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# Who is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution

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Who is My Neighbor?:  
An Essay on  
Immigrants, Welfare Reform, and the Constitution

MICHAEL SCAPERLANDA\*

*When an alien resides with you in your land, do not molest him.  
You shall treat the alien who resides with you no differently  
than the native born among you . . . I, the LORD, am your God.<sup>1</sup>*

I. INTRODUCTION

In this essay, I will use the recent Welfare Reform legislation to juxtapose two different readings of the Constitution. The first, and the more obvious reading, treats the Constitution as binding law. This reading of the Constitution is most closely associated with the practice of judicial review, which comes down to us from Chief Justice Marshall's opinion in *Marbury v. Madison*.<sup>2</sup> Pursuant to this reading, the judiciary authoritatively decides the question of whether the Constitution disallows or forbids a certain course of action chosen by the political branches of government.

The second reading, while not necessarily rejecting the Court's place in creating judicially enforceable constitutional norms, emphasizes the important way that the people of this country view the Constitution as a prism through which we see ourselves as a constituted people. This alternative reading, which I suggest has roots that are at least as deep as *Marbury v. Madison*,<sup>3</sup> asks the important question of what does

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1. Leviticus 19:33-34 (New American Bible).

2. 5 U.S. (1 Cranch) 137 (1803).

3. See *infra* Part IV.

our Constitution tell us about who We are as a People? What are our common values? What is our common vision? What specific actions will make for "a more perfect Union" or "establish Justice" or "promote the general Welfare?" What does it mean to pronounce in the Declaration that we are all created equal? At this level, the Constitution is not read as binding law but as a document calling us to focus on what it means to be a member of this constitutional community. This reading of the Constitution will strike many people as odd, even alien, to our constitutional traditions because our training as lawyers—and as citizens—conditions us to see only the judiciary-centered model of constitutional interpretation.

Quite apart from what the United States Supreme Court may say about the alienage classifications and discrimination found in the Welfare Reform Act, I argue here that the Act conflicts with a Judeo-Christian vision of our constitutional community.

## II. WELFARE REFORM

Following in the footsteps of California with its Proposition 187,<sup>4</sup> Congress was busy last year debating and passing major legislation affecting our immigrant population. One major piece of legislation, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996<sup>5</sup> ("Welfare Reform Act"), overhauled the welfare system and shifted more responsibility for welfare policy and implementation to the states. Significantly, the Welfare Reform Act's major cost savings

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4. In his contribution to this symposium, Professor Spiro draws a direct link between judicial interference with Proposition 187 and congressional action on immigration in 1996. See Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997). Several commentators have written on various aspects of Proposition 187, its cultural impact, and its legal status. See, e.g., Evangeline G. Abriel, *Rethinking Preemption for Purposes of Aliens and Public Benefits*, 42 UCLA L. REV. 1597 (1995); Lolita Buckner Innis, *California's Proposition 187: Does it Mean What it Says? Does it Say What it Means? A Textual and Constitutional Analysis*, 10 GEO. IMMIGR. L.J. 577 (1996); Kevin Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995); Kevin Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509 (1995); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425 (1995); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights and Alienage Classifications*, 35 VA. J. INT'L L. 217 (1994); Peter Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121 (1994).

5. Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 22, 1996) [hereinafter "Welfare Reform Act"].

come from provisions that bar most legal aliens from eligibility for many welfare benefits. Prior to this act, noncitizens authorized to reside in the United States, particularly lawful permanent resident aliens, benefited generally from the federal safety net.<sup>6</sup> In this section, I outline the major provisions of the Welfare Reform Act as they pertain to noncitizens.

The Welfare Reform Act purportedly restructures a failed welfare system, which "traps recipients in a cycle of dependency," and "undermines the values of work and family" that provide the base for "America's communities," and "fails the Nation's children."<sup>7</sup> Its goal is to "save families by promoting work, discouraging illegitimacy, and strengthening child support enforcement. It converts welfare into a helping hand, rather than a handout."<sup>8</sup> Whether or not the Welfare Reform Act has or will succeed in reaching these lofty goals is beyond the scope of this Article. We can, however, note initially that different goals must have motivated the immigrant stripping provisions; withholding the helping hand will separate and potentially destroy families who will now be ineligible to reunite because of their low income level.<sup>9</sup>

The immigrant stripping provisions achieve an end antithetical to one vision of America, a vision that generously welcomes "the tired, the poor, the huddled masses."<sup>10</sup> This vision has always lived in uneasy tension with our more nativist side, and it is this second vision that has emerged victorious in the Welfare Reform Act.<sup>11</sup> But what

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6. See STEPHEN LEGOMSKY, *IMMIGRATION LAW AND POLICY* 1011 (2d ed. 1997). See also Richard Boswell, *Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. REV. 1475, 1487-92 (1995) (canvassing welfare programs and alien eligibility).

7. H.R. REP. NO. 104-651, 104th Cong., 2d Sess. at 3 (1996), reprinted in 1996 U.S.C.C.A.N. 2183, 2184.

8. *Id.*

9. See *id.* at 2187 ("Under the congressional plan, families that sponsor immigrant relatives will be legally required to provide for the economic well-being of the members they bring to the United States.").

10. See EMMA LAZARUS, *The New Colossus*, in EMMA LAZARUS: SELECTIONS FROM HER POETRY AND PROSE 40, 41 (1944).

11. "United States immigration policy has had a long and illustrious past, marked by a continual thrust and parry of competing societal interests. At certain times and to certain peoples, the arms of lady liberty are held wide open . . . . At other times and with other peoples, the door to our borders is slammed shut." Michael Scaperlanda, *The Paradox of a Title: Discrimination within the Anti-Discrimination Provisions of the Immigration and Control Act of 1986*, 1988 WIS. L. REV. 1043, 1044; see also Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927 (1996) ("We share a deeply rooted tradition of being a 'nation of immigrants' . . . . Despite this tradition of openness, a skeptical, restrictionist view of immigration has equally deep historical roots.").

exactly are the policy justifications behind this act? In its findings, Congress states that:

- (1) Self-sufficiency has been a basic principle of the United States immigration policy since the country's earliest immigration statutes.
- (2) It continues to be the immigration policy of the United States that—
  - (A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and
  - (B) the availability of public benefits not constitute an incentive for immigration to the United States.<sup>12</sup>

Although Congress found that it had a "compelling government interest" in removing "incentive for *illegal* immigration provided by the availability of public benefits," it failed to make any finding that the availability of public benefits provided a pull factor drawing *legal* immigrants to the United States.<sup>13</sup> Additionally, Congress' stated policy with respect to legal immigrants does not differ markedly from its stated policy for citizens. In both cases, Congress seeks to encourage the "fundamental American values" of "work, family, personal responsibility, and self-sufficiency."<sup>14</sup> Congress, however, never adequately explains why this can be done by modifying public assistance for citizens but requires stripping most legal aliens of this safety net. Perhaps Congress' actual reason for enacting the immigrant stripping provisions had nothing to do with immigration policy. Perhaps Congress' primary if not sole motivation was economic; it needed to achieve real savings from welfare reform, and immigrants made an easy and politically viable target.<sup>15</sup> In Part V of this essay, I argue that drawing the line

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12. Welfare Reform Act § 400.

13. See *id.* (emphasis added).

14. H.R. REP. NO. 104-651, at 4 (1996), reprinted in 1996 U.S.C.C.A.N. 2183, 2185.

15. "The underlying motive for restricting legal aliens from federal and state benefit programs was economic. Eliminating coverage for aliens will save an estimated \$23.7 billion over the next six years, which represents approximately 44 percent of the total \$53.4 billion savings in the legislation." Charles Wheeler, *The New Alien Restrictions on Public Benefits: The Full Impact Remains Uncertain*, 73 INTERPRETER RELEASES 1245, 1248 (Sept. 23, 1996) (citing Correspondence from Congressional Budget Office to Sen. Pete Domenici, Chair of the Senate Budget Committee (Aug. 1, 1996)). See also Bishop John H. Richard, *Welfare Reform: Are We Abandoning the Most Abandoned?*, LIGUORIAN, Apr. 1997, at 5, 6 ("the final bill was more about reducing funding and reallocating roles than it was about rebuilding lives and help-

between citizens and most legal aliens for purposes of welfare eligibility fundamentally violates our sense of who we are as a nation.

Charles Wheeler, a senior attorney with the Catholic Legal Immigration Network, has written an excellent overview of the new immigrant stripping provisions.<sup>16</sup> I will only summarize his analysis here. Under the Welfare Reform Act, noncitizens generally will be ineligible to participate in the federal Food Stamp program and the Supplemental Security Income program, which provides cash assistance to the aged, blind, and disabled poor.<sup>17</sup> Additionally, the federal government has given states authority to deny legal aliens access to three state administered federal benefits programs: Temporary Assistance for Needy Families (successor to AFDC); Social Service Block Grant funds under Title XX of the Social Security Act; and non-emergency medicaid.<sup>18</sup>

Exempted from disqualification are three groups of noncitizens: (1) refugees, asylees, and aliens granted withholding of deportation during the first five years after receiving the immigration benefit; (2) permanent resident aliens if they have worked forty qualifying quarters as defined by the social security act; and (3) an alien and his family if the alien lawfully resides in the United States and is on active duty in the military or has received an honorable discharge.<sup>19</sup>

Other "federal public benefits" will be available to "qualified" noncitizens who were in the country on August 22, 1996, the date of the enactment.<sup>20</sup> "Qualified" aliens arriving after that date, however, will be statutorily excluded from all "federal means-tested" programs for a period of five years after entry.<sup>21</sup> After the five-year period, these aliens will still most likely be excluded because their sponsor's income will be deemed to the alien for purposes of determining program eligibility.<sup>22</sup> Since "qualified" alien only includes permanent residents, refugees, asylees, those receiving withholding of deportation, parolees who have been in the United States for at least a year, and conditional entrants,<sup>23</sup> "many aliens who are lawfully in the U.S. and

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ing families overcome poverty").

16. See Wheeler, *supra* note 15. Although I will not repeatedly cite this work here, I have drawn heavily from his excellent analysis.

