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Narenji v. Civiletti: Equal Protection and the Iranian Crisis

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Under present standards of constitutional analysis, governmental classifications which make distinctions or discriminate on the basis of national origin are suspect in nature and, as such, are subject to the strict standard of judicial review imposed by the equal protection guarantees of the fifth and fourteenth amendments. Since The Japanese Restriction Cases, the

1. Prior to 1938, the Supreme Court upheld discriminatory classifications against equal protection challenges if they met the criteria of minimum rationality. See, e.g., Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32 (1928); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Southern Ry. v. Greene, 216 U.S. 400 (1910); Gulf, Colo. & S.F. Ry. v. Ellis, 165 U.S. 150 (1897). When reviewing socioeconomic regulations, the Court determined that government restrictions treating persons differently need only have a reasonable and nonarbitrary basis in order to survive judicial review. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911). Under the standard of minimum rationality, a discriminatory classification will be invalidated only if it rests “on grounds wholly irrelevant to the achievement of the State's objective” or if it is unsupported by “any state of facts [that] reasonably may be conceived to justify it.” McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

A second level of equal protection analysis emerged in 1938 when the Supreme Court first acknowledged, in United States v. Carolene Prod. Co., 304 U.S. 144 (1938), that discrimination against “discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” Id. at 152-53 n.4. This heightened level of review, termed “strict scrutiny,” is triggered whenever discrimination is directed against a “suspect” class or when fundamental rights are abridged. Korematsu v. United States, 323 U.S. 214, 216 (1944); see Shapiro v. Thompson, 394 U.S. 618, 638 (1969). Cases decided since the “suspect class” theory was first articulated in Korematsu, see notes 45-53 and accompanying text infra, have further defined the criteria that characterize a suspect class. In addition to the factor of political underrepresentation, the Court looks carefully at classifications which are based on “an immutable characteristic determined solely by the accident of birth,” Frontiero v. Richardson, 411 U.S. 677, 686 (1973), or which affect groups that have been “subjected to a history of purposeful unequal treatment.” San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). In order that a suspect classification withstand review under the strict scrutiny standard, the government must make a dual showing. First, a compelling state interest or purpose must exist. See Graham v. Richardson, 403 U.S. 365 (1971); Oyama v. California, 332 U.S. 633, 640 (1948). Second, the use of the classification must be necessary to the accomplishment of the state interest. See In re Griffiths, 413 U.S. 717 (1973); Shapiro v. Thompson, 394 U.S. 618 (1969). Since most classifications fail to survive the two-pronged strict scrutiny test, Professor Gunther has labeled the approach “strict in theory and fatal in
application of a strict scrutiny test to national origin discrimination\(^3\) has become a fundamental tenet of equal protection theory, frequently serving as a constitutional shield for the protection of politically unpopular minorities in times of public unrest. Nevertheless, in the midst of the recent Iranian crisis, the United States Court of Appeals for the District of Columbia Circuit upheld a discriminatory law directed at a political minority of specific national origin under a minimum rationality standard of review.\(^4\)

*Narenji v. Civiletti\(^5\)* involved an equal protection challenge to a regulation promulgated by the Immigration and Naturalization Service (INS) in response to a directive issued by President Carter following the seizure of the American hostages in Tehran in November, 1979. The INS regulation directed all Iranian nonimmigrant students in the United States to report to the Immigration and Naturalization Service in order to verify compliance with the terms of their immigration status. Failure to do so would result in the risk of deportation.\(^6\) A consolidated class action was brought

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\(^3\) It should be noted that the distinction between race and national origin has largely disappeared in the equal protection doctrine. *See L. Tribe, *American Constitutional Law* 1052 n.3 (1978). Professor Tribe states: “The Supreme Court has assimilated discrimination based on specific national origin to racial or ancestral determination.” *Id. See also II T. Emerson, D. Haber, & N. Dorson, *Political and Civil Rights in the United States* 84 (4th ed. 1979). For purposes of this note, the terms “national origin” and “ancestry” will be used interchangeably.


\(^5\) *Id.*

\(^6\) 8 C.F.R. § 214.5 (1981). As originally promulgated by Attorney General Benjamin Civiletti, the reporting requirement read as follows:

On November 10, 1979, the President ordered the Attorney General to identify Iranian students in the United States who are not maintaining status and to take immediate steps to commence deportation proceedings against such persons. The Attorney General directed the Immigration and Naturalization Service to issue regulations requiring all nonimmigrant Iranian students to report their present location and status promptly to the nearest INS office and to take additional actions to identify and locate all Iranian students to determine their immigration status. In
in the United States District Court for the District of Columbia by several Iranian nonimmigrant students which, inter alia, challenged the INS regulation on equal protection grounds.  

District Court Judge Joyce Hens Green invalidated the regulation as "an impermissible distinction made on the basis of national origin which violated the fifth amendment's guarantee of equal protection of the law."  

compliance with the President's directive, the regulations governing maintenance of status by nonimmigrant students will be amended to require Iranian students in the United States to report within 30 days to the nearest INS office or to an INS representative on campus and to present certain information verifying location and status as a student. Failure to report as required or provision of false information to the INS will subject a student to deportation proceedings for failure to comply with the conditions of nonimmigrant status. Conviction of a crime punishable by imprisonment for more than one year will constitute failure to maintain status. These regulations are issued under the authority vested in the Attorney General by Sect. 214 (a) of the Immigration and Nationality Act, 8 U.S.C. 1184 (a). Effective Date: November 13, 1979.


