Partial Membership: Aliens and the Constitutional Community

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Abstract

In the midst of one of the largest waves of legal immigration in our nation's history, a strong anti-immigrant undertow threatens to pull us from our constitutional commitment to equality and from our national mythology of open arms and golden doors. The debates concerning noncitizens in the "public square" of the 1990s provide a good occasion and excellent backdrop for re-examining the noncitizen's status in our constitutional order.

Although noncitizens are "a discrete and insular minority" in need of heightened judicial protection, the U.S. Supreme Court has applied a panoply of standards when reviewing government actions that classify based on "alienage." The Court's review ranges from the strict scrutiny normally associated with suspect classifications to a near abdication of any judicial review responsibilities. Two paradigms emerge: membership and personhood.

The membership paradigm provides the baseline, unifying a seemingly incoherent alienage jurisprudence. When the Court perceives that a governmental entity is engaged in the process of communal formation, the Court applies a deferential "membership" standard allowing the political branches to go about their substantive work unencumbered by noncitizens' claims of constitutional protection. Where membership issues are absent, the Court shifts its focus to the rights of the individual noncitizen, more aggressively reviewing political choices under the "personhood" paradigm.

After examining these two paradigms and the complex set of doctrines developed within them, this Article explores membership's border. In the coming years, as litigation arises from renewed anti-immigrant legislation, this border will be critical. The Court confines state membership issues to questions of formation of the political community. In contrast, it reads federal membership issues expansively to include formation of the economic, social, and cultural community in addition to the political.

The federal membership cases are unpersuasively based on supposed unlimited and inherent sovereign powers. Here, I suggest that the Court, where it has not already done so, should make explicit that its federal alienage jurisprudence rests on the process of communal formation, not on unbridled and inherent governmental

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Given judicial absence from the ongoing conversation concerning communal formation, I conclude that the public, which has the primary responsibility for ensuring that our membership rules are commensurate with our a priori commitments, should engage in constitutional dialogue concerning the place of noncitizens in the American community.

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A hundred poems are on the walls.
Looking at them, they are all pining at the
delayed progress.
What can one sad person say to another?

Unfortunate travelers everywhere wish to commiserate.
Gain or lose, how is one to know what is
predestined?
Rich or poor, who is to say it is not the will
of heaven?

Why should one complain if he is detained
and imprisoned here?

From ancient times, heroes often were the
first ones to face adversity.¹

I. INTRODUCTION

An anti-immigrant tide currently rages against this country's shores. Proposition 187, which denies illegal aliens access to publicly funded social services, nonemergency health care, and education, received overwhelming support from the voters of California in the 1994 elections.² Several states

have sued the federal government, alleging that lack of border enforcement has cost the states millions of dollars in services provided to illegal aliens. Extending beyond disdain for the undocumented, the current anti-immigrant backlash blurs the distinction between legal and illegal migration, stigmatizing legal permanent resident aliens who have settled here with permission and have begun the process of becoming full members in our national community. This backlash also threatens our national commitment to generous and orderly legal immigration. Welfare reform proposals in Congress would exclude aliens from eligibility for welfare benefits and would allow states to adopt similar discriminatory restrictions. Other proposals would restrict the administrative and judicial process for some aliens facing deportation. Still other potential legislation would restructure the number and characteristics of noncitizens allowed to immigrate to the United States. Proposals have even been introduced to amend the Constitution to restrict the birthright citizenship granted by the Fourteenth Amendment.

stated: "We will tolerate no bashing of Mexico or immigrants." Anti-Immigrant Talk Angers Texas Governor, Wash. Post, Aug. 11, 1995, at A7; see Roberto Suro, Two Political Realities: Immigration Effect—Texas, California, Wash. Post, Oct. 27, 1994, at A25 (stating that because Texas has a different political, cultural, and historical relationship with immigrants, "in Texas illegal immigration does not produce the kind of outrage that has so thoroughly inflamed politics in California").

3. Arizona, California, Florida, New Jersey, New York, and Texas have sued the federal government seeking reimbursement for the cost of services provided to illegal aliens, claiming that the federal government failed to properly secure the border. See, e.g., Reimbursement Denied, Wash. Post, Feb. 14, 1995, at A11 (dismissing California suit); see also Padavan v. United States, 82 F.3d 23 (2nd Cir. 1996) (holding New York's suit failed to state a claim upon which relief could be granted); Chiles v. United States, 874 F. Supp. 1334 (S.D. Fla. 1994) (dismissing Florida's lawsuit). Additionally, nonjudicial avenues may be available to states seeking reimbursement. Several bills have been introduced in Congress that would reimburse states for various expenditures associated with an immigrant population. See, e.g., H.R. 205, 104th Cong., 1st Sess. (1995) (reimbursing state and local governments for the cost of imprisoning deportable criminals).

4. See U.S. Commission on Immigration Reform, U.S. Immigration Policy. Restoring Credibility, 1994 Executive Summary 1995 ("[F]ailure to develop effective strategies to control unlawful immigration has blurred the public perception of the distinction between legal and illegal immigrants.").

5. See, e.g., H.R. 605, 104th Cong., 1st Sess. (1995) (requiring certain legal aliens to reside in the United States for five consecutive years to be eligible for preferential public housing and rental assistance); H.R. 4, 104th Cong., 1st Sess. § 402 (1995) (restricting permanent resident alien eligibility under several welfare programs and authorizing states to follow suit as part of comprehensive welfare reform).


7. See, e.g., H.R. 373, 104th Cong., 1st Sess. (1995) (proposing an immigration moratorium, narrowing the scope of both family-sponsored and employment-based immigrants, decreasing family-sponsored immigration from a maximum of 225,000 to 10,000 persons a year and employment-based immigration from 140,000 to 5,000 persons a year, and eliminating the diversity immigrant category).

This phenomenon is not new. Although we are, in many respects, a
nation of immigrants, xenophobia and nativism have afflicted us in times
past, manifest in different ways at different times. Additionally, genuine
dialogue concerned with developing an immigration policy consistent with
our national interest has ebbed and flowed over the last century. During
these periods of robust—and sometimes nasty—debate, the judiciary was
often called upon to mediate between the interests of the government and
the rights of the noncitizen. In response, the Supreme Court developed a
rich, complex, and seemingly incoherent jurisprudence of the noncitizen.
The current national and regional debate on immigration policy serves as a
timely backdrop for re-examining the constitutional status of the
noncitizen.

Alienage jurisprudence operates within at least five separate distinct
levels of judicial review ranging from strict scrutiny to something
approaching the nonjusticiability of the political question doctrine. At
to children of mothers who are legal residents); H.R.J. Res. 56, 104th Cong., 1st Sess. (1995)
(restricting birthright citizenship to children of legal residents). Other proposals would
(children born in the United States to parents who are not citizens or permanent resident
aliens are not "subject to the jurisdiction of the United States" and not automatic citizens);
mothers are not born "subject to the jurisdiction of the United States"). For an argument that
a constitutional amendment is not necessary to deny birthright citizenship to children of
illegal aliens, see Peter H. Schuck & Rogers M. Smith, Citizenship Without Consent 116
(1985) (arguing for a "reinterpretation of the Citizenship Clause of the Fourteenth
Amendment. Its guarantee of citizenship to those born subject to the jurisdiction of the United
States should be read to... refer only to children of those legally admitted to
permanent residence in the American community"). See generally Robert J. Shulman, Children
of a Lesser God: Should the Fourteenth Amendment be Altered or Repealed to Deny
Automatic Citizenship Rights and Privileges to American Born Children of Illegal Aliens?, 22
Pepp. L Rev. 669 (1995); Note, The Birthright Citizenship Amendment: A Threat to Equality,

9. See, e.g., Richard O. Curry & Thomas M. Brown, Conspiracy: The Fear of Subversion
in American History (1972) (presenting a collection of essays on American xenophobia);
Roger Daniels, Anti-Chinese Violence in North America (1978) (presenting a collection of
previously printed essays); Alexander Saxton, The Indispensable Enemy: Labor and the Anti-
Chinese Movement in California (1971) (exploring the expansive effect of California's
treatment of the "indispensable enemy," which permeated the political and economic scene
throughout the country).

10. Cf U.S. Commission on Immigration Reform, supra note 4, at 1:
The Commission decries hostility and discrimination against immigrants as
antithetical to the traditions and interests of the country. At the same time, we
disagree with those who would label efforts to control immigration as being
inherently anti-immigrant. Rather, it is both a right and a responsibility of a
democratic society to manage immigration so that it serves the national interests.

11. When a state entity classifies persons on the basis of alienage, the classification will
normally be reviewed under the "strict scrutiny" standard, and the state classification will be
struck down. See infra notes 215-32 and accompanying text. (discussing the review of
classification under the "strict scrutiny" standard). When, however, the state engages in the
sovereign function of defining its political community, the Court abandons strict scrutiny
one extreme, the Court treats aliens as a "discrete and insular" minority entitled to heightened judicial protection. At the other end of the spectrum, the Court allows the political branches broad policy making discretion, while consciously discarding long standing constitutional principles. These two opposing approaches—strict scrutiny and unbridled discretion—reflect the tenuous position occupied by noncitizens within the American constitutional community.

In exploring this tension, I offer a model that attempts to pull the multifarious strands of the alienage jurisprudence into a unified whole. For all of its doctrinal complexity, the Court frames alienage cases around two broad categories: one marked by extreme deference to the political branches of government, and the other, in stark contrast, marked by heightened suspicion of invidious governmental action. I refer to these

review, preferring to defer to the state's lawmakers with a modified "rational basis review." See infra notes 159-68 and accompanying text. When faced with a state classification denying illegal alien children a free public education, the Court employed intermediate scrutiny to strike down the law. See infra notes 233-54 and accompanying text (analyzing the application of the intermediate scrutiny standard in the realm of denying alien children access to tuition-free public education). Most federal alienage classifications are upheld pursuant to standards of review that grant unusual deference to the judgment of the political branches of the national government. When the federal government acts with respect to core immigration issues, the Court's deference is at its greatest, bordering on nonjusticiability under the guise of the "political question" doctrine. See infra notes 80-123 and accompanying text. Aside from issues of admission, exclusion, and expulsion of aliens, the Court remains extremely deferential, applying rational basis review to federal alienage classifications. See infra notes 124-45 and accompanying text (discussing the application of the "rational basis" standard in classifying aliens). When, however, the federal government attempts to treat aliens differently with respect to certain civil and criminal procedural rights, the Court is much less deferential. See infra notes 183-205 and accompanying text (discussing situations where procedural rights trump membership concerns).

12. See, e.g., Graham v. Richardson, 403 U.S. 365, 372 (1971) ("[A]lliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." (citation omitted)).

13. See, e.g., Reno v. Flores, 507 U.S. 292, 305-06 (1993); Kleindienst v. Mandel, 408 U.S. 753 (1972) (holding that the Attorney General may exclude aliens who advocate "the economic, international, and governmental doctrines of world communism").

14. It is here that I first part company with fellow travelers who, like me, are attempting to make sense of our alienage jurisprudence. Alex Aleinikoff states that "the two lines of cases are not part of a coherent whole, but rather reflect conflicting strands in our constitutionalism: one concerned with affirming the importance of membership in the national community; the other pursuing a notion of fundamental human rights that protects individuals regardless of their status." T. Alexander Aleinikoff, Citizens, Aliens, Membership and the Constitution, 7 Const. Commentary 9, 19 (1990) [hereinafter Aleinikoff, Citizens]; see, e.g., Linda S. Bosniak, Membership, Equality, and the Difference Alienage Makes, 69 N.Y.U. L. Rev. 1047, 1056 (1994) [hereinafter Bosniak, Membership, Equality, and Difference (contending "that the law has contructed alienage as a hybrid legal status category that lies at the nexus of two legal – and moral – worlds. It lies, first of all, in the world of borders, sovereignty, and national community membership;... [it] also lies in the world of social relationships among territorially present persons"). Although I agree that these two traditions grow out of conflicting constitutional origins, the argument that I develop in this Article is that an overarching principle exists that draws them together into a coherent whole.
categories as the membership\textsuperscript{15} and personhood\textsuperscript{16} paradigms, respectively.

Although many others have contrasted these seemingly inconsistent traditions, they usually distinguish immigration law—the law of admission, exclusion, and expulsion\textsuperscript{17}—from the larger alienage jurisprudence.\textsuperscript{18} To

15. Membership as used here encompasses those issues faced by a sovereign people as they struggle with issues of communal formation, in determining the characteristics of those who would be desirable newcomers to the community. It also includes issues of preservation of the community from external threats. Professor Aleinikoff has argued that “constitutional norms defining the federal immigration power are shaped by a membership model of citizenship and alienage.” \textit{See} Aleinikoff, \textit{Citizens}, supra note 14, at 9-10 (suggesting that permanent resident aliens be considered members of the national community and arguing that the federal immigration power ought to be decoupled from membership notions and reconceptualized as “one of many powers Congress exercises in pursuit of the national welfare”); \textit{see also} Peter H. Schuck, The Transformation of Immigration Law, 84 Colum. L. Rev. 1, 54-58 (1984) (viewing \textit{Plyler v. Doe}, 457 U.S. 202 (1982), as plausibly a judicially mandated expansion of “the national community” to persons who are unlawfully present in the United States).

In the interest of clarity, I should note my use of the term “membership” differs from the use of others who write in this area. For them, the membership concept provides a tool or a rationale for inclusion, supplying an argument that noncitizens who have gained entrance and developed ties to the United States should receive a portion of the benefits of membership. \textit{See}, \textit{e.g.}, Linda S. Bosniak, Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law, 1988 Wis. L. Rev. 955, 1042 (1988) (“[W]e must acknowledge [the undocumented’s] vital place in the community.”); David A. Martin, Due Process and Membership in the National Community: Political Asylum and Beyond, 44 U. Pitt. L. Rev. 165, 201 (1983) (arguing that the Court’s due process analysis should reflect that “notions of membership in the national community” are more complex and multi-layered than can be captured in the concept of citizenship alone). In contrast, I use “membership” as a shorthand way of expressing the judiciary’s reluctance to interfere with the membership choices made by the political community. \textit{Cf.} Bosniak, Membership, Equality and Difference, supra note 14, at 1057 n.28 (now characterizing “the sphere of membership” as encompassing “border regulation, or admission”).

16. Personhood denotes constitutional status. Persons have constitutional rights, nonpersons do not. \textit{See} Roe v. Wade, 410 U.S. 113, 156-57 (1973) (conceding that its holding that the constitutional right to privacy encompassed the right to terminate pregnancy collapses if the fetus is a “person” ); \textit{cf.} Scott v. Sandford, 60 U.S. 393, 407 (1856) (holding that when the Constitution was adopted, African-Americans were not considered “people” and thus the protection of the Constitution did not apply to them, even if they were free). Where the Court’s emphasis is on the noncitizen as a constitutionally constituted person, it takes seriously the alien’s claim to constitutional protection. \textit{See}, \textit{e.g.}, Michael Scaperlanda, Justice Thurgood Marshall and the Legacy of Dissent in Federal Alienage Cases, 8 Geo. Immigr. L.J. 1, 3-4 (1994) (identifying the \textit{Yick Wo} and \textit{Graham} cases as models of the personhood approach).

17. \textit{See}, \textit{e.g.}, Stephen H. Legomsky, Immigration Law and the Principle of Plenary Congressional Power, 1984 Sup. Ct. Rev. 255, 256 [hereinafter Legomsky, Plenary Congressional Power] (“For purposes of my argument, the term ‘immigration law’ will be used to describe the body of law governing the admission and exclusion of aliens. That is the sphere in which plenary power has operated. It should be distinguished from the more general law of aliens’ rights and obligations.”).

18. \textit{See}, \textit{e.g.}, Legomsky, supra note 18, at 256 (distinguishing alienage jurisprudence, which includes alien eligibility for social programs, certain forms of employment, or special legal duties, from immigration law, which is concerned only with the admission, expulsion,
them, "the stunted growth of constitutional immigration law contrasts sharply with the flowering of constitutional protections for aliens in areas other than immigration law." I agree with them that the judiciary's refusal to "review federal immigration statutes for compliance with substantive constitutional restraints" makes immigration law a "constitutional oddity."

Immigration law, with its "plenary power doctrine," however, provides only one part of this complex puzzle. The sharp contrast does not exist between immigration law, "in its strict sense," and the larger alienage jurisprudence. In my analysis, the contrast lies between the law of membership, which transcends the immigration field, and those alienage cases where membership issues are absent.

While I agree that plenary power marks the outer edges of the deferential membership paradigm, the constitutional anomaly it creates, far from being cabined within immigration law, pervades the entire alienage jurisprudence.

Professor Bosniak succinctly illuminates this point. She argues that the traditional analysis, with its focus on whether a case is "inside" or "outside" immigration law, "tends to obscure the complex and contested nature of the status of aliens." Like me, she recognizes that "wholly

and exclusion of aliens).

19. See e.g., Hiroshi Motomura, The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights, 92 Colum. L. Rev. 1625, 1626 (1992); see also Legomsky, Plenary Congressional Power, supra note 17, at 256 (terming the difference a "mild contrast").

20. Id. at 255.

21. Id.


23. Legomsky, Plenary Congressional Power, supra note 17, at 256.

24. Membership and membership's deference even apply to the review of state laws affecting the formation of the state's political community. See infra text accompanying notes 159-68.

25. See Scaperlanda, Polishing, supra note 22, at 994-1002 (exploring the expansion of plenary power to issues of noncitizen entitlement to welfare and Fourth Amendment rights of noncitizens); Taylor, supra note 22, at 1153-56 (exploring plenary power's subconscious influence on cases involving conditions at noncitizen detention facilities).


27. Id. at 1058.

28. In an earlier article, I stated that "[o]utside the immigration context, in the context of economic opportunity, the Court has spurned the Yick Wo [personhood] tradition in favor of allowing the executive branch and Congress broad powers to discriminate against lawfully resident aliens." Scaperlanda, Polishing, supra note 22, at 996, 971 n.20 ("The political
apart from questions of admission, expulsion and naturalization, the law continues to treat alienage as the rightful basis for less favorable treatment of persons in a variety of contexts, notwithstanding the *Yick Yo* tradition. To account for this complexity, she envisions the alienage jurisprudence more broadly as involving a “jurisdictional dispute” between the domains of membership and equal personhood.

Bosniak views the “defining question” as whether government treatment of aliens beyond the border broadly construed—beyond questions of admission, exclusion, deportation, and naturalization—is itself to be viewed as an incident or extension of the immigration power. To the extent that the immigration power is understood to represent the power to define membership in the national community, how far does that power extend? Does it extend to regulation of the status of aliens in the economic, social and political spheres of life within our society?

Membership, Equality, and the Difference that Alienage Makes provides a useful framework for structuring the debate. Bosniak, however, does not venture an answer to her question beyond the observation that “the cases will likely turn on the question of where immigration—or membership—regulation legitimately begins and ends. Percisely how the courts will respond is, of course uncertain.” In this Article, I attempt to answer the question by suggesting an expansive reading of membership.

The membership and personhood traditions collapse into a unified whole because of the Court’s approach to prioritizing these categories.

branches of the federal government have the broadest power over aliens in the immigration context, but even outside this context, the Court has afforded the political branches great latitude.


30. Id. at 1056-57 (“To what degree, in short, is the status of aliens to be understood as a matter of national borders, to what degree a matter of personhood, and how are we to tell the difference?”).

31. Id. at 1143 (“The defining question in the current politics of alien status is just how far the government’s power to regulate immigration legitimately extends.”).