17. See Welfare Reform Act § 402(a)(1) & (a)(3).

18. See *id.* § 402(b).

19. See *id.* § 402(a)(2) & (b)(2).

20. See *id.* § 401 *et seq.*

21. See *id.* § 403(a).

22. See *id.* § 421(a) & (b).

23. See *id.* § 402(b)(2).

working, such as applicants for asylum or adjustment of status, or aliens granted temporary protected status ("TPS"), will be treated under such programs as if they were undocumented."<sup>24</sup>

The immigrant stripping provisions will have their "harshest impact . . . on children, the elderly, and others who are unable to naturalize."<sup>25</sup> In its rush to cut immigrants from public assistance, Congress "provided no allowances for those who have disabling accidents or illnesses after coming to the U.S., or for those who have lived here for decades."<sup>26</sup> Relying on Congressional Budget Office data, Wheeler says that "approximately 500,000 legal immigrants" could "lose SSI benefits and almost one million" may "lose food stamps."<sup>27</sup>

Before turning to the constitutional challenges—legal and cultural—to the Welfare Reform Act, I should note that the governors, many of whom pushed hard for welfare reform, have received the cuts in immigrant welfare benefits with little enthusiasm. At the conclusion of the National Governor's Association meeting in February of 1997, the governors issued a policy statement asking Congress and the Executive "to ensure that the immigration system and its requirements are fair to both citizens and noncitizens and meet the needs of aged and disabled legal immigrants who cannot naturalize and whose benefits may be affected" by the Welfare Reform Act.<sup>28</sup> Although Congress is unlikely to reopen the welfare reform debate as a whole, there may be an opportunity to revisit at least the harshest provisions pertaining to legal immigrants, either with a semi-permanent solution or on a year-to-year basis through the appropriations process.

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24. Wheeler, *supra* note 15, at 1247. The Welfare Reform Act contains many other provisions, but we have canvassed enough of the Act to make the constitutional claims that I will set out in Section V of this essay.

25. *Id.* at 1248.

26. *Id.*

27. *Id.* ("About half of those losing SSI benefits will have been in the U.S. for more than ten years."). Between 600,000 and 1.3 million new immigrants will be affected by the five-year waiting period on Medicaid, and up to 320,000 noncitizens could lose Temporary Assistance for Needy Families (TANF) benefits. *See id.*

28. Robert Jackson, *Governors Back Aid for Immigrants at Conference*, L.A. TIMES, Feb. 5, 1997, at A10; *see also* Christi Harlan, *Governors Exit Meeting Without Welfare Answer*, AUSTIN AM.-STATESMAN, Feb. 5, 1997, at A4 (Majority Leader Dick Army "was sympathetic to the position taken by [Governor George] Bush and other governors that certain elderly and disabled legal immigrants will be unduly punished by their disqualification for welfare benefits.").



### III. CONSTITUTIONAL INTERPRETATION FROM THE COURT: PLENARY POWER

Suppose that an immigrant, who is denied benefits under the Welfare Reform Act solely because of her noncitizen status, sues alleging that the Welfare Reform Act constitutes unconstitutional discrimination based on an impermissible alienage classification. *Mathews v. Diaz*<sup>29</sup> appears to preclude success in this litigation endeavor. The question in *Mathews* was “whether Congress may condition an alien’s eligibility for participation in a federal medical insurance program on continuous residence in the United States for a five-year period and admission for permanent residence.”<sup>30</sup> In a 9-0 decision, the United States Supreme Court concluded that the discriminatory eligibility requirement was constitutional.

In *Mathews*, the Court first discussed whether the Constitution allowed the federal government to distinguish between citizens and noncitizens in formulating welfare policy and then discussed whether Congress could constitutionally discriminate “*within* the class of aliens.”<sup>31</sup> In answering the first question, the Court stated:

[T]he fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for *all aliens*. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien’s tie grows stronger, so does the strength of his claim to an equal share of that munificence.<sup>32</sup>

As to the second question, the Court stated that since it “is unquestionably reasonable for Congress to make an alien’s eligibility depend on both the character and duration of his residence,” and “[s]ince neither requirement is wholly irrational,” what “this case essentially involves is

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29. 426 U.S. 67 (1976).

30. *Id.* at 69.

31. *Id.* at 80 (emphasis in original).

32. *Id.* (emphasis in original).

nothing more than a claim that it would have been more reasonable for Congress to select somewhat different requirements of the same kind."<sup>33</sup> The Court concluded that "appellees . . . have, in effect, merely invited us to substitute our judgment for that of Congress in deciding which aliens shall be eligible . . . on the same conditions as citizens. We decline the invitation."<sup>34</sup>

In one sense the result in *Mathews* was surprising; five years earlier, the Court, in *Graham v. Richardson*,<sup>35</sup> held that a state could not constitutionally deny noncitizens welfare benefits solely because of alienage status. In *Graham*, the Court concluded "that classifications based on alienage, like those based on nationality or race are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."<sup>36</sup> Applying strict scrutiny, the Court struck down Pennsylvania and Arizona's welfare laws, which had imposed durational residency requirements on all noncitizens. *Graham's* equal protection analysis would seem to be applicable in the *Mathews* case. After all, if aliens are a discrete and insular minority, the logic of the Court's equal protection jurisprudence suggests that noncitizens are in need of judicial protection from potential invidious legislation, whether adopted by state or federal authorities.<sup>37</sup>

To understand the divergent results, we must step back from the respective holdings in *Graham* and *Mathews* to view the two lines of cases that support these very different modes of analysis. In the late nineteenth century, the Court decided two cases, *Yick Wo v. Hopkins*<sup>38</sup>

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33. *Id.* at 83.

34. *Id.* at 84.

35. 403 U.S. 365 (1971).

36. *Id.* at 372.

37. See Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 722 (1996) ("[t]he characteristics of the noncitizen that led the Court to apply the 'discrete and insular' label do not abate merely because" the federal government is involved). See also Michael Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1062 (1979) ("if it is unjust for a state to treat a person as inferior on the basis of a morally irrelevant trait, there is no conceivable basis for concluding that it is any less unjust for the federal government to do the same"); Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 294 ("if alienage is a suspect classification when made on the basis of state legislation, should it not remain suspect when it is used by the federal government?"). Cf. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2118 (1995) ("equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment").

38. 118 U.S. 356 (1886).

and the *Chinese Exclusion Case*,<sup>39</sup> which formed the foundations for alienage jurisprudence's conflicting personhood and membership traditions. These traditions have been written about extensively elsewhere;<sup>40</sup> therefore, I will provide only a brief summary here.

The plenary power doctrine, which has "permitted, and perhaps encouraged, paranoia, xenophobia, and racism,"<sup>41</sup> provides membership's core. Built upon the *Chinese Exclusion Case*, which gave judicial imprimatur to a racist exclusion policy, the plenary power doctrine has stood for the proposition that "[o]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."<sup>42</sup> Therefore, "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."<sup>43</sup> The plenary power doctrine, rooted in nineteenth century conceptions of absolute sovereignty,<sup>44</sup> today stands for the proposition that members of the political community have a right superior to any claimed by a noncitizen to fashion rules governing the admission, exclusion, and expulsion of noncitizens.<sup>45</sup> Over the decades, the

39. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). For a brief introduction into Chae Chan Ping's unfortunate brush with the fluid nature of our government's foreign policy and its immigration consequences, see Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 976 n.42.

40. See, e.g., Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); Scaperlanda, *supra* note 37; Scaperlanda, *Polishing*, *supra* note 39; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

41. Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 859 (1987).

42. *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

43. *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976). Despite word of its demise, see e.g., Schuck, *supra* note 40, at 4, the plenary power doctrine still provides the baseline of our alienage jurisprudence. See Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995). For recent cases applying some form of the plenary power doctrine, see, e.g., *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Miller v. Christopher*, 96 F.3d 1467, 1470 (D.C. Cir. 1996); *Salazar-Haro v. INS*, 95 F.3d 309, 311 (3d Cir. 1996); *Duldulao v. INS*, 90 F.3d 396, 399 (9th Cir. 1996); *Legal Aid Soc'y of Haw. v. Legal Serv. Corp.*, 961 F. Supp. 1402, (D. Haw. 1997).

44. See Scaperlanda, *supra* note 39.

45. See Scaperlanda, *supra* note 37, at 761-62 ("When the government, whether state or federal, articulates a plausible argument that its classification involves fundamental questions of membership in the national or state community, the Court abandons its lofty ideals of protect-

political branches of the federal government, free from meaningful judicial oversight, have deported long term resident aliens,<sup>46</sup> excluded aliens on ideological grounds,<sup>47</sup> excluded other aliens despite their close family ties to the United States solely on the grounds of illegitimacy,<sup>48</sup> and excluded noncitizens, including a returning long time permanent resident, upon secret evidence without a hearing,<sup>49</sup> even where the non-citizen faced indefinite and potentially lifelong detention on Ellis Island.<sup>50</sup>

Contrasting sharply with plenary power and the membership cases, the personhood tradition takes seriously constitutional claims made by noncitizens, recognizing that noncitizens are "persons" entitled to constitutional protection.<sup>51</sup> In *Yick Wo*, the Court held that it was unconstitutional for the City of San Francisco to discriminate against Chinese immigrants in granting or denying permits to operate laundries.<sup>52</sup> The personhood cases rest on the proposition that sharing "our common humanity, [noncitizens] are protected by all the guaranties of the Constitu-

ing the dispossessed. It subordinates the noncitizen's constitutional interests as a protected person to society's interest in making important membership decisions.").

46. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

47. See *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

48. See *Fiallo v. Bell*, 430 U.S. 787 (1977).

49. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). For a detailed history of these two cases, see 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 (1995). On modern use of modified secret hearings in the immigration context, see Michael Scaperlanda, *Are We That Far Gone?: Due Process and Secret Deportation Proceedings*, 7 STAN. L. & POL'Y REV. 23 (1996).

50. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). The possibility of indefinite detention has plagued the United States during the last 15 years as a result of the Cuban influx from Mariel, Cuba during the early 1980s. Most of these Cubans were allowed to enter the United States, but a significant number were considered undesirable and excluded. Since they couldn't be returned to Cuba, these were held indefinitely in United States jails. See Richard A. Boswell, *Rethinking Exclusion—the Rights of Cuban Refugees Facing Indefinite Detention in the United States*, 17 VAND. J. TRANSNAT'L L. 925 (1984); Paul Wickham Schmidt, *Detention of Aliens*, 24 SAN DIEGO L. REV. 305 (1987).

51. "[T]he *Yick Wo* tradition accords treatment to aliens that is largely indistinguishable from that afforded to citizens." Bosniak, *supra* note 40, at 1060.

52. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The Court stated:

The rights of the petitioners . . . are not less, because they are aliens and subjects of the Emperor of China . . . . The Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . . . [Its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . .

*Id.* at 368-69.

tion."<sup>53</sup> Over the past century, the Court has used the personhood tradition to strike down state and territorial laws that restricted noncitizen employment in the work force generally,<sup>54</sup> prohibited alien ownership of land,<sup>55</sup> denied commercial fishing licenses to noncitizens who were ineligible for citizenship,<sup>56</sup> and denied employment opportunities in a state's civil service,<sup>57</sup> in law,<sup>58</sup> in civil engineering,<sup>59</sup> and as a notary public.<sup>60</sup>

Since the issues in *Mathews* did not specifically deal with the core immigration issues of admission, exclusion, or expulsion, the Court could have distinguished the membership cases and adopted the personhood tradition.<sup>61</sup> Although the residency rules at issue in *Mathews* produced "some harsh and apparently arbitrary consequences,"<sup>62</sup> the Court rejected the personhood tradition and followed a century of precedent by deferring to the judgment of Congress on matters relating to the status of immigrants: "[f]or reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government."<sup>63</sup> Quoting *Harisiades*, the Court stated that:

[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely

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53. *Fong Yue Ting v. United States*, 149 U.S. 698, 754 (1893) (Field, J., dissenting).

