his departure . . . [from the United States] was not intended or reasonably expected by him or his presence [outside the United States] . . . was not voluntary: Provided, that no person whose departure . . . was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

INA § 101(a)(13), 8 U.S.C. § 1101(a)(13). Entry has also been defined as: (1) crossing into the territorial limits of the United States, i.e., physical presence; (2) an inspection and admission by an immigration officer; (3) actual and intentional evasion of inspection at the nearest inspection point coupled with; (4) freedom from restraint. See KURZBAN, *supra* note 4, at 25 (citing *Matter of Z*, Int. Dec. No. 3208 (BIA 1993) (finding entry when person came within federal jurisdiction for reasons unrelated to immigration processing); *Matter of Patel*, Int. Dec. No. 3157 (BIA 1991) (finding no entry on account of lack of freedom from restraint where permanent resident alien was deferred for customs inspection after passing primary immigration inspection)). Now, pursuant to the INA as amended by IIRAIRA in 1996, an individual has only entered if it has been a lawful admission, requiring an inspection and authorization by an immigration officer. IIRAIRA § 301, Pub. L. No. 104-208 (1996) (amending INA § 101(a)(13), 8 U.S.C.). For a further discussion of IIRAIRA, see *supra* note 11 and accompanying text.

156. Aleinikoff, *Community Ties*, *supra* note 29, at 245-46. Under provisions of the 1996 immigration legislation, those individuals who Aleinikoff discusses as having "entered" without inspection and subject to deportation will now be characterized as having "arrived" without being admitted or paroled and will be inadmissible rather than deportable. IIRAIRA §§ 301(c), 302, 304 (to be codified at INA §§ 212(a)(6)(A)(i), 235, 240, in scattered sections of 8 U.S.C.). Even with the enactment of IIRAIRA, Aleinikoff's theory, as discussed in this Article, would still allow one to conclude that inadmissible individuals who arrive without legal admission or parole are entitled to greater rights than the first time applicant for admission. Aleinikoff, *Community Ties*, *supra* note 29, at 245-46.

157. Aleinikoff, *Community Ties*, *supra* note 29, at 245-46.

158. *Id.*

159. Martin, *supra* note 28, at 230-31.

its members at a critical decision-making point.¹⁶⁰ Consequently, this group of undocumented individuals should be treated as first time admission applicants when determining the amount of due process they should be afforded.¹⁶¹

Yet, as undocumented aliens living in the United States have generally been accorded more protections than applicants for admission, there appears to be a greater regard for the individual's community ties than his or her formal admission as a member in the national community.¹⁶² Traditionally, undocumented aliens discovered after entering the United States either with or without inspection are afforded more substantive relief if they can demonstrate a long residency in the United States and strong community ties.¹⁶³ Additionally, individuals discovered by the INS have tradi-

160. *Id.*

161. *Id.* at 231. Martin believes that to allow greater due process protections to a "clandestine entrant" than those afforded to a first time applicant for entry would continue one of the most anomalous lessons learned from *Knauff-Mezel*. *Id.* at 230 n.231. The lesson involved the realization that an individual who successfully evaded immigration and secretly entered the country is entitled to more protection than individuals who honestly present themselves to immigration at the border. *Id.* This theory, which Martin advanced in 1983, charged that "the most glaring anomaly of the *Knauff-Mezel* doctrine" is that it entitles individuals who arrive clandestinely to be entitled to greater procedural protection than those legally applying for admission at the border. *Id.* at 230; *see also id.* at 212-13, 230-34 (criticizing rights provided for those who evade inspection). Thus, Martin's theory seems to be consistent with the 1996 immigration legislation charging individuals who "arrive without inspection" as being inadmissible and thus entitled to less protection. IIRAIRA §§ 301(c)(1), 302, 304 (to be codified at INA §§ 212(a)(6)(A)(i), 235, 240, in scattered sections of 8 U.S.C.).

Yet, while asserting that the due process afforded to a clandestine entrant should be limited, Martin believes that the entrant's length of stay and the ties which he or she has developed should have a positive effect. *Id.* at 232-33. For example, Martin recognizes suspension of deportation as a positive ameliorative legislative measure. *Id.*; *see also* INA § 244(a), 8 U.S.C. § 1254(a) (discussing suspension of deportation). With the recent repeal of suspension of deportation and the heightened criteria enacted for "cancellation of removal," it becomes apparent, however, that it may be unwise to fully rely on legislative protection for individuals who are here without proper inspection and admission. *Compare* INA § 244(a), 8 U.S.C. § 1254(a) (discussing suspension of deportation), *with* IIRAIRA § 304 (to be codified at INA § 240A(b), 8 U.S.C.) (discussing cancellation of removal).

162. For a further discussion of membership and community ties, *see supra* notes 121-33 and accompanying text.

163. *See* INA § 244(a), 8 U.S.C. § 1254(a) (suspension of deportation); IIRAIRA § 304 (to be codified at INA § 240A, 8 U.S.C.) (replacing suspension of deportation with cancellation of removal); INA § 249, 8 U.S.C. § 1259 (registry); IIRAIRA § 308(g)(10)(B) (amending registry); AEDPA § 413(e) (amending registry); INA § 242(b), 8 U.S.C. § 1252(b) (voluntary departure); INA § 244(e), 8 U.S.C. § 1254(e) (voluntary departure); IIRAIRA § 304 (to be codified at INA § 240B, 8 U.S.C.) (replacing previous forms of voluntary departure); *see also* IIRAIRA §§ 308(a)(7), (g)(5)(D) (repealing former provisions for suspension of

tionally been assured more protection than individuals who are apprehended upon attempting their first entry.¹⁶⁴

In an attempt to restrict "illegal immigration," however, recent legislative measures limit the procedural and substantive rights of aliens who enter without inspection.¹⁶⁵ These measures reveal Congress stepping back from its previous position, demonstrating Congress's willingness to ignore an alien's ties to the community.¹⁶⁶ Congress has previously recognized the significance of community membership by preventing the potential deportation of thousands of undocumented aliens through such legalization programs as the "amnesty."¹⁶⁷ Presenting these programs to Congress, Attorney General Smith stated: "We have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community."¹⁶⁸

Outside of the immigration context, for undocumented aliens who have not formally become members of the national community, Martin's or Aleinikoff's theory seem to reach the same result. These individuals have established ties and have been recognized as members of the community to the degree that they are subject to our criminal laws, participate in their local community, etc.¹⁶⁹

deportation and voluntary departure). For further discussion of IIRAIRA, see *supra* note 11.

164. For example, compare INA § 241, 8 U.S.C. § 1251, with INA § 212(a)(1), 8 U.S.C. § 1182(a)(1) (reflecting grounds of deportation are less encompassing than grounds of exclusion as there is no comparable ground of deportation for carrying of communicable disease). Moreover, in the case of deportable aliens, the burden of proof is on the government to support a finding of deportability by "clear, unequivocal, and convincing evidence." *Woodby v. INS*, 385 U.S. 276, 286 (1976); see also Martin, *supra* note 28, at 212-13 (discussing Court's requirement of due process in deportation proceedings).

165. For a discussion of the recent changes in the immigration law, see *supra* note 11-12 and accompanying text.

166. For a discussion of the recent immigration legislation, see *supra* notes 11 and 12 and accompanying text.

167. See IRCA § 201, 8 U.S.C. § 1255(A) (1994) (stating amnesty provision); *GORDON ET AL.*, *supra* note 137, at § 52.01 (discussing amnesty provision of 8 U.S.C. § 1255(A)).

168. *Plyler v. Doe*, 457 U.S. 202, 218 n.17 (1982); see also Martin, *supra* note 28, at 202 n.136 (discussing reasoning for amnesty programs).

169. See Aleinikoff, *Community Ties*, *supra* note 29, at 245-46 (discussing stake persons have in their community); Martin, *supra* note 28, at 202, 230-34 (arguing against Court's recognition of greater procedural protections for clandestine entrants as opposed to less protections for first time applicants for admission). Gerald Neuman finds that the constitutional rights of aliens present in the United States correspond to their "pervasive subjection" to American law. Neuman, *Whose Constitution*, *supra* note 30, at 977. But see Bosniak, *supra* note 27, at 1126-31 (sug-

The courts historically have recognized the rights of these individuals based upon a respect for the ties they have developed.¹⁷⁰ For example, the Court suggests that even illegal aliens have ties to the community which entitle them to certain rights in *Plyler v. Doe*.¹⁷¹ Like *Plyler*, the Court rejected the notion that one's status as an unlawful immigrant signifies that the individual is not entitled to constitutional protection in *Wong Wing v. United States*.¹⁷² As the Court held in *Wong Wing*, undocumented aliens living in the United States generally enjoy full constitutional protection.¹⁷³ Yet, the protection of these rights is, however, being challenged and at risk of being undone by recent efforts both nationally and locally.¹⁷⁴

gesting that undocumented alien's ability to exercise his or her civil and political rights is limited by omnipresent shadow of federal immigration authorities).