32. Id. at 1094. Bosniak reformulates this question several times throughout the article. E.g., id. at 1055 (“What legitimate bearing should the country’s interests in regulating immigration have on the general treatment of aliens in our society?”); id. at 1067 (“What are the contours of that body of law we call immigration law; where does it legitimately begin and end? Likewise, what are the parameters of the law regulating alien status beyond immigration law; where does it end and begin?”); id. at 1087 (“What is the legitimate scope, or jurisdiction, of the membership sphere? When do membership principles appropriately shape the status of aliens residing within the national community, and when is their status subject instead to broad principles associated with the sphere of equal personhood.”).

33. Id. at 1148 (“Given the judiciary’s change in personnel in recent years, many observers predict things will go badly for the immigrants.”). Descriptively, Bosniak views the law as having one of two responses to the question of membership’s reach: (1) the “convergence” model treats membership broadly, extending beyond immigration issues to the regulation of social relationships among all territorially present persons; and (2) the “seperation” model maintains a restrictive view of membership and “urges a relatively strict separation between the membership domain and the domain of territorial personhood.” Id. at 1138.

34. Process values, however, do not fall within this unified model. See infra text
Where membership issues are present, the Court categorically ignores or severely discounts the noncitizen's interests, deferring instead to the policy developed by the political arms of government. When, however, membership issues are absent, the Court generally heightens its scrutiny allowing the noncitizen's personhood to trump any asserted state interest. Simply put, membership interests trump and render negatory any substantive rights claimed by aliens. Sections II-IV sketch the development of these paradigms and explore the doctrinal framework that brings them out of formless abstraction and into concrete law.

My thesis is that membership provides the baseline norm governing all aspects of our alienage jurisprudence, with the personhood tradition subordinated to a secondary status. Assuming no change from the judiciary, it is imperative in this time of fervent immigration debate for the political branches to explore membership's borders to determine what interests legitimately belong in the membership category and what interests are more properly addressed within the personhood framework. For the most part, the Court has taken an expansive view of membership. At the federal level, all issues pertaining to entry into the social, economic, and political community fall within membership's parameters. The state cases reflect shifting notions of membership. At one time the membership paradigm applied to the distribution of the state's resources, but today it operates solely within the context of a state's attempt to form its political community. Even here, the Court defers to any state policy choice that is arguably within the state's interest in communal formation. Section V explores the parameters of the membership paradigm.

Finally, in Section VI, I look to the rhetoric used to construct the membership paradigm. State membership cases are built on the affirmative responsibility of the people to form a political community. In contrast, the federal membership cases rest on a negative, unwritten, absolute, and even arbitrary power of the governing bodies to set policy. If the membership paradigm remains as the cornerstone of our alienage jurisprudence, and there is no indication otherwise, the community building rationale of the
state cases provides the better model for two reasons. First, it fits more squarely with our democratic traditions than a rationale rooted in the "powers inherent in sovereignty." Second, it explicitly signals to the community's members that they assume the responsibility for fulfilling or undermining constitutional values in the realm of communal formation. The Court's deferential membership policy has dearly left to the People, as members of the national community, not only the opportunity, but more importantly the responsibility, to participate in the building of a membership scheme that reflects the nation's constitutional values and aspirations. In substance, the Court has refused this role. We the People must accept the challenge or lose, for this generation, coherence between our membership goals and our constitutional commitments.


[T]he identification of constitutional law with the decisions of the Supreme Court is a damaging and ahistorical mistake. This identification, fueled by the Warren Court, 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.

41. Some would say that the Court has abdicated its responsibility. See Henkin, supra note 22, at 854 (concluding that "courts are prepared to abdicate their responsibility to ensure that the executive act in conformity with international law"). Although the Court refuses to reconcile plenary power with the constitutional rights tradition, it continues to arrogate to itself the constitutional decision making power. Instead of committing immigration issues to the judicial nadir of the political question doctrine and admitting that it has neither the tools nor the will to respond to constitutional issues arising in this context, it concludes that the Congressional exercise of the immigration power, no matter how far removed from our constitutional norms, is constitutional. See, e.g., Mathews, 426 U.S. at 81-82 ("The 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.") (footnote omitted).

42. This task is not new. The founding generation struggled profoundly with the application of our constitutional values toward noncitizens. Prior to Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and the establishment of judicial review of constitutional issues, Congress passed the Alien Act of 1798, ch. 58 § 1, 1 Stat. 570, (1798) (authorizing the President to deport aliens he considers dangerous to the United States). Madison argued against the constitutionality of the Act. See 4 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 554-56 (1881) (2d ed. 1866) ("If aliens had no rights under the Constitution, they might not only be banished, but even capitaly punished, without a jury or the other incidents to a fair trial."). Virginia and Kentucky passed resolutions condemning the Alien Act and its sibling, the Sedition Act. Kentucky Resolutions of 1798 and 1799, reprinted in 4 Elliot, supra, at 540-45; Virginia Resolutions of 1798, reprinted in 4 Elliot, supra, at 528-32 (pronouncing the Alien and Sedition Acts unconstitutional and "defining the rights of the states"). With the benefit of robust constitutional dialogue, the Act expired after two years. See Charles Gordon & Stanley Mailman, Immigration Law and Procedure § 2.02 (1) (1994) ("[T]he Alien Act of 1798 . . . was allowed to expire at the end of its two-year term.").
II. A CONFLICT OF TRADITIONS

Like the noncitizen, the Court finds itself straddling two worlds, the one rooted in individual rights (whether the rights tradition of the Founders or the one created by the Court in the Warren era) and the other deeply concerned with communal formation. From the time the Supreme Court first involved itself with immigration issues, it's alienage jurisprudence has produced two distinct traditions. Two cases from the foundational period in federal jurisprudence—Yick Wo v. Hopkins and Fong Yue Ting v. United States—illuminate both the personhood tradition and the membership tradition.4

_Yick Wo v. Hopkins_ illustrates the founding of the personhood tradition. Long before the Equal Protection Clause provided meaningful protection for Blacks, the Court utilized it to protect aliens of Chinese origin. _Yick Wo_ involved a San Francisco ordinance requiring a special permit to operate a laundry in any structure not made of brick or stone. The city granted permits to eighty non-Chinese nationals, but denied them to the more than two hundred Chinese nationals who applied. In concluding that the discriminatory application of the ordinance violated the Equal Protection Clause, 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

43. My analysis begins with cases decided in the 1880s, which mark the genesis of the two lines of cases that I refer to as the membership and personhood traditions. Prior to that time, immigration restrictions were largely matters of state law. Professor Gerald Neuman has brought this "lost century" to life in a thorough historical analysis. _See generally_ Gerald L. Neuman, _The Lost Century of American Immigration Law (1776-1875)_ (1993) (examining the major categories of state immigration law during the first century of American history).

44. For an article exploring three periods of profound judicial activity reviewing federal action adversely affecting noncitizens, see generally Scaperlanda, Polishing, supra note 22, at 975. The foundational period was marked by judicial acquiescence to racially discriminatory congressional immigration policies. Id. at 976-84. The entrenchment period witnessed a similar acquiescence to ideological discrimination. Id. at 984-91. In the modern period, the court has held steadfast to its doctrines of the past, transcending the border to encompass issues outside of the core immigration concerns of admission, exclusion, and expulsion. Id. at 991-1002.

45. 118 U.S. 356 (1886).
46. _See e.g.,_ Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding Louisiana statute requiring "equal but separate" accommodations on passenger railroads); The Civil Rights Cases, 109 U.S. 3 (1883) (striking down civil rights law that required "equal enjoyment" of privately owned public accommodations on the ground that the Fourteenth Amendment only protected against state, not private, discrimination). _But see_ Strauder v. West Virginia, 100 U.S. 303 (1879) (striking down state statute that barred blacks from serving on juries).
47. _Yick Wo_, 118 U.S. at 374.
Yick Wo, together with Wong Wing v. United States, established the personhood tradition: noncitizens, "having our common humanity, . . . are protected by all the guaranties of the Constitution." Under this tradition, the constitutional rights of the individual, including the noncitizen, restrict the power of the government to act.

Fong Yue Ting, in contrast, ignores the possible constitutional rights of the noncitizen, subordinating any such interests to Congress's plenary power to expel those not possessing membership in the national community. This case illustrates the founding of the membership tradition. In Fong Yue Ting, three Chinese laborers, who had resided in the United States for nineteen, sixteen, and fourteen years, respectively, faced deportation for failure to obtain the requisite certificate of residence. In affirming the deportation orders, the Court explored the nature of the noncitizens' rights and the federal government's power to expel. The Court concluded that the power to expel, like the power to exclude, derives from international law and is an "absolute and unqualified" power "inherent in [a nation's] sovereignty."

Therefore, if:

the government of the United States, through its legislative department, considers the presence of foreigners of a different

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48. Id. at 368-69.
49. 163 U.S. 228, 238 (1896) (stating that aliens are "persons" and are protected by the Fifth Amendment).
50. Fong Yee Ting v. United States, 149 U.S. 698, 754 (1893) (Field, J., dissenting).
51. At times I refer to constitutional rights as constitutional first principles or a priori commitments because "[t]he strident rights rhetoric that currently dominates American political discourse poorly serves the strong tradition of protection for individual freedom for which the United States is justly renowned." Mary A. Glendon, Rights Talk: The Impoverishment of Political Discourse 171 (1991) ("Our stark, simple rights dialect puts a damper on the processes of public justification, communication, and deliberation upon which the continuing vitality of a democratic regime depends."). Id.
52. This point might seem obvious outside of the alienage context. The right to be free from governmental racial discrimination restricts the power of the government, prohibiting race based policy choices. See, e.g., Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2100 (1995) ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."). The right to freely express oneself restricts the governmental power to prohibit an offensive demonstration. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech.").
53. Interestingly, this period was "almost as long a time as some of those who were members of the Congress that passed this act of punishment and expulsion." Fong Yee Ting, 149 U.S. at 734 (Brewer, J., dissenting).
54. Id. at 702-04. In one of the cases, the petitioner had proved, to the satisfaction of the judge, that he had resided in the United States for a time sufficient to be eligible for a certificate; he was held deportable, however, because the proof was not established by the testimony of a "credible white witness," which was required by statute. Id. at 704.
55. Id. at 705, 707.
race in this country, who will not assimilate with us, to be
dangerous to its peace and security, their exclusion is not to be
stayed because at the time there are not actual hostilities with the
nation of which the foreigners are subjects.\textsuperscript{56}

Values of communal formation and protection, with deference to the
political branches’ judgment on the ability of foreign peoples to assimilate
and on their potential threat as outsiders to the security and stability of the
nation, proved determinative.

The majority dismissed the noncitizens’ constitutional claims holding
that “aliens residing in the United States... are entitled, so long as they
are permitted by the... United States to remain... , to the safeguards of
the constitution... ”\textsuperscript{67} In other words, Congress may expel
aliens—because of their lack of membership in the community—whenever
it decides that their removal is in the public interest.\textsuperscript{58} The Court
distinguished \textit{Yick Wo} and the personhood tradition: \textit{Yick Wo} addressed the
constitutional limits to a state’s power over continually residing
noncitizens; \textit{Fong Yue Ting}, in contrast, addressed the federal government’s
plenary power “to put an end to their residence.”\textsuperscript{59}

The three dissenting opinions strongly rejected the creation of the
membership tradition and its divergence from \textit{Yick Wo}’s personhood
tradition. These justices found inherent sovereign powers antithetical to
the structure of our form of government.\textsuperscript{60} Even assuming that the power
to expel is “among the powers implied,” the dissent suggests, “it can be
exercised only in subordination to the limitations and restrictions imposed
by the constitution.”\textsuperscript{61} Further, the Bill of Rights generally, and the Fifth
Amendment specifically, limit the scope of federal power; therefore, the
federal immigration power must succumb to the limitations imposed by
those first amendments. If not, the dissent asserts, the guarantees of the
Constitution belong to noncitizens “by sufferance and not of right.”\textsuperscript{62}

\begin{footnotes}
\footnotetext{56}{Id. at 706 (quoting Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889)).}
\footnotetext{57}{Id. at 724.}
\footnotetext{58}{\textit{Fong Yue Ting}, 149 U.S. at 724.}
\footnotetext{59}{Id. at 725.}
\footnotetext{60}{Id. at 737-38 (Brewer, J., dissenting); 757-58 (Field, J., dissenting); 762 (Fuller, C.J.,
dissenting).}
\footnotetext{61}{Id. at 738 (Brewer, J., dissenting). Chief Justice Fuller, in his dissent, recited the
majority’s argument “that friendly aliens, who have lawfully acquired a domicil [sic] in this
country, are entitled to avail themselves of the safeguards of the constitution only while
permitted to remain, and that the power to expel them and the manner of its exercise are
unaffected by that instrument.” Id. at 762. For him—and me—“[i]t is difficult to see how this
can be so... [because it] import[s] a condition not recognized by the fundamental law.” Id.
\footnotetext{62}{Id. at 743 (Brewer, J., dissenting).
\texttt{[Noncitizens] differ only from citizens in that they cannot vote or hold any public
office. As men having our common humanity, they are protected by all the
 guaranties of the constitution. To hold that they are subject to any different law or
 are less protected in any particular than other persons, is in my judgment to ignore
 the teachings of our history, the practice of our government, and the language of
 our Constitution.}}
\end{footnotes}
For these dissenters, *Yick Wo* established the authoritative precedent. If the use of the word "person" in the fourteenth amendment protects all individuals lawfully within the state, the use of the same word, "person," in the fifth must be equally comprehensive, and secures to all persons lawfully within the territory of the United States the protection named therein; and a like conclusion must follow as to the sixth.63

In many respects, *Fong Yue Ting* presented the more compelling case for judicial intervention. *Yick Wo* invalidated a facially neutral statute that had been discriminatorily administered to prevent relatively few people from pursuing their chosen occupation.64 *Fong Yue Ting*, on the other hand, involved a federal law that subjected "a hundred thousand people . . . to arrest and forcible deportation."65 If the lesser wrong receives judicial rebuke, the *Fong Yue Ting* dissent suggests that the "greater wrong" should receive no less.66

As these cases demonstrate, the Court proceeds from a membership baseline in its alienage jurisprudence. Where membership issues are present, the Court has consistently refused to seriously consider the constitutional claims made by noncitizens or their citizen families,67 much less balance those claims against purported governmental interests. With respect to core federal membership issues (those involving admission, exclusion, and expulsion), the Court has consistently held that the government's sovereign power to develop immigration restrictions is plenary, rendering any rights claims irrelevant.68 And, with respect to state membership issues, the Court has held that while rights claims are not irrelevant, its "scrutiny will not be so demanding."69

When a case implicates membership issues, this categorical approach ignores the constitutional values of liberty and equality, along with the "rights" of noncitizens and their families. Only in the absence of membership issues does the Court provide constitutional protection to noncitizen persons. The choice of the membership baseline is rooted in the last century's understanding of sovereignty.70 Although this historical

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Id. at 754 (Field, J., dissenting). Since the provisions of the Fifth and Fourteenth Amendments, guaranteeing certain rights "are . . . universal in their application to all persons within the territorial jurisdiction, . . . the rule laid down [in *Yick Wo*, 118 U.S. 356 (1886)] as much applies to Congress, under the Fifth Amendment, as to the States under the Fourteenth." Id. at 761-62 (Fuller, C.J., dissenting).

63. *Fong Yue Ting*, 149 U.S. at 739 (Brewer, J., dissenting).
64. See id. at 744 (restating the Court's holding in *Yick Wo*).
65. Id.
66. See id. (arguing that the Court in *Fong Yue Ting* should provide at least as much constitutional protection as it did in *Yick Wo*).
67. See infra notes 77-169.
68. See infra notes 88-124.
70. Scarperlanda, Polishing, supra note 22, at 974; see also *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) ("[T]he fallacy of the assumption [that domestic constitutional norms apply in the
link provides a weak justification for ignoring our constitutional text and tradition, it does explain the initial divergence of the membership and personhood traditions. At the founding of these two traditions and for much of the ensuing century, doctrinal and theoretical coherence could be forged from these seemingly inconsistent paradigms; the Court could be viewed as engaging in categorical balancing of interests, with personhood interests subordinated to membership issues, but prevailing over other governmental interests.

This alluring coherence disintegrated with the Court's decision in *Graham v. Richardson*. The *Graham* Court's use of strict scrutiny within the personhood paradigm precludes doctrinal consistency. The characteristics of the noncitizen that led the Court to apply the "discrete and insular" label do not abate merely because membership issues are present. Justice Marshall, in elaborating on the "spectrum of standards" for reviewing equal protection claims, stated that the level of scrutiny depends on "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." When a law adversely

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It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions. . . . The right of a nation to expel or deport foreigners . . . rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.

72. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting). Although Marshall was arguing against categorical balancing in favor of sliding scale balancing, he agrees that the Court reserves its strictest scrutiny for classifications that impinge fundamental rights or discriminate against suspect classes. Id. at 99. *See also* United States v. Carolene Prods., Co., 304 U.S. 144, 152-53 n. 4 (1938). In the alienage context, at least, Marshall got it backwards; the degree of scrutiny depends on the nature of the government's interests, not the interests or characteristics of the individual. Only in the
affects a "suspect class," it is presumed invidious and strict scrutiny applies. Therefore, doctrinal consistency would require the Court to strictly scrutinize all alienage cases—a result both unlikely and unwise—or refrain from calling noncitizens a "discrete and insular" minority. In the next two sections of the Article, I develop the membership paradigm and the personhood paradigm in greater detail. Taken together, these paradigms transcend the doctrinal morass, providing a model explaining alienage jurisprudence as a whole, not just its constituent parts.

III. THE MEMBERSHIP MODEL

Even before Graham, troubling questions arose from the Court's refusal to apply constitutional first principles to many alienage cases. For example, in the Chinese Exclusion Case, the Court upheld the exclusion of Chae Chan Ping by recognizing the government's power to formulate membership policy along racial lines. The Court ignored the constitutional constraints present in the personhood tradition, which emphasizes the rights of individual noncitizens under our Constitution, preferring, instead, the membership tradition with its emphasis on the rights of the sovereign in the areas of communal formation and security. This section will sketch the doctrinal framework shaping the membership tradition, first at the federal level and then at the state level.

A. Membership in the American Community

In contrast to the heightened review attending most state alienage cases, the Court grants extreme deference when reviewing federal alienage cases. The intersection of alienage issues and criminal trial rights, where domestic constitutional norms apply, provides the only real absence of communal formation interests will the Court apply strict scrutiny to laws that intentionally discriminate against noncitizens. See, e.g., Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982) (holding strict scrutiny inapplicable in determining whether employment as probation officer could be limited to citizens).


77. Chae Chan Ping was no stranger to the United States. He had resided in the United States for twelve years prior to returning to China for a visit. Before leaving the United States he obtained a certificate from the United States ensuring his re-entry. Id. at 582.

78. Id. at 606. The Fourteenth Amendment, which overruled Dred Scott, prohibited the use of racial classifications in drawing internal membership policy. See U.S. Const. amend. XIV.

79. See infra notes 214-32 and accompanying text (surveying state case law applying strict scrutiny to alienage cases).
deviation from the principle of deference. When, however, the Court addresses immigration issues—issues of admission, exclusion, or expulsion—its analysis treads perilously close to the political question doctrine. And, in cases that fall between the immigration context and the criminal context, the Court, at its most stringent, applies a rational basis test.

Deference is due, the Court has said, because "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." Despite criticism from the bench and from many commentators, the Court has consistently refused to assimilate federal alienage cases into mainstream constitutional law.

80. See infra text at notes 182-91.
81. See infra notes 87-123.
82. See infra notes 124-44 and accompanying text.
83. E.g., Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) ("Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."); see also Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("[I]t is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909))); Mathews v. Diaz, 426 U.S. 67, 81 (1976):

For 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. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.

