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The New Leviathan: Can the Immigrant Responsibility Act of 1996 Really Transfer Federal Power Over Public Benefits to State Governments?

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THE NEW LEVIATHAN:* CAN THE IMMIGRANT RESPONSIBILITY ACT OF 1996 REALLY TRANSFER FEDERAL POWER OVER PUBLIC BENEFITS TO STATE GOVERNMENTS?

BARBARA A. ARNOLD**

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* The title for this piece comes from two sources, the poem *The New Colossus* and Thomas Hobbes' treatise *Leviathan*. In her famous poem, Emma Lazarus celebrates immigration to the United States. Nostalgia about turn-of-the-century immigration stands in stark contrast to the present negative view. EMMA LAZARUS, *The New Colossus*, *reprinted in* Brendan Maturen, Comment, *Recent Developments: The U.S. and Them: Cutting Federal Benefits to Legal Immigrants*, 48 WASH. U. J. URB. & CONTEMP. L. 319 (1995) [hereinafter Lazarus]. In his political treatise, Hobbes praises the ultimate power of the sovereign. A now well-known illustration accompanied the original text, published in 1651. This illustration depicts the figure of a king composed of the bodies of his smaller subjects. THOMAS HOBBES OF MALMESBURY, LEVIATHAN, OR THE MATTER, FORME, & POWER, OF A COMMON-WEALTH ECCLESIASTICALL AND CIVILL p. I (Michael Oakeshott ed., Collier Books 1962) (1651). This image reminds me of the subject of this paper, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, in which the federal government purports to have the states behave in much the same way that the tiny men unite to serve the whole, as in the art work that for centuries has been synonymous with the Leviathan.

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I. INTRODUCTION

Americans have mythologized the United States as a nation of immigrants.[1] Nonetheless, waves of nativism[2] have periodically washed over the American ethos.[3] The fundamental tension between these two philosophies has given our nation a sense of irony even in immigration's heyday, the turn of the 20th century. At that time, Emma Lazarus' famous poem, "The New Colossus," celebrated the arrival of the world's "tired," "poor," and "huddled masses yearning to breathe free" to America's shores.[4] Ironically, at the same time, the United States was enforcing laws that excluded any alien who was likely to become a public charge.[5] In reality, the world's "homeless" and "tempest-tost"[6] were not at all welcomed in the United States.

This irony is mirrored in contemporary case law and statutes. Recently, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 became law.[7] IIRIRA permits states to classify persons according to immigration status in ways that previous legislation had not expressly permitted. Section 553 of the Act authorizes states to prohibit or to limit

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1. Thomas J. Espanshade & Katherine Hempstead, *Contemporary American Attitudes Toward U.S. Immigration*, 30 INT'L MIGRATION REV. 535 (1996), *available in* 1996 WL 13348001 [hereinafter Espanshade & Hempstead].

2. "Nativism" is a sociopolitical policy, especially in the United States in the 19th century, favoring the interests of native inhabitants over those of immigrants. AMERICAN HERITAGE DICTIONARY 832 (2d College ed. 1985).

3. *See* Espanshade & Hempstead, *supra* note 1.

4. *See* Lazarus *supra* note *.

5. Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214.

6. *See* Lazarus *supra* note *. The full text of the passage is as follows:

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

(emphasis added).

7. Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 U.S.C.) [hereinafter IIRIRA].

public benefits available to immigrants.[8] A state may make such limitations or prohibitions on immigrants, so long as the restrictive classifications are not more restrictive than limitations imposed under comparable federal programs.[9]

Section 553 says that "a State or a political subdivision of a State is authorized to prohibit or otherwise limit or restrict the eligibility of aliens or classes of aliens for programs of general cash public assistance furnished under the law of the State or political subdivision of a State." For example, a state may impose a restriction, such as a residency or age requirement, that it does not impose upon United States citizens. By the use of the words "prohibit," "limit," and "restrict," the new law only authorizes states to be *less* generous than the federal government in allocating public benefits to immigrants. A state may not expand the availability of public benefits to aliens where comparable federal programs make such benefits unavailable.

This article predicts that section 553 of the new law is invalid as it affects legal immigrants because section 553 permits a state to make distinctions between immigrants and citizens where it has no legitimate interest to do so. Legal immigrants, having been lawfully admitted to the United States, have a mixed political status. That is to say, legal immigrants share some aspects of the political identity of American citizens. Yet because legal immigrants do not possess full citizenship, they remain somewhat distinct from the rest of the body politic. The federal government alone possesses a legitimate interest in distinguishing between immigrants and citizens because the federal government has the inherent power of self-definition. This power stems from the federal government's sovereign power as expressed in the Supremacy Clause of the U.S. Constitution.[10] Individual states do not have a legitimate interest in distinguishing between immigrants and citizens because the states do not possess the full panoply of sovereign powers.