54. *See, e.g., Truax v. Raich*, 239 U.S. 33 (1915).

55. *See, e.g., Oyama v. California*, 332 U.S. 633 (1948).

56. *See, e.g., Tarao Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

57. *See, e.g., Sugarman v. Dougall*, 413 U.S. 634 (1973).

58. *See, e.g., In re Griffiths*, 413 U.S. 717 (1973).

59. *See, e.g., Examining Bd. v. Flores de Otero*, 426 U.S. 572 (1976).

60. *See, e.g., Bernal v. Fainter*, 467 U.S. 216 (1984).

61. In *Carlson v. Landon*, 342 U.S. 524, 534 (1952), the Court said that "[w]hen legally admitted, [noncitizens] come at the Nation's invitation, as visitors or permanent residents, to share with us the opportunities and satisfactions of our land. As such visitors and foreign nationals they are entitled in their persons and effects to the protection of our laws." *See also Harisiades v. Shaughnessy*, 342 U.S. 580, 586 n.9 (1952) ("the Constitution assures [the noncitizen] a large measure of equal economic opportunity; he may invoke the writ of habeas corpus to protect his personal liberty; in criminal proceedings against him he must be accorded the protections of the Fifth and Sixth Amendments; and, unless an enemy alien, his property cannot be taken without just compensation").

62. *Mathews v. Diaz*, 426 U.S. 67, 83 (1976).

63. *Id.* at 81.

immune from judicial inquiry or interference.<sup>64</sup>

The Court opted for the membership tradition in *Mathews* even in the absence of core immigration issues because "[m]embership issues—plenary power's long arm—pass through the border, extending to almost all federal issues uniquely affecting aliens and to all state issues that arguably affect the formation of the political community."<sup>65</sup> It distinguished *Graham*, recognizing "that the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization."<sup>66</sup> In other words, while membership concerns guided the *Mathews*' Court, those concerns were noticeably absent in *Graham*.

Given the *Mathews* decision and its supporting cast of 100-plus years of the plenary power doctrine, the courts will likely find the Welfare Reform Act constitutional, although there will be many attempts to distinguish or overturn the *Mathews* result as it relates to the Welfare Reform Act.<sup>67</sup> My interests and the focus of this essay lie elsewhere. To me, the interesting question is not whether judicially enforceable constitutional norms prohibit Congress from discriminating

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64. *Id.* at 81 n.17.

65. Scaperlanda, *supra* note 37, at 762; see also Bosniak, *supra* note 40, at 1110 ("while *Graham* and *Mathews* part company on the equal protection question, they do so in large part for compatible reasons. Both cases assume that federal discrimination on the basis of alienage is a form of regulation of immigration—or regulation of the nation's membership sphere."); Scaperlanda, *supra* note 39, at 996 ("Outside the immigration context, in the context of economic opportunity, the Court has spurned the *Yick Wo* tradition in favor of allowing the executive branch and Congress broad powers to discriminate against lawfully resident aliens."); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1095 (1995) ("the border between the plenary power doctrine and the aliens' rights tradition is in fact porous in both directions . . . [T]he plenary power doctrine infects decisions outside the realm of immigration law, and works to undermine the aliens' right tradition").

66. *Mathews*, 426 U.S. at 86-87. In addition to the Equal Protection rationale for striking down the state's discriminatory welfare provision, the Court also said that the state law at issue unconstitutionally "encroach[ed] upon exclusive federal power" in the field of immigration and naturalization. See *Graham v. Richardson*, 213 U.S. 365, 380 (1971). For recent discussion of preemption, see Symposium, *Immigration Law and the New Century: The Developing Regime*, 35 VA. J. INT'L L. 1 (1994).

67. See Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 617-623 (1994) (arguing that Congress lacks the power to authorize the states to engage in alienage discrimination); Wheeler, *supra* note 15, at 1253-55 (offering several potential constitutional challenges); Lisa Levinthal, Note, *Welfare Reform and the Limits on the Rights of Legal Residents*, 10 GEO. IMMIGR. L.J. 467, 482 (1996) (arguing that the courts should apply heightened scrutiny in reviewing welfare reform as it applies to permanent resident aliens).

against certain aliens in parceling out welfare benefits. To me, the interesting question is whether such discrimination comports with our, or rather my, vision of who we are as a constituted people. If others stand with me in my vision of our constitutional community, then we can attempt to mount a political campaign petitioning Congress to remove the discriminatory aspects of the recent welfare legislation.<sup>68</sup> Even if I stand alone or as an insignificant minority in the current debate, my argument, to the extent it is heard, registers a strong dissent to the current political order.<sup>69</sup>

Before I continue to develop my argument that the Welfare Reform Act, by discriminating against permanent resident aliens, violates a Judeo-Christian and specifically Catholic Christian perspective of our constitutional heritage, I need to momentarily digress to address whether my non-judiciary centered constitutional inquiry is legitimate. The late Chief Justice Charles Evans Hughes once remarked, "We are under a Constitution, but the Constitution is what the judges say it is."<sup>70</sup> More recently, the Court, in speaking of "the character of a Nation of people who aspire to live according to the rule of law," concluded that "[t]heir belief in themselves as such a people is not readily separable from *their* understanding of the Court invested with the authority to decide *their* constitutional cases and speak before all others for *their* constitutional ideals."<sup>71</sup> Are we so incompetent that we need the Court,

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68. Kevin Johnson has written two articles providing valuable insight into the need for innovative political strategies for immigrants, while relying less on litigation. See Kevin R. Johnson, *Civil Rights and Immigration Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42 (1995); Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139.

69. Often, it takes years or generations for ideas to seep into the mainstream of American conscience. Susan B. Anthony and Elizabeth Cady Stanton were lonely voices ahead of their time who envisioned a constitutional community where women would share equal membership. Ideas advanced by Frederick Douglass and Sojourner Truth weren't given a full hearing for a century. Ideas, especially ones that receive hostile reception in a given generation, cannot germinate in the fertile soil of the public square unless nourished by dialogue and debate.

70. Speech before the Elmira Chamber of Commerce (May 3, 1907), in ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES (1906-1916) 185 (2d ed. 1916).

71. *Planned Parenthood v. Casey*, 505 U.S. 833, 868 (1992) (emphasis added). Note the Court's use of the word "their" rather than "our." The use of the word "our" would have expressed that all of us, members of this constitutional community, including the Court, are engaged in a common enterprise. Instead, the word choice employed by the Court—"their"—suggests that "We the Court" act as the law giver, imparting law (and possibly wisdom?) on the subjects, "they the people," who strive to obey the Court's revealed law. See Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 675

as a "bevy of Platonic Guardians,"<sup>72</sup> to infuse meaning into our life as a nation? And, whether or not we need these judicial high priests to breathe life into our constitutional community, does the evidence suggest that the Court has served us well by imparting a constitutional vision of which we can be proud? History's judgment has not yet passed on the Court's work of the past thirty or forty years, but history has not been kind to much of the Court's work during our first 175 years. Ask yourself, do *Dred Scott v. Sandford*,<sup>73</sup> the *Civil Rights Cases*,<sup>74</sup> *Plessy v. Ferguson*,<sup>75</sup> *Lochner v. New York*,<sup>76</sup> *Korematsu v. United States*,<sup>77</sup> *Knauff v. Shaughnessy*,<sup>78</sup> and *Shaughnessy v. United States ex rel. Mezei*<sup>79</sup> advance the American promise as expressed in the Declaration of Independence and the Preamble to the Constitution? No! These cases are not the stuff of which constitutional ideals are made, at least not our ideals. I doubt that any high school civics books would champion these cases as providing a foundation for what it means to be a citizen of the United States and a member of this constitutional community.

I reject any notion that the Court can "speak before all others for [my] constitutional ideals." Instead, I join Professor Michael Stokes Paulsen and others who would diminish the interpretative authority of that "elite cabal of high priests" we refer to as the Supreme Court and "recover the Constitution as a document to be understood, interpreted,

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(1995).

72. LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958) ("For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs"). See also JAMES BRADLEY THAYER, *JOHN MARSHALL* 106-07 (1901) ("the exercise of [judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors . . . . [Judicial review] deaden[s] [our] sense of moral responsibility").

73. 60 U.S. (19 How.) 393 (1857) (holding that even free blacks were not citizens and that Congress could not outlaw slavery in the territories).

74. 109 U.S. 3 (1883) (overturning the Civil Rights Act of 1875, which had outlawed racial discrimination in places of public accommodation).

75. 163 U.S. 537 (1896) (constitutionalizing the doctrine of separate but equal).

76. 198 U.S. 45 (1905) (constitutionalizing the doctrines of laissez faire economics and social Darwinism).

77. 323 U.S. 214 (1944) (sanctioning the internment of Japanese Americans).

78. 338 U.S. 537 (1950).

79. 345 U.S. 206 (1953).



and applied by WE THE PEOPLE.”<sup>80</sup> In the next section, I briefly outline the rich history of constitutional interpretation outside the courts, and at times, against the courts.

#### IV. CONSTITUTIONAL INTERPRETATION OUTSIDE THE COURT: AN HISTORICAL SUMMARY

Constitutional interpretation outside the courts predates *Marbury v. Madison*. After Congress passed the Alien & Sedition Acts of 1798,<sup>81</sup> the Kentucky and Virginia legislatures, by resolutions drafted by Thomas Jefferson and James Madison, respectively, attacked the Acts on constitutional grounds.<sup>82</sup> The Kentucky Resolutions of 1798 stated that when the federal government exercises powers not delegated that “its acts are unauthorized, void, and of no force.”<sup>83</sup> Kentucky, along with Virginia, generated a great deal of controversy by asserting an independent right to determine whether the federal government had trans-

80. Michael Stokes Paulsen, *supra* note 71, at 657-76. In this witty and provocative article, Paulsen uses an episode from the original *Star Trek* series to make the point that the Constitution should be restored to “We the people.” Paulsen suggests five paths for recovering our constitutional traditions: 1) intelligible, straightforward judicial opinion writing; 2) abandoning the doctrine of *stare decisis* in constitutional cases; 3) recognizing political branch review of Supreme Court decisions; 4) reconsidering the states’ role in constitutional interpretation; and 5) allowing juries to independently interpret the Constitution. See also, CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 350 (1993) (“the identification of constitutional law with the decisions of the Supreme Court is a damaging and ahistorical mistake. This identification . . . is inconsistent with the democratic goals of the American constitutional tradition. Those goals call for nonjudicial actors—Congress, the President, state officials, ordinary citizens—to engage in deliberation about the meaning of the Constitution’s broad guarantees”); Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights From the Virginia and Kentucky Resolutions*, 11 CONST. COMM. 315, 315 (1994) (“Judges are not the only constitutional decisionmakers in the United States. It is necessary, therefore, to move beyond widespread preoccupation with the Constitution’s *judicial* interpretation and enforcement.”). Cf. Scaperlanda, *supra* note 37, at 773 (“constitutional dialogue within the realm of politics provides the most viable vehicle for establishing immigration and alienage policies that balance the legitimate interest of the national community (and its local constituent parts) with the human dignity and value of the noncitizen person”).