84. See e.g., Fong Yue Ting v. United States, 149 U.S. 698, 702 (Brewer, J., dissenting). For a look at the history of dissent in federal alienage cases, see generally Scaperlanda, supra note 6.
86. See e.g., Galvan v. Press, 347 U.S. 522, 531-32 (1954):

"In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion . . . in regulating the entry and deportation of aliens . . . . But the slate is not clean. As to the extent of the power of Congress under review, there is not merely a page of history but a whole volume." (citations omitted).
1. Plenary Immigration Power

The Court's deference to the judgment, whim, or fancy of the political branches reaches its apex when the Court confronts immigration issues. "Over no conceivable subject is the legislative power of Congress more complete than it is over" the admission, exclusion, and expulsion of aliens. Although aliens are "persons" entitled to the protection of the Constitution, in the immigration context, neither the Constitution itself nor the Supreme Court's ruminations about the document entitle the noncitizen to substantive constitutional guarantees.

Plenary immigration power was founded on the back of blatant racial discrimination. The Chinese Exclusion Case, which affirmed the exclusion of Chinese nationals from the United States, established within the political branches the absolute power to develop a profile of the "desirable" immigrant unfettered by any provision of our higher law. As Professor Henkin has noted, "[w]hatever the Court intended [in the Chinese Exclusion Case], both its holding and its sweeping dictum have been taken to mean that there are no constitutional limitations on the power of Congress to

88. Wong Wing v. United States, 163 U.S. 228, 238 (1896).
89. The Chinese Exclusion Case, 130 U.S. 581 (1889).
90. The "exclusive and absolute" power to exclude foreigners, which emanates from sovereignty, rests with the political branches of the federal government and is "conclusive upon the judiciary." The Chinese Exclusion Case, 130 U.S. at 606. "The right of a nation to expel or deport foreigners ... rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country." Fong Yue Ting, 149 U.S. at 707. Several commentators have noted that the Court, while not rejecting the Chinese Exclusion Case and its rationale, has softened its stand that the political branches' immigration decisions are "conclusive upon the judiciary." See, e.g., Schuck, supra note 15, at 85 (noting that the Court's language in Diaz and Fiallo suggests that "the seeds of judicial intervention have been planted"). The Court's language suggests that the commentators are correct; the Court has retired the language of total abdication. See, e.g., Reno v. Flores, 507 U.S. 292, 306 (1993) (reaffirming an expansive plenary power on immigration matters, and stating that, "[o]f course, the INS regulation must still meet the (unexacting)" rational basis test); Fiallo, 430 U.S. at 798 n.5 ("Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to [core immigration matters]."). Many lower courts apply the rational basis standard in reviewing Congress's immigration laws. E.g., Perez-Oropeza v. INS, 56 F.3d 43, 45 (9th Cir. 1995); Ablang v. Reno, 52 F.3d 801, 804 (9th Cir. 1995). Despite the appearance of less deferential review, the results in the Supreme Court have remained the same; the government prevails in constitutional immigration cases. Additionally, the opinions that suggest less deference often contain conflicting language. For instance, in Fiallo the Court said "these are policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress." Fiallo, 430 U.S. at 798. The second Justice Marshall ably summed up the current state of affairs. He concluded that the Court's review remained "completely 'toothless'" because "the majority concludes: [B]ut the decision nonetheless remains one 'solely for the responsibility of the Congress and wholly outside the power of this Court to control.' Such 'review' reflects more than due deference; it is abdication." Id. at 805 (Marshall, J., dissenting) (citations omitted).
regulate immigration."91 From racial discrimination, plenary immigration power grew without bounds, allowing Congress to reflect the mood of an often anxious and fearful nation, unencumbered by the dictates of the Constitution.92 During the "red scare" of McCarthyism, Congress wielded this power to deport long time resident aliens for their thoughts and associations.93 Today it continues to stand as a sentry at our gates, allowing the political branches to formulate immigration policy without the restrictions that would otherwise be required by our constitutional traditions.94

The immigration power, an unenumerated95 "incident of sovereign-
ty,"\textsuperscript{96} belongs to both Congress\textsuperscript{97} and the Executive.\textsuperscript{98} The Constitution does not provide internal limitations to this power;\textsuperscript{99} moreover, the Court has consistently refused to supply external constitutional constraints, such as the Bill of Rights, to limit the power's scope.\textsuperscript{100} A modern example of plenary power will illustrate its immense breadth.

\textit{Fiallo v. Bell}\textsuperscript{101} serves as a useful guide. It discusses and rejects modern domestic equal protection doctrine within the immigration context despite the presence of gender, illegitimacy, and alienage that the Commerce Clause, the Naturalization Clause, the Migration and Importation Clause, The War Power, as well as the implied power to conduct foreign policy, and the implied powers accruing to a sovereign have all been used as justifications for the federal government's immigration power); Thomas A. Aleinikoff et al., Immigration Process and Policy 7-17 (3d ed. 1995) (same and adding a discussion on "constructional and structural" arguments for sources of federal immigration power); Stephen H. Legomsky, Immigration Law and Policy 8-12 (1999) (hereinafter Legomsky, Immigration Law] (same).

\textsuperscript{96}. See, e.g., \textit{Chae Chan Ping}, 130 U.S. at 609; see also \textit{Nafziger}, supra note 85, at 46 (criticizing inherent sovereign powers justification for plenary power); Scaperlanda, Polishing, supra note 22, at 968 (criticizing the inherent sovereign powers justification of plenary power in light of evolving international law norms).

\textsuperscript{97}. The Court has "repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." E.g., \textit{Fiallo}, 430 U.S. at 792.

\textsuperscript{98}. "When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power." E.g., \textit{United States ex rel. Knauff v. Shaughnessy}, 338 U.S. 537, 542 (1950); cf. \textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring) (discussing the relationship between executive power and congressional power).

\textsuperscript{99}. \textit{United States v. Curtiss-Wright}, 299 U.S. 304, 316 (1936) (stating that with respect to external sovereignty, the United States government is not a government of limited and defined enumerated powers, "[S]ince the states severally never possessed state powers but obviously were transmitted to the United States from . . . the Crown"). Therefore, "[T]he power to expel undesirable aliens . . . which is [not] expressly affirmed by the Constitution, nevertheless exist[s] as inherently inseparable from the conception of nationality." Id. at 318.

\textsuperscript{100}. See, e.g., \textit{Kleindienst}, 408 U.S. at 753-54 (holding that the First Amendment provides no protection for American scholars wanting to hear an alien speaker whom the Attorney General has excluded from entry). For noncitizens, a constitutional framework anchored by a commitment to protect the individual lives in suspended animation, just past the second star to the right. See \textit{Kikuyo Matsumoto-Power}, Comment, Aliens, Resident Aliens, and U.S. Citizens in the Never-Never Land of the Immigration and Nationality Act, 15 U. Haw. L. Rev. 61 (1993); see also \textit{Henkin}, supra note 22, at 861 ("[T]he offspring of Chinese Exclusion still reign to deny constitutional protection to many thousands of aliens against new indeniciencies . . . ."); Legomsky, Plenary Congressional Power, supra note 17, at 255 ("In immigration cases, the American courts have been their most restrained on constitutional issues."); \textit{Schuck}, supra note 15, at 1 ("Immigration has long been a maverick, a wild card, in our public law. Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right . . . that animate the rest of our legal system."). For a thorough examination of the minority of justices who would have used the Bill of Rights to restrict Congress' plenary power in immigration matters, see Scaperlanda, supra note 16.

\textsuperscript{101}. \textit{430 U.S. 787, 787} (1977) (holding that excluding an illegitimate child and his natural father, though not the natural mother, from special preference status is constitutional).
questions. *Fiallo* involved claims by three illegitimate children and their natural fathers that then existing immigration laws violated the "equal protection" component of the Fifth Amendment's Due Process Clause. The problem: Although the parent-child relationship provided the best avenue to obtain immigration benefits, the immigration laws recognized only the parent-child relationship between a mother and her illegitimate child and ignored the relationship between a father and his illegitimate child. The fathers and their illegitimate offspring could not obtain immigration benefits based on their familial relationship, scuttling their desire for family reunification in the United States.

Following a strategy first employed in *Kleindienst v. Mandel*, the plaintiffs in *Fiallo* claimed that the discriminatory immigration law violated the rights of the family member currently in the United States, not the one seeking entrance. They argued that the challenged provision "involved 'double-barreled' discrimination based on sex and illegitimacy," which "infringed upon... the rights of citizens and legal permanent residents... ." Because the *Kleindienst* Court upheld Congress's plenary

102. Where either the parent or adult child is a citizen, the noncitizen parent or minor child can immigrate without regard to the annual numerical limitations placed on the immigrants, which can lead to long delays. See 8 U.S.C. § 1151(b) (West Supp. 1995) (defining immediate relatives). For example, a married son or daughter of a United States citizen seeking to immigrate from the Philippines to the United States was eligible to immigrate in July of 1995 if she applied to immigrate before January 1, 1984. See 72 Inter. Releases 829, 862 App. IV (June 26, 1995) (quoting State Department Visa Preference Numbers for July 1995). Brothers and sisters of United States citizens immigrating from the Philippines in July 1995 applied before September 2, 1977. See id. Although adult unmarried sons and daughters of citizens are subject to numerical limitations, 8 U.S.C. §1153(a)(1) (West Supp. 1995), this category is current. See 72 Inter. Releases at 862 App. IV (June 26, 1995) (listing visa preference statistics for July 1995). For spouse and unmarried sons and daughters of permanent residents, who are subject to numerical limitations, 8 U.S.C. at §1153(a)(2), there is a backlog of between two and five years. See 72 Inter. Releases at 862 App. IV (June 26, 1995) (listing visa preference statistics for July 1995).


104. 408 U.S. 753, 769 (1972) (acknowledging that American academics had a First Amendment right to hear the Marxist journalist they had invited to speak, yet subordinating this right to the government's plenary power to exclude).

105. Previous cases had addressed the issue of whether the noncitizens' constitutional rights were violated by the denial of admission or the order of expulsion. For example, see Shaughnessy v. Mezei, 345 U.S. 206, 209 (1953) (although alien had immediate family in the United States, he claimed that his substantive and procedural constitutional rights were violated by indefinite detention pending removal from the United States). In an attempt to distinguish their cases from earlier failed attempts to break plenary power's stronghold on immigration law, the plaintiffs in *Kleindienst* and *Fiallo* attempted, albeit unsuccessfully, to shift the focus away from the adverse affect on the aliens to the harm visited upon those already lawfully in the United States.

106. *Fiallo*, 430 U.S. at 794.
power to override the First Amendment rights of citizens and legal permanent residents in the immigration context, the plaintiffs distinguished Kleindienst. Unlike the statutory provisions in Kleindienst, in Fiallo “the statutory provisions were designed to reunite families wherever possible.” Therefore, the plaintiffs argued, Congress intended to grant rights to United States citizens and legal permanent residents. The Court, however, was unpersuaded by this “unique coalescing of factors.” Following the long line of plenary power cases, stretching back to the Chinese Exclusion Case, the Court concluded that “[i]n any event, it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision.”

Why did the Court refuse to “probe and test” the legislative rationale underlying the discriminatory classification? This law discriminated against aliens and their citizen family. Even if Chinese Exclusion’s plenary power doctrine subordinates Graham v. Richardson’s characterization of aliens as members of a “discrete and insular” minority, how does the Court justify denying the citizen family members equal protection of the law? After all, the classification did involve “double-barreled” discrimination; both gender and illegitimacy classifications normally receive intermediate scrutiny review. The Court, which takes upon itself the role of shedding “increasingly outdated misconceptions concerning the role of females in the home rather than in the ‘marketplace of ideas,’” told the families in Fiallo that their argument “should be addressed to the Congress.

107. Id. at 793, 794 (discussing Kleindienst and declining to reconsider the case). The plaintiffs charged that this discrimination undermined a major policy of our immigration legislation, which “was concerned with the problem of keeping families of United States citizens and immigrants united.” House Judiciary Comm., Facilitating the Entry into the United States of Certain Adopted Children, and Other Relatives of United States Citizens, H.R. Rep. No. 1199, 85th Cong., 1st Sess., pt. 1, at 7 (1957), reprinted in 1957 U.S.C.C.A.N. 2016, 2020. In contrast, the statute at issue in Kleindienst was not designed to enhance the ability of United States citizens to exercise their First Amendment right to hear diverse viewpoints. Instead, that law was designed to protect the country and its citizens from perceived threats to the national security. See Fiallo, 430 U.S. at 806-08 (Marshall, J. dissenting) (noting that the instant case was distinguishable because here the government was not concerned with the influx of “undesirables” and the large potential audience for the “probity of [their] ideas”).

108. Fiallo, 430 U.S. at 793.

109. Id. (quoting brief of appellants).

110. Id. at 793.


112. See, e.g., Clark v. Jeter, 486 U.S. 456 (1988) (describing the intermediate scrutiny analysis as applied to claims of illegitimacy); Craig v. Boren, 429 U.S. 190 (1976) (holding that equal protection claims based on gender are subject to intermediate scrutiny).


114. Their argument was precisely the argument that had received favorable treatment in Craig: “that the statutory distinction [denying them immigration benefits] is based on an overbroad and outdated stereotype concerning the relationship of unwed fathers and their illegitimate children.” Fiallo, 430 U.S. at 799 n.9.
rather than the courts." Why did the Court refuse to "probe and test" in this particular case?

Citing the Chinese Exclusion Case and its progeny, the Court began its analysis by synthesizing a century of plenary power: "At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation." Immigration involves "an exercise of the Nation's sovereign power to admit or exclude foreigners in accordance with perceived national interests. . . . [L]imits and classifications as to who shall be admitted are traditional and necessary elements of legislation in this area." The Court hovers near, but never on, the judicial nadir known as the "political question" doctrine. Quoting Galvan v. Press, the Court stated that "the formulation of these 'policies pertaining to the entry of aliens' . . . is entrusted exclusively to Congress." In the same paragraph, the Court continued: "This is not to say . . . that the Government's power in this area is never subject to judicial review, . . . only to limited judicial review." Equivocating further, the Court stated that "the 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." Doctrinally, immigration law's plenary power grants more deference, if possible, than rational basis review and less deference than a full embrace of the political question doctrine would entail.

Plenary power, with its near total deference to the political branches, continues to serve as the cornerstone of our alienage jurisprudence. Many commentators have echoed the sentiment of Professor Henkin when he wrote: "Chinese Exclusion—it's very name is an embarrassment—must go." Yet the Court has shown no signs of relenting. Taking this reluctance as a given, this Article attempts to explore the parameters of the doctrine. With that in mind, I turn to another line of cases within the membership model; cases where the Court has slightly moderated the force of plenary power.

115. Id.
116. Id. at 792.
117. Id. at 795 n.6.
119. Fiallo, 430 U.S. at 795 n.6.
120. Id. at 795-96 n.6
121. Id. at 796 (quoting Mathews v. Diaz, 426 U.S. 67, 81-82 (1976)).
122. Henkin, supra note 22, at 863.
123. See Reno, 507 U.S. at 305-06 (recognizing a long line of plenary power cases as authoritative).
2. Rational Basis

Outside the immigration context, a semblance of domestic constitutional decisionmaking appears. Plenary power loses much of its rhetorical thrust as the Court appears to take semi-seriously the review of these alienage cases by utilizing the rational basis test. Companion cases, Mathews v. Diaz\textsuperscript{124} and Hampton v. Mow Sun Wong,\textsuperscript{125} involved federal alienage classifications outside of the immigration context. Both cases had state counterparts: Mathews, which involved eligibility for welfare benefits, found its corollary in Graham v. Richardson,\textsuperscript{126} and Hampton, which involved citizenship requirements for the federal civil service, followed Sugarman v. Dougal.\textsuperscript{127} Forging new constitutional doctrine, the Court rejected both the judicial abstinence of plenary power and the strict scrutiny of the state alienage cases. Instead, these federal classifications, which adversely affected a "discrete and insular" minority, received deferential but not abdicational review. Some commentators hoped that these cases signaled the beginning of the end for the plenary power doctrine.\textsuperscript{128} In my opinion, they strengthen and broaden its force.

In Mathews v. Diaz, the Court confronted the issue of "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."\textsuperscript{129} In reaching an affirmative conclusion, the Court rejected Graham's strict scrutiny test and employed a rational basis test, placing the burden on the

\textsuperscript{124} 426 U.S. 67 (1976).
\textsuperscript{125} 426 U.S. 88 (1976).
\textsuperscript{126} 403 U.S. 365 (1971); see id. at 382 n.14 ("We have no occasion to decide whether Congress could itself enact a statute imposing on aliens a uniform nationwide residency requirement as a condition of federally funded welfare benefits.").
\textsuperscript{127} 413 U.S. 634 (1973); see infra notes 159 and 164 and accompanying text.
\textsuperscript{128} See, e.g., Schuck, supra note 5, at 65-66; Dias seemed to concede that even federal alienage classifications were reviewable, albeit under a 'narrow standard of review'... Great and imposing structures of judicial power have been built upon far less prepossessing foundations than these. It seems likely that, just as the Court earlier imposed constitutional limits on Congress's broad power to regulate the acquisition and loss of American citizenship, the Court will not continue indefinitely to tolerate, as it did in Dias, unprincipled discrimination against aliens who... have become vital members of the community; cf. Stephen H. Legomsky, Immigration and the Judiciary: Law and Politics in Britain and America 219 (1987) ("[T]here is evidence that the plenary power doctrine is beginning to warp."). Professor Legomsky has recently revised his predictions on the demise of plenary power, believing now that the Court will only slowly undermine the century-old doctrine. Stephen H. Legomsky, Ten More Years of Plenary Power: Immigration, Congress, and the Courts 22 Hastings Const. L.Q. 925, 937 (1995).
\textsuperscript{129} Mathews, 426 U.S. at 69.
law's challenger. It concluded that "it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence." The Court distinguished Graham because of "significantly different considerations" present in the relationship between federal government and alien but absent in the relationship between state government and alien. Unlike the states, "it is the business of the political branches of the Federal Government . . . to regulate the conditions of entry and residence of aliens."

In a rare move, the Court, in Hampton v. Mow Sun Wong, struck down a federal rule prohibiting aliens from competing for federal civil service positions. In reaching its conclusion, the Court did not follow Sugarman v. Dougall, which used strict judicial scrutiny to strike down state civil service eligibility requirements; instead, it adopted a rationale that defies easy characterization. Perhaps the dissent put it best: "[T]he Court does not rely on an equal protection analysis . . . . [I]t instead inexplicably melds together the concepts of equal protection and procedural and substantive due process to produce" its holding. Because of the federal government's "overriding national interests" in immigration, the Court jettisoned "traditional equal protection analysis." In its stead, the Court inserted a two prong melding. First, if a state's adoption of the discriminatory rule would violate the Fourteenth Amendment, then "due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve" an overriding national interest.

130. Id. at 82-83. The Court reasoned:

Since neither requirement is wholly irrational, this case essentially involves nothing more than that it would be more reasonable for Congress to select somewhat different requirements of the same kind . . . . Since appellees have not identified a principled basis for prescribing a different standard than the one selected by Congress, they have, in effect, merely invited us to substitute our judgment for that of Congress . . . . We decline the invitation.

Id. at 83-84.

131. Id. at 84-85. This rationale, which drew distinctions based on the type of government making the decision, originated in Fong Yue Ting v. United States, 149 U.S. 698, 725 (1893). In contrast, the Court of the middle period focused on the type of power wielded, promoting deference to the federal government's immigration decisions, but counseling greater review outside the immigration context. See Harisiades v. Shaughnessy, 342 U.S. 580, 586-87 (1952).