7. Plaintiffs also raised other constitutional and statutory arguments contending that the regulation constituted an illegal seizure under the fourth amendment and that the first amendment rights of speech, assembly, and association of both Iranian students and American citizens were infringed by 8 C.F.R. § 214.5 (1981). In addition, they argued that the regulation violated international law and that the defendants had failed to comply with the notice and comment provisions of the Administrative Procedure Act. Narenji v. Civiletti, 481 F. Supp. at 1136-37.

8. There has been some dispute in the past over whether the equal protection component of the fifth amendment due process clause compels the same guarantees as the equal protection clause of the fourteenth amendment. See Gruenwald v. Gardner, 390 F.2d 591 (2d Cir.), cert. denied, 393 U.S. 982 (1968) (only invidious discrimination is barred by fifth amendment due process clause); accord, Taylor v. United States, 320 F.2d 843 (9th Cir. 1963); United States v. First Nat'l Bank of Cincinnati, 329 F. Supp. 1251 (S.D. Ohio 1971). The Supreme Court's most recent pronouncements indicate that the equal protection guarantees of the two amendments are now considered coextensive. In Bolling v. Sharpe, 347 U.S. 497 (1954), the Court held racial segregation in the District of Columbia public school system violative of the fifth amendment and stated that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. . . . [D]iscrimination may be so unjustifiable as to be violative of due process." Id. at 499 n.2 (citing Detroit Bank v. United States, 317 U.S. 329 (1943); Currin v. Wallace, 306 U.S. 1, 13-14 (1948); Steward Mach. Co. v. Davis, 301 U.S. 548, 585 (1936)). Later decisions further clarified the scope of the fifth amendment equal protection guarantee. See Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment," citing Schlesinger v. Ballard, 419 U.S. 498 (1975); Jimenez v. Weinberger, 417 U.S. 628, 637 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973)); See also Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975)); accord, Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

9. 481 F. Supp. at 1145. Judge Green first addressed the plaintiffs' nonconstitutional arguments and found that the defendant's failure to comply with the notice and comment
Although she acknowledged that the well-established plenary power of Congress over matters relating to immigration and naturalization could be delegated to the executive, Judge Green held that the broad powers con-

provisions of the Administrative Procedure Act was permissible under the circumstances since compliance would have resulted in a delay in the regulation's implementation, weakening its effect in such a manner as to be "impracticable and contrary to the public interest." *Id.* at 1137. The district court also determined that the specific provisions of 8 C.F.R. § 214.5 (1981) requiring students to produce passports and related documents as part of the reporting procedure were within the powers delegated to the executive branch by the Immigration and Nationality Act of 1952, as amended by 8 U.S.C. § 1184(a) (1976). *481 F. Supp.* at 1137-38. The court then invalidated the regulation on equal protection grounds and did not reach plaintiff's first amendment argument, which alleged that the purpose of the regulation was to chill the exercise of the rights of Iranian students to speech, association and assembly. Nor did the court find it necessary to address the argument that 8 C.F.R. § 214.5 (1981) was a "compelled interrogation" and thus constituted an illegal seizure in violation of the fourth amendment.

10. *481 F. Supp.* at 1139. The plenary power doctrine states that Congress has exclusive control over the entry, exclusion and regulation of aliens in this country by virtue of both the express power delegated to it by the Constitution and the extra-constitutional powers inherent in national sovereignty. Art. I, § 8, cl. 4 of the United States Constitution delegates to Congress the power to "establish an uniform Rule of Naturalization . . . throughout the United States." The theory that the federal power over immigration, which is vested in the political branches, has an extra-constitutional source is predicated on the sovereign right of every nation to regulate the passage of noncitizens over its borders. In *Ekiu v. United States*, 142 U.S. 651 (1892), the Court summarized the national sovereignty argument, stating: "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *Id.* at 659.

Because of the close relationship between immigration matters and foreign affairs, courts hesitate to second-guess the decisions of the legislative and executive branches concerning matters which these political bodies are considered better equipped to resolve. In *Mathews v. Diaz*, 426 U.S. 67 (1976), the Supreme Court elaborated on this aspect of the plenary power doctrine:

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. *Id.* at 81-82. The plenary power doctrine has been relied upon in a number of decisions involving federal restrictions on noncitizens but has its strongest support in those cases involving anticommunist legislation. See *Galvan v. Press*, 347 U.S. 522 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Carlson v. Landon*, 342 U.S. 524 (1952). For an excellent discussion urging abandonment of the plenary power doctrine in immigration cases, see Comment, *Aliens, Deportation and the Equal Protection Clause: A Critical Reappraisal*, 6 *Golden Gate Univ. L. Rev.* 23 (1975) [hereinafter cited as *Aliens, Deportation*]. The author argues that further reliance on the plenary power is unjustifiable for the following reasons: (a) the concept of an unrestrained federal power conflicts with the constitutional model of restraint, *id.* at 25-26; (b) in the balance of powers equation, even the foreign affairs power
ferred by Congress on the Attorney General to establish conditions for the entry of aliens into the United States did not include "explicit authority to discriminate among aliens on the basis of national origin." The court rejected the government's argument that the President's constitutional power to regulate foreign affairs gave the executive branch authority over immigration matters concurrent with that of Congress and thus exempted actions taken by the executive in that area from judicial review. Judge Green noted that "above all, it is patent that the executive, even in the area of immigration and naturalization, must be subject to applicable principles of the Constitution." After evaluating the action of the executive in light of the familiar balance of powers analysis set forth by Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, the court concluded that review of the regulation at issue in *Narenji* was appropriate because, in the absence of congressional authorization, the issuance of the regulation "exceeds the proper boundaries within which the three branches of our constitutional government coexist." The district court then went on to review the equal protection question under the "legitimate basis" standard enunciated by the Supreme Court in *Hampton v. Mow Sun Wong*. Examining the national interests offered by the government as justification for the challenged regulation, the court determined is subject to judicial review, *id.* at 36-37; (c) since immigration laws often affect the fundamental or sensitive rights of aliens, there is a corresponding need for a greater degree of constitutional protection, *id.* at 67-77; and (d) the plenary power theory conflicts with modern techniques of constitutional analysis because it leaves no room for a balancing of competing interests, *id.* at 63-64, 77.

11. 481 F. Supp. at 1141.
12. *Id.*
13. *Id.* at 1143.
14. 343 U.S. 579 (1952). Under the balance of powers theory, if the President acts in response to congressional authorization, his exercise of power has a strong presumption of validity and receives "the widest latitude of judicial interpretation." *Id.* at 637 (Jackson, J., concurring). If the President lacks either a congressional endorsement or denial of authority, however, he exercises the challenged action "in a zone of twilight," and any review by the courts must look to "the imperatives of events and contemporary imponderables rather than... abstract theories of law." *Id.* Measures taken in direct opposition to the expressed will of Congress must be carefully examined by the judicial branch since, at this point, the President acts when "his power is at its lowest ebb." *Id.*
15. 481 F. Supp. at 1143.
17. The government's interest in retaliating against Iran was dismissed by the court as noncompelling, especially where other political and economic actions could be taken that would not violate individual rights. Characterizing the government's actions as a "discriminatory thirty-day roundup that violates the fundamental principles of American fairness," 481 F. Supp. at 1144, the court found that "census taking", the second justification offered by the government, was for administrative convenience only and could not be justified as an "overriding" governmental interest. *Id.*
that only protection of the hostages could be labeled "overriding." That justification failed, however, because there was at best only a "dubious" relationship between the protection of the hostages and the presence of Iranian students in this country.

On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed, holding that the INS regulation was a valid exercise of the authority delegated to the Attorney General under the Immigration and Nationality Act. Judge Robb, writing for the court, concluded that the actions of the Attorney General taken pursuant to his broad authority to administer the immigration laws need not be specifically delegated by statute but only reasonably related to his duties under the Act. In contrast to the intermediate standard of review utilized by the lower court, the court of appeals examined the regulation in *Narenji* under the less demanding standard of minimal rationality. Despite the suspect nature of national origin discrimination, the court found such distinctions permissible when made by Congress or the executive in the field of immigration as long as they are not "wholly irrational." In the opinion of the court of appeals, the district court had overstepped its role and should have declined to review a judgment made by the President in the field of foreign policy, especially when that judgment also involved the congressional power over immigration and naturalization.

*Narenji* v. *Civiletzi* illustrates the problematic nature of equal protection cases where a discriminatory law directed at a particular class (aliens) also discriminates within that class on a suspect basis (national origin). Such

18. *Id.*
19. *Id.* Judge Green went on to state that: "[T]his undeniably tenuous cause and effect relationship between this inherently discriminatory regulation and the unpredictable emotional reaction it is to temper, based as it must be on speculation, utterly fails to demonstrate that the regulation indeed serves the national interest in protecting the hostages." *Id.* at 1145.
20. 617 F.2d 745, 747. The court found that the issuance of the regulation was within the scope of 8 U.S.C. § 1103(a) (1976) which charges the Attorney General with the "administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens," and was also within 8 U.S.C. § 1251(a)(9) (1976) which grants the Attorney General the power to deport aliens who are out of compliance with the terms of their immigration status.
21. 617 F.2d at 748.
22. *Id.* at 747.
23. *Id.*
24. *Id.* at 748.
25. One commentator has explained:

[In] such cases aliens as a group are not the objects of discrimination. Rather naturalization and deportation laws necessarily discriminate among aliens on the basis of other, presumably nonsuspect, criteria. This situation, discrimination within rather than against an arguably suspect group, is unique, since in other contexts the
a situation is further complicated when such actions are taken in the politically sensitive areas of foreign affairs and immigration under the rubric of the congressional plenary power over aliens. The threshold characterization of a governmental distinction as one that affects either a fundamental right or a suspect class triggers the strict scrutiny standard, a result that is largely outcome-determinative. Under the prevailing standards of equal protection, discriminatory classifications which abridge fundamental rights or affect a suspect characteristic such as race or national origin have traditionally received a higher degree of judicial scrutiny than classifications which discriminate on the basis of alien status. In contrast, federal alienage classifications will generally be sustained by the courts under the minimum rationality standard, in deference to the congressional plenary power over matters in the immigration area.