This article proposes some factors which motivated section 553 of IIRIRA and explores the evolution of the section 553 in four parts: (1) discussion of the events leading up to the Immigration Act's passage, (2) exposition of the two divergent theories of the immigration power, (3) summation of relevant case law, and (4) comparison of these criteria to the language of section 553.

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8. 8 U.S.C.A. § 1624 (West Supp. 1997) (codifying section 553 of IIRIRA). *See infra* notes 164 and 166 quoting subsections (a) and (b), respectively, of section 553 of the Act.

9. 8 U.S.C.A. § 1624(b) (West Supp. 1997). *See infra* note 166 for the full text of this section.

10. U.S. CONST. art. VI, cl. 2.

II. EVENTS LEADING UP TO THE IMMIGRATION ACT'S PASSAGE: CUT-BACKS IN FEDERAL WELFARE & PROPOSITION 187'S FAILURE IN CALIFORNIA

IIRIRA is the result of current trends to limit both immigration and public benefits. The saga of California's Proposition 187 and the reform of federal welfare by the 104th Congress have set the stage for section 553 of IIRIRA.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996[11] marked significant cut-backs in the federal welfare program. Title IV of the Welfare Reform Act of 1996 gives states the option to bar current and future legal immigrants from receiving Medicaid, Aid to Families with Dependent Children, Title XX assistance and all means-tested programs funded by the state.[12] Despite his public criticism of the bill, President Clinton signed it into law in the final days of the 104th Congress.[13]

The Welfare Reform Act of 1996 is similar to IIRIRA in that both laws grant to state governments the authority to affect immigration indirectly by treating citizens differently than immigrants in the administration of public benefits programs.[14] As is the nature of immigration, both recent acts touch upon many fields: the balance of power between state and federal governments,[15] the balance of power among branches of the federal government,[16] the public persona projected by political leaders[17]

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11. Pub. L. No. 104-193, 110 Stat. 2105 (1996) [hereinafter Welfare Reform Act of 1996].

12. 73 INTERPRETER RELEASES 1029, 1030-31 (Aug. 5, 1996).

13. Barbara Vobejda, *Clinton Signs Welfare Bill Amid Division*, WASH. POST, Aug. 23, 1996, at A1.

14. *See supra* notes 7, 11.

15. California voters passed Proposition 187 in 1994. Proposition 187 mirrors the federal law in that both aim to take away from undocumented persons public benefits such as education and medical care. In *League of United Latin American Citizens v. Wilson*, a federal district court struck down substantial parts of Proposition 187 as unconstitutional on the grounds that a state actor cannot regulate immigration. 908 F. Supp. 755 (C.D. Cal. 1995). Governor Pete Wilson of California has favored a policy that limits the public resources available to immigrants in an attempt to stem the flow of immigration to that state. *See* Tim Golden, *California Governor Cuts Off Aid for Illegal Immigrants*, N.Y. TIMES, Aug. 28, 1996, at A1 [hereinafter Golden]. Following passage of the Welfare Reform Act, Wilson signed an executive order on August 27, 1996, announcing that undocumented aliens will no longer have access to state benefits and services. *Id.* The order purports to accomplish the same goals as Proposition 187, only this time Wilson asserts that he and his constituents have the federal "go ahead." 37 INTERPRETER RELEASES 1187 (Sept. 9, 1996).

16. The IIRIRA attempts to legislate the standard of review to be used by the courts. *See* H.R. REP. NO. 828, 104th Cong., 2d Sess. 4 (1996). For discussion on recent

and the image of America as a nation of immigrants.[18] To appreciate the vision of section 553, a recounting of the events leading up to the law's passage is in order.

In 1994, California voters passed Proposition 187, a measure which denied many immigrants access to public benefits under state authority.[19] Proposition 187 was intended to dissuade undocumented immigrants from coming to California, but the proposition died when a federal district court found that it intruded upon Congressional power over immigration.[20] Drafters of Proposition 187 considered curtailing availability of public benefits to immigrants as a legitimate means to dissuade migration to the State.[21] In addition, California Governor Pete Wilson had been a proponent of the proposition and has remained resolute on his stance to dissuade migration to the State.[22]

Forces driving immigration can be either "push" or "pull" factors.[23] For example, civil unrest or poverty in a foreign country will "push" people to emigrate from their native land. The availability of jobs or public benefits in another country will "pull" immigrants to a host country.[24] The drafters of Proposition 187 considered the availability of public benefits in the State to be a "pull" factor, which they hoped Proposition 187 would eliminate.[25] However, a federal district court ruled that significant portions of Proposition 187 were preempted by the federal power

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case law concerning whether legislative measures might violate the separation of powers, see *infra* note 168.