81. Alien and Sedition Acts of 1798, ch. 58, § 1, 1 Stat. 570 (1798).

82. The 1798 and 1799 Kentucky Resolutions, as adopted, can be found in 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 540-45 (Jonathan Elliot ed., 1836) [hereinafter “ELLIOT’S DEBATES”]. For the Virginia Resolutions, see ELLIOT’S DEBATES, *supra*, at 528-29. And Madison’s Report on the Virginia Resolutions can be found in ELLIOT’S DEBATES, *supra*, at 546-80. For a thorough and insightful look at the modern interpretative lessons to be drawn from the Virginia and Kentucky Resolutions, see Moore, *supra* note 80.

83. Kentucky Resolutions, in ELLIOT’S DEBATES, *supra* note 82, at 540.

scended its limited authority:

[T]hat to this compact each state acceded as a state, and is an integral party; that this government, created by this compact, was not made the exclusive or final judge of the extent of the powers delegated to itself, since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all cases of compact among parties having no common judge, *each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.*<sup>84</sup>

Most of Kentucky and Virginia's sibling states disagreed, arguing that questions of constitutional interpretation "are exclusively vested by the people in the judicial courts of the United States."<sup>85</sup> Although disavowing any interpretative authority, these states believed "unreservedly [] that those acts are constitutional, and, in the present critical situation of our country, highly expedient."<sup>86</sup>

Kentucky and Virginia, Jefferson and Madison viewed the Alien & Sedition Acts as unconstitutional on numerous grounds. First, they viewed both acts as *ultra vires*, acts outside Congress' delegated powers. Second, the Sedition Act, which criminalized seditious libel, violated the constitutionally guaranteed right of free speech. Third, the Alien Friends Act, which provided for executive orders of deportation, constituted an unconstitutional delegation of lawmaking and adjudicative power to the executive, violated constitutional principles of separation of powers, violated due process as guaranteed by the Fifth Amendment, and denied affected aliens the criminal trial rights guaranteed by the Sixth Amendment.<sup>87</sup>

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84. *Id.* See also The Virginia Resolutions, in ELLIOT'S DEBATES, *supra*, at 528 ("in case of a deliberate, palpable, and dangerous exercise of others powers, not granted by the said compact, the states, who are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties, appertaining to them").

85. *E.g.*, Answer of the Commonwealth of Massachusetts, in ELLIOT'S DEBATES, *supra* note 82, at 533.

86. *E.g.*, Answer of the State of New Hampshire, in ELLIOT'S DEBATES, *supra* note 82, at 539.

87. See Kentucky Resolutions, in ELLIOT'S DEBATES, *supra* note 82, at 541-42. Although the Court has for a century considered deportation a civil action, see, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893), Madison considered deportation a criminal punishment:

[I]t can never be admitted that the removal of aliens, authorized by the act, is to be considered, not as punishment for an offence, but as a measure of precaution and prevention. If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness,—a country where he may

Could Kentucky and Virginia, acting alone or in unison with a majority of the states, declare an act of Congress void in a legally binding way at least within their respective jurisdictions? Or were these Resolutions a form of constitutional dialogue, prodding the federal government and the other member states to reflect in a meaningful way upon the values expressed in the words of the Constitution? While the Resolutions themselves are somewhat ambiguous on this point, Kentucky and Virginia appear to be appealing to other state legislatures, seeking repeal of the offending legislation in Congress, and loudly registering their protest.<sup>88</sup> Even though Madison and Jefferson lacked the authority to bind the country to their constitutional viewpoints, "the constitutional disputes" they generated through the Virginia and Kentucky Resolutions "are signs of constitutional vitality,"<sup>89</sup> providing an early indication of the interpretative possibilities awaiting an invigorated citizenry.

Jefferson and Madison's work as constitutional interpreters was not confined to the Alien & Sedition Acts, which expired in 1800 and 1801. Several years prior to the Virginia and Kentucky Resolutions, Representative Madison and Secretary of State Jefferson, along with Secretary of Treasury Alexander Hamilton and others, analyzed the constitutionality of the proposed national bank, interpreting the Constitution to determine whether Congress had the constitutional power to create a bank. Since the power to create a bank was not among the expressly enumerated powers of Congress, was it beyond Congress' power to create a bank? Or, did Congress have the implied power or the express power through the "necessary and proper" clause to incorporate a bank as a *means* to some enumerated *end*—i.e., laying and

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have property . . . ; where he enjoys, under the laws, a greater share of the blessings of personal security, and personal liberty, that he can elsewhere hope for; and where he may have nearly completed his probationary title to citizenship; . . . if a banishment of this sort be not punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.

Madison's Report, in ELLIOT'S DEBATES, *supra*, at 555. See, e.g., *Fong Yue Ting*, 149 U.S. at 759 (Field, J., dissenting) (deportation is punishment "beyond all severity . . . . It is cruel and unusual. As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations . . . there contracted.").

88. See Moore, *supra* note 80, at 323-24, 326-27.

89. Moore, *supra* note 80, at 345 ("Commitment to the rule of law, understood as compliance with the Constitution's own imperatives, undercuts rather than supports . . . deferring to others' mistaken interpretations of the Constitution itself. In practice, therefore, the rule of law is promoted by the Constitution's being flexible enough to allow different persons . . . to act based on diverging interpretative positions.").

collecting taxes, borrowing money, or regulating commerce. Although the Supreme Court did eventually weigh in, reading the "necessary and proper" clause with sufficient breadth to uphold the congressional act,<sup>90</sup> a great constitutional debate took place both before and after the Court's decision. From this debate we see a tension of constitutional proportions that remains with us to this day—what, if any, areas of legislative activity are exclusively local and beyond the legislative grasp of Congress?<sup>91</sup>

Madison, in a speech before the House,<sup>92</sup> and Jefferson, in a memorandum to President Washington,<sup>93</sup> argued that Congress lacked the constitutional authority to incorporate a national bank. Finding no express authority, Madison turned to the "necessary and proper" clause, suggesting that "[w]hatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress."<sup>94</sup> In his view, the result, taken to its logical end, of saying that a nationally chartered bank is "necessary" to achieve an enumerated end obliterates

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90. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In upholding the constitutionality of Congress' creation, the Court allowed the Constitution a *living* presence in successive generations as the people of each era work out the problems of their day. Since the "constitution [is] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs," *id.* at 415, the Court "must never forget, that it is a *constitution* [they] are expounding." *Id.* at 407. In contrast, when the Court strikes down political solutions as it did in cases like *Dred Scott*, *The Civil Rights Cases*, or *Lochner*, the Court denies to the people a living Constitution, freezing its meaning within the intellectual framework of the then current Court. See LOUIS B. BOUDIN, *GOVERNMENT BY JUDICIARY*, at viii (1932) ("in this country the Men who wield the real power of government are not accountable to the people, and their decisions are irrevocable and irreversible except by themselves. The net result is that we are ruled frequently by *dead Men* (not, however, the dead 'Framers,' but generations of dead judges)"); *United States v. Virginia*, 116 S. Ct. 2264, 2291-92 (1996) (Scalia, J., dissenting) ("the virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. . . . [T]his most illiberal court [is] embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preference of the society's law-trained elite) into our Basic Law.").

91. See, e.g., *United States v. Lopez*, 115 S. Ct. 1624 (1995) (Congress' attempt to create gun free school zones unconstitutionally usurped the state's police powers); *New York v. United States*, 505 U.S. 144 (1992) (Congress prohibited from treating states as mere administrative provinces).

92. See James Madison's Speech to the House of Representatives (1791), reprinted in 2 *ANALS OF CONG.* 1901 (1834).

93. See THOMAS JEFFERSON, *Opinion on the Constitutionality of the Bill Establishing a National Bank*, in THOMAS J. JEFFERSON'S WRITINGS 416-21 (1984).

94. Madison, *supra* note 92.

the division of power between federal and state, allowing Congress to "reach every object of legislation, every object within the whole compass of the political economy."<sup>95</sup> Jefferson agreed. If "*necessary*" could be construed as "merely 'convenient,'" then "[i]t would swallow up all the delegated powers, and reduce the whole to one power, as before observed."<sup>96</sup>

Hamilton, in defending his bank proposal, rejected Jefferson's interpretation as a "*radical* source of error in reasoning," which will "beget endless uncertainty & embarrassment."<sup>97</sup> To allow for efficient and competent government, Hamilton would interpret "*necessary* and proper" broadly so that "[i]f the end be clearly comprehended within any of the specified powers, & if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution—it may safely be deemed to come within the compass of the national authority."<sup>98</sup>

Neither the Jefferson/Madison interpretation nor the Hamilton interpretation provides an entirely satisfying answer given our system of dual sovereignty with a limited national government. On the one hand, Hamilton is correct; if the Jefferson/Madison interpretation of "*necessary*" were adopted, the federal government's ability to meet the various crises of governing would be severely if not fatally hampered.<sup>99</sup> On the other hand, Hamilton's construction, which received a judicial imprimatur in *McCulloch v. Maryland*, has led, as Jefferson and Madi-

95. *Id.*

96. JEFFERSON, *supra* note 93, at 419 ("any non-enumerated power [may be] torture[d] into a *convenience* in some instance or other . . . . Therefore it was the Constitution restrained them to the *necessary* means, that is say, to those means without which the grant of power would be nugatory"). Jefferson did say

however, that unless the President's mind on a view of everything which is urged for and against this bill, is tolerably clear that it is unauthorized by the Constitution; if the pro and the con hang so even as to balance his judgment, a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion.

*Id.* at 421.

97. ALEXANDER HAMILTON, *Opinion on the Constitutionality of an Act to Establish a Bank* (1791), reprinted in 8 THE PAPERS OF ALEXANDER HAMILTON 97, 102-03 (Harold C. Syrett ed., 1965).

98. *Id.* at 107; see also *id.* at 104 ("The degree in which a measure is necessary, can never be a test of the *legal* right to adopt it. That must ever be a matter of opinion; and can only be a test of expediency.").