170. For a discussion of the cases recognizing the ties of an alien, see *supra* notes 146-53 and accompanying text.

171. 457 U.S. 202 (1982) (discussing right of illegal aliens to go to school); see also Aleinikoff, *Citizens, Aliens, Membership*, *supra* note 40, at 25 (recognizing that undocumented children were likely to be permanent members of American society); Bosniak, *supra* note 27, at 1098-99, 1115-17 (discussing provision for constitutional protection regardless of undocumented alien status). Bosniak recognizes that *Plyler* may be limited to a finding that an unlawful status is an irrelevant factor for children, but not necessarily for adults. *Id.* at 1125 (noting "*Plyler* is not likely to be very helpful in a case in which . . . rights are denied to undocumented aliens over the age of eighteen"). Bosniak concludes that the law is divided over the difference undocumented alienage makes in an analysis. *Id.* at 1117-26. Another commentator has also been suggested that *Plyler* was decided under the federal preemption principle, and thus, is not a broad recognition of alien rights by the Court. Matsumoto-Power, *supra* note 59, at 79. For a discussion of recent federal legislative efforts to prevent undocumented children from attending public school, see *infra* note 174 and accompanying text.

172. 163 U.S. 228, 238 (1896); see also Bosniak, *supra* note 27, at 1095-98, 1115-17 (discussing Court's extension of constitutional protections to aliens in cases outside sphere of immigration). For a further discussion of *Wong Wing*, see *supra* note 78 and accompanying text.

173. *Wong Wing*, 163 U.S. at 238; see also Mathews v. Diaz, 426 U.S. 67, 77 (1976) (noting "[e]ven one whose presence in this country is unlawful, involuntary, or transitory, is entitled to [Fifth and Fourteenth Amendment] protection"). But see *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261-62, 272, 274-75 (1990) (holding Verdugo-Urquidez, who was brought involuntarily to United States, was not entitled to Fourth Amendment protection); Neuman, *Whose Constitution*, *supra* note 30, at 972 (discussing *Verdugo-Urquidez*). For a further discussion of *Verdugo-Urquidez*, see *supra* notes 108-13 and *infra* notes 193-94 and accompanying text.

174. Efforts to bar undocumented children from public school failed only after the hotly debated provision sponsored by Representative Elton Gallegly (R-Cal.) was dropped from the HIRAIRA and was sponsored by Gallegly as a separate immigration bill. H.R. 4134, 104th Cong. (1996). After passing the House by a 254-175 vote, the bill was not taken up by the Senate. *Bill to Block Illegal Immigration Passed, Signed: Controversial Education Measure Cut*, FACTS ON FILE, Oct. 3, 1996, available in LEXIS, News File; William Branigin, *Congress Finishes Major Legislation; Immigration; Focus Is Borders, Not Benefits*, WASH. POST, Oct. 1, 1996, at A1 (discussing new legislation); Eric Schmitt, *Bill Tries to Balance Concerns on Immigration*, N.Y. TIMES,

D. *Applicants for Admission*

For Martin, the first time applicants for admission occupy the outermost ring of membership in the national community.¹⁷⁵ But, unlike the *Knauff* Court, Martin recognizes these individuals' "common humanity" and acknowledges that they are entitled to the due process protections applied in *Yick Wo* and found in the language of the Due Process Clause referring to "all persons."¹⁷⁶ Martin believes

Sept. 29, 1996, § 1, at 28 (same); *Text on President Clinton's Statement on Omnibus Appropriations and Immigration Reform Bill*, U.S. NEWSWIRE, Oct. 2, 1996, available in LEXIS, News File; see also *Immigration Bills Head to House-Senate Conference; Battles Over Particulars Loom*, 73 INTERPRETER RELEASES 678, 680 (1996) (discussing Gallegly amendment to House Bill 2202 allowing states to bar public education benefits to undocumented aliens, including children); *Conferees Agree on Immigration Bill; Hill Negotiators Delete Schooling Ban; Clinton Undecided on Veto*, WASH. POST, Sept. 25, 1996, at A14 (discussing alien children and school rights); David Hess, *Senate OKs Tightening the Border*, MIAMI HERALD, May 3, 1996, at A1 (discussing Senate vote to tighten border); *Immigration Bill Attracts Broader Range of Opponents*, WASH. POST, Sept. 28, 1996, at A7 (discussing proposed bill); Eric Schmitt, *Conferees Approve a Tough Immigration Bill*, N.Y. TIMES, Sept. 25, 1996, A15 (discussing proposed bill).

California's Proposition 187 also demonstrates an attempt to restrict the rights of undocumented aliens living in the United States. See Bosniak, *supra* note 27, at 1143-47 (discussing Proposition 187's denial of basic public services to aliens); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187*, 70 WASH. L. REV. 629 (1995) (discussing Proposition 187); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. REV. 1509 (1995) (same); Kurfis, *supra* note 86, at 165 (arguing that portions of Proposition 187 deny equal protection to undocumented alien children); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1448-52 (1995) (arguing that Proposition 187 violates Equal Protection).

Initiatives similar to California's Proposition 187 are gaining the support of voters in Florida. See Rick Barry, *Amendment Backers Pen Hopes on Voters*, TAMPA TRIBUNE, Jan. 17, 1996, at 1 (describing attempts to put anti-immigration initiatives on Florida ballot); James G. Driscoll, *Venom Aimed at Immigrants Destroys Their Precious Dream of America*, SUN-SENTINEL, May 18, 1996, at 15A (discussing anti-immigrant sentiment); *Prop. 187 Clones Advance*, SUN-SENTINEL, May 16, 1996, at 3B (describing Florida petition driving voter initiative similar to Proposition 187); Reena Shah Stamets, *Benefits for Illegal Aliens Defended*, ST. PETERSBURG TIMES, Mar. 23, 1996, at 3B (describing local meeting defending benefits for illegal aliens); Andres Vignucci, *Immigration Hot Topic for Voters, Not Candidates*, ST. PETERSBURG TIMES, Feb. 12, 1996, at 1A (describing presidential candidate's lack of comment on immigration).

175. Martin, *supra* note 28, at 216.

176. *Id.* For Martin, "[t]he excludable alien is not a constitutional stranger, but he is not quite intimate family Thus, the character of the excludable alien's—as yet tenuous—relationship to the national polity may be used in deciding what process is owed as a constitutional minimum." *Id.* Recognizing our universal common humanity, Justice Field in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) stated:

The moment any human being from a country at peace with us comes within the jurisdiction of the United States . . . he becomes subject to all their laws, is amenable to their punishment and entitled to their protection. Arbitrary and despotic power can no more be exercised over them with reference to their persons and property, than over the persons and

that an alien at entry should insist on minimum constitutional protections, including “an unbiased decision-maker, notice of the proceedings and of the general grounds asserted by the government for denial of admission; a meaningful opportunity to dispute or overcome those grounds, orally or in writing; and a statement of reasons, even if oral and summary, for any adverse decision.”¹⁷⁷ Martin, justifying different procedural protections for individuals depending on their relative location to the border, argues that such an approach serves as an essential and practical tool for courts.¹⁷⁸ Martin agrees with the United States Court of Appeals for the Fifth Circuit which acknowledged that “constitutional protections cannot be afforded to the entire population of the world, and some distinction is necessary.”¹⁷⁹

Aleinikoff takes a more humanitarian approach to determining what rights should be afforded to each individual.¹⁸⁰ For Aleinikoff, more than the minimal due process suggested by Martin may exist for an individual, even a first time entrant at the border.¹⁸¹ The fact that an individual is an applicant for admission does not definitively determine that he or she should be afforded only the most minimal due process.¹⁸² There are “relevant differences” between individuals seeking entry.¹⁸³ While recognizing that an applicant for admission is likely to have fewer ties to the United States than a U.S. citizen or permanent resident, an appli-

property of native-born citizens. They differ only from citizens in that they cannot vote or hold any public office. As men having our common humanity, they are protected by all the guaranties of the Constitution. *Id.* at 754 (1893) (Field, J., dissenting); *see also Wong Wing*, 163 U.S. at 242-43 (Field, J., concurring in part and dissenting in part) (claiming that all persons are entitled to equal protection of laws); *Yick Wo v. Hopkins* 118 U.S. 356, 369 (1886) (stating that Fourteenth Amendment “is not confined to the protection of citizens”). For a further discussion of an individual alien’s due process rights, see *supra* notes 53-62 and accompanying text.

177. Martin, *supra* note 28, at 218. Martin cautions, however, that it is “hazardous” to set out any procedural standards. *Id.*; *see also INS v. Stanisic*, 395 U.S. 62, 79 & n.22 (1969) (refusing to consider Director’s bias because case remanded for new hearing); Henry M. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1278-81 (1975) (noting danger of setting procedural standards).

178. Aleinikoff, *Community Ties*, *supra* note 29, at 239 (discussing Martin’s view).

179. Martin, *supra* note 28, at 233 (citing *Pierre v. United States*, 547 F.2d 1281, 1290 (5th Cir.), *vacated*, 434 U.S. 962 (1977) (remanding for consideration of mootness)).

180. Aleinikoff, *Community Ties*, *supra* note 29, at 239 (questioning “why should not all [citizens and aliens alike] be entitled to the same constitutional guarantees before being ordered out of the country?”).

181. *Id.* at 239, 245-47.

182. *Id.* at 245-47.