This note will trace the historical development of the existing equal protection standards in both alienage and national origin cases and will further examine the Narenji decision in light of those standards. It will be demonstrated that the deviation in Narenji from established standards of review cannot be justified either by previous decisions of the Supreme Court or the congressional power over immigration and naturalization. In conclusion, it will be argued that adherence to basic constitutional principles is especially warranted in politically volatile situations where public antagonism threatens the rights of a powerless minority.

I. Aliens in the Melting Pot: A Tradition of Discrimination

Historically, aliens in this country have received discriminatory treat-
ment during periods of economic depression and political unrest. In the late nineteenth century, as increased industrialization resulted in a scarcity of available jobs for which citizens had to compete with an ever-growing number of immigrants, Congress passed exclusionary legislation directed primarily at the Chinese. Further prohibitions on the immigration of the Japanese and other groups of Asiatic origin were enforced through the Gentleman's Agreement of 1907 and the 1914 National Origins Act. The Mexican “Repatriation” Campaign of the post-Great Depression years resulted in the expulsion of over 250,000 United States citizens of Mexican descent. As the nation became more sensitive to the negative effects of racial and ancestral discrimination in the years following World War II, this lamentable tradition of lawfully-sanctioned discrimination against aliens was diminished. The 1965 and 1978 amendments to the Immigration and Nationality Act abolished the national origins quota system and lifted the hemispheric quotas which favored immigration from nations with racial compositions similar to that of most Americans. Most significantly, during this time the Supreme Court clarified its opposition to racial and ancestral discrimination and greatly altered its treatment of equal protection cases involving discrimination against aliens.

34. Civil Rights Report, supra note 30, at 10.
35. Among the most shameful and harshest decisions discriminating against aliens were the Communist Party cases of the McCarthy era. See Galvan v. Press, 347 U.S. 522 (1954); Carlson v. Landon, 342 U.S. 524 (1952); Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (upholding the deportation of aliens on the basis of membership in the communist party absent advocacy of unlawful action).
38. See Civil Rights Report, supra note 30, at 11-12.
A. Discrimination on the Basis of National Origin: Evolution of the Suspect Class Distinction and the Strict Scrutiny Standard

Following the enactment of the fourteenth amendment, the Equal Protection Clause was originally interpreted to apply only to negroes as a class.\(^3\) Seven years later, however, in *Strauder v. West Virginia*,\(^4\) the Supreme Court suggested that the scope of the fourteenth amendment might encompass other classes identified by racial or ancestral characteristics. Invalidating a state law excluding blacks from juries, the Court questioned, “if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the Amendment?”\(^5\) In the 1886 landmark case of *Yick Wo v. Hopkins*,\(^6\) the equal protection guarantee of the fourteenth amendment was extended to prohibit arbitrary discrimination by the states on the basis of race, color, or nationality.\(^7\) Continued antagonism toward the Chinese in the late nineteenth century spawned a series of cases in which the Supreme Court repeatedly sustained equal protection challenges made on the basis of ancestry.\(^8\)

In *The Japanese Restriction Cases*,\(^9\) the Supreme Court introduced the “suspect class” distinction into equal protection analysis and established a heightened standard of review for laws discriminating on the basis of national origin.\(^10\) In *Hirabayashi v. United States*,\(^11\) a curfew order applica-
ble only to Japanese-Americans was upheld as within the executive's power to wage war.\(^4\) The Court recognized that under normal peacetime conditions "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."\(^4\) Nevertheless, the Court limited its inquiry to "whether, in light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew."\(^5\) One year later, however, the Court abandoned the rational basis test for ancestral classifications in *Korematsu v. United States*.\(^5\) Although it sustained the wartime exclusion of persons of Japanese ancestry from designated West Coast military areas, the Court declared at the outset of its opinion that:

> It should be noted, to begin with, that all legal restrictions which curtail the rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.\(^5\)

The exclusion order in *Korematsu* was constitutional, according to the Court, only because the war with Japan produced an "apprehension...of the gravest imminent danger to the public safety,"\(^5\) justifying otherwise

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\(^4\) 320 U.S. 81 (1943).
\(^5\) 323 U.S. 214 (1944).
impermissible ancestral distinctions.

The equal protection analysis set forth in *Korematsu* for review of national origin classifications was reaffirmed by the Supreme Court during the post-war years in *Oyama v. California*. *Oyama* invalidated California’s Alien Land Law under which farmlands recorded in the name of the minor son of a Japanese alien ineligible for naturalization escheated to the state. Application of the statute deprived the son, a citizen, of treatment under the law equal to that given children of other nationalities. The Court found no “compelling justification which would be needed to sustain discrimination of that nature” and emphasized that there were constitutional limits to the means used by the state to enforce its purposes. In the subsequent case of *Hernandez v. Texas*, the fourteenth amendment’s prohibition on national origin discrimination was again invoked when the Supreme Court held unconstitutional Texas’ systematic exclusion of Mexican-Americans from jury service. The court noted that “[i]t has been recognized since *Strauder v. West Virginia* that the exclusion of a class of persons from jury service on grounds other than race or color may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection of the laws.”