99. Madison and Jefferson's interpretation "would render" the legitimate operations of the federal government "difficult, hazardous, and expensive." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819).

son feared, to a near total obliteration of any boundary limiting federal authority. Consider that Congress can even limit the production of wheat grown in Ohio for a farmer's own table as a means to regulating interstate commerce.<sup>100</sup>

Mediating between these two extremes should be constitutional dialogue within the political branches on the question of whether the means chosen are truly necessary to achieve the purported ends, given the constitutional interest in maintaining separate spheres of authority for federal and state governments. *McCulloch* allows Congress and the President the freedom to read "necessary and proper" broadly, but it does not compel that result. Here, President Andrew Jackson provides guidance. After Congress voted to extend the life of the second Bank of the United States, Jackson vetoed the bill on the grounds that the bank as structured was not necessary to effectuate the legitimate ends of the federal government.

Jackson maintained that historical practice or what he called "precedent" coupled with the Supreme Court's decision in *McCulloch* did *not* settle the question of the bank's constitutionality. With respect to *McCulloch*, Jackson stated, in his veto message, that opinions of "the Supreme Court . . . ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution."<sup>101</sup>

In this case though, Jackson did not have to openly defy a Supreme Court ruling. *McCulloch*'s genius resides in the fact that the Court merely deferred to the political branches' determination of the bank's necessity.<sup>102</sup> "[W]here the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."<sup>103</sup> In exercising his reasoned judgment and taking

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100. See *Wickard v. Filburn*, 317 U.S. 111 (1942).

101. Andrew Jackson, Veto Message (July 10, 1832), in *ANDREW JACKSON 1845-65*, at 48 (Randall E. Shaw ed., 1969) ("Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others.").

102. *Cf. Fiallo v. Bell*, 430 U.S. 787 (1977) (in immigration cases, courts defer to the judgment of the political branches).

103. *McCulloch*, 17 U.S. at 423. "To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances;" *id.* at 415, therefore, from a judicial perspective, "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which

into account the constitutional interests involved, Jackson concluded that the bank proposed by Congress was not necessary and proper for the efficient administration of the federal government.<sup>104</sup>

The arguments of Madison, Jefferson, Hamilton, Marshall, and Jackson were, of course, much more intricate than I have laid out in this summary. A full discussion of their nuances is beyond the scope of this Article. For our purposes, it is sufficient that we simply remember that healthy constitutional dialogue outside the courtroom—even after the Supreme Court has spoken—has from the beginning been an integral part of this nation's history.

Abraham Lincoln makes the most compelling—and radical—case for nonjudicial constitutional interpretation. Unlike Madison, Jefferson, and Hamilton who interpreted the Constitution in the *absence* of the Supreme Court's voice, and unlike Jackson who interpreted the Constitution *beyond* but *not* against the Court's holding, Lincoln directly *challenged* the Court's ability to speak authoritatively for the whole nation on constitutional issues. Alluding to the Court's decision in *Dred Scott*, Lincoln, in his first inaugural address, said:

I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases, by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by the decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have

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are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421. President Jackson interpreted *McCulloch* as holding that "it is the exclusive province of Congress and the President to decide whether the particular features of this act are *necessary and proper*." Jackson, *supra* note 101.

104. See Jackson, *supra* note 101, at 49-50.

ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hand of that eminent tribunal.<sup>105</sup>

Earlier, in his failed 1858 Illinois Senate Campaign, Abraham Lincoln traded lively barbs with his opponent Stephen Douglas on the questions of *Dred Scott* and judicial supremacy. Lincoln unequivocally denounced *Dred Scott*: "I have expressed heretofore, and I now repeat, my opposition to the Dred Scott Decision . . . I'm . . . refusing to obey it as a political rule."<sup>106</sup> Lincoln married the ideals of the Declaration of Independence with the Constitution's structure to cement his opposition to *Dred Scott*.

Taking the Declaration's words that "all men are created equal" seriously, Lincoln believed the authors "intended to include *all* men . . . They did not assert the obvious untruth, that all were then actually enjoying that equality . . . They meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit."<sup>107</sup> For Lincoln, the Declaration "meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness

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105. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in IV THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (1953).

106. Abraham Lincoln, Speech at Chicago, Ill. (July 10, 1858), in II THE COLLECTED WORKS OF ABRAHAM LINCOLN 484, 495 (1953). Lincoln characterized Douglas' position on the Court's opinion saying,

[t]his man sticks to a decision which forbids the people of a Territory from excluding slavery, and he does so not because he says it is right in itself—he does not give any opinion on that—but because it has been *decided by the court*, and being decided by the court, he is, and you are bound to take it in your political action as law—not that he judges at all of its merits, but because a decision of the court is to him a "Thus saith the Lord."

First Debate with Stephen Douglas, Ottawa, Ill. (Aug. 21, 1858), in III THE COLLECTED WORKS OF ABRAHAM LINCOLN 1, 27-28 (1953). Cf. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (upholding the "core" holding of *Roe* without giving an opinion on whether *Roe* was correctly decided).

107. Abraham Lincoln, Speech at Springfield, Ill. (June 26, 1858), in II THE COLLECTED WORKS OF ABRAHAM LINCOLN 398, 405-06 (1953). For a much darker and more stifling view, see 13 CONG. REC. 1546 (1882) (remarks of Sen. Grover) ("when they declared that all men are created equal, and were endowed by their creator with the inalienable right of life, liberty, and the pursuit of happiness, they undoubtedly meant all men like themselves").



and value of life to all people of all colors everywhere."<sup>108</sup> How in our society do we attempt as a community to live out these lofty ideals? Lincoln's answer—turn to the Constitution.

Lincoln divides constitutional questions into two categories: those that are expressly addressed in the document and all others. Recognizing that "no foresight can anticipate, nor any document of reasonable length contain express provision for all possible questions,"<sup>109</sup> Lincoln saw "all our constitutional controversies" arising, not from what the Constitution says, but from what it fails to say—the great constitutional questions of his day (and ours) spring from our unwritten constitutional traditions. Lincoln's way of resolving these constitutional issues differs markedly from our current practice. Today, when the Constitution is silent on an issue of constitutional significance, we turn to the judiciary for resolution. Explicitly rejecting this judicial model, Lincoln's appeal is to the people, putting "patient confidence in the ultimate justice of the people" because, in the end God's truth and justice will prevail.<sup>110</sup> He understood that disagreement would surface with respect to all the great constitutional issues, and since the written Constitution fails to resolve these disputes, the questions are left to the people. In resolving these questions,

[i]f the minority will not acquiesce, the majority must, or the government must cease. There is no other alternative; for continuing the government, is acquiescence on one side or the other . . . . Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy, or despotism in some form, is all that is left.<sup>111</sup>

And Lincoln would encourage us as we attempt to work through the constitutional issues of our day to turn to the idea expressed in the

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108. Abraham Lincoln, Speech at Springfield, Ill. (June 26, 1858), in II THE COLLECTED WORKS OF ABRAHAM LINCOLN 398, 406 (1953). Lincoln criticized Douglas' view that "all men" referred only to British subjects; "see what a mere wreck—mangled ruin—it makes of our once glorious Declaration." *Id.*

109. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in IV THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 267 (1953).

110. See Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in IV THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 270 (1953) ("If the Almighty Ruler of nations, with his eternal truth and justice, be on your side of the North, or on yours of the South, that truth, and that justice, will surely prevail, by the judgment of this great tribunal, the American people.").

111. *Id.* at 267-68.

Declaration that we are all created equal.

Lincoln effectively made the link between the Declaration of Independence's aspirational language and constitutional interpretation. Professor Ronald Garet suggests that the Declaration might inspire "a certain kind of thought: reflective, intuitive, almost meditative. There is a place," he suggests, "for such contemplative thought in our efforts to understand the Constitution's provisions and to apply them to some of the issues of our day."<sup>112</sup> At this level, constitutional interpretation (meditation?) makes no legally binding claims on society; to borrow Jackson's phrase, it has "only such influence as the force of [its] reasoning may deserve."<sup>113</sup> With the Virginia and Kentucky Resolutions, Madison and Jefferson attempted to speak authoritatively for the true and binding interpretation of the Constitution as a legal instrument, even if they lacked the practical means for enforcing their interpretation. Jackson's veto of the bank and Lincoln's rejection of the *Dred Scott* decision both possess the quality of legal argument, as they attempt to interpret the Constitution as fundamental law. But each of these individuals is also speaking at a different level; they are drawing from the Constitution a sketch of who we are as a constitutional people. This is most evident in Lincoln as he tries to take the words of our Declaration of Independence and infuse them into the political life of the nation. As I said earlier, it is to this tradition that I wish to appeal in my argument that the Welfare Reform Act, to the extent that it discriminates against noncitizens, is unconstitutional.

Beyond serving its purpose as binding fundamental law framing and governing our nation, the Constitution serves as a venerated sign of what it means to be an American. In a nation not bound together by a common ethnic or religious heritage, the Constitution symbolizes the tie that binds. In contrast, many Europeans were ethnic or religious peoples long before forming independent countries; they formed nations because of their ethnic ties to one another, and they forged constitutional communities because they were a people. We, on the other hand, have become a people because of our constitutional commitments to one another, forged when our country's founders agreed to "mutually

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112. Ronald R. Garet, Essay, *The Resolution of Independence*, 29 Hous. L. Rev. 867, 868 (1992).

113. Jackson, *supra* note 101, at 49.

pledge to each other our Lives, our Fortunes, and our sacred Honor.”<sup>114</sup> The Constitution provides the framework for living out this commitment to one another.

Although he did not specifically interpret the words of the Constitution, the speeches, the writings, and the very life of Reverend Martin Luther King, Jr., certainly resonate with a clear vision of who we should be as a constitutional people. Standing on the steps of the Lincoln Memorial, King proclaimed his vision for the United States of America:

I say to you today, my friends, so even though we face the difficulties of today and tomorrow, I still have a dream. It is a dream deeply rooted in the American dream. I have a dream that one day this nation will rise up and live out the true meaning of its creed: “We hold these truths to be self-evident; that all men are created equal.” I have a dream that one day, on the red hills of Georgia, sons of former slaves and sons of former slave owners will be able to sit down together at the table of brotherhood. I have a dream that one day even the state of Mississippi, a state sweltering with the heat of injustice, sweltering with the heat of oppression, will be transformed into an oasis of freedom and justice. I have of dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character. I have a dream today.<sup>115</sup>

King had a vision that one day “the glory of the Lord shall be revealed” and with our “faith we will be able to transform the jangling discords of our nation into a beautiful symphony of brotherhood.” No constitutional scholar, King, perhaps more than any other 20th century American figure, embodies the tenets of our living constitutional traditions.

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114. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). See also Ronald R. Garet, *Creation and Commitment: Lincoln, Thomas, and the Declaration of Independence*, 65 S. CAL. L. REV. 1477, 1496 (1992) (“Recall the words ‘we mutually pledge.’ This is the language, not only of the Declaration, but of the exchange of wedding vows. . . . Vows that perform and celebrate the union of human persons, in marriages, communities, or states, are not” to be taken lightly. “One either makes these pledges and means them and tries in loving partnership to give them substance and to live up to them: or one has no business speaking their language.”).