17. As part of his 1992 campaign, President Clinton promised to "end welfare as we know it." President's Address to the Nation on the Economic Program, 2 Pub. Papers, 1321, 1324 (Aug. 3, 1993). He may have felt compelled to sign the Welfare Reform Act despite its rider concerning immigrants. Section 412 of the Act grants states the authority to limit the eligibility of qualified aliens for state benefits and services. Act of Aug. 22, 1996, Pub. L. No. 104-193, 1996 U.S.C.C.A.N. (110 Stat. 2105) 2269.

18. *See* Espanshade & Hempstead, *supra* note 1, at 536.

19. League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 763 (C.D. Cal. 1995) [hereinafter *LULAC*].

20. *Id.* at 775.

21. *Id.* at 765.

22. *See* Golden, *supra* note 15, at A1.

23. Alejandro Portes & József Böröcz, *Contemporary Immigration: Theoretical Perspectives on its Determinants and Modes of Incorporation*, 23 INT'L MIGRATION REV. 606, 607-14 (1989), *reprinted in* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION: PROCESS AND POLICY 70-74 (3d ed. 1995) [hereinafter Portes & Böröcz].

24. Portes & Böröcz, *supra* note 23.

25. *LULAC*, 908 F. Supp. at 765 (stating that "[t]he benefits denial provisions . . . have the purpose of deterring illegal aliens from entering or remaining in the United States.").

over immigration.[26] In particular, the district court found that the provisions which required state officials to report, notify and enforce federal laws penalizing illegal immigrants were beyond the competency of the state government.[27]

In enacting IIRIRA, the federal legislature has attempted to resurrect the spirit of Proposition 187. The practical effect of section 553 of the IIRIRA is to permit some of the same results that Proposition 187 would have allowed.[28] Proposition 187 announced California's intention to prevent illegal immigrants from receiving public social services, publicly-funded health care, and public education. Section 553 of the federal law permits states to prohibit, limit or restrict immigrant access to the same benefits, by allowing the state to classify according to immigration status. In addition, section 553 of the federal law expands the scope of Proposition 187. Proposition 187 was targeted only to illegal immigrants; section 553 permits California to pass laws affecting both illegal and legal immigrants.[29] IIRIRA takes its cue from Proposition 187, but moves beyond it by permitting state governments to impose limits on all immigrants, regardless of their legal status.

Congress enacted the 1996 law on the heels of the defeat of Proposition 187. This sequence of events indicates that Congress intends to permit states to effect those restrictions envisioned by mandates such as Proposition 187, by eliminating "pull" factors at the local level and making access to public benefits substantially more restrictive.[30] Congress has followed the will of a state to limit both immigration and public benefits. In no other area of the law would this seem to be an unusual chain of events. In the field of immigration, however, there are questions as to the legitimacy of the federal government following a state's lead.

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26. *Id.* at 778-79.

27. *Id.* at 770.

28. Section 553 of the IIRIRA purportedly grants to states a discretionary function in determining which applicants for public benefits are eligible. *See infra* notes 164, 166. In *LULAC*, Judge Pfaelzer rejected a parallel provision in Proposition 187, stating that "[p]ermitting state agents, who are untrained — and unauthorized — under federal law to make immigration status decisions, incurs the risk that inconsistent and inaccurate judgments will be made." *LULAC*, 908 F. Supp. at 770.

29. Section 553 of the IIRIRA refers to "aliens or classes of aliens" generally; no distinction is made between legal and illegal aliens. *See infra* note 164.

30. *LULAC*, 908 F. Supp. at 765 (stating that the purpose of Proposition 187 was to "deter illegal aliens from entering and remaining in the United States . . . ."); 73 INTERPRETER RELEASES 1187 (Sept. 9, 1996) (quoting Pete Wilson's characterization of public benefits as a "magic lure" to immigrants).