132. Mathews, 426 U.S. at 84.


134. Id. at 119 (Rehnquist, J., dissenting). The Court held:

The added disadvantage resulting from the enforcement of the rule—ineligibility for employment in a major sector of the economy—is of sufficient significance to be characterized as a deprivation of an interest in liberty. Indeed, we deal with a rule which deprives a discrete class of persons of an interest in liberty on a wholesale basis. By reason of the Fifth Amendment, such a deprivation must be accompanied by due process.

Id. at 102-03.

135. Id. at 100-01.

136. Id. at 103.

137. Id. at 103. "[I]f the rule were expressly mandated by the Congress or the President,
Second, if an agency with no foreign affairs responsibility promulgates the discriminatory rule, the Court balances the governmental interest against the interests of those harmed by the rule.\(^{138}\)

In this case the balance was struck for noncitizens. "Any fair balancing of the public interest in avoiding the wholesale deprivation of employment opportunities caused by the Commission’s indiscriminate policy, as opposed to what may be nothing more than a hypothetical justification, requires rejection of the argument of administrative convenience in this case."\(^{139}\) Therefore, the Civil Service Commission’s regulations were invalid.\(^{140}\) The Court assumed a different outcome if the classification had been made by Congress or the President.\(^{141}\) Three federal court decisions upholding President Ford’s subsequent executive order excluding aliens from civil service positions ratified the Court’s assumption.\(^{142}\)

Reading between the lines, the Court seems to hold that if the political branches of the federal government adopt a discriminatory posture adversely affecting aliens or a group of aliens outside the immigration context, the Court will apply at most a rational basis review. Where, however, a federal agency possessing no residual immigration power adopts the discriminatory rule, the Court will apply some form of heightened scrutiny, but its review will still fall short of the strict scrutiny analysis applied in the state cases.

The membership paradigm remains operative justifying broad judicial deference to the political branches of the federal government when classifying in ways that disadvantage this “discrete and insular” minority. This paradigm, and not the personhood paradigm, applies because:

[T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers,

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we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption.” Id. This dicta follows the rationale of Hampton’s companion case, Mathews v. Diaz, 426 U.S. 67 (1976), where the Court applied a rational basis test to a congressionally adopted rule that excluded certain aliens from welfare benefits. Mathews, 426 U.S. at 82-83.


139. Id. at 115-16.

140. Id. at 116-17.

141. See id. at 105 (discussing the fact that the civil service commission’s adoption of citizenship as a requirement for employment in the federal civil service is without congressional or presidential authorization.).

and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the judiciary. In regulating this relationship between the national community and the noncitizen, the dual membership concerns of communal formation and protection reign paramount, permitting discriminatory classifications as an "incentive" to noncitizens to become full participatory members of the community through naturalization. Membership is not, however, within the exclusive province of the federal government.

B. Membership in a State Community

From Yick Wo through Graham, the personhood paradigm finds its strongest roots in the state alienage cases. Unlike the federal counterpart, where membership provides the point of embarkation, in state cases membership "appears" as an exception to the personhood tradition. The membership exception has surfaced under two distinct doctrines: the special public interest doctrine and the public function doctrine.

1. Special Public Interest Doctrine

Prior to 1948, when a state reserved its resources for its own citizens, denying noncitizens access to those resources, no constitutional violation existed. This line of cases had its roots in the now largely discarded right versus privilege distinction. Where the discrimination pertained "to the

143. Mathews, 426 U.S. at 81.
144. See Hampton, 426 U.S. at 105 ("[I]f the Congress or the President had expressly imposed the citizenship requirement it would be justified ... [as] an incentive for aliens to become naturalized ....").
145. Analyzing the state alienage cases without the benefit of the federal cases is like examining the source of the moon's "light" without knowledge of the sun—the perspective is skewed by incomplete data. If we examine the state cases in isolation, personhood appears as the norm and membership the exception. Steps back and viewing the alienage jurisprudence as a whole allows us to see that membership, like the sun, sits at the center providing the energy for the whole mechanism, while personhood is relegated like the moon to a secondary role, giving the illusion that it is casting its own light.
146. See William W. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1444 (1968) (explaining that to a large extent, the right versus privilege distinction has been relegated to the jurisprudential graveyard in many cases, including those involving state alienage classifications); Goldfarb, supra note 2, at 1460 ("[In state alienage cases], the Court rejected the special public interest doctrine as part of a dated and discredited right versus privilege distinction ... "). But see Rodney A. Smolla, The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much, 35 Stan. L. Rev. 69, 70 (1982) (noting the "astounding ability of the right versus privilege distinction to rebound from discredit"). The right versus privilege distinction maintains vitality in the federal alienage cases. See Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application...."); Alfred C. Aman, Jr. & William T. Mayton, Admin. Law 158 (1993); Aleinikoff, Federal Regulation, supra note 85, at 865 ("News of the decline of the "rights/privilege distinction has not yet reached immigration law....").
regulation or distribution of the public domain, or of the common property or resources of the people of that State, the enjoyment of [such] may be limited to its citizens as against both aliens and citizens of other States.\textsuperscript{147} Therefore, states could prohibit noncitizens from hunting wildlife,\textsuperscript{148} owning land,\textsuperscript{149} and leasing land for agricultural pursuits.\textsuperscript{150} This special public interest doctrine extended to private employment on public projects.\textsuperscript{151} The line between the public domain and private enterprise blurred when the Court extended this doctrine to purely private activity in upholding a law that prohibited aliens from owning and operating a billiard parlor.\textsuperscript{152} Applying a rational basis standard of review, the Court in \textit{Clarke v. Deckebach} concluded that it was not irrational to prohibit aliens from engaging in this occupation because billiard parlors were potential locations for depravity.\textsuperscript{153}

The special public interest doctrine’s influence in state alienage cases was short lived. In \textit{Torao Takahashi v. Fish \\& Game Comm’n},\textsuperscript{154} the Court struck down a California statute that denied Japanese citizens living in California the opportunity to obtain a commercial fishing license.\textsuperscript{155} After

\begin{footnotesize}
\begin{enumerate}
\item[147.] \cite{454 U.S. at 437}
\item[148.] \textit{See Patson}, 232 U.S. at 143 (describing the contemporary statute prohibiting noncitizens from hunting wildlife).
\item[150.] \textit{See Terrace v. Thompson}, 263 U.S. 197, 220-21 (1923) (upholding a law that denied the right to lease land to aliens not seeking citizenship in good faith).
\item[151.] \textit{See Crane v. New York}, 239 U.S. 195, 198 (1915) (following result in \textit{Heim}); \textit{Heim v. McCall}, 239 U.S. 175, 194 (1915) (holding that New York City may exclude aliens from public construction projects). This result was partially foreordained by the right versus privilege distinction. Justice Cardozo, on behalf of the New York Court of Appeals, said:

\begin{quote}
The state in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens rather than that of aliens. Whatever is a privilege rather than a right, may be made dependent upon citizenship. In its war against poverty, the state is not required to dedicate its own resources to citizens and aliens alike.
\end{quote}

\item[152.] \textit{Ohio ex rel. Clarke v. Deckebach}, 274 U.S. 392, 396 (1927).
\item[153.] Id. at 397.
\item[154.] 334 U.S. 410 (1948). Tarao Takahashi became a permanent resident of California in 1907. Between 1915 and 1942 he earned his living as a fisherman off California's coast pursuant to a fishing license granted to him by the state. While he and other Japanese residents of California were interred during World War II, California passed several anti-Japanese measures including one "prohibiting issuance of a [commercial fishing] license to any 'alien Japanese.'" Id. at 413. Fearing that the law might be unconstitutional, California amended it to prohibit the "issuances of licenses to any 'person ineligible to citizenship.'" Id. Although the Court did not treat this classification as race based, it is clear that the law had deep racial overtones. Id. at 418, 422 (Murphy, J., concurring).
\item[155.] Under the statute, any resident of California who was ineligible for United States citizenship was prohibited from obtaining a commercial fishing license. Id. at 413. Japanese immigrants were prevented, until 1952, from becoming citizens pursuant to our formerly
\end{enumerate}
\end{footnotesize}
noting that a state's power to classify along alienage lines "is confined within narrow limits," the Court rejected California's public domain argument concluding that: "To whatever extent the fish... off California may be 'capable of ownership' by California, we think that 'ownership' is inadequate to justify... excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean... while permitting all others to do so." In refusing to distinguish the right to fish from the right to hunt or Takahashi from the previous special public interest cases, the Court signaled the decline of that doctrine.

The transferral of all state alienage jurisprudence to the personhood paradigm did not follow this decline. Instead, the "public function" exception replaced the special public interest doctrine as the membership prong of the state cases. The two doctrines differ significantly on the underlying meaning of citizenship. Although both are membership centered, special public interest emphasizes the rewards of full membership—reaping the fruits of a state's bounty; public function, in contrast, emphasizes the participatory process value of communal formation.

2. Public Function

The special public interest doctrine had its foundations in economic protectionism by the state legitimized through the vehicle of the right versus privilege distinction. In contrast, the public function doctrine finds its moorings in an exclusionary theory of the political community. The Court will not employ strict scrutiny to protect this discrete and insular minority in cases where the state, by the challenged classification, is merely engaging in the ongoing process of "defin[ing] its political

racially discriminatory naturalization process. The first Congress declared that only "free white persons" were eligible for citizenship. See Act of Mar. 26, 1790, ch. III, § 1, 1 Stat. 103 (1845) (describing the procedures for a free white person to become a U.S. citizen). This "only 'free whites' need apply" rule was whittled away over the years. See 16 Stat. 254, 256 (1870) (making aliens of African nativity or descent eligible for naturalization); 54 Stat. 1137, 1140 (1940) (declaring "races indigenous to the Western Hemisphere" eligible for naturalization); Act of Dec. 17, 1943, ch. 344, § 1, 57 Stat. 601 (making aliens of Chinese origins eligible for naturalization); 60 Stat. 416 (1946) (making "races indigenous to India" and Filipinos eligible for naturalization). In 1952, Congress ended its racially discriminatory naturalization policies. See Act of June 27, 1952, ch. 477, § 311, 66 Stat. 165, 239 (1952) (codified as amended at 8 U.S.C.A. § 1422 (West Supp. 1995). The 1952 repeal accrued primarily to the benefit of Japanese immigrants, who at that time were the largest group of aliens living in the United States but ineligible for citizenship. Cf. Oyama v. California, 332 U.S. 633 (1948) (holding that an American citizen's right to equal protection was violated when his land escheated to the state because his father was a Japanese alien). See generally 2 Gordon & Mailman, supra note 42, § 15.12; Charles Gordon, The Racial Barrier to American Citizenship, 93 U. Pa. L. Rev. 237 (1945) (arguing that the U.S. should repeal all racial exclusion laws because they are anachronistic and unjust).

156. Takahashi, 334 U.S. at 420.
157. Id. at 421.
158. Id. at 420-21.
community." This exception to the use of strict scrutiny "applies to laws that exclude aliens from positions intimately related to the process of democratic self-government."160

The Court's scrutiny in these cases becomes less demanding because:

The act of becoming a citizen is more than a ritual with no content beyond the fanfare of ceremony. A new citizen has become a member of a Nation, part of a people distinct from others. The individual, at that point, belongs to the polity and is entitled to participate in the processes of democratic decisionmaking. Accordingly, we have recognized "a State's historical power to exclude aliens from participation in its democratic political institutions," as part of the sovereign's obligation "to preserve the basic conception of a political community."161

Because the Court refuses to strictly scrutinize all state laws affecting this discrete and insular minority, it has developed a test for determining when to employ the less demanding rational basis standard and when to retain the strict scrutiny standard:

First, the specificity of the classification will be examined: a classification that is substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification services legitimate political ends.... Second, even if the classification is sufficiently tailored, it may be applied in the particular case only to "persons holding state elective or important nonelective executive, legislative, and judicial positions," those officers who "participate directly in the formulation, execution, or review of broad public policy" and hence "perform functions that go to the heart of representative government."162

If a classification is over or underinclusive, the law receives strict scrutiny review. If the classification, even though not over or underinclusive, is not tailored to encompass only those positions that "go to the heart of

159. Sugarman, 413 U.S. at 642-48.
160. Bernal v. Fainter, 467 U.S. 216, 220 (1984). In Sugarman, the Court had stated:
   Neither do we hold that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office... Such power inheres in the State by virtue of its obligation... 'to preserve the basic conception of a political community'.... Our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives.

Sugarman, 413 U.S. at 647-48 (citation omitted).
representative government," the law receives strict scrutiny. If, however, the classification is sufficiently narrow to restrict access to only those jobs involving development, implementation, and execution of "broad public policy," then the Court will employ rational basis review. Teachers, peace officers, and parole officers all perform important political functions, and states may prohibit noncitizens from working in those fields. Civil servants, engineers, notary publics, and attorneys do not perform such functions, and states may not bar noncitizens from pursuing these careers.

If the Court seriously considers aliens as members of a discrete and insular minority who are entitled to greater judicial protection, the level of judicial scrutiny should not be dependent on the nature and strength of the government's interest. The Court's opinions should counsel strict scrutiny review and the state should have the burden of showing that it had a compelling state interest and that the classification was necessary to meet the compelling interest. The state may have a compelling interest in reserving jobs essential to defining the political community to its citizenry. And, it is theoretically possible to draw a classification narrowly enough to be necessary to achieve that compelling interest. The Court, however, refuses to engage in this inquiry, preferring instead to change the rules of analysis for this particular type of alienage issue. This result is partly a product of the outcome determinative nature of categorical balancing, which possesses a rigidity that cannot account for nuance.

More importantly, whether the Court employs a categorical approach or an ad hoc balancing approach, the public function doctrine represents the scales tilting away from the "rights" of the individual in favor of the interests of the community precisely because membership issues are present. In the next section, I survey the personhood model marked by its categorical presumption in favor of protecting the noncitizen.

163. See Ambach v. Norwick, 441 U.S. 68, 75 (1979) (teachers); Foley, 435 U.S. at 300 (police officers); Cabel, 454 U.S. at 447 (parole officers).
164. See Sugarman, 413 U.S. at 640 (discussing various federal and New York state laws excluding noncitizens from public employment).
165. See Examining Board v. Flores de Otero, 426 U.S. 572, 603 (1976) (finding that Puerto Rico's prohibition of noncitizen employment in the private practice of engineering is unconstitutional).
166. See Bernal, 467 U.S. at 225 (holding that Texas law precluding noncitizens from employment as a notary public to be unconstitutional).
168. "Unless the Court was prepared to strike down every manner and form of distinction between citizens and aliens, it would have to acknowledge that alienage is no garden-variety suspect classification and then construct a rationale to support some of those distinctions." Gerald Rosberg, Discrimination Against the "Nonresident" Alien, 44 U. Pitt. L. Rev. 399, 400 (1983).
IV. THE PERSONHOOD PARADIGM

The personhood tradition, dating back to *Yick Wo v. Hopkins*, has existed in tandem with the Chinese Exclusion Cases membership paradigm, generating a century long dissonance in our alienage jurisprudence. Although most pronounced at the state level, the personhood paradigm has found a limited, but significant, home in the federal cases. During the 1950s and its period of ideological exclusions, the Court often assumed that noncitizens shared the same rights as citizens outside of the immigration context. Without marking a distinction between federal and state treatment of aliens, the Court in *Harisiades v. Shaughnessy* stated:

> [T]he Constitution assures [the alien] 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.

In reality, personhood remains the subsidiary paradigm, garnering a majority support in the Supreme Court only in the absence of broadly construed membership issues (with one notable exception). Its presence, however, is critically important. Whether finding voice in majority opinions or in dissents, the personhood tradition serves to force the courts and those of us who think about these issues “to reconsider the

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171. Aleinikoff, *Citizens*, supra note 14, at 19 (describing the two paradigms as “conflicting strands”).
173. Id. at 586 n.9 (“Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with citizens. Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance.”); see also *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) (“[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.”); *Carlson v. Landon*, 342 U.S. 524, 534 (1952) (“When legally admitted, they have 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.”). Following Michael Walzer, this is what Professor Bosniak refers to as the “separation” model, where there is “a strict separation between the sphere of membership and the spheres internal to the national society in which aliens conduct their lives.” Bosniak, *Membership, Equality, and Difference*, supra note 14, at 1095. In contrast, both earlier and later cases use the state versus federal distinction to demarcate the line between the personhood and membership paradigms. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (“[T]he States enjoy no power with respect to the classification of aliens. This power is 'committed to the political branches of the Federal Government.'” (citations omitted)); *Fong Yue Ting*, 149 U.S. at 725 (distinguishing *Yick Wo* because the “question there was of the power of a state over aliens continuing to reside within its jurisdiction, not of the power of the United States to put an end to their residence”).
174. See infra note 182 (discussing procedural rights exception).
fundamental questions and to rethink the result[s]"\(^{175}\) of the Court's alienage jurisprudence.

**A. Noncitizen as "Person" Under the Fifth Amendment**

As an exercise of sovereignty, the executive and the legislative branches have almost absolute authority and power to adopt any immigration policy, even those that offend our most basic constitutional principles. The further removed the issues are from the immediate substantive decisions to admit, exclude, or expel, the more likely the Court will backpedal from this near total abdication. As we saw with *Hampton* and *Mathews*, the Court will apply domestic norms, albeit still an extremely deferential rational basis review, to federal discrimination against aliens in the distribution of government benefits. Justice Thurgood Marshall identified two areas where even unadmitted aliens enjoy constitutional protection: First, nonenemy aliens can employ the Fifth Amendment's Takings Clause to protect their property against unlawful takings by the federal government. Second, aliens subject to criminal prosecution "enjoy at trial all of the protections that the Constitution provides to criminal defendants."\(^{176}\)

1. **Alien Property and the Takings Clause**

Membership issues are largely absent from Takings Clause questions; therefore, domestic constitutional norms apply. In *Russian Volunteer Fleet v. United States*,\(^ {177}\) a Russian corporation sought compensation for two shipbuilding contracts requisitioned by the United States. Relying on the archetypical personhood cases, *Yick Wo* and *Wong Wing*, the Court concluded that the Russian Corporation, as "an alien friend, . . . was entitled to the protection of the Fifth Amendment."\(^ {178}\) Domestic norms flourished here under a personhood regime because questions of admission, exclusion, expulsion, and protection of society's members from outsiders were not present.

If the case had involved enemy aliens or acquisition or retention of

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177. 282 U.S. 481 (1931).
178. Id. at 489. Constitutional protection did not depend on reciprocity from the foreign government.

The Fifth Amendment gives to each owner of property his individual right. The constitutional right of owner A to compensation when his property is taken is irrespective of what may be done somewhere else with the property of owner B. As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. The provision that private property shall not be taken for public use without just compensation establishes a standard for our government which the Constitution does not make dependent upon the standards of other governments.

Id. at 491-92.
property by noncitizens in violation of U.S. law, the case may have had a
different outcome.\textsuperscript{179} Enemy aliens threaten the security of the
community, compelling the use of membership standards.\textsuperscript{180} Violating
property laws designed to restrict foreign ownership may be seen as an
external threat to the integrity of the process of communal formation.\textsuperscript{181}
	extit{Russian Volunteer Fleet} demonstrates that where no such membership issues
arise, the Court will treat aliens as constitutional persons. In the next
section, I explore a true exception to plenary power, application of
personhood principles in the presence of membership policy.

2. \textit{Process Values: Personhood's Stronghold}

If immigration law is a constitutional oddity, then the procedural
aspects of immigration law present a plenary power doctrine oddity. In the
procedural realm, the Court, at times, shifts paradigms and takes the rights
of noncitizens seriously within the context of immigration law, limiting the
sovereign's otherwise inherent and exclusive power to develop immigration
policy. The lesson seems to be that process values, where practicable,\textsuperscript{182}
trump membership concerns. Procedural issues arise within the context of
the decision to admit, exclude, or expel and also within the context of
criminal prosecutions of aliens.