115. The Reverend Martin Luther King, Jr., *I Have A Dream Speech*, Washington, D.C. (Aug. 28, 1963).

Our constitutional imaginations have been dulled by an endless stream of judicial mantras purporting to establish fundamental law while obscuring and limiting "We the People's" interpretive authority.<sup>116</sup> As Professor Henkin has noted, "by establishing the Constitution as law, the thing of courts and lawyers, . . . [w]e were condemned to be textualists, 'interpretivists'; other parts of our hagiography—notably the Declaration of Independence—were excluded from the jurisprudential canon."<sup>117</sup> What I propose here<sup>118</sup> is that we open up the canon to allow for a broader understanding of our constitutional traditions and of our attempts to arrive at common understandings of who we are as a constitutional community.<sup>119</sup> This exercise would embrace "that web of understandings, myths, symbols, and documents out of which [is] woven interpretive narratives"<sup>120</sup> contributing to our national identity. In the context of the immigration debate, my proposal is much less radical than Abraham Lincoln's. He proposed *opposing* the Supreme Court's decision in *Dred Scott* as a political rule governing the country. All that I need propose here is that we look *beyond* the Supreme Court's plenary power doctrine and articulate a new constitutional vision for the treatment of noncitizens.<sup>121</sup> In the next section, I propose one alternative.

## V. CONSTITUTIONAL INTERPRETATION: A CATHOLIC CHRISTIAN PERSPECTIVE

The Parable of the Good Samaritan provides an excellent backdrop

116. See Moore, *supra* note 80, at 316 ("forms of analysis that center on the Constitution's judicial enforcement" obscure other "interpretative options"); Paulsen, *supra* note 80, at 675 ("The priests are careful to recite the formulae of their predecessors, rather than the words of the document itself, and so keep up the illusion that their guardianship is necessary in order to translate an increasingly incomprehensible document (which they have made so) into concrete commands that they then issue to the (small "p") people as 'law.'").

117. LOUIS HENKIN, *THE AGE OF RIGHTS* 90-91 (1990).

118. See also Scaperlanda, *supra* note 37, at 771-73.

119. Immigration and membership in our community lie at the heart of this question. See, e.g., Richard A. Boswell, *Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. REV. 1475, 1478 (1995) ("The manner in which immigration policy is discussed and defined determines the very nature of who we are as a nation.").

120. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 10 (1988).

121. Pursuant to the plenary power doctrine, the courts won't "probe and test the justification for the legislative decision," *Fiallo v. Bell*, 430 U.S. 787, 799 (1977), but that does not exonerate the lawmaking branches from independently ascertaining the constitutionality of proposed legislation.

to illustrate my Catholic Christian vision of America's constitutional duty toward permanent resident aliens. The parable begins with a lawyer asking Jesus what he must do to inherit everlasting life.

Jesus answered him: "What is written in the law? How do you read it?"

He replied: "You shall love the Lord your god with all your heart, with all your soul, with all your strength, and with all your mind; and your neighbor as yourself."

Jesus said, "You have answered correctly. Do this and you shall live." But because he wished to justify himself he said to Jesus, "And who is my neighbor?" Jesus replied: "There was a man going down from Jerusalem to Jericho who fell prey to robbers. They stripped him, and then went off leaving him half-dead. A priest happened to be going down the same road; he saw him but continued on. Likewise there was a Levite who came the same way; he saw him and went on. But a Samaritan who was journeying along came on him and was moved to pity at the sight. He approached him and dressed his wounds, pouring in oil and wine. He then hoisted him on his own beast and brought him to an inn, where he cared for him. The next day he took two silver pieces and gave them to the innkeeper with the request: 'Look after him, and if there is any further expense I will repay you on my way back.' Which of these three, in your opinion, was neighbor to the man who fell in with the robbers?" The answer came, "The one who treated him with compassion." Jesus said to him, "Then go and do the same."<sup>122</sup>

"Go and do the same." I am not arguing in this essay, that loving your neighbor, including noncitizen neighbors, requires government funded welfare.<sup>123</sup> My argument here is much narrower. I argue that a Catholic Christian vision of who we are as a constitutional people forbids a policy choice that places the burdens of welfare cuts mainly on the backs of noncitizens. Although I am arguing from a Catholic faith perspective, this argument's roots are deeply embedded in broader

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122. *Luke* 10:25-37 (New American Bible). Cf. *Leviticus* 19:18; *Deuteronomy* 6:4.

123. Some Christian commentators argue forcefully that loving your neighbor means reducing, eliminating, and replacing the faceless bureaucratic welfare state with private charity that concerns itself with the needs of the whole of individual persons, not solely the material needs of the masses. See, e.g., MARVIN OLASKY, *RENEWING AMERICAN COMPASSION* (1996).

Judeo-Christian teaching. Deuteronomy states: "For the LORD, your God, is the God of gods, the LORD of lords, the great God, mighty and awesome, who . . . befriends the alien, feeding and clothing him. So you too must befriend the alien, for you were once aliens yourselves in the land of Egypt."<sup>124</sup> Speaking of an early form of welfare, Leviticus instructed the Israelites: "[Y]ou shall not pick your vineyard bare, nor gather up the grapes that have fallen. These things you shall leave for the *poor* and the *alien*. I, the LORD, am your God."<sup>125</sup>

Before developing this argument further, I need to digress momentarily. Some readers might object on the grounds that we are a secular state and that my proposal, based as it is on my Catholic Christian faith, if adopted would constitute an unconstitutional breach of the separation of church and state. A recent book has argued that the framers of the Constitution deliberately created a "godless constitution" to structure a "godless politics."<sup>126</sup> Attempting humor, the authors offer "a constitutional amendment to shore up national morality," an amendment that would allow the impeachment of any elected official who hinted that he or she was attempting to do God's will.<sup>127</sup> Impeach Lincoln! After all, he ended his second inaugural address, admonishing the whole nation to carry on according to direction given by God.<sup>128</sup>

Godless politics, or the idea that all laws must be based on secular reasoning, have gained currency of late. In *Compassion in Dying v. Washington*,<sup>129</sup> the Ninth Circuit, in creating a constitutional right to assisted suicide, stated that those who oppose assisted suicide "are not

124. Deuteronomy 10:17-19 (New American Bible). See also Leviticus 19:33-34; Exodus 23:9 ("You shall not oppress an alien, since you were once aliens yourselves in the land of Egypt."); James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 809 n.20 (1983) (quoting Leviticus and discussing Catholic Social teaching).

125. Leviticus 19:10 (New American Bible) (emphasis added).

126. See ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* (1996).

127. See *id.* Kramnick and Moore backtrack later, agreeing "with Stephen Carter that it is wrong to ridicule persons who professes [sic] to hold a political position because it is required by their understanding of God's will." *Id.* at 173. And although they don't like the "sour voices" who use religion to stigmatize and divide people, they look at Martin Luther King, Jr. as a "religious prophet who calls upon an unjust society . . . to transcend itself . . ." I would suspect that Rev. King was a sour voice to the ears of the racists that he attempted to stigmatize. *Id.* at 162.

128. See *infra* text at note 178. Parts of this paragraph are taken directly from Michael Scaperlanda, *A godless Constitution?*, OUR SUNDAY VISITOR, Nov. 10, 1996, at 16-17.

129. 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd sub nom.* Washington v. Glucksberg, 117 S. Ct. 2258 (1997).

free, however, to force their views, their religious convictions, or their philosophies on all the other members of a democratic society . . . ."<sup>130</sup> More specifically, Justice Stevens, concurring in part and dissenting in part in *Webster v. Reproductive Health Services*, argued that unless a law has an "identifiable secular purpose" it "violates the Establishment Clause."<sup>131</sup> Justice Stevens, and others of similar philosophy, insist that our religiousness as a people should not make a difference in our political communities, that we should ignore this reality in our national lives. They would create a "naked public square . . . that would exclude religion and religiously grounded values from the conduct of public business."<sup>132</sup> Since "[p]olitics is an inescapably moral enterprise," this desire to rid the public square of religion "is not a conflict between morality and secularism. It is a conflict of moralities in which one moral system calls itself secular and insists that the other do likewise as the price of admission to the public arena."<sup>133</sup>

If we take Stevens seriously, at least four major problems arise. First, the courts will search for an "identifiable secular purpose" only in those cases where they suspect a religious motivation behind the law. This presents a Free Exercise concern; secularists are free to adopt whatever laws they want for whatever reason they want, but believers in a Creator God must advance a secular purpose for the laws they desire.<sup>134</sup> Steven's view puts a unique burden of justification only on religious people and solely on the grounds of their religiousness.

Second, it denies an important aspect of our constitutional heritage. Our separation from the Crown and our creation of a representative democracy are based on the belief that we are "created equal." We are not accidentally equal because we all oozed out of the slime together

130. *Id.* at 839.

131. 492 U.S. 490, 566-67 (1989). "I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause . . . ." *Id.* at 566. See also *Planned Parenthood v. Casey*, 505 U.S. 833, 932 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part) (Establishment Clause violation to base law on "theological or sectarian" interests).

132. RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* at ix (2d ed. 1986).

133. *Id.* at 125-26.

134. Cf. *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) ("Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause, properly understood, . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.").

(although we might have!).<sup>135</sup> In fact, if that were the case, we would not be equal; some of us might be further along on the evolutionary scale than others, and those who were more advanced would have a plausible claim to rule and to perpetuate the master race.<sup>136</sup> Additionally if, as leading evolutionary biologist Richard Dawkins claims, any evidence of design in evolution is merely an illusion,<sup>137</sup> then we share our common humanity by chance and we owe no moral commitment to any neighbor. If, on the other hand, we are created beings then we have a common connection and our task individually and as a society is to attempt to live according to the rules established by the Creator.<sup>138</sup>

Third, taking Stevens seriously would in many cases disenfranchise religious believers. Devout Christians—Jews and Muslims as well—cannot separate their morality from their knowledge of God and His purposes; “[t]herefore, our views of slavery, abortion, capital punishment, war, nuclear arms, immigration, assisted suicide, race relations, welfare, and a host of other issues, grounded as they are in our limited understanding of God’s purposes, would be barred” effectively from the public debate.<sup>139</sup>

Richard John Neuhaus persuasively reveals a fourth potent danger to representative democracy existing in a politics void of religion and

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135. I don’t want to enter into an evolution/creation debate here. It matters not how God created the world but that He did create the world. See PHILLIP JOHNSON, *REASON IN THE BALANCE* 107 (1995) (“The most important statement in Scripture about creation is not contained in Genesis but in the opening verses of the Gospel of John: ‘In the beginning . . .’”).