183. *Id.*

cant may have a personal stake in the United States that needs to be assessed.¹⁸⁴

Because the notion of community ties allows for an assessment of “the actual relationships the individual has developed with a society: a family, friends, a job, association memberships, professional acquaintances, opportunities,” individuals outside of the United States may have varying stakes in the United States and therefore, be entitled to varying degrees of due process.¹⁸⁵ For example, Aleinikoff recognizes a first time entrant may have established a “pre-existing” stake in the community, coming to the United States after being granted an immigrant visa through family or an employer located in the United States.¹⁸⁶ On the other hand, first time entrants on a nonimmigrant visa may have less of an interest at stake.¹⁸⁷ By contrast, they are not planning to make the United States their permanent home and probably have demonstrated that they will return to their country in order even to be issued the visa.¹⁸⁸ The restriction of due process, which could lead to the exclusion of the intended immigrant, would disrupt his or her entire future life.¹⁸⁹ Restricting due process in the case of the individual coming to the United States for a brief stay, however, would create less of a disruption.¹⁹⁰ Considering the differing interests, greater due process should be accorded to an intending immigrant who potentially has more at stake.¹⁹¹

For individuals living outside of the United States, the courts generally have taken a limited view of the rights which should be awarded to them both in the immigration and nonimmigration context.¹⁹² In *United States v. Verdugo-Urquidez*, the Supreme Court denied Fourth Amendment protection to an individual after classi-

184. *Id.*

185. *Id.* at 244-47 (emphasis added).

186. *Id.* at 246.

187. *Id.* at 246-47.

188. *Id.* Various sections of the INA provide for obtaining a nonimmigrant visa. *See, e.g.*, INA § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B) (1994) (providing for temporary visitors); INA § 101(a)(15)(F), 8 U.S.C. § 1101(a)(15)(F) (providing for bona fide students); INA § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H) (providing for certain occupations); INA § 101(a)(15)(J), 8 U.S.C. § 1101(a)(15)(J) (providing for participants in United States Information Agency programs).

189. Aleinikoff, *Community Ties*, *supra* note 29, at 247.

190. *Id.* at 246-47.

191. *Id.* at 245-47.

192. *See* *Flemming v. Nestor*, 363 U.S. 603, 608, 616-21 (1960) (upholding statute which deprived deported persons of social security benefits). For a further discussion of *Flemming*, *see supra* note 114-15 and accompanying text.

fyng the respondent as having no ties or membership in the United States, despite physically awaiting criminal prosecution in the United States.¹⁹³ The *Verdugo-Urquidez* Court found that *Yick Wo*, *Wong Wing* and the aliens' rights cases which developed in their wake, "establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."¹⁹⁴ Following this rationale, the Court's decision in *Russian Volunteer Fleet v. United States*¹⁹⁵ can be justified.¹⁹⁶ In *Russian Volunteer Fleet*, the Court found that the appellant, while a nonresident of the United States, had property here and therefore, was entitled to protection.¹⁹⁷

In the immigration context, rights of aliens seeking entry also receive minimal attention. For example, the Court easily dismissed the challenge before proceeding to examine more closely the claims of the United States citizens involved in the suit in *Kleindienst v. Mandel*.¹⁹⁸ The Court noted that "[i]t is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise."¹⁹⁹ Even Justice Marshall, dissenting so as to recognize the rights of the United States citizen appellees, did not openly disagree with the holding of the majority regarding the rights of Mandel.²⁰⁰ Similarly, the majority and the dissent agreed that the Court had limited judicial responsibility with respect to Congress's power to regulate the admission of undocumented children living abroad in *Fiallo v. Bell*.²⁰¹ The key to all of these cases does not

193. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). For a further discussion of *Verdugo-Urquidez*, see *supra* notes 108-13 and accompanying text.

194. *Verdugo-Urquidez*, 494 U.S. at 271.

195. 282 U.S. 481 (1931).

196. *Id.* (holding that alien petitioner had Fifth Amendment right to just compensation for property taken by United States).

197. *Id.* at 489-92. The Court found that the Fifth Amendment duty of just compensation for the taking of property applied fully to the property of nonresident aliens. *Id.*

198. 408 U.S. 753, 762 (1972).

199. *Id.*; see also *Galvan v. Press*, 347 U.S. 522, 530-32 (1954) (describing congressional power with respect to admission of aliens as "very broad"); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (noting "[a]dmission of aliens to the United States is a privilege granted by the sovereign United States Government"); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (stating that "those who are excluded cannot assert the rights . . . in a land to which they do not belong as citizens or otherwise").

200. *Kleindienst*, 408 U.S. at 782 (Marshall, J., dissenting).

201. 430 U.S. 787, 792-95 (1977); *id.* at 805 (Marshall, J., dissenting). *Fiallo* involved the challenge of three sets of unwed natural fathers and their illegitimate offspring. *Id.* at 790.

seem to be whether the case involves a challenge to an immigration or a nonimmigration law, but whether the individual demonstrated an attachment to the national community or community ties.

VII. THE MUTUALITY APPROACH

Relying on either Martin's or Aleinikoff's theory, withholding constitutional rights from aliens similarly situated to Verdugo-Urquidez could be justified. An individual with neither a claim to membership nor any discernible ties to the United States is arguably not entitled to the protection of the Fourth Amendment or any other significant substantive or procedural constitutional rights.²⁰² Yet, despite the ostensible lack of connection to the United States, such an individual should still be entitled to protection.

A. *Gerald Neuman: The Mutuality Approach*

Gerald Neuman directly addresses the application of constitutional protections to aliens living outside the United States who have never resided or visited the United States.²⁰³ Interestingly, Martin and Neuman begin from the same premise: that any consideration of the Constitution's application should be in keeping with the social contract tradition.²⁰⁴ Yet, from this point, the theories of Martin and Neuman drastically diverge. Neuman recognizes that aliens abroad essentially have been invited to enter into a nation's social contract whenever they are subject to its law.²⁰⁵ Thus, the rationale of his mutuality approach is that "American constitutional rights and the obligation of obedience to American law go together . . . the rights and the obligations are coextensive."²⁰⁶

202. For a further discussion of Martin's and Aleinikoff's theories, see *supra* notes 121-33 and accompanying text.

203. Neuman, *Whose Constitution*, *supra* note 30, at 981.

204. See Martin, *supra* note 28, at 193-204 (discussing relationship between membership and due process); Neuman, *Whose Constitution*, *supra* note 30, at 976-77 (discussing social contract tradition). Neuman, reflecting on the social contract tradition, asserts:

The United States Constitution has long been understood as a fundamental law within the meaning of the social contract tradition — a design for government and limitations on government that protect the interests of the governed sufficiently to form part of a justification of their obligation of obedience to it. Establishing a legitimate government empowers that government to generate obligations that would not exist in anarchy or a state of nature.

Id. at 976-77.

205. Neuman, *Whose Constitution*, *supra* note 30, at 923-25 (discussing aliens and social contract).

206. *Id.* at 977. Neuman refers to the "mutuality approach" as the "municipal law approach." *Id.* In a forthcoming book, however, Neuman renames the theory,

Following this rationale, "when the United States asserts an alien's obligation to comply with American law, the alien is presumptively entitled *pro hac vice* to all constitutional rights."²⁰⁷ The mutuality approach once applied only to a nation's own territory as the territory defined the sphere in which a nation's municipal law operated.²⁰⁸ The United States has, however, increasingly subjected individuals abroad to U.S. law when either the United States as a country or its citizens are affected.²⁰⁹ Now that the United States is living in an era of extraterritorial legislation, the mutuality approach and the protections it offers should be extended beyond the nation's territory when situations arise in which either U.S. citizens or foreigners abroad are compelled to obey U.S. law.²¹⁰ Such an approach properly addresses how the Constitution can fairly, but in a limited scope, apply abroad. The mutuality approach clearly limits the extraterritorial application of the Constitution and its protections to the case of an individual abroad being subjected to U.S. law either voluntarily or involuntarily.²¹¹ In so doing, this approach is less encompassing than a universalist's approach.²¹² Most

calling it the "mutuality approach." GERALD NEUMAN, STRANGERS TO THE CONSTITUTION 97-100 (1996). The term "mutuality" used throughout this discussion refers to what Neuman previously referred to as the "municipal law approach." For a further discussion of the mutuality doctrine, see Scaperlanda, *Marshall's Jurisprudence*, *supra* note 25, at 69 n.83.

207. Neuman, *Whose Constitution*, *supra* note 30, at 978.

208. *Id.* at 977-78.

209. *Id.* at 978-81.

210. *Id.* at 977-78. The mutuality approach considers the need for "an appropriate evolutionary response to changes in the technology of transportation and communication, background international practices, and American self-assertion." *Id.* at 980.

211. *Id.* at 984 (discussing application of Constitution to individuals abroad). Neuman argues:

[C]onstitutional rights should not be interpreted as restricting all government action against all persons in all places, even when the government does not assert its sovereignty over the individual. This does not mean that such uses of force or wealth are immune from demands for justification, but simply that the standards of justification are not to be sought in the United States Constitution.

Id.