From plenary power's beginnings, the Court has consistently held that
noncitizens are entitled to domestic criminal trial rights before being
criminally sanctioned. After concluding that noncitizens are persons
entitled to the protections of the Fifth and Sixth Amendments, the Court,

\textsuperscript{179} Cf. id. at 489 ("There was no legislation which prevented it from acquiring and
holding the property in question. The petitioner was an alien friend . . . .").

\textsuperscript{180} See Johnson v. Eisentrager, 339 U.S. 765, 771-72 (1950) ("It is war that exposes the
relative vulnerability of the alien's status. . . . [D]isabilities this country lays upon the alien
who becomes also an enemy are imposed temporarily as an incident of war and not as an
incident of alienage."); see also Gerald L. Neumann, Whose Constitution?, 100 Yale L.J. 909,
936 n.149 (1991) (noting difference between "alien friends" and "alien enemies"); Douglass L.
Koff, Note, Post-Verdugo-Urquidez: The Sufficient Connection Test—Substantially Ambiguous,
parameters of \textit{Eisentrager}).

\textsuperscript{181} See Mathews, 425 U.S. at 80 ("The decision to share [our country's] 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."); cf. Takahashi, 334 U.S. at 421 ("To whatever
extent the fish in the three-mile belt off California may be 'capable of ownership' by
California, we think that 'ownership' is inadequate to justify California in excluding any or all
aliens who are lawful residents of the State from making a living by fishing in the ocean off its
shores while permitting all others to do so.").

\textsuperscript{182} The provision of procedural rights is ever bounded by practical concerns. In the
immigration context, the essential problem is developing a framework that limits the number of
people entitled to benefit from constitutionally mandated procedural minimum. "The main
difficulty is probably an obvious one. We are talking about literally everyone in the
in *Wong Wing v. United States*, held that although an alien could suffer deportation upon a summary executive proceeding, it was unconstitutional for the state to first sentence the alien to hard labor without benefit of a judicial trial. Many criminal cases raise no membership issues. Likewise, the criminal alien normally poses no threat to the security of society’s members distinct from that provided by our own home grown rabble. One might be tempted to conclude, on the basis of lack of membership concerns, that the personhood paradigm applies.

*Wong Wing* defies such a simple answer because *Wong Wing* was an immigration case. In formulating membership policy, Congress made a deliberate choice to impose, as part of a package aimed at stemming Chinese migration, criminal sanctions on Chinese nationals residing unlawfully within the United States. The statute allowed the government to impose the criminal penalty administratively without indictment, trial by jury, or judicial involvement. Assuming that the mere threat of deportation would not provide an adequate incentive for the targeted group to voluntarily leave the country, Congress decided that it needed the threat of a relatively quick and cheap punishment that could be imposed upon a summary hearing. Membership’s plenary power doctrine would dictate deference to the policy judgments of Congress because “any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and

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183. 163 U.S. 228, 238 (1896).
184. Bosniak reads the *Wong Wing* case as a classic example of the Court separating immigration issues from other issues involving the life of the noncitizen within the United States. She says:
In effect, *Wong Wing* stands for the following proposition: The mere fact that the object of government power is an alien does not mean that the government is exercising its immigration power. The proper domain of immigration regulation has its limits. There is immigration power, and there is governmental power in spheres not directly connected with admission and exclusion; the two are not coextensive and must be kept separate. . . . In other words, power in one sphere does not necessarily entail power in the other. This is a profound and not immediately intuitive holding. . . . [The immigration] domain governs matters of admission, exclusion, and deportation; beyond it, the alien inhabits the domain of territorially present persons where different and more protective rules against government power apply.

Bosniak, Membership, Equality, and Difference, supra note 5, at 1097-98. Here, I think Bosniak has it wrong. *Wong Wing* is not what she terms a separation case; it is, as I state above in the text, a core immigration case. Since *Wong Wing* cannot be justified or explained on the theory that it is a nonimmigration case, some other rationale is needed to explain the presence of meaningful judicial review. I argue that *Wong Wing* reflects the Court’s willingness to impose a minimum procedural regime within which the political branches can carry out their substantive immigration policy.

185. Act of May 5, 1892, ch. 60, § 4, 27 Stat. 25 (1893) (“[A]ny such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period of not exceeding one year and thereafter removed from the United States.”).
the maintenance of a republican form of government."\(^{187}\)

*Wong Wing* squarely addressed Congress's attempt to streamline the removal of those who were not welcome as members or even visitors to our national community.\(^{188}\) The Court, relying on plenary power precedent, clearly recognized that it could place "[n]o limits . . . upon the power of congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land."\(^{189}\) Nonetheless, the Court rejected the membership rationale and proceeded to impose limits using the personhood paradigm.\(^{190}\) Congress's underlying substantive decision to punish these aliens did not trouble the Court, but it found the process used to adjudicate the question of punishment unacceptable. "[W]hen Congress sees fit to further promote [its expulsion] policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused."\(^{191}\)

At least with respect to process in criminal proceedings incident to immigration policy, the Court will enforce domestic norms. Process values have also displaced plenary power in the context of deportation, and to a lesser extent, in the context of exclusion.\(^{192}\) Unlike the criminal procedure arena, with its constitutionally enumerated trial rights, the process owed to noncitizens in deportation and exclusion derives from the amorphous Due Process Clause. In the *Japanese Immigrant Case*, the Court established that before the government could deport a noncitizen, she must be given "all opportunity to be heard upon the questions involving his [sic] right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized."\(^{193}\)

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\(^{187}\) *Mathews*, 426 U.S. at 81 (quoting *Harisiades*, 342 U.S. at 588-89; *Reno*, 507 U.S. at 305 ("['O']ver no conceivable subject is the legislative power of Congress more complete."(quoting *Fiallo*, 430 U.S. at 792)).

\(^{188}\) "The question now presented is whether Congress can promote its policy in respect to Chinese persons by adding to its provisions for their exclusion and expulsion punishment by imprisonment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused."\(^{189}\)

\(^{189}\) *Wong Wing*, 163 U.S. at 237 (emphasis added).

\(^{190}\) *Wong Wing*, 163 U.S. at 237.

\(^{191}\) "The one partial exception to the absolute character of Congress's power over immigration concerns procedural due process. . . . It is now accepted that aliens undergoing deportation proceedings are entitled to procedural due process. The same principle seems to extend to those exclusion proceedings in which aliens are returning residents, although again the cases are in conflict." *Legomsky*, Plenary Congressional Power, supra note 17, at 259.

\(^{192}\) *Yamataya v. Fisher*, 189 U.S. 86 (1903).

\(^{193}\) Id. at 101. Finding the minimal due process requirements satisfied, the court affirmed
For the most part, the Court takes a territorial approach with little or no regard for the strength of an alien’s ties to the United States. Noncitizens who are within our borders legally or illegally, for short or extended periods of time, possess a liberty interest in remaining in this country; therefore, they are entitled to due process prior to deportation. Noncitizens who are outside this country, no matter how strong their ties to the United States, have no similar liberty interest in gaining admittance and, therefore, are entitled to none of the Constitution’s procedural guarantees unless the alien falls within the purview of Landon v. Plasencia.

Landon involved the Immigration and Naturalization Service’s attempt to exclude Plasencia from the United States on grounds of her involvement in smuggling illegal aliens into the United States. Plasencia, a permanent resident alien, made two procedural claims. First, she claimed an entitlement to have her immigration status determined in a deportation hearing rather than an exclusion hearing. Second, she claimed that her status as a returning permanent resident entitled her to the constitutional protections found in the Due Process Clause of the Fifth Amendment, regardless of whether she received a deportation hearing or an exclusion hearing. After denying her claim to a deportation hearing on statutory construction grounds, the Court concluded “that under the deportation order. Id. at 102. “If the appellants want of knowledge of the English language put her at some disadvantage in the investigation . . . that was her misfortune . . . .” Id. 195. “Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons guaranteed due process of law by the Fifth and Fourteenth Amendments.” Pylar, 457 U.S. at 210.

196. See Yamateya, 189 U.S. at 86 (four days).


198. See, e.g., id. at 215; United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”); see also Nafziger, supra note 85, at 51 (discussing the plenary power doctrine, which “is illogical” and should not bar judicial review of visa denials).


200. At the time an alien “who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law” was excludable. Id. at 23 (quoting 8 U.S.C. § 1182 (a)(31)). The “for gain” language has been deleted from the statutes, allowing for the exclusion of volunteer alien smugglers. See 8 U.S.C. § 1182 (a)(6)(5)(i) (1994) (“Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is excludable.”).

201. Following Rosenberg v. Fleuti, 374 U.S. 449 (1963), which held that an “innocent, casual, or brief” absence from the country does not trigger “the consequences of an “entry” on return, Plasencia argued that her trip to Mexico fit within the Fleuti exception, and, therefore, she was entitled to a deportation hearing. Landon, 459 U.S. at 30. The Court disagreed, stating that Fleuti “only defined ‘entry’ and did not designate the forum for deciding questions of entry.” Id. at 31-32.

202. Landon, 459 U.S. at 32 (“The Statutory scheme is clear: Congress intended that the
circumstances of this case, she can invoke the Due Process Clause on returning to this country, although we do not decide the contours of the process that is due or whether the process accorded Plasencia was insufficient. 203 The Court found that the sovereign was obligated to provide a constitutionally prescribed procedural minimum because Plasencia's prior residence in the United States strengthened her constitutional status. 204

In Landon, as with the other cases granting noncitizens procedural relief, the Court saw its role as limited. "The role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy." 205 This limited role, however, is significantly broader than the one played by the judiciary under plenary power. Some aliens (those present in the United States and those who fall within Plasencia) receive treatment as persons under the procedural due process component of the Fifth Amendment even at the expense of Congress' membership scheme. We will return briefly to the procedural exceptions to plenary power in Section IV of the Article. As the only true exceptions to plenary power's hold on membership policy, these cases may contain the formula for those desiring to loosen the grip of plenary power on the Court's alienage jurisprudence.

B. Noncitizen as "Person" Under the Fourteenth Amendment

Yick Wo v. Hopkins 206 created the personhood paradigm. During the next half century, the state alienage cases developed along two distinct lines. One line of cases addressed classifications imposing burdens on aliens in the private sphere. The other line addressed classifications involving the special public interest. 207 Truax v. Raich 208 is a typical example of the former line. In Truax, the challenged Arizona law prohibited most employers from employing more than twenty percent noncitizens. The Court struck down the law on equal protection grounds:

It requires no argument to show that the right to work for a living

determinations of both 'entry' and the existence of grounds for exclusion could be made at an exclusion hearing.").

203. Id. at 32. The Court recognized that the balancing test developed in Matthews v. Eldridge, 424 U.S. 319, 354-35 (1976), was the appropriate test to determine the process due. Landon, 459 U.S. at 34. Here, the "weighty" competing interests, Plasencia's interest in staying in the United States with her family and the government's "sovereign prerogative" to control immigration, hung in the balance. Id.

204. Id. at 32. ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly," at least with respect to procedural due process.).

205. Id. at 34-35.

206. See supra notes 169-175 and accompanying text (discussing the personhood paradigm).

207. See supra notes 146-158 and accompanying text.

208. 239 U.S. 33 (1915).
in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. . . . If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.  

_Yick Wo_, its early progeny, and its exceptions provide the necessary backdrop for examining the modern state alienage cases. Before moving on to those cases, it is important to mention the two distinct theories that underlie and support the results in _Yick Wo_ and its progeny. First, aliens, like citizens, are “persons” entitled to equal protection. Second, the federal government possesses exclusive power over alienage issues.

For my purposes, it does not matter whether the Court’s state alienage cases rest on equal protection or federalism grounds. Rather, what matters is that the Court applies strict scrutiny in many state alienage cases precisely because of the absence of membership issues; the rationale—equality or preemption—is irrelevant to the outcome. As an explanatory tool, however, preemption has greater force by staying clear of the hopelessly tangled web the Court created by characterizing aliens as a suspect class. Doctrinally, this latter approach, based on federalism, is clearer; it recognizes that the citizen and the alien are not similarly situated for purposes of parceling out the benefits of membership, while also recognizing that the primary responsibility for drawing distinctions rests with the federal government. Despite the attractiveness of the federalism approach, the Court continues to emphasize the equal protection rationale in its alienage cases.

Choosing between these two theoretical approaches to the alienage cases does not resolve one other important issue—the intensity with which the Court will review the government’s alienage classifications. As the

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209. Id. at 41 (citations omitted).

210. Id. at 42.

211. See, e.g., _Bernal_, 467 U.S. at 219 (holding that a Texas statute violates the Equal Protection Clause by denying aliens the opportunity to become notaries public).

212. Even if the personhood approach provides a sound legal alternative to the federal...
Court has stated, aliens are persons and, at least in some limited context, are entitled to equal protection. However, states may have various interests in treating aliens and members of their own political community similarly or dissimilarly. The formula for reconciling these competing interests remained elusive until *Graham v. Richardson.*

1. **Strict Scrutiny**

Modern equal protection law affecting aliens has retained strands of both the *Yick Wo* tradition and its exception, the special public interest doctrine. The progeny of *Yick Wo* solidified protection for aliens, subjecting most state classifications that discriminate on alienage grounds to strict scrutiny review. The exception, narrowed and refocused, reappeared as the public function doctrine. This subsection discusses the strict scrutiny cases.

Building on *Takahashi* and the creation of two-tiered equal protection analysis, the Court in *Graham v. Richardson* 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." Applying strict scrutiny, the Court will strike down any state law that discriminates against aliens unless the classification is necessary to achieve a compelling state interest. The Court has used this test to strike down laws that deny permanent resident aliens welfare benefits, financial aid for higher education, the opportunity to compete for state civil service jobs, and the opportunity to work as an attorney, civil engineer, and

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supremacy rationale, the Court is not bound to intensely review state discrimination against aliens. "Decisions of this Court holding that an alien is a "person" within the meaning of the Equal Protection Clause of the Fourteenth Amendment are simply irrelevant to the question of whether that Amendment prohibits legislative classifications based upon this particular status." *Sugerman v. Dougall,* 413 U.S. 634, 653 (1973) (Rehnquist, J., dissenting); *Williamson v. Lee Optical,* 348 U.S. 483, 491 (1955) (explaining that although opticians are "persons" under the Fourteenth Amendment, classification that places them at a competitive disadvantage to ophthalmologists and optometrists is deferentially scrutinized under the rational basis test).

214. *See supra* notes 159-68 (discussing when strict scrutiny will be applied to state laws affecting a "discrete and insular minority" and when such scrutiny by the Court is less demanding).
216. Id. at 372 (citation omitted). The Court did cite *Carolene Products' footnote 4. See Carolene Prods.,* 304 U.S. at 152 n.4; *see also Hampton,* 426 U.S. at 102 (describing aliens as "an identifiable class of persons . . . subject to disadvantages not shared by the remainder of the community").
220. *Sugerman,* 413 U.S. at 643.
notary public.\textsuperscript{223}

\textit{Sugarman v. Dougal,}\textsuperscript{224} like its federal counterpart, \textit{Hampton v. Mow Sun Wong,}\textsuperscript{225} involved a government attempt to restrict civil service employment to citizens. The state's discriminatory classification failed strict scrutiny because the "citizenship restriction [swept] indiscriminately," prohibiting noncitizen employment as garbage collectors and typists.\textsuperscript{226} Although the Court's analysis fell solidly within the personhood paradigm, the dicta presaged membership in the form of the public function doctrine. In disavowing any suggestion that it would reject a state's attempt to develop citizenship requirements for "an appropriately defined class of positions," the Court said that "our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives."\textsuperscript{227}

Justice Rehnquist dissented. He did not quarrel with the Court's characterization of the noncitizen as a "person" entitled to equal protection; rather, he took issue with the Court's choice of strict scrutiny as the prism with which to review the classification. Rehnquist saw no constitutional ground to treat aliens as a "suspect" class; he would have upheld the classifications using a rational basis analysis. According to Rehnquist, the Court, by applying the greatest degree of judicial protection to noncitizens, seriously undervalued the importance of citizenship. "In constitutionally defining who is a citizen of the United States, Congress obviously thought it was doing something important. Citizenship meant something, a status in and relationship with society which is continuing and more basic than mere presence or residence."\textsuperscript{228} Because membership issues were present, even at the state level, Rehnquist would strike the categorical balance toward the community and place the case in the membership category.\textsuperscript{229}

\textsuperscript{222} Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976).
\textsuperscript{224} 413 U.S. 634 (1973).
\textsuperscript{225} For a discussion of \textit{Hampton}, see supra text at notes 133-42.
\textsuperscript{226} \textit{Sugarman}, 413 U.S. at 643.
\textsuperscript{227} Id. at 647-48.
\textsuperscript{228} Id. at 652 (Rehnquist, J., dissenting). The most disturbing part of the opinion "is the intimation, if not statement, that [citizens] are really not any different from aliens." Id. at 658. "The Court simply ignores the purpose of the process of assimilation into and dedication to our society . . . ." Id. at 661.
\textsuperscript{229} Rehnquist's concern extended beyond the alienage sphere to what he saw as the Court's indiscriminate use of "strict scrutiny." He saw no support for treating any minorities other than racial minorities as "discrete and insular." Id. at 650.

Our society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find "insular and discrete" minorities at every turn in the road. Yet, unless the Court can precisely define and constitutionally justify both the terms and analysis it uses, these decisions today stand for the proposition that the Court can choose a "minority" it "feels" deserves "soliditude." . . . I cannot find, and the Court does not cite, any constitutional authority for...
By employing the rigid and dichotomous equal protection doctrine, and by casting noncitizens as a discrete and insular minority, the Court commits itself to a highly intensive level for reviewing state alienage claims. Echoing the spirit of Carolene Products’s Footnote 4, Graham and its progeny assign paramount weight to the noncitizen’s personhood, placing great emphasis on the values of human dignity and equality. Against equality, the state’s interests are insignificant. The state’s interests merit no weight unless compelling. Even then, the state has the insurmountable task of proving that its classification is necessary to achieve that compelling state interest. This method of assigning relative weight to the competing interests works fairly well where the Court is willing to summarily dismiss the state’s interests. Complications arise in the alienage field because the Court is unwilling, in all cases, to discard the governmental interest, as evidenced by the “public function doctrine” at the state level and plenary power at the federal level.

Classifying aliens as a discrete and insular minority and tying the Court to a personhood approach in alienage classifications cemented the dissonance in an already polarized field. Although the class of aliens presumably retain the characteristics that earned this legally privileged label, close judicial scrutiny has never applied to substantive questions falling within the membership paradigm. In Section V, I will turn to exploring what Margaret Taylor has described as the “pourous border” between membership and personhood.

2. Intermediate Scrutiny: Education and Undocumented Children

Perhaps Plyler v. Doe is best understood as a constitutional anomaly. In Plyler, the state’s ability to allocate its limited education dollars collided with the purported rights of undocumented alien children to receive tuition-free access to education on an equal basis with citizens and legal aliens. In resolving this issue in favor of the alien children, the Court blended strands from both the personhood and membership paradigms. Doctrinally, the Court created yet another standard of review in alienage cases. Aliens, even those illegally in the United States, are such a “ward of the Court” approach to equal protection.