136. Cf. Margaret Sanger, *Why Not Birth Control in America?*, *Birth Control Rev.* 12 (May 1919) (“More children from the fit, less from the unfit”); MARGARET SANGER, *THE PIVOT OF CIVILIZATION* 93 (1922) (“the destiny and the progress of civilization and human expression has been hindered and held back by this burden of the imbecile and the moron”); MARGARET SANGER, *MARGARET SANGER: AN AUTOBIOGRAPHY* 375 (1938) (“We . . . sought first to stop the multiplication of the unfit. This appeared the most important and greatest step toward race betterment”); *Practical Eugenics: Mission of the American Eugenics Society*, 30 *EUGENICS REV.* 187, 195 (1938) (“the United States should not admit immigrants whose hereditary capacities are below our own present average”).

137. See RICHARD DAWKINS, *THE BLIND WATCHMAKER* (1986) (“Natural selection is the blind watchmaker, blind because it does not see ahead, does not plan consequences, has no purpose in view. Yet the living results of natural selection overwhelmingly impress us with the illusion of design and planning.”).

138. See, e.g., Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 *DUKE L.J.* 1229, 1230.

139. Michael Scaperlanda, *A godless Constitution?*, *OUR SUNDAY VISITOR*, Nov. 10, 1996, at 16, 17. See also MICHAEL PERRY, *MORALITY, POLITICS & THE LAW* 72-73 (1988) (“To bracket [her moral and religious beliefs] would be to bracket, indeed, annihilate herself. And doing that would preclude her—the particular person *she* is—from engaging in moral discourse with other members of society.”).



religious values:

[O]nce religion is reduced to nothing more than privatized conscience, the public square has only two actors in it—the state and the individual. Religion as a mediating structure—a community that generates and transmits moral values—is no longer available as a countervailing force to the ambitions of the state.”<sup>140</sup> Without religious institutions to “generate and transmit values . . . the vacuum will be filled by the agent left in control of the public square, the state. In this manner, a perverse notion of the disestablishment of religion will lead to the establishment of the state as church.”<sup>141</sup>

Fortunately, the Stevens/Blackmun/Reinhardt view has yet to thoroughly saturate either judicial or lay thought, although I fear that the cultural sponge continues to wipe religion and religious beliefs from the public square. The correct view, and I hope it is not too late in the day to resurrect it, was expressed by the Court in *McDaniel v. Paty*,<sup>142</sup> a case that overturned Tennessee’s bar to clergy serving in a political capacity. Concurring in judgment, Justice Brennan said that “[t]he antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls.”<sup>143</sup>

Brennan’s view finds refuge in an uninterrupted history of religion and religious morality informing the American experience, including the legal landscape. President Washington, in his farewell address, warned a young nation that:

Of all the dispositions and habits, which lead to political prosperity, Religion and Morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of Men and Citizens . . . [R]eason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.<sup>144</sup>

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140. NEUHAUS, *supra* note 132, at 82.

141. *Id.* at 86.

142. 435 U.S. 618 (1978).

143. *Id.* at 642 (Brennan, J., concurring).

144. George Washington, *Farewell Address* (Sept. 17, 1796), in 35 THE WRITING OF GEORGE WASHINGTON 214, 224 (John Fitzpatrick ed., 1940).

John Adams reflected that "[w]e have no government armed with power capable of contending with human passions unbridled by morality and religion. Our constitution was made only for a moral and religious people. It is wholly inadequate for the government of any other."<sup>145</sup> Even Jefferson, in his fretting analysis of slavery, trembled at the knowledge "that God is just; that his justice cannot sleep forever."<sup>146</sup> Slavery was immoral (and should eventually be extinguished) because it violated God's law: "can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?"<sup>147</sup>

In short, as Justice Douglas put it, "[w]e are a religious people whose institutions presuppose a Supreme Being."<sup>148</sup> "The popular intuition is that this fact ought, somehow, to make a difference,"<sup>149</sup> it ought to be reflected in how we live our lives and in how we order our society. Those of us who believe in a loving and active Creator God know that as individuals and as a community we are bound in truth and love to order our lives and our society according to the Divine Plan as we provisionally understand it. As members of this political community we must, to borrow from Lincoln, participate in governing "with firmness in the right, as God gives us to see the right."<sup>150</sup> In a pluralistic society, my religiously grounded ideas for the right ordering of society may not carry the day, but they ought to be allowed on the table alongside the whole smorgasbord of competing and complementary views of who we are as a constitutional community.<sup>151</sup>

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145. John Adams, *Letter to the Officers of the First Brigade of the Third Division of the Military of Massachusetts* (1798), in 9 LIFE AND WORKS OF JOHN ADAMS 229 (1854). See also 1 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1908, at 284-86 (1908) (quoting John Adams) ("The safety and prosperity of nations ultimately and essentially depend on the protection and the blessing of Almighty God, and the national acknowledgment of this truth is . . . a duty whose natural influence is favorable to the promotion of that morality and piety without which social happiness can not exist, nor the blessings of a free government be enjoyed.").

146. Thomas Jefferson, Notes on the State of Virginia, 1781-1785, in SAUL PADOVER, THE COMPLETE JEFFERSON 677 (1943).

147. *Id.* at 677-78.

148. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

149. NEUHAUS, *supra* note 132, at 82.

150. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in VIII THE COLLECTED WORKS OF ABRAHAM LINCOLN 333 (1953).

151. E.g., STEPHEN CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 232 (1993) (political dialogue should welcome "arguments from religious tradition . . . as it welcomes every useful, thoughtful voice, not because their epistemological suppositions are universally shared, but because even those with very dif-

Returning to the Good Samaritan, ironically the foreigner, the alien, stops to help the citizen who had been left to die by his own countrymen.<sup>152</sup> Through this parable, Jesus reveals the true nature of the law requiring one to love one's neighbor. "The lawyer's question implies that someone is not my neighbor."<sup>153</sup> Jesus uses the tale of this "Samaritan, a member of the people despised and ridiculed by Jews, performing a loving service avoided by Jewish religious leaders" to teach that all humans are neighbors and that even the outcast can understand this principle.<sup>154</sup> Why is neighbor defined so broadly by Jesus? Why isn't the concept of neighbor defined by clan, family, friends, nation, or some other similarly limiting parameters? The answer lies in the Judeo-Christian (and also American<sup>155</sup>) understanding of Creation—we are created in the image of God.

Genesis tells us that "God created man in his image; in the divine image he created him; male and female he created them."<sup>156</sup> As Pope John Paul II has said:

Solidarity is undoubtedly a Christian virtue . . . . One's neighbor is then not only a human being with his or her own rights and a fundamental equality with everyone else, but becomes the living image of God the Father, redeemed by the blood of Jesus Christ and placed under the permanent action of the Holy Spirit. Our neighbor must therefore be loved, even if an enemy, with the same love with which the Lord loves him or her; and for that person's sake we must be ready for sacrifice, even the ultimate one: to lay down one's life for the brethren.<sup>157</sup>

In addition to being created in God's image, the Christian tradition teaches that we encounter Jesus in each other and especially in the least

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ferent epistemologies might learn—or teach").

152. See THE JEROME BIBLICAL COMMENTARY 44:103-105 (Raymond Brown et al. eds., 1968) ("In the course of the parable, he who possesses the secret of eternal life turns out to be this stranger without the lawyer's learning and concern for security and without the dignity and status of the priestly and Levitical condition.").

153. Jerome Kodell, *The Gospel According to Luke*, 3 COLLEGEVILLE BIBLE COMMENTARY 59 (1983).

154. See *id.*

155. Cf. THE DECLARATION OF INDEPENDENCE.

156. *Genesis* 1:27.

157. John Paul II, Encyclical Letter *Sollicitudo Rei Socialis*, § 40-40.1 (1987), reprinted in *PROCLAIMING JUSTICE AND PEACE: PAPAL DOCUMENTS FROM RERUM NOVARUM TO CENTESIMUS ANNUS* 392, 422 (Michael Walsh & Brian Davies eds., 1991).

of our brothers and sisters.<sup>158</sup> For these reasons, the whole human race are neighbors to be treated with compassion.

We as individuals, if we seek to follow God's law, must show compassion for our neighbor, properly understood, especially when that neighbor is in trouble and need of assistance. Although the legal alien, the subject of this essay,<sup>159</sup> is my (our) neighbor, we have not yet established why, in this context, government welfare benefits are a proper form of aid. I will address this issue in two steps, first looking at the special status of "alien" as neighbor and then at the government as innkeeper, caring for the alien while in need.

The story of God's people is the story of aliens; "[t]he Judeo-Christian tradition is steeped in images of migration."<sup>160</sup> At one level, Christians are what Augustine called "*peregrine*, a word we might define as registered aliens, strangers in this life always longing for their true home."<sup>161</sup> At another, more temporal, level, the Old and New Testaments are filled with stories of exile, exodus, refuge, and uprootedness. Eve and Adam were exiled from the Garden, Cain be-

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158. E.g., *Matthew* 25:31-46 (when you welcome the stranger you welcome Christ); 1 *Corinthians* 12:27 ("You, then, are the body of Christ."); Cardinal Roger Mahoney, *You Have Entertained Angels—Without Knowing It*, THE TIDINGS, Oct. 10, 1993, at 10-12 ("In the stranger we encounter Christ."). Cf. *Hebrews* 13:2 ("Do not neglect to show hospitality, for by that means some have entertained angels without knowing it."). Rabbi Marc Gellman reminds us that

[i]n Hebrew, the word for angel is *malach*, which means "messenger," and so for Judaism any person with a message from God is a *malach*, an angel . . . [T]here are two kinds of angels: the *malachin*, the angels who are human beings recruited into God's service, and then there are the angels who inhabit the *alam habak*, heaven.

Marc Gellman, *What are You Looking For?*, FIRST THINGS 20, 21 (Mar. 1997).

159. For this essay, I have chosen to limit my topic to noncitizens who are lawfully in this country. Undocumented or "illegal" aliens are our neighbors to be treated with compassion: "It is against the common good and unacceptable to have a double society, one visible with rights and one invisible without rights—a voiceless underground of undocumented persons." National Conference of Catholic Bishops, *Together a New People*, Pastoral Statement on Migrants and Refugees 10 (1987). The question of illegal immigrants is in one sense more complex. In accord with a long line of international law scholars, see generally Nafziger, *supra* note 124 (historically international law has allowed limited state discretion not unfettered control of its borders), the Catholic Church recognizes a limited "right of nations to control their borders." One Family Under God, A Statement of the U.S. Bishop's Committee on Migration 5 (1995). Since the individual alien has responsibility toward society, including the responsibility to obey the law, a just, compassionate, and loving response to the needs of the undocumented require a more nuanced analysis.