212. *See id.* at 983-84 (discussing application of universalist/mutuality approach). A universalist applying the mutuality approach consistent with the social contract theory would argue that the proper sphere is planet Earth and that U.S. federal statutes which demand universal obedience (reflected in prohibitions on international drug smuggling, counterfeiting) make all humans subjects of the American social contract. *Id.* at 982-83. Such an approach "would transcend the concerns of a single social contract and bind the government to the rules of a just world order." *Id.* at 983. Neuman finds that a universalist approach would dilute the protections the Constitution offers in the United States by applying it in a broader, global context, rather than the more limited, national context for which it was drafted. *Id.* at 984.

importantly, this approach is in keeping with the spirit of *Reid v. Covert*,²¹³ which recognizes correlation of rights and obligations for U.S. citizens abroad, and protects their constitutional rights when subjected to U.S. legislation.²¹⁴

B. A Mutualist's Criticism of the Membership Approach

Following the mutuality approach, the flaws of a traditional Hobbesian "members only" approach, as reflected in Chief Justice Rhenquist's *Verdugo-Urquidez* decision and Martin's membership theory, become apparent.²¹⁵ One of the inherent difficulties of the membership approach is the illegitimacy of a nation exercising extraterritorial power without entitling those subjected to the power to any individual rights. Such a Hobbesian argument "would enable the government to withhold constitutional rights, but only at the price of delegitimizing its claim to obedience."²¹⁶ A Hobbesian could try to justify this approach as a necessary means of survival.²¹⁷ Additionally, a Hobbesian might characterize this use of power as an exception to the restraints of the social contract theory.²¹⁸ Yet,

213. 354 U.S. 1 (1957).

214. *Id.* Neuman recognizes at the outset that *Reid* does not definitively apply to noncitizens, but argues that its holding should apply. Neuman, *Whose Constitution*, *supra* note 30, at 915-16, 986-87. Other commentators also question the extent of the Constitution's application abroad. See Martin, *supra* note 28, at 179 n.51 (discussing Supreme Court cases regarding application of Constitution abroad). Since *Reid*, commentators have discussed the lower courts' recognition of the constitutional rights of aliens abroad and one commentator, Louis Henkin, suggests that the Court has overruled previous dicta suggesting that "[t]he Constitution [can have] no operation in another country." Henkin, *Constitution as Compact and Conscience*, *supra* note 26, at 22-24; see also *United States v. Demanett*, 629 F.2d 862, 866 (3d Cir. 1980) (stating Fourth Amendment applies to alien aboard foreign flag vessel); *United States v. Toscanino*, 500 F.2d 267, 271, 275 (2d Cir. 1974) (holding U.S. officials' illegal conduct of torturing and forcibly bringing to United States accused, invalidated victim's trial in United States); *Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332 (S.D.N.Y. 1984) (refusing case for being political and nonjusticiable; involving citizens of Great Britain asserting constitutional rights on British soil), *aff'd*, 755 F.2d 34 (2d Cir. 1985); *United States v. Tiede*, 86 F.R.D. 227, 242-44 (U.S. Ct. Berlin 1979) (holding Constitution applies to criminal proceedings and alien has right to jury trial in U.S. court abroad).

215. See Neuman, *Whose Constitution*, *supra* note 30, at 912 (criticizing Justice Rhenquist's decision in *Verdugo-Urquidez*).

216. *Id.* at 984-85 (relying on THOMAS HOBBS, *LEVIATHAN* 272-73 (C.B. Macpherson ed., 1985)).

217. *Id.* at 984. A Hobbesian justifies this approach on the basis of a concern for national security. *Id.* As the nation-state operates in a state of nature, i.e., war, survival is the predominate concern. *Id.*

218. *Id.* at 985. A Hobbesian might argue that the impossibility of getting actual or tacit consent from an alien when a nation exercises its authority abroad removes a nation's use of power abroad from the social contract theory. *Id.* Yet, many would argue that this idea has no distinction from the social contract the-

to accept that aliens have no rights abroad would be to ignore the fact that if an individual is subjected to U.S. laws in some fashion, he or she has implicitly joined the national polity.²¹⁹ Moreover, freeing U.S. power abroad from constitutional restraint would prevent any limit to the severity of the laws exercised abroad.²²⁰

Extending the doctrine of mutuality beyond U.S. territory can perhaps be effectively countered as some valid arguments exist to limit the Constitution to within U.S. territory.²²¹ Recognizing these problems does not signify, however, that the Constitution has no application abroad.²²² In order to maintain the spirit of *Reid v. Covert* and legitimate the demand for compliance with U.S. law abroad, the United States must extend constitutional rights to *everyone* abroad who is subject to its laws.²²³ Such an approach would prevent the threat that a members only approach poses to the limiting of the rights of aliens here.²²⁴ As suggested by Gerald Neuman:

By requiring the government to afford constitutional rights whenever it asserts legal obligation against any human being, the [mutuality] approach respects the function that fundamental law serves in the social contract tradition. Its sense of jurisdictional limits has proven capable of evolution, and has lessened the temptation to retreat to forms of constitutionalism "for members only" that were

ory's inherent problem of it being impossible to show actual or tacit consent. *Id.* (citing DAVID P. GAUTHIER, *MORAL DEALING: CONTRACT, ETHICS AND REASON* 53-57 (1990) (discussing social contract theory); JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* 266-79 (1986) (same); JOHN RAWLS, *A THEORY OF JUSTICE* 12-13 (1971) (same); David Hume, *Of the Original Contract* (1777), reprinted in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 475 (Eugene F. Miller ed., 1985) (same)).

219. Neuman, *Whose Constitution*, *supra* note 30, at 972, 985-86.

220. *Id.* at 985-86.

221. *See id.* (discussing importance of extending Constitution beyond U.S. territory). The counter to an extension of the doctrine of mutuality beyond the United States is that the Constitution is "an artifact of an era of territorial nation-states" and that era continues. *Id.* at 979. Also, while Neuman recognizes that it is administratively difficult to apply the Constitution overseas, he argues that as the government's power abroad increases, practical difficulties should not prevent the Constitution's application overseas. *Id.*

222. *See id.* at 979-80 (discussing historical and contemporary arguments which can be used to define personal and geographic scope of Constitution); *see also* Aleinikoff, *Citizens, Aliens, Membership*, *supra* note 40, at 21 n.54 (recognizing question of whether aliens should be subject to U.S. power even if outside national boundaries).

223. Neuman, *Whose Constitution*, *supra* note 30, at 986-87.

224. *Id.* at 990. Neuman, in observing that aliens may be better off without a members only approach, points to Justice Rehnquist's suggestion in dicta that "newly arrived aliens might not be included among 'the people.'" *Id.* at 990 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271-74 (1990)).

wrong [with the passage of the Alien Act of 1798] and are wrong today.²²⁵

C. *Mutuality and the Courts*

Neuman is not alone in recognizing that it defies rationality to deny rights to aliens not residing in the United States.²²⁶ The Supreme Court is credited with a "long-held and recently reaffirmed commitment to apply the Constitution's due process and equal protection guarantees to all individuals within the reach of our sovereignty."²²⁷ It is also recognized that by virtue of our common humanity all individuals should be entitled to similar constitutional rights.²²⁸

Even Professor Martin, who accepts some disparate treatment of individuals depending upon alienage, respects all persons' common humanity and thereby reveals his own misgivings about treating individuals as nonpersons within the meaning of the

225. *Id.* at 990-91. The Alien Act of 1798 authorized the President upon mere suspicion to expel, upon ex parte order, any alien the President judged dangerous to the peace or safety or that the President believed was involved in any act of treason against the government. *Id.* at 927-39 (discussing generally Alien Act).

226. *See id.* (arguing for government to afford constitutional protection whenever it asserts its power against any human being); *see also* Jean v. Nelson, 472 U.S. 846, 874 (1985) (Marshall, J., dissenting) (arguing "the principle that unadmitted aliens have no constitutionally protected rights defies rationality"). Dissenting in *Jean*, Justice Marshall relied on the dissenting opinions of Justices Black, Frankfurter and Douglas in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), which argued that only a perverse interpretation of the Constitution would deny aliens the right to challenge the conditions of their confinement. *Jean*, 472 U.S. at 874 (Marshall, J., dissenting). Additionally, Justice Jackson in *Mezei* asked the rhetorical question whether "[b]ecause the respondent has no right of entry, does it follow that he has no rights at all?" *Mezei*, 345 U.S. at 226 (Jackson, J., dissenting). In *Mezei*, Jackson concluded that detention procedures must "meet the test of due process of law." *Id.* at 227 (Jackson, J., dissenting). For a further discussion of Marshall's dissent on this issue, see Scaperlanda, *Marshall's Jurisprudence*, *supra* note 25, at 62-67.

227. *Jean*, 472 U.S. at 874-75 (Marshall, J., dissenting).

228. *See id.* at 875 (Marshall, J., dissenting) (stating that principles of Fourteenth Amendment apply to "aliens, for '[w]hatever his status under the immigration laws, an alien is surely a "person" in any ordinary sense of that term.'" (quoting *Plyler v. Doe*, 457 U.S. 202, 210 (1982))); *id.* (Marshall, J., dissenting) (noting "[s]uch emphasis on universal coverage is not surprising, given that the Fourteenth Amendment was specifically intended to overrule a legal fiction similar to that undergirding *Knauff, Chew*, and *Mezei* — that freed slaves were not 'people of the United States'" (quoting *Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857))); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (noting that "[e]ven one whose presence in this country is unlawful, involuntary, or transitory, is entitled to Due Process protection"); *Fong Yue Ting v. United States*, 149 U.S. 698, 755 (1893) (Field, J., dissenting) (arguing that to deny Fourth Amendment protection to aliens would be "undisguised despotism and tyranny . . . not permissible under our Constitution").