Id. at 657.
231. The Graham Court did not forget federalism issues. “An additional reason why the state statutes at issue in these cases do not withstand constitutional scrutiny emerges from the area of federal-state relations.” Graham, 403 U.S. at 376-77.
232. Taylor, supra note 22, at 1145.
234. “[B]y patching together bits and pieces of what might be termed quasi-suspect-class [illegal alien children] and quasi-fundamental-rights [education] analysis, the Court spins out a theory custom-tailored to the facts....” Id. at 244 (Burger, C.J., dissenting); see also Spiro, supra note 71, at 153 n.136 ("Plyler is but a small twig on the jurisprudential tree, one which would be readily broken off with disturbing other rulings, for other decisions have not followed from it.")
"persons" entitled to the protections of the Constitution. The question then became the intensity of judicial oversight. The Court found that strict scrutiny was inappropriate for two reasons: First, the illegal alien children could not be considered a "suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy'." Second, public education, although "a most vital civic institution," is not a fundamental constitutional right. Minimum rational basis review, however, inadequately protected the important educational interests of these "special members of this underclass" who are in the United States involuntarily. Denying these children free public education would "impose[] a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives." Additionally, since these undocumented children will likely spend their lives in this country, the state has a long term interest in having them educated.

The Court, therefore, settled for the middle ground, applying intermediate scrutiny review. The law, which burdened illegal alien children in a significant way, would not be found rational and upheld "unless it furthered some substantial goal of the State." The Court found that none of the state's "three colorable" interests met the constitutional burden. First, the Court thought "it clear that charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration." Second, the Court

235. Plyler, 457 U.S. at 210. A person illegally in the United States "is subject to the full range of obligations imposed by the State's civil and criminal laws. And until he leaves ... he is entitled to the equal protection of the laws that a State may choose to establish." Id. at 215.

236. Id at 223. We reject the claim that "illegal aliens" are a "suspect class." ... Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is a product of voluntary action. Indeed, entry into the class is itself a crime. ... [U]ndocumented status is [not] a "constitutional irrelevancy." With respect to the actions of the Federal Government, alienage classifications may be intimately related to the conduct of foreign policy. ... No State may independently exercise a like power.

237. Id. at 221 (citing Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)).


239. Id. at 223; see also Elizabeth Hull, Undocumented Children and Free Public Education: An Analysis of Plyler v. Doe, 44 U. Pitt. L. Rev. 409, 432 (1983) ("To deny them the equal protection of the laws would ... compound an injustice, and create for the first time since the demise of Jim Crow legislation an institutionalized underclass.")

240. Plyler, 457 U.S. at 224. "'Intermediate' scrutiny permits [the Court] to evaluate the rationality of the legislative judgment with reference to well-settled constitutional principles: by inquiring whether [the classification] may fairly be viewed as furthering a substantial interest of the State." Id. at 217-18, n.16.

241. See id. at 227, 230 (labeling the state's three interests as "colorable" and deciding these interests are "wholly insubstantial in light of the costs involved to these children").

242. Id. at 228-29.
found undocumented children to be similarly situated with children
lawfully in the country with respect to educational funding issues.\footnote{243} Third, since “[t]he State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State’s borders,” likely future contributions to the state is an inadequate justification for the disparate treatment.\footnote{244}

With its heightened scrutiny, \textit{Plyler} clearly and squarely falls within the personhood paradigm. Membership concerns, obscure, but present nevertheless, played a supporting role in advancing the case for the undocumented children. The Court recognized that many of these children “will remain here permanently and that some indeterminate number will eventually become citizens.”\footnote{245} The Court could not fathom “precisely what the State hope[d] to achieve by promoting the creation and perpetuation of a subclass of illiterates within its boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.”\footnote{246} In addition to providing “the basic tools by which individuals might lead economically productive lives to the benefit of us all[,]”\footnote{247} education plays a central role in communal formation. “[P]ublic schools [serve] as a most vital civic institution for the preservation of a democratic system of government.”\footnote{248} They serve as a vital forum where students are inculcated with the “fundamental values necessary to the maintenance of a democratic political system.”\footnote{249} Education “is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values.”\footnote{250}

To justify its protection of the individual, the Court relied heavily on the membership concerns of communal formation beginning with the education of the young. Although membership issues were present, the Court unequivocally rejected the membership paradigm. The Court, not the state legislature, made the policy determination that the membership concerns it valued, coupled with the concerns for the innocent child, merited close scrutiny of Texas’s legislative scheme.\footnote{251} In contrast, the Court dismissed the state’s asserted membership interests as ludicrous\footnote{252}
and "difficult to understand." 255

This section and the previous one explored the various doctrinal manifestations of the membership and personhood paradigms. In the next section, I explore the broad parameters of membership.

V. MEMBERSHIP'S BORDERS

The alienage cases are unique because they exhibit the full range of doctrinal options currently used by the judiciary. Broadly summarized, the Court uses strict scrutiny to review most alienage classifications made by the states; however, the political function exception to strict scrutiny allows the Court to apply a rationality test to state alienage classifications that are intimately associated with the state's definition of its political community. The Court employed intermediate scrutiny where the state denied illegal alien children equal access to free public education. The Court uses some form of heightened scrutiny in reviewing federal action that denies noncitizens, who are present in the United States, criminal trial rights and other procedural protections, but it uses rational basis review for federal alienage classifications that do not involve immigration's core. Finally, the Court gives deferential review, bordering on use of the political question doctrine, in cases of federal classifications involving questions of noncitizen admission, exclusion, and expulsion from the United States.

Generally, when a case involves sovereign interests of immigration and communal formation, the Court examines the issues through membership's lens, allowing lawmakers broad flexibility in policy development. In the absence of these membership concerns, the Court generally focuses on the noncitizen as an individual protected by the Constitution. The Court refuses to engage in ad hoc balancing of the interests of the government and of the noncitizen, preferring instead the categorical balancing so prevalent in modern constitutional analysis. When a case is catalogued within the membership sphere, the Court has made an a priori determination that membership issues outweigh personhood issues, obviating the need for a delicate balancing of the competing interests. Conversely, when the Court applies the personhood approach, it has made a prior determination that personhood concerns outweigh any purported governmental interests. This methodology is too rigid to accommodate meaningful exploration into the relative strengths of the competing individual and governmental interests. It forces the Court to undervalue the interests of either the government or the individual. Given the fact that the categorization almost always proves outcome determinative, it is imperative to explore the borderland between membership and personhood.

It seems obvious "that as the alien's tie [to the United States] grows stronger, so does the strength of his claim to an equal share of [this
country’s] munificence." Equally obvious is that the government's interests gain strength, reaching an apex "with decisions that lie at the heart of immigration policies." When does one interest dominate the other?

In general, national-origin classifications have a stronger claim to constitutionality when they are employed in connection with decisions that lie at the heart of immigration policy. When central immigration concerns are not at stake, however, the Executive must recognize the individuality of the alien, just as it must recognize the individuality of all other persons within our borders. How wide and deep is the "heart of immigration?" Stated more broadly, what is the scope of the membership sphere? And, who—the Courts or the policy makers—gets to decide these parameters?

Justice Marshall explored these issues in his dissent in Jean v. Nelson. That case presented an equal protection claim by Haitians who claimed that they were denied parole into the United States, pending the determination of their admissibility as refugees, on the basis of race and national origin. The Court based its decision on nonconstitutional grounds, a position Marshall saw as "untenable." He concluded that the Fifth Amendment’s equal protection component prohibited the government from discriminating on the basis of race or national origin in its decision whether to parole unadmitted aliens pending the determination of their admissibility. In reaching this conclusion, Marshall took a narrow view of immigration’s core and would have required the

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254. Mathews, 426 U.S. at 80.
256. Id.
257. Id. at 858-82.
258. For many years, the INS paroled undocumented aliens into the country pending a determination of their admissibility. Id. at 849. Pursuant to our entry fiction, these parolees although physically present have not made an entry into the United States and therefore remain subject to the procedural and substantive law of exclusion. See Kathrin S. Mautino, Entry: What Mama Never Told You About Being There, 31 San Diego L. Rev. 911, 933-36 (1994) (discussing the parole of excludable aliens); Charles D. Weissselberg, The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei, 143 U. Penn. L. Rev. 933, 951-52 (1995) (exploring the entry fiction and the detention of excludable aliens). As a result of the increased flux of refugees flowing into South Florida from the Caribbean, the INS began a policy of detaining the undocumented aliens pending a determination of admissibility. Jean, 472 U.S. at 849 (Marshall, J., dissenting). In Jean v. Nelson, the Haitians claimed that the detention policy was being applied adversely to them based on their race and national origin. Id.
259. Jean, 472 U.S. at 868 (Marshall, J., dissenting). Avoiding the constitutional issues, the majority concluded that the applicable statutes and regulations did not permit parole decisions to be based on race or national origin grounds. Id. at 857. Marshall viewed the Court's nonconstitutional argument as a "house of cards," because he saw no "nonconstitutional constraints on the Executive's authority to make national-origin distinctions in the statutes and regulations." Id. at 859 (Marshall, J., dissenting).
260. Id. at 868-69.
government to show that its discriminatory acts fall within that core. For him, the issue of parole into the United States pending a determination of admissibility, which necessarily includes temporary admission, was not a core immigration question.\textsuperscript{201} If Congress or the Executive demonstrates that its discriminatory parole policy is "sufficiently related to [a] valid immigration goal... then arguably it should be upheld, provided of course that it is not too underinclusive."\textsuperscript{202} As the cases explored in the previous sections reveal, Marshall's position is the minority position: membership's core is broad and the political branches receive wide latitude in formulating its policy.

A. Substantive Values

The Court gives both the federal and the state governments much discretion regarding the parameters of membership. More discretion flows to the federal government because of its status as a sovereign nation and its obligations to set immigration policy, but ample discretion is still given to the states. The public function exception to strict scrutiny, as seen in the contrast between \textit{Sugarman v. Dougall}\textsuperscript{265} and \textit{Cabell v. Chavez-Salido}\textsuperscript{264} illustrates this proposition. In \textit{Sugarman}, the Court recognized New York's "substantial" interest in prohibiting nonmembers from taking part in the shaping of the political community.\textsuperscript{265} A statute limiting employment in the competitive civil service to citizens failed under strict scrutiny, however, because the means chosen were not "precisely drawn in light of the acknowledged purpose;... [t]he citizenship restriction sweeps indiscriminately."\textsuperscript{266} The citizenship requirement was both over and underinclusive: the statute barred noncitizens from many state jobs, such as sanitation worker and typist, that do not touch upon important sovereign functions of the state, but it did not bar noncitizens from "holding elective and high appointive offices."\textsuperscript{267} The Court left open the possibility of

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\textsuperscript{261.} Id. at 877-78. \\
\textsuperscript{262.} Id. at 880-81. Marshall also took a narrow view of membership in the state cases. First, he would have preferred to strictly scrutinize any state policy choice that placed citizenship restrictions on employment, even when the state sought to justify the classification on communal formation grounds. See Foley v. Connallic, 435 U.S. 291, 303 n.1 (1978) (Marshall, J., dissenting) ("The Court did not explain why the level of scrutiny should vary with the nature of the job from which aliens are being excluded."). Second, Marshall read the political function exception much more narrowly than the majority. See id. at 304-05 (explaining that a state trooper is not a policy maker); see also Cabell v. Chavez-Salido, 454 U.S. 432, 455 (1982) (Blackmun, J., joined by Marshall, Brennan and Stevens, dissenting) ("California's statutory exclusion of aliens is fatally overinclusive and underinclusive."); Ambach v. Norwich, 441 U.S. 68, 90 (1979) (Blackmun, J., joined by Marshall, Brennan and Stevens, dissenting) (remarking that New York's exclusion of aliens from teaching school children is "repugnant" to the values the state is trying to teach). \\
\textsuperscript{263.} 413 U.S. 634 (1973). \\
\textsuperscript{264.} 454 U.S. 432 (1982). \\
\textsuperscript{265.} Id. \\
\textsuperscript{266.} Id. \\
\textsuperscript{267.} Id. \\
\end{tabular}
citizen restrictive laws by stating: "Neither do we hold that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office." In contrast, the Court applied the political function exception in upholding California's requirement that "peace officers be citizens of the United States." Under a strict scrutiny analysis, an appropriately defined class must be narrowly drawn to achieve the state's sovereignty interests. As we have seen, the Court rejected such a rigid analysis when reviewing a state's attempt to prohibit noncitizens from occupying jobs that go to the heart of governing. As a threshold for determining whether to apply the membership approach, the Court inquires into "the specificity of the classification . . . a classification that is substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends." In other words, the Court will look at substantial overbreadth as a sign that the state's true motive was something other than fostering the political community.

If the Court had used strict scrutiny in Chavez-Salido or if the Court had even taken seriously the political function exception's test for deference, it would not have upheld California's law prohibiting noncitizens from becoming peace officers. California had classified "[c]emetery sextans, furniture and bedding inspectors, livestock identification inspectors, and toll service employees" as well as several other types of "law enforcement" officials under the rubric "peace officer." These positions certainly are not important to California's identity as a political community. The severe overinclusiveness of the citizenship restriction undermined California's argument that the law served the purportedly important political function interest; instead, a fairly clear inference could be drawn that the state was merely engaged in impermissible economic protectionism.

Without probing the invidious and prejudicial nature of the

268. Id. at 647 (citing Cal. Penal Code §830.5 (West Supp. 1981)).
270. See supra notes 206-25 and accompanying text (discussing the Supreme Court's decision that strict "scrutiny will not be so demanding . . . with matters resting firmly within the state's constitutional prerogatives").
271. See Foley, 435 U.S. at 296-97 (recognizing that citizenship can be a relevant qualification for government jobs).
272. Cabell, 454 U.S. at 440. Additionally, "even if the classification is sufficiently tailored, it may be applied in the particular case only to 'persons holding state elective or important nonelective executive, legislative, and judicial positions,' those officers who 'participate directly in the formulation, execution, or review of broad public policy' and hence 'perform functions that go to the heart of representative government.'" Id. at 440 (quoting Sugarman, 413 U.S. at 647. See supra text at notes 159-68 for a more detailed analysis of the public function doctrine.
274. At the least, "the [s]tatutes at issue here represent . . . an unthinking and haphazard exercise of state power." Id. at 454.
classification, as evidenced by the law's overinclusiveness and underinclusiveness, the Court jettisoned strict scrutiny analysis, concluding that such a high standard "is out of place when the restriction primarily serves a political function." Instead, the Court employed the "public function" exception to strict scrutiny review. Since law enforcement officers generally serve important public functions, the Court did not press the state to justify each constituent peace officer position. Although some peace officer jobs "may have only a tenuous connection to traditional police functions of law enforcement," the Court found that the statute's classification is "sufficiently tailored . . . to pass the lower level of scrutiny . . . articulated as the appropriate equal protection standard for such an exercise of sovereign power . . . ." Noncitizens remain a suspect class and alienage classifications remain "inherently suspect" because noncitizens fall within the judicially constructed category of discrete and insular minority. Because, however, the "[d]efinition of the important sovereign functions of the political community is necessarily the primary responsibility of the representative branches of government," the Court will engage in only "limited judicial review."

The rigid tiered analysis cannot adequately accommodate both the alien and the government where both have important interests on the line. The strict scrutiny test falters under the weight of the state's asserted interest in defining and shaping its political community. Under traditional strict scrutiny, the Court explores whether the state is engaged in invidious discrimination by first inquiring into the compellingness of the state's interest. If the state has no compelling interest in its classification, the Court might suspect a wrongful and prejudicial purpose behind the law. In

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275. Id. at 439.
276. See id.
277. Id. at 444. The Court admits that some of the jobs placed in the categorical umbrella of peace officer "have only a tenuous connection to traditional police functions of law enforcement." Id. at 443.
278. See Bernal v. Fainter, 467 U.S. 216, 219 n.5 (1984) (quoting Graham v. Richardson, 403 U.S. 365, 372 (1971)); see also Cabell, 454 U.S. at 438 (1982) (defining areas in which state government may distinguish between its citizens and aliens). In Flores, the Court suggests that strict scrutiny applies to all alienage cases (at least non-immigration cases):

We do not suggest, however, that a State, Territory, or local government, or certainly the Federal Government, may not be permitted some discretion in determining the circumstances under which it will employ aliens or whether aliens may receive public benefits or partake of public resources on the same basis as citizens. In each case, the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn.

279. Cabell, 454 U.S. at 445. "[A]lthough citizenship is not a relevant ground for the distribution of economic benefits, it is a relevant ground for determining membership in the political community," therefore, "strict scrutiny is out of place when the restriction primarily services a political function." Id. at 438-39.
Chavez-Salido, we can assume, arguendo, that the state's interest is compelling. Next, the Court would inquire into the classification's necessity in achieving the compelling state interest of defining the political community. The classification would be examined under the judicial microscope for possible under and overinclusive tendencies, which would undermine the state's claim that its law was not invidious. Here, in the means testing, the process breaks down. Almost all classifications can be drawn with more precision. But, the instruments necessary to calibrate the law with such precision raise the cost of legislation above that which the Court is willing to demand. Therefore, the Court's "scrutiny will not be so demanding where [they] deal with matters resting firmly within a State's constitutional prerogatives." 280

With respect to the state alienage jurisprudence, I do not want to overstate the case for deference. Graham v. Richardson, with its strict scrutiny doctrine, operates in a wide sphere, placing strict equal protection limitations on state actors. My point, informed by the Court's reasoning in Chavez-Salido, is that when membership issues are arguably present, the Court retreats, allowing the states broad authority to discriminate in the name of communal formation. 281 Two components are present: the Court's decision to create an exception to the strict scrutiny analysis, and the Court's deferential posture toward the state legislatures when the issues reside in the borderland between membership and personhood.

The federal government has even broader authority. With the demise of the special public interest doctrine, the Court has limited the states' membership concerns to the political formation of the community and not the distribution of the community's goods. 282 At the federal level, nearly every action affecting noncitizens is considered part of the membership scheme. It is here that I seem to part company with other scholars who cabin the plenary power doctrine solely within immigration law. 283 In my analysis, the Court discards burdensome domestic constitutional norms whenever and wherever membership issues are found. 284

280. Sugarmen, 413 U.S. at 648.
281. Cabell, 454 U.S. at 445. "Definition of the important sovereign functions of the political community is necessarily the primary responsibility of the representative branches of government, subject to limited judicial review." Id.
282. It is probably no coincidence that the demise of the special public interest doctrine paralleled the Court's acceptance of a national economy. See generally Wickard v. Filburn, 317 U.S. 111 (1942) (maintaining that all of the wheat produced and consumed on a farm is "far from trivial" and thus should fall within the scope of federal regulation); United States v. Darby, 312 U.S. 100 (1941) (holding that while manufacture itself may not be interstate commerce, the interstate shipment of such goods is commerce and, thus, is controlled by congressional regulations); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (holding that "acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power . . .").
283. See supra note 18 (recognizing that plenary power, strictly speaking, applies only in cases of admission, exclusion, and deportation, but its effects are felt throughout the alienage jurisprudence, and it serves as the centerpiece for the membership paradigm).
284. Procedural due process is the exception. See supra notes 182-205 and accompanying
Aside from the issues of admission and exclusion, which lie at membership's core, Congress acts in two other ways that can significantly and adversely impact an alien's status as a partial member in the American community: First, Congress may place conditions on continued residence in the form of affirmative conditions and negative consequences. Second, it may deny permanent resident aliens complete access to our economic union.  

Most new immigrants to the United States receive unqualified permanent residence. Coupled with a fairly short and light path to citizenship, this allows for the process of integration to begin in earnest immediately. When immigration is based on a new marriage or a substantial investment in this country, Congress chooses to confer "conditional" permanent residence, which the government can revoke within two years after entry. In addition to these affirmative conditions applying to a small group of immigrants, the government can remove all noncitizens for misbehavior or other undesirable characteristics. Current law grants the power to deport on a variety of grounds including criminal activity, document fraud, terrorist activity, and on the ground

285. Additionally, for those unfortunate aliens who find themselves incarcerated as a result of our immigration laws, there is the question of their "conditions of confinement." Taylor, supra note 22, at 1089.