**B. Discrimination on the Basis of Alienage: A Double Standard for State and Federal Classifications**

In contrast to the strict standard of review compelled by national origin discrimination in equal protection analysis, discrimination against aliens triggers heightened review only when a state classification is involved. Federal alienage classifications fall within the shadow of the congressional plenary power over immigration and are consequently shielded from all but minimal scrutiny by the courts.

Subsequent to the Supreme Court’s ruling in *Yick Wo v. Hopkins* that

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showing that any of the Japanese-Americans affected by the order were an actual threat to national security. See id. at 235 (Murphy, J., dissenting). It is interesting to note that the INS regulation at issue in *Narenj* was premised on the same type of blanket assumption: that all Iranian students in this country both supported their government’s actions in Tehran and were an actual threat to domestic order. See 481 F. Supp. at 1147.

54. 332 U.S. 633 (1948).
55. Id. at 640.
56. Id.
59. 347 U.S. at 477 (citation omitted).
aliens are "persons" entitled to the protection afforded by the fourteenth amendment,\textsuperscript{62} equal protection challenges to state laws effectively denying the civil rights of aliens were generally sustained by the courts.\textsuperscript{63} An exception to this trend developed in those cases where the state invoked the "public interest doctrine" as justification for granting citizens priority over aliens in the enjoyment of public benefits, particularly in the employment sector.\textsuperscript{64} Essentially, the public interest doctrine permitted the states to reserve certain benefits for their citizens if those benefits "pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State . . . ."\textsuperscript{65}

The public interest doctrine met its demise in 1971 in the same case in which the Supreme Court elevated state discrimination against aliens to suspect status. While scrutinizing an Arizona statute denying welfare benefits to aliens who failed to meet a fifteen-year durational residency requirement, the Court determined in \textit{Graham v. Richardson}\textsuperscript{66} that because aliens were a "discrete and insular minority," they were entitled to "heightened judicial solicitude" when discriminated against by the states.\textsuperscript{67} The Court thus guaranteed that state classifications based on alienage would be subject to the strictest standard of review under equal protection analysis.\textsuperscript{68} In subsequent cases, the invalidation of various state restric-

\textsuperscript{62} 118 U.S. 356 (1886). \textit{See} notes 42-43 and accompanying text \textit{supra}.

\textsuperscript{63} Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926) (de facto discrimination against Chinese merchants in the Philippines for keeping books in Chinese held violative of the equal protection clause); \textit{Truax v. Raich}, 239 U.S. 33 (1915) (Arizona statute prohibiting employers from hiring more than a specified percentage of aliens invalidated as an unreasonable interference with a particular group's right to earn a livelihood as protected by the fourteenth amendment).

\textsuperscript{64} \textit{See}, e.g., \textit{Ohio ex rel} Clarke v. Deckebaugh, 274 U.S. 392 (1925) (alien denied license to operate pool hall); Heim v. McCall, 239 U.S. 175 (1915) (public works projects); Miller v. City of Niagara Falls, 207 A.D. 798, 202 N.Y.S. 549 (1924) (fear of contamination justifies prohibition on sale of soda pop by aliens).

\textsuperscript{65} \textit{Truax v. Raich}, 239 U.S. at 39.

\textsuperscript{66} \textit{Id.} at 356 (1971).

\textsuperscript{67} \textit{Id.} at 372 (citing United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938)).

\textsuperscript{68} A loophole in the application of the strict scrutiny (compelling state interest) test to aliens has limited the potential effect of \textit{Graham} on state alienage restrictions. Under the "governmental functions exception," the Supreme Court has recognized that the states have a right to discriminate on the basis of alienage where such discrimination is necessary "to preserve the basic conception of a political community." \textit{Dunn v. Blumstein}, 405 U.S. 330, 344 (1972). Aliens may be excluded from those state positions which involve direct participation in the formulation, execution, or review of broad public policy or which require the performance of functions that go to the heart of representative government. \textit{Sugarman v. Dougall}, 413 U.S. 634, 647 (1973). Recently, the governmental functions exception has been expanded to include "functions that are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have
Equal Protection and National Origin

...tions on aliens resulted. For example, prohibitions on aliens in the practice of law were struck down as well as state restrictions on aliens in the New York Civil Service System and in college loan programs.

Although the suspect status accorded state alienage classifications in *Graham* implied that similar federal restrictions on aliens might also violate equal protection principles, the Supreme Court has consistently deferred to the federal government when reviewing federal alienage classifications, requiring only a rational basis for such restrictions. Indeed, in immigration cases involving membership in political parties, discrimination against illegitimates, and even the rights of American citizens to the free exchange of political views, the Court has declined to review alienage distinctions made by the political branches of the federal government. This relaxed analysis in federal alienage cases, premised on both the plenary power doctrine and the foreign affairs power, has prevailed since 1889 when the Supreme Court decided *The Chinese Exclusion Case*.