Constitution.²²⁹ This acknowledgment illustrates that to make any distinction which accepts providing less rights to certain classifications of persons is to ignore their common humanity and ultimately leads to the treatment of individuals as nonpersons. At the extreme, denying rights to inadmissible aliens condones subjecting aliens to inhumane treatment at the hands of the government.²³⁰

Beyond recognizing the principles of mutuality and respect for our common humanity, while the "slate is not clean," case law does not prohibit extending constitutional rights to aliens outside our borders.²³¹ As Justice Brennan stated in *Baker v. Carr*,²³² "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."²³³ Justice Marshall suggested that only dicta in *Mezei* prevents undocumented aliens at the border from invoking the equal protection guarantees of the Due Process Clause of the Fifth Amendment.²³⁴ Justice Marshall found that "[t]his broad dicta, however, can withstand neither the weight of logic nor that of principle, and has never been incorporated into the fabric of our constitutional jurisprudence."²³⁵ The authority of the political branches over entry decisions is not unbridled.²³⁶ "Indeed, '[our] cases reflect acceptance of a limited judicial responsi-

229. See Martin, *supra* note 28, at 176, 216 (discussing traditional extension of Constitution to aliens and citizens alike).

230. See *Jean*, 472 U.S. at 874 (Marshall, J., dissenting) (stating "[o]nly the most perverse reading of the Constitution would deny detained aliens the right to bring constitutional challenges to the most basic conditions of their confinement"). As Justice Jackson stated in *Mezei*:

Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate [an alien's] exclusion to eject him bodily into the sea or to set him adrift in a rowboat. Would not such measure be condemned judicially as a deprivation of life without due process of law?

Mezei, 345 U.S. at 226-27 (Jackson, J., dissenting).

231. *Galvan v. Press*, 347 U.S. 522, 531 (1954) (entrusting procedural due process policies to Congress). This language in *Galvan* has often been relied on to justify severe immigration policies. See *Fiallo v. Bell*, 430 U.S. 787, 792-93 n.4 (1977) (relying on *Galvan* in declining to circumscribe Congress's power to exclude aliens); *Kleindienst v. Mandel*, 408 U.S. 753, 766-67 (1972) (relying on *Galvan* in deportation case). But see Martin, *supra* note 28, at 235 (calling for Supreme Court to "develop a due process jurisprudence that takes realistic account of aliens' differing ties to this national community").

232. 369 U.S. 186 (1962).

233. *Id.* at 211.

234. *Jean*, 472 U.S. at 868-69 (1985) (Marshall, J., dissenting); see also *Kwong Hai Chew v. Colding*, 344 U.S. 590, 601 (1953) (discussing resident alien's right to due process); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (noting "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned").

235. *Jean*, 472 U.S. at 868-69 (Marshall, J., dissenting).

236. *Id.* at 875 (Marshall, J., dissenting).

bility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens."²³⁷

Yet, entitling all aliens to equal protection and due process, regardless of their location to the U.S. border does not require ignoring the interests of the government.²³⁸ Consideration should be given to all of the interests at stake. Therefore, "[t]he proper constitutional inquiry must concern the scope of the equal protection and due process rights at stake, and not whether the Due Process Clause can be invoked at all."²³⁹

VIII. CREATING A CONSTITUTIONALLY HUMANE APPROACH

Having begun this discussion with a review of the limitations of the plenary power doctrine and the aliens' rights tradition, the alternative theories advocated by Martin, Aleinikoff and Neuman were reviewed in an attempt to find a tool for creating policies affecting aliens that will properly consider the interests of all the parties. The mutuality approach recognizes that all individuals, regardless of their ties to the United States, should be accorded rights if subjected to U.S. law. Yet, theories based on community ties and membership reveal the importance of these interests. Recognizing these principles, it is suggested that a mutuality approach, which incorporates proper consideration for membership, community ties and the alternative interests of all of the affected parties be followed.²⁴⁰

237. *Id.* at 875-76 (Marshall, J., dissenting) (citing *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977)). As Fifth Amendment protections are available to aliens, protecting such a person from the deprivation of their property, "[i]t simply is irrational to maintain that the Constitution protects an alien from deprivations of property, but not from deprivations of 'life' or 'liberty' . . . Such a distinction is rightfully foreign to the Fifth Amendment." *Id.* at 874 (Marshall, J., dissenting). Justice Marshall also points out that while Fifth Amendment protection is provided at criminal proceedings, it is absurd to require an alien to commit a crime before he or she is entitled to Fifth Amendment protection. *Id.* at 873 (Marshall, J., dissenting).

238. *See id.* at 882 (Marshall, J., dissenting) (discussing reasons for depriving one of liberty). Justice Marshall suggests that the deprivation of liberty should result only after a showing of reasons "closely related to immigration concerns." *Id.* For example, classifications may be constitutional if they are "employed in connection with decisions that lie at the heart of immigration policy." *Id.* at 881 (Marshall, J., dissenting) (citing *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976) (noting "due process requires that [an agency's] decisions to impose [a] deprivation of an important liberty . . . be justified by reasons which are properly the concern of that agency"))).

239. *Id.* at 876-77 (Marshall, J., dissenting).

240. To the extent that the consideration of community ties encompasses notions of membership, I would argue that a greater emphasis be placed on community ties.

Whether inside or outside the U.S. border, once an individual is subjected to U.S. laws, the mutuality approach would entitle him or her to constitutional rights. Such a constitutionally humane approach is consistent with traditional due process determinations and evaluates the interests at stake for both the individual and the government.²⁴¹ This type of uniform approach will yield fairer and more predictable results than attempts to forcibly characterize a legal challenge as one involving the plenary power doctrine or the aliens' rights tradition. Moreover, such an approach brings federal authority over aliens "within the fold of other constitutional powers."²⁴²

IX. CONSTITUTIONAL HUMANITY IN THE FAMILY UNIFICATION ARENA

A. *The Rights of the Undocumented Family Member*

By utilizing a constitutionally humane approach for an undocumented alien who wants to be united with his or her lawful family in the United States, it first can be acknowledged that the desire to unite with family brings an individual under U.S. immigration law regarding family unity.²⁴³ Having crossed the mutuality step of this approach, the discussion would then turn to considering the individual interests at stake and the countervailing governmental interests.

While there has been a refusal to weigh the interests of aliens against any governmental interests,²⁴⁴ courts have demonstrated

241. See *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (evaluating interests of government and individual). The value of additional procedures and the risk of erroneous deprivation of the interest must also be considered in the *Mathews* calculus. *Id.* at 335.

242. Aleinikoff, *Federal Regulation of Aliens*, *supra* note 26, at 867.

243. For a further discussion of the current immigration law, see *supra* note 11-13 and accompanying text.

244. See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (explaining that Congress's power to expel or exclude aliens is fundamental sovereign attribute and largely immune from judicial control); *Kleindienst v. Mandel*, 408 U.S. 753, 765-70 (1972) (recognizing Congress's exclusive sovereign power to exclude aliens); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 210 (1953) (stating that once alien is admitted and begins to develop ties that go with permanent residence, his or her constitutional status changes accordingly entitling him or her to fair hearing when threatened with deportation), *modified in part by Landon v. Plasencia*, 459 U.S. 21 (1982); see also *Matsumoto-Power*, *supra* note 59, at 82 (recognizing development of balancing test in *Landon v. Plasencia*, 459 U.S. 21 (1982), pitting alien's ties to United States against national interest).

their competence in balancing competing interests.²⁴⁵ The *Plasencia* Court recognized that a lawful permanent resident's home, work and family are his or her ties to the U.S. community and the Court indicated that these interests must be weighed against the government's interests.²⁴⁶ Having outlined a balancing test in *Plasencia*, the Court implied that if courts are competent to conduct balancing tests for lawful permanent residents, they are competent to do so for undocumented aliens who are challenging restrictions to their asserted right to family unity.²⁴⁷

In conducting such a test, courts can compare possible infringements upon the rights of an undocumented alien who attempts to unite with lawful permanent resident family members, with the restrictions placed on an individual related to a U.S. citizen. By virtue of their "common humanity," an argument can be made that an individual related to a lawful permanent resident should be afforded protection equal to that given an individual related to a U.S. citizen.²⁴⁸

An alien's wait to be united with his or her petitioning family member is, however, determined by the petitioning family member's immigration status.²⁴⁹ Thus, while an alien who is the child of a lawful permanent resident has no less of an interest in being united with his or her parent than the child of a U.S. citizen, these

245. See *Matsumoto-Power*, *supra* note 59, at 84 (discussing Court's balancing of interests); see also *Plasencia*, 459 U.S. at 21 (considering various interests). For a further discussion of *Plasencia*, see *supra* notes 96-101 and accompanying text.

246. *Plasencia*, 459 U.S. at 32.

247. See *Matsumoto-Power*, *supra* note 59, at 84 (arguing Court's ability to balance interests). *Matsumoto-Power* argues specifically for the marital rights of aliens married to United States citizens or lawful permanent residents. *Id.* The work of *Matsumoto-Power* significantly advanced my thinking on this issue.

248. See *Fong Yue Ting v. United States*, 149 U.S. 698, 754 (1893) (Field, J., dissenting) (stating aliens living in United States by permission of government are entitled to same guarantee of protection of their person and property as native-born citizens). Regarding the issue of treating citizen's and resident alien's family reunification interests differently, Professor John Guendelsberger, now a BIA member, proposed that "immediate relatives" be defined to include permanent residents' spouses and children under the age of 18. Guendelsberger, *Family Unification*, *supra* note 14, at 87-91.