286. In general, permanent resident aliens who have resided continuously in the United States for five years are eligible for naturalization, provided that they are "of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States." 8 U.S.C.A. §1427(a) (West Supp. 1995). Additionally, applicants for citizenship must have minimal competency in English and minimal knowledge of United States history and government. See id. at § 1423 (waiving English requirement for elderly and disabled, and waiving government and history requirement for disabled).

287. See 8 U.S.C.A. § 1186(a) (West Supp. 1995) (providing that a noncitizen who immigrates based on a marriage that is less than two years old is a permanent resident on a "conditional basis," which can be terminated for various reasons in the first two years); id. at §1186(b) (providing that alien entrepreneurs, who gain immigrant status based on capital investment and employment creation obtain permanent resident status "on a conditional basis," which can be terminated for various reasons during the first two years of residence). For a discussion of these provisions, see generally Janet M. Calvo, Spouse-Based Immigration Laws: The Legacies of Coverture, 28 San Diego L. Rev. 593 (1991); Gary Endelman & Jeffrey Hardy, Uncle Sam Wants You: Foreign Investment and the Immigration Act of 1990, 28 San Diego L. Rev. 671 (1991); Ronald R. Rose, Fixing the Wheel: A Critical Analysis of the Immigrant Investor Visa, 29 San Diego L. Rev. 615 (1992); Joe A. Tucker, Assimilation to the United States: A Study of the Adjustment of Status and Immigration Marriage Fraud Statutes, 7 Yale L. & Pol'y Rev. 20 (1989).


289. See id. at § 1251(a)(3) (consisting of failing to register and falsifying documents).

290. See id. at § 1251(a)(4) (listing criminal activities which endanger public safety or national welfare). Our immigration laws have often reflected a close nexus between exclusion-deportation for terrorism and exclusion-deportation on ideological grounds causing some to
that the alien has become a "public charge."291 These are conditions subsequent to the admission decision. Additionally, a partial member suffers several constitutional encumbrances292 and other statutorily imposed encumbrances.293 These measures may derive from a desire to reserve certain benefits for full members or to encourage aliens to acquire full membership.294

Imagine membership as a process.295 The government screens


292. See Sugarman, 413 U.S. at 651 (Rehnquist, J., dissenting) (listing the encumbrances, Rehnquist states, "the distinction [between alien and citizen] is constitutionally important in no less than 11 instances in a political document known for its brevity").

293. See, e.g., Mathews v. Diaz, 426 U.S. 67 (1976) (upholding denial of welfare benefits to certain aliens). See also supra note 5 (discussing a proposal in Congress to curtail benefits to noncitizens).

294. See, e.g., Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976) (holding that residents legally admitted by decisions from Congress or the President cannot, as a class, be denied opportunities for employment by Civil Service Commission).

295. David Martin characterizes "[m]embership, in short, as a matter of degree." Martin, supra note 15, at 201. Citizens, permanent resident aliens, and even illegal aliens are all part of the everwidening "circle of concentric communities that make up the nation." Id. at 201-02. His metaphor provides a useful description of the varying ties different noncitizens have with the United States. From this he concludes that permanent resident aliens" are entitled by virtue of that [degree of] membership alone to enter fully into virtually all other aspects of community life." Id. at 202 (emphasis added). Even with respect to undocumented persons who may be "denied many benefits" of membership, "as to other advantages of life in this political community, denial is not allowed." Id. This conclusion of entitlement simply does not follow from a recognition that the heterogeneous body of noncitizens have differing degrees of attachment to the United States. In fact, because membership is the controlling paradigm, all "entitlements" for this class of persons are to a large extent "illusory." See Haniades, 342 U.S. at 600 (Douglas, J., dissenting).

At a constitutional law level, membership as "process" more closely captures the Court's work than "degrees" of membership. Marriage provides an illustrative metaphor. Dating, courtship, and betrothal are all part of a process leading up to and culminating in the marriage commitment. As the relationship progresses from a casual date, through "going steady," to engagement, the young man's membership in his future wife's family changes by degrees. This change will most likely carry with it certain rights and responsibilities. At first he may wait to be invited for Sunday dinner, later he may assume he is welcome at Sunday dinner, and finally he may even find himself posing for the family portrait. As in the state alienage cases, a certain family member, possibly a sibling, has no jurisdictional authority over the question of whether he can sit for the portrait. But, no matter how attached he becomes
prospective members for their desirable characteristics, which will allow them to immigrate, and for any undesirable characteristics, which will preclude immigration, even for those who are otherwise qualified. Upon admission, the process of becoming a member is far from complete; on the contrary, admission signals the beginning of the membership process. Prior to the decision to admit, the noncitizen is, in no way, a member or even a member in process. Instead, she is a prospective member—a member wannabe. If she happens to have the statutorily required characteristics, the government will stamp her membership application with approval. At this point, she begins the journey toward full membership—citizenship. As a partial member, a novice, her continued membership is not assured. If she fails to meet a condition or misbehaves in a serious way, her membership may be terminated. Additionally, until she qualifies for and chooses full membership, she is not entitled to all the privileges of membership. Once she acquires citizenship, she has the full right to participate in the community’s decisions, including the decision of who to admit and under what circumstances.

Every action uniquely affecting aliens involves membership. As noncitizens proceed along the journey toward full membership, do personhood concerns at some point outweigh membership concerns? Stated differently, at some point does the Court shift paradigms, seriously enforcing constitutional restrictions on governmental action? Starting with to this new family, no matter how much he is treated as a member, and no matter how much he relies on this relationship for economic, intellectual, emotional, or spiritual support, he can be cast aside and discarded by this community, for any reason or no reason at all. Additionally, some family policymaker or group of policymakers have unfettered authority to decide what membership benefits will accrue to his benefit and at what point in the process they will accrue. It is only after he has completed the process and taken the culminating oath that he has legal rights that cannot be ignored. Although an imperfect analogy, this more closely approaches what the Court is and has been telling us in its alienage jurisprudence.

296. See 8 U.S.C.A. §§ 1151, 1153 (West Supp. 1995). United States immigration laws have developed three profiles of desirable immigrants: (1) those with close family in the United States; (2) those with education and training that would benefit the United States; and (3) those who would add diversity to the immigration pool. See id. The most preferred group are immediate relatives of United States citizens. See id. at § 1151(b) (stating that immediate relatives of citizens can immigrate outside the numerical system that places limits on the number of immigrants admitted each year).


298. The only exception is the constitutional bar to her becoming president. See U.S. Const. art. II, § 1, cl. 5 ("No Person except a natural born Citizen . . . shall be eligible to the Office of President . . . .").

299. Precedent establishes "that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990). See Aleinikoff, Citizens, supra note 14, at 10 ("If membership is to be the guiding principle for constitutional analysis of the immigration power, then the circle of membership should include permanently residing aliens.").
United States v. Fong Yue Ting, dissenting opinions have argued that the act of removal is fundamentally different in kind from the question of admission, requiring a readjustment of the constitutional balance between membership and personhood. The view that the power of Congress to deport aliens is absolute and may be exercised for any reason which Congress deems appropriate rests on Fong Yue Ting v. United States. That decision seems to me to be inconsistent with the philosophy of constitutional law which we have developed for the protection of resident aliens.

An alien, who is assimilated in our society, is treated as a citizen so far as his property and his liberty are concerned. He can live and work here and raise a family. Those guaranties of liberty and livelihood are the essence of the freedom which this country from the beginning has offered the people of all lands. If those rights, great as they are, have constitutional protection, I think the more important one—the right to remain here—has a like dignity.

A majority of the Court has consistently disagreed, maintaining that the removal power and the admission power are closely intertwined and that no substantive constitutional guaranties limit either power. Even away from the border, in areas of economic opportunity supposedly protected by the Constitution, the Court employs the membership paradigm because Congress can “make an alien’s eligibility [for many privileges of membership] depend on both the character and the duration of his residence.”

The Chinese Exclusion Case and Graham v. Richardson provide the archetypes for membership and personhood, respectively. If noncitizens are discrete and insular and in need of special judicial intervention, what compels the Court to abandon its aid in the membership cases? The character of the class—aliens—undergoes no transformation in the shift from...
issues contemplating the distribution of state benefits to the issues of communal formation. Similarly, no transformation occurs in the shift from the state to the federal context; aliens remain discrete and insular. The last hundred years are replete with occasions where the federal government acted with invidious prejudice against some portion of this politically powerless discrete and insular minority. The change, and it is significant, lies in the character of the government’s interest.

When the government, whether state or federal, articulates a plausible argument that its classification involves fundamental question of membership in the national or state community, the Court abandons its lofty ideals of protecting the dispossessed. It subordinates the noncitizen’s constitutional interests as a protected person to society’s interest in making important membership decisions. Membership 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.

B. Procedural Cracks?

Procedural due process rights provide the only true relief to membership’s dominance. In the criminal area, noncitizens benefit from the criminal trial rights provided by the Fifth and Sixth Amendments. Since immigration has always been characterized as “civil” in nature, those protections are not available in the deportation context. The Court has, however, applied the amorphous concepts of procedural due process found in the Fifth Amendment to protect noncitizens in immigration proceedings. This practice is not surprising given the qualitative differences between procedural rules and substantive policy choices.

Since the due process arena marks the only place in our alienage

306. See, e.g., Fiallo, 430 U.S. at 799-800 (allowing discrimination on the basis of gender and illegitimacy); Kleindienst v. Mandel, 408 U.S. 753 (1972) (condoning discrimination on the basis of political beliefs); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215 (1953) (allowing the indefinite detention and exclusion of an alien on secret national security grounds); Chinese Exclusion Case, 130 U.S. at 609 (discriminating against an alien on the basis of race).

307. See, e.g., Harisiades, 342 U.S. at 594 ("Deportation, however severe its consequences, has been consistently classified as a civil rather than criminal procedure."); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (holding that deportation is not punishment); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893). This view has, from the beginning, met with ardent dissent. See, e.g., Harisiades, 342 U.S. at 600 (Douglas, J., dissenting) ("Banishment is punishment in the practical sense. It may deprive a... family of all that makes life worthwhile."); Fong Yue Ting, 149 U.S. at 759 (Field, J., dissenting) (arguing that not only is deportation punishment, it is "beyond all reason in its severity... It is cruel and unusual.").

308. See supra notes 192-204 and accompanying text.

309. Due process “must be a specialized responsibility within the competence of the judiciary on which they do not bend before the political branches of the Government, as they should on matters of policy which compromise substantive law.” Mezić, 345 U.S. at 224 (Jackson, J., dissenting) (“Only the untaught layman or the charlatan lawyer can answer that procedures matter not.”).
jurisprudence where the personhood paradigm applies when membership issues are present, those seeking to weaken membership’s grip on the rights of aliens should focus their efforts here.\textsuperscript{310} Only a cursory overview of the procedural possibilities is necessary in this Article because Professor Hiroshi Motomura has thoroughly explored this issue.\textsuperscript{311} In addition to providing procedural due process protection to affected aliens, Motomura convincingly demonstrates how courts use procedural claims at times as surrogates for substantive constitutional claims. These procedural surrogates operate at two levels. First, marginal claims, ones that are not clearly “substantive” or “procedural,” can be cast as procedural making it possible to enforce rights that would not be recognized in a substantive context.\textsuperscript{312} Second, substantive constitutional norms inform even clearly procedural analysis.\textsuperscript{313} For Motomura, “procedural surrogates are a natural outgrowth of the tension between the plenary power doctrine in immigration law and the \textit{Yick Wo} tradition’s more humane treatment of aliens in other contexts.”\textsuperscript{314}

\begin{itemize}
  \item \textsuperscript{310} “While it is a widely accepted idea that procedural rules often reflect substantive values, the anomalous structure that the plenary power doctrine imposes on constitutional immigration law means that procedural decisions are often the only vehicle for taking substantive rights seriously.” Motomura, supra note 19, at 1656.
  \item \textsuperscript{311} \textit{See} id. at 1656.
  \item \textsuperscript{312} \textit{Section 5 of the Immigration Marriage Fraud Amendments (“IMFA”) of 1986, Pub. L. No. 99-639, \textsect 5, 100 Stat. 3537, 3543 (1986) (codified at 8 U.S.C.A. \textsectsect 1154(g), 1255(e) (West Supp. 1995)), which prohibits aliens who were married during deportation or exclusion proceedings from using the marital status to immigrate to the United States until they have resided outside the United States for two years, illustrates Motomura’s point. See Motomura, supra note 19, at 1659-65. Although most courts reviewing \textsect 5’s constitutionality upheld the provision, \textit{e.g.}, Anetekhai v. INS, 876 F.2d 1218 (5th Cir. 1989), two courts adjudged it unconstitutional, concluding that \textsect 5 was ‘procedural’ because it interposed a two-year delay before the government would decide the [bona-fides of the] marriage.” Motomura, supra note 19, at 1661 (citing Escobar v. INS, 896 F.2d 564 (D.C. Cir. Feb. 2, 1990) (opinion withdrawn) and Manwan v. United States, 756 F. Supp. 1367 (W.D.N.C. 1990)). \textit{See also} Edward L. Rubin, Generalizing the Trial Model of Procedural Due Process: A New Basis for the Right to Treatment, 17 Harv. C.R.-C.L. L. Rev. 61, 69 (1982) (“The boundary between [substance and procedure] is far from sharp.”).
  \item \textsuperscript{313} Motomura examines the \textit{Orantes-Hernandez} litigation to make this point. In this case, the district court concluded that INS summary removal procedures denied Salvadorans their right to due process by effectually denying their ability to apply for asylum. Motomura, supra note 19, at 1673-75 (citing Orantes-Hernandez v. Smith, 541 F. Supp. 351 (C.D. Cal. 1982) (prelim. inj.); Orantes-Hernandez v. Meese, 685 F. Supp. 1468 (C.D. Cal. 1988) (perm. inj.), \textit{aff’d} \textit{sub nom.}, Orantes-Hernandez v. Thornburg, 919 F.2d 549 (9th Cir. 1990) (affirming on nonconstitutional grounds)). “In \textit{Orantes-Hernandez}, the procedural policies and practices of the INS were troubling largely because asylum seekers from countries other than El Salvador apparently received better treatment without congressional authority for the difference. . . . This disparity in treatment would have raised serious equal protection problems but for the plenary power doctrine. With direct equal protection claims barred, the next best alternative for the plaintiffs and the court was to take the procedural due process claims in \textit{Orantes} seriously—as a procedural surrogate for equal protection.” Motomura, supra note 19, at 1674-75.
  \item \textsuperscript{314} \textit{Id.} at 1700.
\end{itemize}
Procedural surrogate use may only be a "transitional stage" between plenary power's nonrecognition of the rights of aliens and an "open and direct approach to aliens' substantive constitutional claims." This stage probably holds the key to any attempt to open plenary power's lock on judicially enforceable substantive constitutional rights of noncitizens. I doubt, however, the sustained success of such ventures. Although immigrant advocates may win a few victories here and there, I do not see the Court abandoning what I term, more broadly, the membership paradigm, which keeps much of alienage jurisprudence at the margins of domestic constitutional law. I offer two reasons for my prediction.

First, I disagree with Motomura and others over the nature of the tension in alienage law: the tension does not exist between immigration law and the larger body of alienage law; instead, in my analysis, the apparent tension arises from the doctrinal incoherence occasioned by labeling noncitizens a discrete and insular minority. This tension dissolves into a hundred years of consistency if we step back from the doctrine and take a broad look at the whole of alienage jurisprudence. Judicial deference to the substantive choices of the political branches transcends the bounds of immigration law, extending to a larger body of membership cases. From Yick Yo and Chinese Exclusion to the present, the Court has consistently and emphatically reconciled the membership and personhood traditions in favor of membership, with a steadfast refusal to displace the political branches' substantive value judgments in the field of communal formation. There is simply little or no evidence to suggest that the

315. Id.
316. A major judicial victory came in American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045 (9th Cir. 1995), where the court clearly rejected the membership paradigm, favoring the personhood approach even in the deportation context. In holding that First Amendment protections apply in deportation, the court said that:

Because we are a nation founded by immigrants, this underlying principle is especially relevant to our attitude toward current immigrants who are part of our community . . . . It is thus especially appropriate that our First Amendment principle of tolerance for different voices restrain our decisions to expel a participant in that community from our midst.

Id. at 1064 (emphasis added).
317. But see Motomura, supra note 19, at 1688-89 ("[T]he more generous constitutional treatment of aliens outside immigration law has exerted considerable pressure on the courts toward greater recognition of constitutional guarantees in immigration matters as well. The plenary power doctrine is fundamentally opposed to this trend. Procedural surrogates reflect the failure of immigration law to reckon openly with the consequences of the resulting tension.").
318. I mean only that the apparent doctrinal tension disappears into a century old jurisprudence that consistently places membership concerns above personhood concerns. The fundamental tension between the rights of the American community to draft more or less exclusionary membership rules and the rights of individual noncitizens to the enjoyment of the benefits of American residence remain central to immigration politics and this tension remains alive in the courts by a minority of justices who would cabin the membership paradigm within the core immigration issues of admission, exclusion and deportation.
personhood tradition is chiseling away at this structure.

Second, and of equal importance, procedural due process claims will not serve as a wedge prying immigration claims free from plenary power's chokehold on the development of substantive constitutional protections. Motomura's argument that procedural due process might serve this role is based on a misconception of the place of procedural claims in the constitutional order. He imagines "a pattern of concentric circles, the radius of which represents a spectrum of constitutional claims. The most substantive constitutional claims are in the inner most rings, and the most procedural claims are in the outer most ones."

In this view, a new vision—that aliens have protectable rights—seeps into the circle of constitutional claims at the margins, slowly and guardedly working its way toward the center. I do not dispute Motomura's conclusion that at times "the substance-procedure distinction is vague and unpredictable." Likewise, I have no quarrel with the argument that procedural decisions often "reflect substantive value judgments." However, I do question Motomura's intermingling of procedure and

319. Motomura, supra note 19, at 1657:
At the center we find the most "substantive" rights, such as freedom of speech, the right to travel, and possibly the right to marry. These rights compel the legislature to grant certain benefits to everyone, and they bar the legislature from imposing certain burdens on anyone. Just further out, as we move into the second ring, we see "substantive" constitutional claims of a different type. These are not claims that the legislature must grant a benefit or may not impose a burden. Instead, they are claims that in granting benefits and imposing burdens the legislature may not transgress a different kind of substantive norm—embodied in the Equal Protection Clause—that constrains legislative choice.

Proceeding outward to the third ring, we find "procedural" constitutional claims. On the inside part of this third ring, close to the second ring of substantive equal protection claims, we find claims of extensive procedural protection. In the middle of the third ring, fewer procedures are claimed, and at the outer edge of the third ring, the only procedural claim is that the government must give reasons for its decision. As we move beyond the outer edge of the third ring, we come to claims like that in Roth, in which there was no valid procedural claim at all because the Court declined to find a constitutionally protected entitlement.

Id. at 1657-58 (footnote omitted).

320. Professor Motomura states:
From a broader historical perspective then, the use of procedural surrogates may be a transitional stage, the sort of awkward accommodation that results when courts are unwilling to acknowledge that one area of law is badly out of touch with the rest. The next step in this natural evolution may be to adopt an open and direct approach to aliens' substantive constitutional claims.

Id. at 1700.