The continued deference of the Supreme Court to the congressional plenary power over immigration and naturalization is evidenced by several post-*Graham* cases involving federal discrimination against aliens. In *Mathews v. Díaz*, a 1976 case upholding the constitutionality of a federal statute that denied Medicare benefits to aliens residing in this country for less than five years, the Court focused on the question of whether "statutory discrimination within the class of aliens—allowing benefits to some people who have served the country by becoming citizens but not to those who enter the country as aliens who have not become part of the process of self-government." *Ahmbach v. Norwich*, 441 U.S. 68, 73-74 (1979) (aliens not intending to seek naturalization denied teaching positions in New York's public school system); *accord*, *Foley v. Connellie*, 435 U.S. 291 (1978) (denial of employment as a New York State trooper).

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77. 130 U.S. 581 (1889) (upholding the right of Congress to deny reentry to a Chinese laborer temporarily out of the United States). Although *The Chinese Exclusion Case* has long been regarded as one of the foundational cases establishing the congressional plenary power over matters relating to immigration and naturalization, a strong argument can be made for the proposition that *The Chinese Exclusion Case* and related decisions in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) and United States ex rel *Turner v. Williams*, 194 U.S. 279 (1904), do not stand for anything more than the right of Congress to deport unlawfully admitted aliens from the country. See *Aliens, Deportation, supra* note 10, at 29.
aliens but not to others—is permissible.” In *Mathews*, the Court reaffirmed the plenary power doctrine, emphasizing that minimal interference by the courts in the relationship between aliens and the federal government was necessary. According to the Court, “[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.” Absent a showing of a “wholly irrational” classification and without identification of a sounder standard under which to terminate Medicare benefits, the Court would not substitute its judgment for that of Congress. Previous cases in which the Court had invalidated federal discrimination under the fifth amendment equal protection guarantee were distinguished as involving interference with or loss of a fundamental right. The Court found that *Graham* supported federal preemption in the immigration field, confining that decision’s strict scrutiny standard to cases which involved state discrimination against aliens.

*Hampton v. Mow Sun Wong*, another post-*Graham* alien discrimination case, involved a constitutional challenge to a Civil Service Commission rule excluding aliens from employment in the federal civil service. Although the Court acknowledged the existence of a fifth amendment equal protection issue, it decided the case on procedural due process grounds. The Court’s narrow inquiry into the procedural sufficiency of the Civil Service Commission rule at issue in *Hampton* proceeded from the premise that, “when the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest.” This due process requirement was man-

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79. Id. at 80 (emphasis in original).
80. Id. at 81-82.
81. Id. at 83-84.
82. Id. at 85-87 (citing Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (fundamental right to travel) and United States Dep’t of Agriculture v. Moreno, 413 U.S. 528 (1973) (right of association)). The distinction made by the *Mathews* Court, that equal protection cases involving a fundamental right are to be decided under a more stringent analysis than that set out in *Mathews*, 426 U.S. at 85-87 suggests that alienage classifications based on suspect criteria would receive the same heightened level of review.
83. 426 U.S. at 84.
85. Id. at 100. The Court noted that “[t]he concept of equal justice under law is served by the Fifth Amendment’s guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment.” *Id.*
86. Id. at 103.
dated as well by the fact that alien "ineligibility for employment in a major sector of the economy" was a deprivation of a liberty interest affecting "a discrete class of persons . . . on a wholesale basis" who were already disadvantaged compared to the rest of the community.\textsuperscript{87} The Civil Service Commission's bar on alien employment was unconstitutional since it was a discriminatory rule promulgated by a federal agency with no direct responsibility for fostering the interest that the rule was intended to serve.\textsuperscript{88} Although the middle scrutiny standard used by the Court in \textit{Hampton} was not premised on the equal protection component of the fifth amendment but on a procedural due process analysis, the level of review was consistent with the less-demanding standards implemented by the Court in previous cases involving equal protection challenges to federal regulation of aliens.

Following \textit{Hampton} and \textit{Mathews}, the Supreme Court reviewed a federal statute which discriminated among aliens as a class on the nonsuspect bases of sex and illegitimacy. In \textit{Fiallo v. Bell},\textsuperscript{89} the Court upheld a provision of the Immigration and Nationality Act of 1952\textsuperscript{90} which denied special preference status to unwed fathers and their illegitimate children. The \textit{Fiallo} Court declined to scrutinize the challenged federal legislation in deference to Congress' plenary power over immigration matters.\textsuperscript{91} Writing for the majority, Justice Powell noted that in immigration cases involving a facially legitimate exercise of executive power, "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification . . . ."\textsuperscript{92}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 102-03.
\item Id. at 116-17. The Court found that the government interests in the citizenship requirement—the enhancement of presidential power to negotiate treaties, the supplying of an incentive for citizenship, and the administrative convenience in screening applicants for sensitive government positions—to be outside the province of the Civil Service Commission. The Court noted, "That agency has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies." Id. at 114.
\item 430 U.S. 787 (1977).
\item 430 U.S. at 792. "At the outset, it 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." Id. at 792 (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).
\item 430 U.S. at 794-95 (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)). The notion that the courts should decline to review such cases originated in \textit{Kleindienst} where the Supreme Court upheld the Attorney General's denial of a passport renewal for noted Marxist scholar Ernest Mandel, despite first amendment claims raised by American citizens who argued that they had been deprived of the exchange of Mandel's views in the academic forum.
\end{enumerate}
\end{footnotesize}
C. Summary

The prevailing principles of equal protection dictate a double standard of review for discriminatory classifications directed against aliens. State laws or regulations infringing on the rights of aliens can be justified only upon a showing that the state's interest is compelling and that the "use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." Federal discrimination based on alien status is reviewed less strictly and will be upheld as long as a reasonable basis for the classification exists, and, where appropriate, the court may refrain completely from scrutinizing a federal classification. In contrast, national origin discrimination is always "suspect" whether the governmental restriction is state or federal, and the strict scrutiny test is applied automatically in the protection of a group's civil rights. Since the respective standard of review in equal protection cases depends on the basis of the discrimination involved, identification of that criterion is the threshold issue when an equal protection analysis is initiated.