In comparing American and German systems of immigration, Motomura notes that Germany's system does not differentiate in waiting times between reunification interests of an alien related to a citizen and those of an alien related to a lawful permanent resident. Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511, 517 (1995) [hereinafter *Family and Immigration*]; see also Guendelsberger, *Family Unification*, *supra* note 14 (comparing French and American family reunification policies).

249. For a discussion of family unification provisions, see *supra* note 11-12 and accompanying text.

two children are subjected to different waiting periods.²⁵⁰ Other relatives are also treated unequally depending upon whether they are related to a U.S. citizen or a lawful resident. For example, an alien who is the sibling of a lawful permanent resident has no right to residency based upon this relationship, whereas the sibling of a U.S. citizen is eligible for residency through this relationship, albeit, after a lengthy wait.²⁵¹

In addition to considering the disparate treatment of individuals related to lawful permanent residents in comparison with those related to U.S. citizens, the courts can consider the damage to the right of family unity which results from being required to wait any length of time to unite with one's family.²⁵² As recognized by the Court in *Plasencia*, the right to rejoin immediate family is "a right that ranks high among the interests of the individual."²⁵³

The courts also may address the infringement on the right to unity with extended family. Only the nuclear family—parents, spouses, siblings and children—has any right to immigrate to the

250. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (1994) (describing eligibility of child of U.S. citizen); INA § 203(a)(2), 8 U.S.C. § 1153(a)(2) (describing eligibility of spouse and children of lawful permanent resident). The child of a U.S. citizen is not subject to any worldwide levels or numerical limitation and thereby is immediately eligible for residency. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). Yet, the child of a lawful permanent resident is within the "second preference" visa allocation category and is currently subject to almost a four year wait. INA § 203(a)(2), 8 U.S.C. § 1151(a)(2); U.S. State Dep't, *Immigrant Visa Preference Numbers for Dec. 1996*, available at 73 INTERPRETER RELEASES 1306 app. II (1996) [hereinafter *Immigrant Visa Preference Numbers*]. Creating even more disparity, the parent of an adult U.S. citizen is immediately eligible for residency, while the parent of an adult lawful permanent resident has no right to residency based on this relation. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

251. INA § 203(a)(4), 8 U.S.C. § 1153(a)(4). The current wait for residency through a sibling who is a U.S. citizen is approximately 10 years. *Immigrant Visa Preference Numbers*, *supra* note 250, at 338.

252. See INA § 203(a)(1)-(5), 8 U.S.C. § 1153(a)(1)-(5) (discussing waiting periods). The following individuals are subject to visa limitations and waiting periods: unmarried children, 21 years of age and over, of a U.S. citizen are given "first preference" and currently have approximately an eight month wait, INA § 203(a)(1), 8 U.S.C. § 1153(a)(1); spouses and unmarried children under the age of 21 of lawful permanent residents are given "second preference" and suffer approximately a four year wait, INA § 203(a)(2)(A), 8 U.S.C. § 1153(a)(2)(A); unmarried children 21 and over of lawful permanent residents, categorized as "second preference-B," suffer almost a six year wait, INA § 203(a)(3), 8 U.S.C. § 1153(a)(2)(B); married children of U.S. citizens are given "third preference" and suffer over a three year wait, INA § 203(a)(3), 8 U.S.C. § 1153(a)(3); and siblings of U.S. citizens are given "fourth preference" and suffer over a 10 year wait, INA § 203(a)(4), 8 U.S.C. § 1153(a)(4). *Immigrant Visa Preference Numbers*, *supra* note 250, at 338.

253. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

United States.²⁵⁴ No provisions exist to allow unity with such extended family members as grandparents, cousins, aunts and uncles. The rights enumerated in *Moore v. City of East Cleveland* have quietly joined the ranks of constitutional rights disregarded in U.S. immigration law.²⁵⁵

With marriage being one of the strongest ties to the national community,²⁵⁶ the courts should fully evaluate how U.S. immigration law restricts this interest and the interest in family unity.²⁵⁷ By

254. While the spouse and unmarried children under 21 of both a U.S. citizen and a U.S. resident are entitled to immigrate, only U.S. citizen's married children, parents and siblings are entitled to immigrate. For a discussion of how certain individuals are subject to worldwide limits on family immigration, see *supra* note 250-52 and accompanying text.

255. See *Moore*, 431 U.S. at 504 (enumerating right of family unity). While *Moore* implicitly recognized the fundamental right of unity within an immediate family, the critical right protected in *Moore* was unification within an extended family. See *id.* at 504-06. The Court stated that: "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family [Rather,] the tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." *Id.* Also in *Moore*, Justice Brennan stated that:

In today's America, the 'nuclear family' is the pattern so often found in much of white suburbia (citation omitted). The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living [T]he prominence of other than nuclear families among ethnic and racial minority groups, including our black citizens, surely demonstrates that the 'extended family' pattern remains a vital tenet of our society.

Id. 508-10 (Brennan, J., concurring) (emphasis added); see also Guendelsberger, *Family Unification*, *supra* note 14, at 51-53 (discussing defining family by kinship or through functional approach).

In discussing the German system, Motomura observes that the German system considers "extraordinary hardship" in granting residence permits to family members other than spouses and unmarried children. Motomura, *Family and Immigration*, *supra* note 248, at 528-30. In contrast, U.S. courts have refused to recognize extended family relationships in awarding residency. See *INS v. Hector*, 479 U.S. 85, 88-91 (1986) (finding question of "extreme hardship" cannot include hardship to alien's citizen nieces in suspension of deportation claim pursuant to INA § 244).

256. See *Plasencia*, 459 U.S. at 34 (discussing interest in marriage). In *Plasencia*, the Court recognized that a permanent resident's interest in rejoining her husband and children in the United States was "a right that ranks high among the interests of the individual." *Id.*

The Court has also addressed the fundamental rights of the family. See *Zablocki v. Redhail*, 434 U.S. 374 (1978) (discussing fundamental right to marry); *Loving v. Virginia*, 388 U.S. 1 (1967) (discussing fundamental right of individuals of different races to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (discussing fundamental right of marital privacy and privacy in one's associations with others). For a further discussion of the fundamental rights of the family, see *supra* notes 17-23 and accompanying text.

257. See Kathryn L. Anderson, *Adams v. Howerton: Avoiding Constitutional Challenges to Immigration Policies Through Judicial Deference*, 13 GOLDEN GATE U. L. REV. 318, 324-27 (1983) (discussing and criticizing protection accorded marital bond between alien and U.S. citizen); *Matsumoto-Power*, *supra* note 59, at 77-80

asserting the rights of marriage and marital privacy, courts can consider the unequal treatment of the spouse of a lawful permanent resident as compared to the spouse of a U.S. citizen. While currently it requires almost four years for an alien spouse of a lawful permanent resident to immigrate lawfully to the United States through a petition filed by the spouse,²⁵⁸ an alien married to a U.S. citizen is immediately eligible for residency.²⁵⁹

B. *The Rights of the United States Citizen or Resident Family Member*

In following the constitutionally humane approach, not only are the rights of the alien recognized, but the rights of the petitioning family member living lawfully in the United States also can be protected. In cases involving challenges to immigration laws by undocumented aliens, the rights of the U.S. citizen's or lawful permanent resident's family members traditionally have been ignored.²⁶⁰ Although courts in immigration cases routinely recognize the importance of considering an alien's marriage to a U.S. citizen,²⁶¹ they do not give any serious consideration to the U.S. citizen's fundamental right to marry and to marital privacy.²⁶²

(same); Note, *The Constitutionality of the I.N.S. Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238, 1243-49 (1986) (same).

258. INA § 203(a)(2), 8 U.S.C. § 1153(a)(2); *Immigration Visa Preference Numbers*, *supra* note 250, at 1306 app. II.

259. 8 U.S.C. § 1151(b)(2)(A)(i); *Immigration Visa Preference Numbers*, *supra* note 250, at 1306 app. II.

260. See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (stating Congress's power to expel or exclude aliens is fundamental sovereign attribute and largely immune from judicial control); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (recognizing Congress's power to expel or exclude aliens is largely immune from judiciary), *modified in part by*, *Landon v. Plasencia*, 459 U.S. 21 (1982); *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (stating alien's entry into United States is "privilege" and not right); see also *Matsumoto-Power*, *supra* note 59, at 76 (stating that application of immigration laws to alien spouses of U.S. citizens typically abridgement of U.S. citizen's fundamental rights).

261. See *Isreal v. INS*, 785 F.2d 738, 741 n.4 (9th Cir. 1986) (recognizing considerable weight afforded to alien's marriage to U.S. citizen); *Matter of Ibrahim*, 18 I. & N. Dec. 55 (BIA 1981) (recognizing marriage to citizen is special weighty equity accorded most favorable status by Congress); *Matter of Cavazos*, 17 I. & N. Dec. 215 (BIA 1980) (holding factors of alien being married to citizen and mother of citizen child outweighed adverse factor of entering United States with preconceived intent to remain); *Matter of Garcia*, 16 I. & N. Dec. 653 (BIA 1975) (recognizing marriage to U.S. citizen sufficient equity); *Matsumoto-Power*, *supra* note 59, at 76 (recognizing that marriage to U.S. citizen is major factor to consider).