321. See e.g., Motomura, supra note 19, at 1703-04 (citing Laurence H. Tribe, American Constitutional Law §§ 10-12, at 711 (2d ed. 1988) (criticizing attempts to distinguish procedure and substance)). "Although much ink has been spilled by courts and commentators in the attempt to separate questions of substance and process, the attempt can never be wholly successful because the questions are functionally inseparable." Jerry L. Mashaw, Due Process in the Administrative State 5 (1985).

322. Motomura, supra note 19, at 1704.
substance in "a spectrum of constitutional claims," and his placement of procedural claims in the third ring, at the margins of recognizable constitutional law.223

Although the Constitution embodies both types of claims, procedure and substance serve the constitutional order in fundamentally different ways. To conceptualize these claims as part of a spectrum (concentric circles) with substance at the "core" and procedure at the margins misconstrues and undermines the important and distinct mission of procedural protections. If the concentric circle metaphor is used, I would argue that procedure, not substance, belongs at the core. As Justice Jackson said in his Mezei dissent, "[p]rocedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. Indeed if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices."224

Procedural due process works to ensure that our substantive laws, whatever they may be, are administered fairly, not by some arbitrary and tyrannical hand.225 For these reasons, in all areas of constitutional law (not just alienage jurisprudence), the courts are more likely to enforce their own procedural regime, while remaining more reticent about displacing the substantive value judgments of others.226

323. Id. at 1657. Motomura's concentric circles analysis is useful in explaining those cases where a court has chosen to affirm a substantive right indirectly by recognizing and giving force to a procedural penumbra surrounding the substantive right. See id. at 1659-79. My point is that in treating questions of procedure as questions of substance and in using the metaphor of concentric circles to describe the relationship between procedural and substantive constitutional questions, important attributes of procedural due process are lost. See George Lakoff & Mark Johnson, Metaphors We Live By 10 (1980) ("The very systemicity that allows us to comprehend one aspect of a concept in terms of another will necessarily hide other aspects of the concept. In allowing us to focus on one aspect of a concept, a metaphorical concept can keep us from focusing on other aspects of the concept that are inconsistent with the metaphor.").

324. Mezei, 345 U.S. at 224 (Jackson, J., dissenting) ("Procedural due process is more elemental and less flexible than substantive due process."). Jackson's dissent forcefully and clearly sets out the distinctive roles of process and substance under our constitution, placing process not substance at the core of constitutional protections. Id. at 218-28.

325. See e.g., William Burnham, Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty, 73 Minn. L. Rev. 515, 529 (1989) ("The fairness concern of procedural due process is that the government will cause a loss that is erroneous under substantive law without providing sufficient attendant procedural safeguards for preventing or correcting that error."); Rubin, supra note 313, at 71 ("The fact that the State acts in a general manner ensures that it will not single out a particular individual for unfair or arbitrary treatment. But when the state focuses its power upon an individual, that person is potentially subject to all the abuses which arbitrary, resentful, or corrupt state agents may inflict, and only judicial review can provide sufficient protection.").

326. See, e.g., T.M. Scanlon, Due Process, in Due Process Noms XVIII 104-05 (J. Roland Pennock and John W. Chapman eds., 1977) ([D]ecisions of substantive due process deserve to be considered a more controversial form of judicial activity, for in making them courts
This basic distinction, which reveals not one but two separate spheres of constitutional protection, has been recognized in the alienage context from plenary power's infamous origins. As Justice Jackson concluded in his *Maez* dissent, "Congress has ample power to determine" substantive immigration policy. "The only limitation is that it may not do so by authorizing United States officers to take without due process of law the life, the liberty, or the property of an alien who has come within our jurisdiction." Because of this fundamental distinction between the work of substantive and procedural protections, I doubt that procedural surrogates are a temporary phase on the journey to judicial recognition of substantive constitutional rights for aliens.

Given my prognosis of membership's health (of course I could be proven wrong tomorrow) and given my dissatisfaction with the Court's story of plenary power, I have sought an alternative way to tell the story. A way that, while not achieving the substantive outcome hoped for by some, would not be antithetical to our constitutional traditions. In the next section, I offer a sketch of that alternative.

VI. THE STATE CASES: A MODEL FOR MEMBERSHIP

"[O]nly . . . the Constitution itself' restricts Congress's sovereign immigration power. Nonetheless, constitutional law has never imposed substantive limits on this power. The unsatisfying story perpetuated by the Court is that Congress and the Executive have inherent plenary power to construct a membership regime. "The right to exclude or expel" is "an inherent and inalienable right of every sovereign and independent nation." However, unlike some other nations, we are a nation that lives by the rule of law, and because our paramount law—the Constitution—places restrictions on the operation of government, this inherent

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327. In the *Japanese Immigrant Case*, the Court reaffirmed a still young plenary power doctrine: "It has been settled that the power to exclude or expel aliens belonged to the political department." *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903). In contrast, "this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law.'" *Id.*


329. Id. ("It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone.").


332. *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1892). Although the Court went on to question whether the immigration power was being exercised in a manner consistent with the Constitution, the Court has never seriously entertained restrictions. Id.
power rationale should not stand as a benchmark for judicial reasoning. Yet, it continues to find its way into cases, justifying results that are at odds with our domestic constitutional norms.

From plenary power's beginnings, dissenting judges have accurately and succinctly exposed the misplaced nature of the Court's logic:

It is said that the power here asserted is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do the obtain the authority for this? Shall they look to the practices of other nations to ascertain the limits? The governments of other nations have elastic powers—ours are fixed and bounded by a written constitution... Now, the power to remove resident aliens is, confessedly, not expressed. Even if it be among the powers implied, yet still it can be exercised only in subordination to the limitations and restrictions imposed by the Constitution.\textsuperscript{533}

Plenary power, with its inherent sovereign power, exists in complete defiance of a constitutional order built on limited and delegated powers, which the Bill of Rights further restrict. Although plenary power's results often seem harsh by contemporary constitutional standards, it is this theory of inherent sovereign powers, not the outcome of a particular case, that causes plenary power's illegitimacy.\textsuperscript{534} Is there an alternative?

Constitutional law involves the practice of prioritizing and balancing competing interests within a given framework.\textsuperscript{535} The competing claims of the individual noncitizen to the constitutional protections afforded persons and of the collective citizenry to fashion membership rules free from binding constitutional restraint create the tension addressed here. On the one hand, the Court recognizes noncitizens as “persons” entitled to protection, and the noncitizens desire more than illusory protection. On the other hand, the Constitution gives Congress the naturalization power,\textsuperscript{536} which in a broader sense gives Congress policy making authority over membership issues, since naturalization completes the legal assimilation process. How should these interests be balanced?

One could argue that the Court should subordinate the express naturalization power to constitutionally imposed restrictions. And, since

\textsuperscript{333} Id. at 737-38 (Brewer, J., dissenting).
\textsuperscript{334} Cf. Nafziger, supra note 85, at 46 (“[A]ll plenary power of Congress must be derived from the Constitution and not from some transcendental concept of inherent sovereignty.”).
\textsuperscript{335} Cf. Kathleen M. Sullivan, Governmental Interests and Unconstitutional Conditions Law: A Case Study in Categorization and Balancing, 55 Alb. L. Rev. 605 (1992) (describing the roles of categorization and balancing in modern constitutional law and the characteristic moves between those two modes of reasoning).
\textsuperscript{336} U.S. Const. art. I, § 8, cl. 4 (granting Congress the power “to establish a Uniform Rule of Naturalization”).
aliens as a class are a discrete and insular minority, the constitutional restrictions should apply with their strongest level of review. This, however, will not occur because it would strip Congress of any flexibility in formulating immigration policy. Some other accommodation of these competing interests must be made. Another possibility would be for the Court to engage in an ad hoc balancing of interests in the vein of City of Cleburne v. Cleburne Living Center, which developed an active rational basis review. Where the Court perceives that Congress or the Executive has acted out of “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable,” the Court’s rational basis review might require a more intrusive inquiry into whether the classification is truly rationally related to legitimate governmental interests.

Over the past one hundred years, the Court has clearly expressed its preference for categorical balancing over ad hoc balancing in its alienage jurisprudence. Where membership issues are involved, broad deference to the appropriate political body, and, in the absence of such issues, strong protection for alien persons. Given this preference for categorical balancing, the federal membership story needs retelling to make it consistent with our constitutional commitments.

The state membership cases provide a model, albeit rather crude, for re-envisioning the tension between communal formation and the rights’ claims of the noncitizen. Instead of casting the conflict in terms of a clash between inherent sovereign power (an alien concept in our jurisprudence) and the rights of recognized persons, it could be recast as a conflict between the rights of “We the People” to create a constitutional community and the rights of nonmembers and partial members to the benefits of constitutional protection.

In Cabell v. Chavez-Salido, the Court said:

[the exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community’s process of political self-definition. Self-government begins by defining the scope of the community and thus the governors as well: Aliens are by definition those outside of this community.]

At the state level, this task is limited to the formation of the political

337. Not even the most ardent dissenters from plenary power have advocated this position. "None of plenary powers dissenters has ever suggested that a noncitizen’s rights are equal to those of a citizen. They all recognize that an alien’s constitutional claim strengthens when she is in the United States and developing ties here. They also recognize that the federal government’s power is extensive in the immigration context, rising to an apex in the admissions decisions.” Scaperlanda, supra note 16, at 21.


341. Id. at 499.
community since the states lack the power to police the border. At the federal level membership touches a broader array of issues, and its reach extends further than limitations on governmental employment to issues of admission and exclusion, to questions of deportation, and beyond the border and immigration law to the benefits and burdens attendant to partial membership, and the qualifications for full membership.

Alexander Bickel once wrote that "[r]emarkably enough—and as I suggest, happily—the concept of citizenship plays only the most minimal role in the American constitutional scheme." The Court, it seems, would dispute this characterization of citizenship's role. "The act of becoming a citizen is more than a ritual with no content beyond the fanfare of ceremony. A new citizen has become a member of a Nation, part of a people distinct from others." Prior to this, the resident alien enjoys "such advantages as accrue from residence here without renouncing his foreign allegiance or formally acknowledging adherence to the Constitution." Justice Rehnquist identified at least eleven constitutional provisions, "in a political document noted for its brevity," where the concept of citizenship is important. The Fourteenth Amendment's definition of a citizen suggests that "[c]itizenship meant something, a status in and relationship with a society which is continuing and more basic than mere presence or residence."

The Court has been telling us for a hundred years that in most instances it will not resolve the tension between membership and personhood by subordinating membership issues to the constitutional claims of nonmembers or partial members. With respect to federal alienage cases, the Court has unconvincingly relied on a theory of inherent sovereign powers. The whole of alienage jurisprudence reveals another explanation—that, in the Court's eyes, the unfettered process of communal formation reigns paramount over the concerns of individual noncitizens and their claims to substantive constitutional protection. Either the Naturalization Clause or the political question doctrine (or both),

342. The political function exception to strict scrutiny "represents the choice, and right, of the people to be governed by their citizen peers. ... [A]lthough we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood, the right to govern is reserved for citizens." Foley, 435 U.S. at 296-97.
343. See supra notes 77-144 and accompanying text.
345. Foley, 435 U.S. at 295; cf. United States v. Manzi, 276 U.S. 463, 467 (1928) ("Citizenship is a high privilege.").
348. Id. at 652.
349. U.S. Const. art. I, § 8, cl. 4. But see Aleinikoff, Citizens, supra note 14, at 9 ("One might well distinguish between regulation of the physical entry of the aliens into the territory of the United States and regulation of the entry into the political community of the United
might justify tilting the balance strongly toward membership. In any event, it provides a more legitimate explanation of the Court's behavior in its alienage cases. Implicit within this understanding of plenary power as part of a larger membership paradigm is the realization that it is our responsibility, as community members, to ensure that our membership rules correspond to our constitutional commitments.

VII. CONCLUSION: CONSTITUTIONAL DIALOGUE

From the Chinese Exclusion Case to the present, the Court has clearly and unequivocally stated that when membership and personhood clash, it will not judicially enforce the substantive constitutional rights tradition. The Court likely will retain this posture if called upon to address the pressing immigration issues of today. With respect to the proposed amendments to limit birth right citizenship, the Court has no role. The Court, relying on precedent, will likely conclude that federal proposals to exclude noncitizens from welfare eligibility fall within the membership paradigm. Even with respect to measures like Proposition 187 that prohibit the undocumented from receiving state benefits available to all other people, the Court might overrule Plyler or distinguish it on the grounds that it involved the unique combination of factors—involuntary presence and the denial of a vitally important educational opportunity. Do any of these current measures conflict with this country's constitutional values? The Court refuses to answer this question in its alienage jurisprudence. In the end, We the People must square immigration policy with cherished constitutional values.

350. See Fiallo v. Bell, 430 U.S. 787, 796 (1977) (quoting Mathews); Mathews v. Diaz, 426 U.S. 67, 81-82 (1976) ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review... in the area of immigration and naturalization."). For thoughtful criticism of the Court's use of the political question doctrine rhetoric and justification in immigration cases, see Nafziger, supra note 85, at 46-49; Legomsky, Immigration Law, supra note 95, at 261-69.

351. Unlike Germany, our constitutional law regime does not visualize unconstitutional constitutional amendments. See Donald P. Kommers, German Constitutionalism: A Prolegomenon, 40 Emory L.J. 837, 852 (1991) ("In the German constitutionalist view, accepted and propogated by the Constitutional Court itself, any constitutional amendment conflicting with the core values or spirit of the Basic Law as a whole would itself be unconstitutional.").

352. We won't be the first generation to undertake such a task. Before the Constitution came to be owned by the judiciary, the People took responsibility for debating whether a proposed law was constitutional—not necessarily in a legally binding way, but with respect to our budding constitutional traditions. See supra note 40. I recognize that I may be taken as naive by some, especially those who have come to rely almost exclusively on the Court for development and enforcement of our constitutional values. My reply is simply that, whether one likes it or not, there is no practical alternative. Constitutional dialogue concerning the place of noncitizens in our society must proceed primarily outside the courthouse because the Court continues to refuse to engage in the dialogue from the bench. The Court here recognizes what it has forgotten elsewhere, that "the democratic faith is this: that the most
This path will not be easy. Like Johnson, Motomura, and others, I question whether the political branches will react positively to the claims of noncitizens. The constitutional values dialogue will take place in a larger debate over immigration policy, competing with a host of other voices—pragmatists, utilitarians, internationalists, racists, organized labor, and anyone else concerned with immigration and communal formation. Many times, maybe even most of the time, more immediate and less lofty concerns will carry the day. But, the outcome of any particular debate is far less important than the process. What is imperative, especially given judicial absence, is that we begin to develop a culture of constitutional dialogue with respect to our membership decisions.

This dialogue represents a shift from judicially enforced constitutional law to a broader concept of constitutional values, embracing "that web of understandings, myths, symbols, and documents out of which [is] woven interpretative narratives" defining the American constitutional experiment. Free from the limitations imposed by treating the constitution as binding law, the constitutional canon might even include documents
terrribly important things must be left to ordinary [people] themselves." G. K. Chesterton, Orthodoxy 47 (1908) ("[T]his is democracy; and in this I have always believed.").

353. Kevin R. Johnson, Los Olvidados Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement, 1993 B.Y.U. L Rev. 1139, 1147 (1993) ("Even when the interests of noncitizens are supported by a majority of the electorate, they may still lose in the political process. In other words, a dysfunctional political system molds immigration law and enforcement.").

354. Motomura, supra note 19, at 1703 ("In any given case, however, the promise of congressional correction is too remote and unreliable.").

355. Chief Justice Marshall established the Constitution as law in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803). See Louis Henkin, The Age of Rights (hereinafter Henkin, Age) ("In establishing judicial review [John Marshall] helped make the courts what they are today, the final arbiters of what the Constitution means, and the rock and the redeemer of our rights. But Marshall achieved his success by establishing the Constitution as law, the thing of courts and lawyers.").

356. Levinson, supra note 346, at 10. Although speaking of "constitutional adjudication", I would place Ronald Gare's The Resolution of Independence with this tradition. See Ronald R. Gare, The Resolution of Independence, 29 Hous. L. Rev. 867, 868 (1992) (discussing the "contribution that the Declaration [of Independence] might make to a certain kind of thought: reflective, intuitive, almost meditative. There is a place for such contemplative thoughts in our efforts to understand the Constitution's provisions and to apply them to some of the issues of our day.").

357. Certain freedom of interpretation was lost in the process of characterizing the Constitution as law and of casting the courts as "the final arbiters of what it means." See Henkin, Age, supra note 355, at 90-91 ("We were condemned to be textualists, 'interpretivists'; other parts of our historiography—notably the Declaration of Independence—were excluded from the jurisprudential canon; ancestral theory might sneak in, but only occasionally, and in the guise of construction of the constitutional text."). Rule 8 of The Bluebook, 15th ed. mandates that the "C" in constitution be capitalized when referring to the United States Constitution. I have deliberately not capitalized it here to emphasize the shift from constitutional "law," which limits the canon to the text and to judicial opinions interpreting the text, to a broader concept of what I have referred to as constitutional values, which legitimately includes many other writings, both official and unofficial, that contribute to
such as Emma Lazarus's *The New Colossus*, which has come to symbolize America as a nation of immigrants, still welcoming others who by choice or by force have left their homelands to build a new life in this country.\textsuperscript{358} At this level, I believe, like Levinson, that the constitution is "less a series of propositional utterances than a commitment to taking political conversation seriously."\textsuperscript{359} The Court, by its abdication, has given us—those who care about such matters—the field of developing, articulating, debating, and attempting to implement a constitutional vision of the noncitizen in our polity. The task will be difficult, the answers usually tentative, but the process of dialogue will be rewarding: "the answers can emerge, if at all, only out of conversation."\textsuperscript{360} In the end, 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.\textsuperscript{361} Let us continue the conversation in earnest.

\textsuperscript{358} In contrast to a textual "protestant" nature of the constitution, Professor Levinson finds "more meaningful a 'catholic' view of the Constitution that adds to the parchment ratified in 1788 (and formally amended thereafter) not only key decisions of the Supreme Court, Congress, and the president, but also fundamental documents such as the Declaration of Independence and the Gettysburg Address and, beyond that, aspects of the American experience that cannot be reduced to a text at all." Levinson, supra note 346, at 185.

\textsuperscript{359} Id. at 193. Cardinal Roger Mahony of Los Angeles exemplifies this serious discourse. In a homily given during an annual Multi-Ethnic Mass and Celebration, he said: "The Catholic tradition proposes certain moral and ethical principles which should guide a reasonable analysis of the issues and the development of fair and just solutions. The rights of immigrants are a theme of extraordinary importance in Catholic social teaching and follow from basic principles of this teaching which affirm human life and human dignity. The right to move across borders to escape political persecution or in search of economic survival is explicitly part of that tradition... Much is at stake in the way we respond...." Cardinal Roger Mahony, You Have Entertained Angels—Without Knowing It, The Tidings, Oct. 10, 1993, at 10-12.

\textsuperscript{360} Levinson, supra note 346, at 194.

\textsuperscript{361} Cf. Johnson, supra note 353, at 1240-41 (discussing the need for innovative strategies to bring about social change for the benefit of noncitizens). Stating that "[p]olitical mobilization and organization that empowers noncitizens offers the only meaningful opportunity for change," Johnson advocates a strategy to put a human face on the noncitizen by sharing the "facts, the stories, and the truth" about their lives. Id. at 1240. Until the full members of the national community come to know the stories of the partial members, the "noncitizens, a significant part of the national community, will continue to be Los Olvidados, The Forgotten. Although this strategy for change may fail, and may be doomed from the outset by its underlying optimism, if not naivete, we will never know unless we try." Id. at 1240-41. See generally Robert Coles, The Call of Stories: Teaching and the Moral Imagination (1989) (a wonderful book about the importance of stories—personal narratives—in the development of moral understanding).