II. Narenji v. Civiletti: The Abandonment of Traditional Equal Protection Principles

Curiously, neither the district court nor the court of appeals applied a strict scrutiny analysis when reviewing the reporting requirement in Narenji, a facially discriminatory classification which clearly distinguished Iranian students from the larger class of aliens on the basis of their national origin.

Although the district court identified the constitutional issue as national origin discrimination and acknowledged that discrimination of this nature merits strict judicial review, the court felt that review under the Hampton v. Mow Sun Wong standard was appropriate stating:

In instances when the guarantee of equal protection under the due process clause of the fifth amendment is invoked against a federal enactment or regulation, a different analysis may be required in that 'there may be overriding national interests which justify selective federal legislation that would be unacceptable for

an individual State.\textsuperscript{98}

The district court’s reliance on \textit{Hampton} was misplaced for two reasons. First, the legitimate basis standard enunciated in \textit{Hampton} and applied by the district court in \textit{Narenji} was a procedural due process standard inapplicable to an equal protection analysis under the fifth amendment.\textsuperscript{99} Second, the language in \textit{Hampton} discussing equal protection analysis under the fifth amendment was preceded by an express declaration that the equal protection guarantees of the fifth and fourteenth amendments “require the same type of analysis.”\textsuperscript{100} Thus, while \textit{Hampton} clearly states that the existence of strong federal interests may \textit{justify} a discriminatory federal classification, presumably when those interests are evaluated under the appropriate standard of review, the case does not stand for the proposition that a less rigorous equal protection standard will \textit{apply} merely because a discriminatory classification is challenged under the equal protection component of the fifth amendment. A further distinction between \textit{Hampton} and \textit{Narenji} is that the discrimination in \textit{Hampton} bore neither of the traditional earmarks of strict scrutiny, in that it affected neither a suspect class nor a fundamental right.\textsuperscript{101} Instead, the appellees in \textit{Hampton} were deprived of an “interest in liberty,”\textsuperscript{102} the review of which has never commanded a more exacting standard than intermediate scrutiny.\textsuperscript{103} A narrow reading of \textit{Hampton} further limits its application to a situation where a discriminatory regulation is promulgated by a federal agency in an area in which that agency has no responsibility.\textsuperscript{104}

In reversing the district court, the Court of Appeals for the District of Columbia Circuit focused on the ability of Congress or the executive branch to create distinctions in the immigration field based on national

\textsuperscript{98} \textit{Id.} at 1144 (citing 426 U.S. 88, 100).

\textsuperscript{99} See notes 84-88 and accompanying text \textit{supra}.

\textsuperscript{100} 426 U.S. at 100. Interestingly enough, the district court in \textit{Narenji} did observe in a footnote to its opinion that:

[H]likewise, if traditional equal protection analysis were applied in this instance, the same reasons that demonstrate the government’s failure to justify its actions as based on an ‘overriding national interest’ would show that the interests asserted are not sufficiently compelling to meet the standard of strict scrutiny required in examining classifications based on national origin.

481 F. Supp. at 1145 n.9.

\textsuperscript{101} See note 1 \textit{supra}.

\textsuperscript{102} 426 U.S. at 102 (ineligibility for employment in a major sector of the economy).


\textsuperscript{104} 426 U.S. at 114-16.
origin if such distinctions were premised on a rational basis. The appellate court did not even afford the classification in *Nareni* the benefit of the middle scrutiny analysis applied by the district court, but held that "classifications among aliens based upon nationality are consistent with due process and equal protection if supported by a rational basis." However, the authorities relied upon by the court to support this proposition involved discrimination among aliens on the basis of other nonsuspect criteria rather than national origin discrimination.

The Court in *Saxbe v. Bustos* upheld the INS practice of exempting daily and seasonal commuters from Mexico and Canada from certain requirements of the Immigration and Nationality Act. The basis for the differential treatment in *Saxbe* was the aliens' status as commuters, rather than their national origin. Similarly, *Mathews v. Diaz* should not be interpreted to support congressional or executive authority to make distinctions among aliens solely on the basis of nationality. Although the objects of the discrimination in *Mathews* were aliens, the basis for the classification was length of residency. Finally, the court of appeals' reliance on *Fiallo v. Bell* is also questionable. The restrictions levied against aliens in *Fiallo* "involved 'double-barreled' discrimination based on sex and illegitimacy" and were not directed at aliens of any specific nationality.