262. See *Smith v. INS*, 684 F. Supp. 1113, 1116-17 (D. Mass. 1988) (stating U.S. citizen's marital rights are subservient to exercise of congressional power in area of immigration and naturalization). Commentators, such as *Matsumoto-Power* and *Guendelsberger*, suggest that courts may not recognize the restrictions upon the fundamental right of marriage created by United States immigration law, because the procedures do not infringe upon a fundamental right as they place "no obsta-

A majority of the Supreme Court upheld sections of the INA excluding the relationship between an illegitimate child and his or her natural father (as opposed to his or her natural mother) from the definition of the parent-child relationship.²⁶³ Likewise, the Court rejected an equal protection challenge to the difference between the waiting periods imposed on an alien married to a U.S. citizen versus one married to a permanent resident.²⁶⁴ Despite the Court's indication that limited judicial responsibility exists with respect to Congress's power to regulate the admission and exclusion of aliens,²⁶⁵ decisions like those in *Kliendienst v. Mandel* and *Fiallo v. Bell* reflect a willingness to allow Congress's assertion of sovereign interest to trump the fundamental constitutional interests of U.S. citizens upon a showing of a "facially legitimate and bona fide reason."²⁶⁶

cles-absolute or otherwise" upon the exercise of the right of marriage. See Guendelsberger, *Family Unification*, *supra* note 14, at 7 (discussing natural right of family unification); Matsumoto-Power, *supra* note 59, at 75-76 (discussing right of marriage).

In the past, the Court when analyzing fundamental rights has examined whether the right is infringed upon by the challenged activity. See *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978) (holding strict scrutiny given only to immigration regulations having "a direct and substantial impact on the right to marry"); *Califano v. Jobst*, 434 U.S. 47, 52-54 (1977) (upholding provisions of Social Security Act that arguably burdened claimant's constitutional right to marry by terminating financial benefits upon marrying); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (discussing when fundamental rights are infringed upon and holding Connecticut could constitutionally refuse to give Medicaid financing for nontherapeutic abortions as statute placed no obstacles in pregnant woman's path to exercising the right to have abortion). Guendelsberger accuses the courts deciding immigration cases of paying "glib attention" to the rights protected in *Moore*, which prevent an individual from having to move from one suburb to another suburb. Guendelsberger, *Family Unification*, *supra* note 14, at 65-66, nn.473-74. By contrast, immigration cases suggest it would be acceptable for a person to be required to move to another country in order to exercise their familial rights. *Id.*

263. *Fiallo*, 430 U.S. at 792-800 (holding sections 101(b)(1)(D) and 101(b)(2) of INA of 1952 constitutional).

264. *Noel v. Chapman*, 508 F.2d 1023 (2d Cir. 1975).

265. See *Fiallo*, 430 U.S. at 793 n.5 (discussing Congress's power to expel or exclude aliens as fundamental sovereign attribute and largely immune from judicial control).

266. See *id.* at 792 (stating Congress's power to expel or exclude aliens is fundamental sovereign attribute and largely immune from judicial control); *Kliendienst v. Mandel*, 408 U.S. 753, 762-67 (1972) (recognizing Congress's exclusive sovereign power to exclude aliens). Critics of such an approach argue that "[t]he underlying assumption in the United States seems to be that constitutional rights apply only after anterior questions of membership (i.e., questions of immigration) are resolved." Motomura, *Family and Immigration*, *supra* note 248, at 517; see also Scaperlanda, *Marshall's Jurisprudence*, *supra* note 25, at 62-64 (discussing sovereign power trumping fundamental rights).

Justice Marshall, dissenting in both *Mandel* and *Fiallo*, recognized the absurdity of allowing the government to restrict fundamental rights by the mere showing of a “facially legitimate and bona fide reason,” when such rights are normally limited only by a “compelling governmental interest.”²⁶⁷ Discussing the distinctions among citizens through the parent-child definition, Justice Marshall found that “[w]hen Congress grants a fundamental right to all but an invidiously selected class of citizens, and it is abundantly clear that such discrimination would be intolerable in any context but immigration, it is our duty to strike the legislation down.”²⁶⁸

Congress should not be given unquestioning deference when the rights of U.S. citizens are at stake.²⁶⁹ As recognized by Martin

267. *Fiallo*, 430 U.S. at 807-09, 816 (Marshall, J., dissenting); *Mandel*, 408 U.S. at 775 (Marshall, J., dissenting). The majority in *Mandel* held that a U.S. citizen's First Amendment rights can be restricted by the Attorney General's assertion of a “facially legitimate and bona fide reason.” *Mandel*, 408 U.S. at 761-70. As Justice Marshall acknowledged, however, “[m]erely ‘legitimate’ governmental interests cannot override constitutional rights.” *Id.* at 777 (Marshall, J., dissenting). Properly considering the First Amendment rights of the appellees, Justice Marshall did not see a “compelling governmental interest” that would override their First Amendment rights and argued:

At least when the rights of Americans are involved, there is no basis for concluding that the power to exclude aliens is absolute. When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our ‘delicate and difficult task’ to determine whether the resulting restriction on freedom can be tolerated. . . . [A]ll governmental power—even the war power, the power to maintain national security, or the power to conduct foreign affairs—is limited by the Bill of Rights. When individual freedoms of Americans are at stake, we do not blindly defer to broad claims of the Legislative Branch or Executive Branch, but rather we consider those claims in light of individual freedoms.

Id. at 782-83 (Marshall, J., dissenting) (citation omitted); see also Scaperlanda, *Marshall's Jurisprudence*, *supra* note 25, at 58-61 (discussing Justice Marshall's approach to fundamental rights for aliens).

It has been suggested, however, that the majority's decision in *Mandel* may not controvert attempts to have the rights of U.S. citizens or lawful permanent family members considered in challenges to U.S. family unification laws. *Id.* at 59. *Mandel* can be viewed as a controversial and distinguishable decision, as it does not involve the rights of an alien with direct ties to the United States or its citizens. See *Mandel*, 408 U.S. at 756-60 (reviewing claim of alien who had no substantial ties to United States and had previously violated conditions of his temporary visa). The group of citizens involved in *Mandel* can be characterized as “ill-defined.” Matsumoto-Power, *supra* note 59, at 85.

268. *Fiallo*, 430 U.S. at 816 (Marshall, J., dissenting).

269. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 549 (1950) (Frankfurter, J., dissenting) (arguing against unquestioning deference); Matsumoto-Power, *supra* note 59, at 77 (same). Justice Frankfurter in *Knauff* chastised such an approach by the Court stating:

It should not be assumed that Congress gave with a bountiful hand but allowed its bounty arbitrarily to be taken away An alien's opportunity of entry into the United States is of course a privilege which Congress

and Aleinikoff, as U.S. citizens are the most protected members of our society, their constitutional rights are deserving of the utmost protection, regardless of the government's assertion of the plenary power doctrine.²⁷⁰ When the rights of U.S. citizens are "implicated," absolute deference to the political branches and its sovereign interest becomes "inapplicable."²⁷¹ As the fundamental rights of lawful permanent residents have traditionally been recognized as deserving nearly, if not the exact, protection provided to U.S. citizens, then, just like in the case of a citizen, when these rights are at stake absolute deference to the political branches is inappropriate.²⁷²

When the fundamental rights of U.S. citizens or residents are at stake, and the absolute defense of controlling sovereign interest is removed, the recent case of *Adarand Constructors, Inc. v. Peña*²⁷³ lends support to subjecting the federal government to the same level of scrutiny as the states in creating alienage classifications.²⁷⁴ The Court in *Adarand* indicated its willingness to hold the federal

may grant or withhold. But the crux of the problem before us is whether Congress having extended the privilege for the benefit not of the alien but of her American husband, left wide open the opportunity to ruthlessly take away what it gave.

Knauff, 338 U.S. at 549.

270. Aleinikoff, *Citizens, Aliens, Membership*, *supra* note 40, at 20-21; Martin, *supra* note 28, at 208.

271. *Mandel*, 408 U.S. at 783 (Marshall, J., dissenting). Marshall distinguishes this case from all of the cases invoking the plenary power doctrine as "all of them involved only the rights of the excluded aliens themselves." *Id.* at 782 (Marshall, J., dissenting); see also *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (evaluating claim of excluded alien); *Chinese Exclusion Case*, 130 U.S. 581 (1889) (reviewing claim of excluded alien). Later, Justice Marshall in his dissent in *Fiallo* argued that any attempt to limit citizens' fundamental rights must comport with the Fifth Amendment principles of due process and equal protection. *Fiallo*, 430 U.S. at 800 (Marshall, J., dissenting). Despite the fact that *Fiallo* challenged an immigration law, Justice Marshall's dissent was consistent with the Court's previous holdings requiring strict scrutiny of legislation affecting "suspect" classifications. *Id.*

272. See Aleinikoff, *Citizens, Aliens, Membership*, *supra* note 40, at 26 (suggesting that lawful permanent residents may have membership rights similar, if not equal to citizens). Aleinikoff questions the distinctive rights of citizens versus residents in the current family immigration system. *Id.*; see also Guendelsberger, *Family Unification*, *supra* note 14, at 82-83 (recognizing many inequities which have existed in treatment of alien spouse and children from early immigration laws to present day).

273. 115 S. Ct. 2097 (1995).