160. One Family Under God, A Statement of the U.S. Bishop's Committee on Migration 2 (1995).

161. *Id.* at 4.

came a restless wanderer, Abraham was promised a new home for his people, the Israelites were held captive and exiled, they wandered in the desert for forty years on the way to their promised land, and after Jesus was born, his family was forced to flee to Egypt.<sup>162</sup> Pope Pius XII stated that:

The emigre Holy Family of Nazareth, fleeing into Egypt, is the archetype of every refugee family. Jesus, Mary, and Joseph, living in exile in Egypt to escape the fury of an evil king, are, for all times and places, the models and protectors of every migrant, alien and refugee of whatever kind who, whether compelled by fear of persecution or by want, is forced to leave his native land, his beloved parents and relatives, his close friends and to seek a foreign soil.<sup>163</sup>

Both the Old and the New Testaments proclaim a special concern for the well being of aliens. The Old Testament counsels concern for the alien borne of common experience, while the New Testament emphasizes "serving strangers because in each face we see Christ."<sup>164</sup> In either case, aliens comprise a unique class of neighbors often in need of special assistance. The need to treat the alien with loving hospitality is especially acute since immigration "is the departure of a person who is also a member of a great community united by history, tradition and culture; and that person must begin life in the midst of another society united by a different culture and very often by a different language."<sup>165</sup> If we do as Lincoln suggests and return to the Declaration of Indepen-

162. See *id.* at 2.

163. Pope Pius XII, Encyclical Letter *Exsul Familia*, quoted in, *One Family Under God*, A Statement of the U.S. Bishop's Committee on Migration 4-5 (1995).

164. *One Family Under God*, A Statement of the U.S. Bishop's Committee on Migration 3 (1995). Cardinal Mahoney says that we receive special benefit from openly receiving the alien: "the stranger, alien and sojourner [is] the symbol of the human person in the quest to realize his or her full potential . . . . Each encounter with the stranger is an opportunity to encounter God anew." Cardinal Roger Mahoney, *You Have Entertained Angels—Without Knowing It*, THE TIDINGS, Oct. 10, 1993, at 10-12. For other American Catholic Teaching on Immigration, see, e.g., Catholic Bishops of Florida, Statement on Immigration: The Flight to Egypt, December 15, 1995; Catholic Bishops of Colorado, "I Was a Stranger and You Made Me Welcome": A Catholic Voice in the Debate Over Immigration, January 26, 1996. Cardinal Mahoney also refers to Drew Christiansen, *Sacrament of Unity: Ethical Issues in Pastoral Care of Migrants and Refugees*, in TODAY'S IMMIGRANTS AND REFUGEES 81-114 (1988) and Allan Figueroa Deck, A Christian Reflection on the Reality of Illegal Immigration, in SOC. THOUGHT 39-53 (Fall 1978). As of this writing, I have not obtained copies of these latter two sources; I mention them here purely for reference purposes.

165. John Paul II, Encyclical Letter *Laborem Exercens* 54 (1981).

dence to guide us as we continually renew our constitutional community, we might—and should—conclude that a Judeo-Christian reading of our constitutional community requires treating aliens (who by definition are not full members of our political community) with the dignity afforded someone created in the image of God.

This still leaves one unanswered question before I close: why government (taxpayer) funded welfare? The parable of the Good Samaritan says nothing about employing the state as a mechanism for aiding the neighbor. In fact, it is the story of three people's personal encounters with another in need and their personal responses. The first two rejected the weak and left him to die, while the third bandaged and cared for him. The Samaritan did entrust his charge to the care of the innkeeper, but even with the introduction of this new figure, we still have a story of personal care and personal responsibility. One could make the case that our welfare system, with its vast and faceless bureaucracy, creates complacency among would-be good Samaritans, lulling them into a sense that the government, as proxy, will show compassion to the neighbor.<sup>166</sup> In the end, however, the Good Samaritan Parable does provide healthy insight into the inappropriateness of the Welfare Reform Act's provisions barring noncitizen receipt of welfare benefits. We, as a society, have chosen (a separate question that I do not address here is whether we have chosen wisely) to help our neighbors through government and governmental programs. We have made government the innkeeper. For better or for worse, the government operates the largest Inn of the late twentieth century, where our wounded neighbor can seek help, funding the care through our tax system. The biblical instruction is to love your neighbor as yourself; we have chosen to "love" members of our political community by providing government funded benefits, we should do no less for our alien neighbor who has been invited to dwell among us.

The Catholic Church implores the policy makers to remember "the personal investments that immigrant families make in this country."<sup>167</sup> The United States Bishops conclude that:

Those here lawfully *or* who have worked and paid taxes in the United States for a substantial period should have the benefit of

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166. See MARVIN OLASKY, *RENEWING AMERICAN COMPASSION* 81 (1996) ("As long as governmental welfare remains, it leads potential helpers to sit back, since they are paying for someone else to do it").

167. One Family Under God, A Statement of the U.S. Bishop's Committee on Migration 12 (1995).

a safety net. Debilitating traffic accidents, on-the-job injuries, and other unforeseen events occur to persons regardless of immigration status. Barring immigrants from forms of relief available to similarly placed citizens denies the basic rights of newcomers and marginalizes them at a time when they are in greatest need.<sup>168</sup>

Quite simply, cutting the safety net from underneath the immigrant, as a cost-saving measure, while maintaining it for citizens, shows a lack of hospitality toward those neighbors who have been invited to reside with us in this community. As a cultural statement we are sending the message that in our community, if you are a legal alien, there is no room at the inn.

## VI. CONCLUSION: RUTH AND NAOMI

The Book of Ruth contains a beautiful account of faith and commitment within the context of immigration and welfare. The story begins with Naomi, her husband Elimelech, and two sons emigrating from Bethlehem to Moab to escape famine. Her husband dies as do her two sons, leaving her with two Moabite daughters-in-law, Orpah and Ruth. Naomi decides to return to the land of Judah, but begs Orpah and Ruth to abandon her and return to their own parents' homes where they still might enjoy fruitful lives. Naomi realizes the absurdity of these two young women accompanying her to Judah: "Like every normal woman of the times, they must desire the esteem, satisfaction, and security that accompany marriage and children. Are they really willing to sacrifice all to live with an aging widow amid strange people?"<sup>169</sup> In asking these women to leave her and pursue their own lives, Naomi is putting their interest above her own and those of her dead kinfolk. "A man's only hope of immortality in the OT lay in sons and grandsons to carry on his name," which could be accomplished fictitiously by the widow marrying into the dead man's family.<sup>170</sup> "In sending Ruth and Orpah after new husbands at home, Naomi

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168. *Id.* (emphasis added). "While it is important for refugees and asylees to strive for early employment, there is often, understandably, some need for transitional assistance." *Id.* at 10.

169. JEROME BIBLICAL COMMENTARY, *supra* note 152, at 36:9-10.

170. See *id.* at 36:10. This levirate law was an ancient custom . . . based in part from the practical necessity of preserving the family estate, primitively on the worship of ancestral spirits. It required a man to marry his brother's widow if she were childless, and any son born of this union to bear

removed whatever chance her menfolk had of survival after death."<sup>171</sup> Orpah, seeing Naomi's logic, kisses Naomi and leaves.

Ruth<sup>172</sup> stays and pledges her commitment to her mother in law, Naomi: "Do not ask me to abandon or forsake you! For wherever you go I will go, wherever you lodge I will lodge, your people shall be my people, and your God my God."<sup>173</sup> Ruth is willing to give up everything for Naomi, her homeland, her family in Moab, and the opportunity to marry a Moabite man in return for uncertainty and most likely a life of poverty in a foreign land. Ruth accompanies Naomi back to Bethlehem where Naomi reports to the towns people that she has lost God's favor because of the misfortune that has visited her.

Naomi's return to Bethlehem with Ruth coincides with the harvest. Since the women are destitute, Ruth goes "to glean ears of grain in the field," picking up whatever the harvesters left behind. According to Jewish law, God instructed landowners to leave some of the crop in the field "for the poor and the alien" to pick.<sup>174</sup> While engaging in this ancient form of workfare, Ruth meets Naomi's prominent relative Boaz, who eventually marries Ruth and agrees to allow their offspring to carry on the line of Ruth's dead husband.

"Succinctly but eloquently the author reveals the vivifying repercussions of a faith like Ruth's. Her total commitment to Yahweh revived the dead stem of Elimelech, which eventually blossomed forth with David and his elect dynasty."<sup>175</sup> In the story of Ruth and Naomi we see the fidelity and love that has caused a person to immigrate to a foreign land without any visible means of support or prospects for prosperity. We also witness an early form of welfare designed to help both the poor and the alien; and we remember to love our neighbor as ourselves.

I close with Lincoln because he so eloquently calls us to exercise

the name and be the heir of the dead brother.

*Id.* at 6:59

171. *Id.* at 36:10.

172. Ruth was King David's great-grandmother. *See id.* at 36:8.

173. *Ruth* 1:16.

174. *See Leviticus* 19:10; *Deuteronomy* 24:19-22 ("When you reap the harvest in your field and overlook a sheaf there, you shall not go back to get it; let it be for the alien, the orphan or the widow . . . When you knock down the fruit of your olive trees, you shall not go over the branches a second time; let what remains be for the aliens, the orphan and the widow. When you pick your grapes . . . For remember that you were once slaves in Egypt; that is why I command you to observe this rule.").

175. JEROME BIBLICAL COMMENTARY, *supra* note 152, at 36:17.



the "better angels of our nature."<sup>176</sup> His second inaugural address ended with these words:

With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation's wounds; to care for him who shall have borne the battle, and for his widow, and his orphan—to do all which may achieve and cherish a just, and a lasting peace, among ourselves, and with all nations.<sup>177</sup>

At Gettysburg, Lincoln concluded: "It is for us the living . . . to be here dedicated to the great task remaining before us . . . that this nation, under God, shall have a new birth of freedom—and that the government of the people, by the people, and for the people shall not perish from the earth."<sup>178</sup>

Our experiment in representative democracy is a process, a continual rebirth as we strive to create a just society. Lincoln governed in perilous times as the Nation teetered on the brink of extinction as the waves of civil war crashed against our shores. By comparison, we live on placid waters and the issue of welfare reform and immigrants pales in contrast to the moral evil of slavery; yet, we can still draw strength and guidance from Lincoln's words "as we strive to finish the work we are in." From my theistic perspective, taking advantage of the marginalized and politically powerless by cutting off the legal alien, poor and needy, from welfare benefits solely because he is not fully a member of our political community, undermines our constitutional vision of a just society. Arthur Leff might ask: Sez who?<sup>179</sup> The "LORD, the great God, mighty and awesome, who . . . befriends the alien, feeding and clothing him."<sup>180</sup> That's who!

176. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in IV THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 271 (1953).

177. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in VIII THE COLLECTED WORKS OF ABRAHAM LINCOLN 333 (1953). Although he fervently prayed for the end of the war, he recognized that we as a nation might continue to suffer the consequences for the sin of slavery "until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn by the sword." *Id.*

178. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), in VII THE COLLECTED WORKS OF ABRAHAM LINCOLN 24 (1953).

179. See Leff, *supra* note 138, at 1249.

180. *Deuteronomy* 10:17-19.