109. 426 U.S. 67 (1976) (invalidating federal statute denying Medicare benefits to aliens failing to meet a five-year durational residency requirement). See also notes 78-83 and accompanying text supra.

110. 430 U.S. 787 (1977) (holding constitutional a provision of the Immigration and Nationality Act granting special preference immigration status to the legitimate children and parents of United States citizens or lawful permanent residents). See also notes 89-92 and accompanying text supra.


112. Although the *Fiallo* opinion reaffirms the plenary power in broad language, it makes no mention of nationality or other such suspect distinctions.
III. THE IMPLICATIONS OF \textit{Narenji} OPENING THE DOOR TO FUTURE DISCRIMINATION WITHIN THE IMMIGRATION CONTEXT

The appellate court's unprecedented holding that the political branches may make ancestral classifications in the immigration field as long as they are not wholly irrational is disturbing for several reasons. First, the court never addressed the suspect nature of the discrimination involved in \textit{Narenji}. It apparently concluded that the issue of suspectness and its attendant strict standard of review could be discarded in the face of the congressional plenary power over immigration and the President's authority to act in the field of foreign affairs. However, the court provided no valid reason why suspect classifications should be evaluated under a diminished standard of review in the immigration context. Certainly, the suspect nature of nationality classifications remains unaltered in that context. Ancestry, like race, remains an "immutable characteristic determined solely by the accident of birth,"\(^3\) and ancestral discrimination directed at aliens cannot be eliminated through the political efforts of the class itself since aliens do not enjoy the right to vote. Since the Supreme Court has never invalidated discrimination of a suspect nature without applying a strict standard of review even during times of war, it is clearly unprecedented to apply a lesser standard to such classifications in peacetime. Having failed the middle scrutiny test applied by the district court, the governmental interests proffered to justify the discrimination in \textit{Narenji} would certainly not be sustained under strict scrutiny. However, application of the proper standard would at least insure that the government make the usual showing of a compelling state interest and a means necessary to the accomplishment of such an interest.

Continued deference to the plenary power merely avoids the issue of whether the executive branch or the Congress can shield otherwise impermissible classifications from the usual constitutional safeguards under the guise of national security and foreign affairs.\(^4\) Since the days of \textit{Marbury v. Madison},\(^5\) it has been clear that even the plenary power cannot authorize either of the popular branches to act outside the perimeters of the


\(^{114}\) Tenuous national security rationales proffered under the President's power to regulate foreign affairs were rejected in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (presidential seizure of the nation's steel mills during the Korean conflict held unconstitutional as exceeding the authority of the executive) and New York Times v. United States, 403 U.S. 713 (1971) (\textit{Pentagon Papers Case}) (executive effort to enjoin publication of secret documents related to the Vietnam war subject to first amendment prohibition on prior restraints).

\(^{115}\) 5 U.S. (1 Cranch) 137 (1803).
Constitution\textsuperscript{116} or eliminate the duty of the Supreme Court to evaluate the constitutionality of those standards. Further reliance on unfettered congressional powers in the area of immigration contradicts both the constitutional model of the balance of powers and the doctrine of fifth amendment substantive due process which limits all congressional power including the war powers.\textsuperscript{117}

Perhaps the most disturbing implication of the \textit{Narenji} decision is the court's failure to remember the lesson of \textit{The Japanese Restriction Cases}, despite three decades of increased public awareness of the harm of racial and ethnic intolerance. As \textit{Narenji} illustrates, national origin is a characteristic readily seized upon in the heat of national crises for the creation of political scapegoats. Equally disturbing is the refusal of the courts to subject the INS regulation to the traditional constitutional hurdles. As Justice Jackson warned thirty-six years ago in his dissent in \textit{Korematsu v. United States}, a governmental distinction made on the basis of race or ancestry, if sanctioned by the courts, will "lie about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."\textsuperscript{118}

IV. CONCLUSION

\textit{Narenji v. Civiletti} suggests that the existing constitutional protections which safeguard the rights of ancestral minorities can be suspended if such actions are taken in the closely related areas of immigration and foreign affairs. The decision of the United States Court of Appeals for the District of Columbia Circuit may serve as precedent within the immigration context for limited judicial review of other suspect classifications such as race

\textsuperscript{116} See Almeida v. Sanchez, 413 U.S. 266, 272 (1973) where the Supreme Court noted within the immigration context that "[i]t is clear, of course, that no Act of Congress can authorize a violation of the Constitution." The words of Justice Gray in \textit{Fong Yue Ting v. United States}, 149 U.S. 698 (1893), point to the conclusion that, even when articulating the basic premises of the plenary power theory, the Supreme Court still felt that the congressional power over immigration and naturalization was subject to constitutional limits:

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.

\textsuperscript{117} See Aliens, Deportation, supra note 10 (citing Reid v. Covert, 354 U.S. 1 (1957); Hirabayashi v. United States, 320 U.S. 81 (1943); Hamilton v. Kentucky Distilleries Co., 251 U.S. 146 (1919)).

\textsuperscript{118} 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).
which presently command a strict scrutiny analysis when subjected to an equal protection challenge. Further reliance upon the plenary power doctrine to permit the circumvention of established constitutional standards of review revives the long-discarded notion that certain actions of the government lie outside the Constitution.

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