274. See *id.* (holding that question of whether government's use of subcontractor compensation clause should be subject to strict scrutiny of Court); Kurfis, *supra* note 86, at 134 (providing history of strict scrutiny of alienage classifications and its development from lower standards). For a further discussion of the fact that state and federal governments are being held to different standards of scrutiny regarding alienage classifications, see *supra* notes 82-87 and accompanying text.

government to the same standard of strict scrutiny as the states and local governments when racial classifications are involved.²⁷⁵ Because the protection of racial classifications stems from the protection of alienage classifications,²⁷⁶ it follows that it is equally "unthinkable" for the federal government to be held to a lesser standard than the states in legislating alienage classifications.²⁷⁷

Adarand is only one block which can be used to build fair immigration policies relating to family unity. *Adarand* strongly illustrates that, despite the Court's historic unwillingness to protect individual rights restricted by the federal government, the Court is prepared to take into consideration the rights of all individuals affected. Courts could properly address a challenge to immigration policies by acknowledging that when the fundamental rights of U.S. citizens or lawful permanent residents are at stake their constitutional rights cannot be ignored.

C. *Balancing the Interests*

Following this approach does not suggest that there should be no restriction on immigration or that the government's interest in

275. *Adarand*, 115 S. Ct. at 2097.

276. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (discussing applicability of Fourteenth Amendment to aliens). Reliance on the Fourteenth Amendment's equal protection clause in challenges to racial classifications developed in reliance on cases like *Yick Wo*. For example, while *Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled by *Brown v. Board of Educ.*, 347 U.S. 483 (1954), upheld racial segregation on the railroads, it did so in distinguishing itself from *Yick Wo*, finding that the classifications in *Yick Wo* constituted "arbitrary and unjust discrimination." RICHARD KLUGER, *SIMPLE JUSTICE* 79 (1975) (citing *Plessy*, 163 U.S. at 550). The Court in *Plessy* by contrast, found the Louisiana statute for racial segregation on the railroad to be a reasonable regulation which could be upheld. *Plessy*, 163 U.S. at 550. In criticizing the *Plessy* decision, Kluger finds *Yick Wo's* test for discrimination "antedated and yet exactly anticipated the *Plessy* doctrine and was available to doom it." KLUGER, *supra*, at 712-13. *Yick Wo* determined discrimination existed if law was administered "with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances." *Yick Wo*, 118 U.S. at 373-74.

Also demonstrating the similarity of racial and alienage classifications, the Margold report, one of the early foundations upon which arguments were based to attack and eliminate racially separate and unequal schooling, relied upon *Yick Wo*. KLUGER, *supra*, at 135. Kluger also notes that the NAACP lawyer's statement to the Supreme Court to take jurisdiction in *Briggs v. Elliott*, 98 F. Supp. 529 (E.D.S.C. 1951), vacated 342 U.S. 350 (1952), also contained recognition that the Court had invalidated racial discrimination in other areas and included mention of *Yick Wo's* invalidation of discrimination in the right to engage in gainful occupation. KLUGER, *supra*, at 537-38; see *Briggs*, 98 F. Supp. at 529 (addressing racially segregated schools).

277. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding state and federal government are properly held to same standard of scrutiny in creating racially segregated schools).

protecting its sovereign power should be ignored.²⁷⁸ In conducting a proper balancing test, courts must balance these interests against the rights of the individual. Arguments regarding the government's interest in sovereignty, opening the floodgates to immigration, creating an unworkable system and the possibility of chain migration can all be entertained by the courts.²⁷⁹ Thus, Congress may still be able to justify the need for some family unity limitation and perhaps the need for a visa preference scheme and allotment based upon relations to either a U.S. citizen or resident. As the U.S. citizen arguably possesses stronger ties and membership, perhaps he or she should be entitled to immigration policy preferences.²⁸⁰

It should be noted further that following a constitutionally humane approach does not lend strong support to extending the definition of family within immigration policies beyond the relationships already constitutionally protected. For example, without constitutional protection for homosexual relationships or po-

278. See *Adarand*, 115 S. Ct. at 2098 (recognizing need to weigh some interests); *Kleindiest v. Mandel*, 408 U.S. 753, 783 (1972) (Marshall, J., dissenting) (recognizing need to balance interests). The Court in *Adarand* noted that “[p]olitical judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, . . . but the standard of justifications will remain constant.” *Adarand*, 115 S. Ct. at 2112 (relying on *Korematsu v. United States*, 323 U.S. 214 (1944)). In *Mandel*, Justice Marshall acknowledged that if the government could demonstrate a “compelling interest,” the American appellees would not have a successful challenge. *Mandel*, 408 U.S. at 783 (Marshall, J., dissenting). Justice Marshall offered as examples of compelling interest “[a]ctual threats to the national security, public health needs, and genuine requirements of law enforcement.” *Id.* (Marshall, J., dissenting).

279. See *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). Acknowledging the government's interest in immigration matters, the *Plasencia* Court instructed the lower court on remand to “weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature.” *Id.* (relying on *Fiallo v. Bell*, 430 U.S. 787, 792-93 (1977); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950); *Japanese Immigration Case*, 189 U.S. 86, 97 (1903)).

Yet, Aleinikoff acknowledges, “the nation would hardly lose its ability to control the borders or to prevent subversion if modern constitutional conceptualizations of due process, equal protection, and fundamental rights were deemed to constrain exercises of the immigration power.” Aleinikoff, *Citizens, Aliens, Membership*, *supra* note 40, at 20. In weighing these interests, courts may also consider the somewhat counterintuitive argument that promoting the unification of a family through immigration laws may work to prevent the economic problems which force individuals to become dependent on the state. See *Moore v. City of East Cleveland*, 431 U.S. 494, 509 (1977) (Brennan, J., concurring) (discussing family unification and economic problems).

280. For a discussion of community ties and membership, see *supra* notes 118-33 and accompanying text.

lygamy, the constitutionally humane approach is limited.²⁸¹ Consequently, a criticism of this approach may be that it does not demonstrate respect for relationships the judiciary is not ready to protect or for the beliefs and customs of other cultures.²⁸² While this approach is constitutionally bound, it can develop with the legal interpretation of fundamental rights. If, for example, *Romer v. Evans*²⁸³ or *Baehr v. Miike*²⁸⁴ were to become a springboard for homosexual marital rights, an argument could be made for the family unification rights in immigration law of a homosexual married couple.²⁸⁵ Following a constitutionally humane approach, any attempt to limit these rights through immigration policies would become subjected to a "compelling interest" standard.

X. CONCLUSION

As noted, applying a constitutionally humane approach does not guarantee a final victory for the individual.²⁸⁶ The constitutionally humane approach, like the plenary power approach, considers the government's interest in sovereignty.²⁸⁷ Under the constitutionally humane approach, however, the government's interest will not predictably become the overriding concern. The interest of the persons affected by the law will also be fully and fairly evaluated. Following a constitutionally humane approach, the fundamental right of the alien and his or her lawful family will begin to be properly assessed along with the rights of the government. Hopefully then, this discussion will have served its limited purpose of initiating an open dialogue regarding the proper assessment of rights.²⁸⁸

281. See generally Anderson, *supra* note 257, at 310-11 (recognizing fact that Refugee Act of 1980 only extends protection to individuals falling within statute's narrow definition of refugee).

282. But see Guendelsberger, *Family Unification*, *supra* note 14, at 54-57 (discussing respect France's immigration system has for other cultures).

283. 116 S. Ct. 1620 (1996).

284. 65 U.S.L.W. 2399 (1st Cir. Dec. 3, 1996) (No. 91-1394)

285. *Gays' Right to Marry Upheld*, NEWSDAY, Dec. 4, 1996, at A5; *The Message from Hawaii*, N.Y. TIMES, Dec. 6, 1996, at A38.

286. See Aleinikoff, *Community Ties*, *supra* note 29, at 245 (discussing community ties). Even in acknowledging the ties of different groups of individuals to the United States and in balancing the rights of individuals against the remaining *Mathews v. Eldridge*, 424 U.S. 319 (1972) factors, reasonable people might ultimately differ as to the degree the government versus the individual is affected. *Id.* For a further discussion of the *Eldridge* factors, see *supra* note 132 and accompanying text.

287. For a further discussion of the notion of sovereignty, see *supra* notes 38-42 and accompanying text.

288. See *Jean v. Nelson*, 472 U.S. 846, 880 (1985) (Marshall, J., dissenting) (noting this may not be appropriate place to set "the precise contours" of U.S.

In so doing, the inhumane results which have been reached in allowing an unbridled deference to the plenary power can be prevented.²⁸⁹ Such a constitutionally humane approach may lead towards the treatment of aliens by federal authorities from the Constitution's fundamental perspective of protecting the rights of the individual.

immigration law's family unification policy); *see also* Aleinikoff, *Citizens, Aliens, Membership*, *supra* note 40, at 26-27 (discussing Court's careful hedging in its statements regarding theory of membership); Scaperlanda, *Marshall's Jurisprudence*, *supra* note 25, at 67 (discussing Justice Marshall's failure to provide formula for determining relationship between government's plenary immigration power and rights of aliens).

289. *See* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (stating individual excluded from United States by Court's strict adherence to will of Congress and refusal to exercise discretion in permitting him to stay); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (noting Court's reliance on immigration laws passed in wartime and observing that Congress did not intend to permit members of armed services to marry and bring into United States aliens that Congress had specifically excluded); *see also* *Jean*, 472 U.S. at 875 (Marshall, J., dissenting) (discussing bridled nature of immigration power); Martin, *supra* note 28, at 192 (commenting on mistakes of *Knauff* and *Mezei*).