III. TWO DIVERGENT THEORIES OF THE IMMIGRATION POWER: CONSTITUTIONALLY COMMITTED POWER OR INHERENTLY SOVEREIGN POWER

Two theories account for the immigration power: constitutionally committed power and inherently sovereign power. To assess the alleged validity of section 553, we must consider each of these two theories. The two theories are opposites, and the ramifications of each theory diverge from the other, as the waters of a forked river diverge. Even when a court denies that it has authority to review an immigration law, it does so after having decided, sometimes implicitly, that one of the two theories is correct. When a court reviews an immigration law, its choice of which theory to use shapes the opinion almost entirely.

First, the court's use of the constitutionally committed theory results in judicial review of a law's merits and subjects the challenged law to constitutional jurisprudence on equal protection and individual liberties.[31] Second, the court's use of the inherently sovereign power theory results in minimal judicial review that does not reach the merits and does not subject the challenged law to constitutional jurisprudence of equal protection and individual rights.[32]

A. *Constitutionally Committed Power*

Although the term "constitutionally committed" is used to describe the power, the term describes an analogy for how the power operates. The immigration power is not enumerated in the Constitution. Powers enumerated in the Constitution have been called "delegated" powers. Since the immigration power is not expressly enumerated, it may be called a "delegatable" power, in order to distinguish it from those powers explicitly enumerated in the Constitution. As a "delegatable" power, the immigration power sometimes permits the states to exercise authority concurrently with the federal government.

Where the immigration power is treated as constitutionally committed, the federal government may delegate its power to the states and thereby permit the state to legislate on some aspects of immigration. Because of its mode of operation, the power over immigration is analogous

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31. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Graham v. Richardson, 403 U.S. 365 (1971) (scrutinizing state action, using the constitutional jurisprudence developed under the Equal Protection Clause).

32. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67 (1976) (holding that federal statutes are subject only to a showing that the immigration classification used is not wholly irrational).

to the power over interstate commerce.[33] The commerce power analogy results in constitutional constraints and judicial review being placed upon immigration laws. Traditionally, the power to regulate immigration has been within the exclusive domain of the federal government.[34] Traditional constitutional jurisprudence includes review under the Fifth[35] and Fourteenth Amendments and case law development under these amendments.[36]

When the court considers state laws, equal protection applies because of the interpretation of the word "person" in the Fourteenth Amendment.[37] Judicial opinions likening the federal power over immigration to the power over interstate commerce generally concern state laws which either directly or indirectly affect immigration. Courts have applied the Fourteenth Amendment equal protection analysis to such cases.[38] The Equal Protection Clause of the Fourteenth Amendment has been interpreted to include aliens in the definition of "person."[39] The inclusive interpretation of the word "person" is consistent with the view that America is a nation of immigrants.

In light of the similarities between the immigration power under this theory and other constitutionally committed powers, some scholars have urged that congressional mandates, like the exercise of any enumerated power, are subject to heightened judicial review.[40] Nonetheless, the fact that the immigration power is not specifically enumerated remains the greatest weakness to this argument. The power over immigration is a sig-

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33. *See* Takahashi v. Fish and Game Commission, 334 U.S. 410, 419 (1948) (holding that state laws "conflicting with the constitutionally derived federal power to regulate immigration [are] invalid.") (citations omitted).

34. *See*, e.g., Chae Chan Ping v. United States, 130 U.S. 581 (1889).

35. *See* Wong Wing v. United States, 163 U.S. 228 (1896).

36. For example, equal protection of the laws is not stated explicitly in the Fifth Amendment. However, case law has recognized that the Due Process Clause of the Fifth Amendment contains an equal protection component. Bolling v. Sharpe, 347 U.S. 497 (1954) (en banc) ("[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The *equal protection of the laws* is a more explicit safe guard of prohibited unfairness then *due process of law* . . . .") (emphasis in original). Therefore, in an analysis of an immigration issue that assumes that the immigration power is a constitutionally committed power, constitutional jurisprudence must be taken into account.

37. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Plyler v. Doe, 457 U.S. 202 (1982).

38. *See, e.g.*, Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948); Graham v. Richardson, 403 U.S. 365 (1971).

39. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371 (1971) (citations omitted).

40. *See* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1985 SUP. CT. REV. 255.

nificant political power, capable of defining the identity of a nation and necessary for a nation's political survival. The inherently sovereign power theory provides an alternative rationale for the exercise of immigration authority.

B. *Inherently Sovereign Power*

The inherently sovereign power theory states that the power to control the flow of people over a nation's borders is inherent in sovereignty. The Supreme Court outlined the boundaries of this theory:

> It is an accepted maxim of international law, that every sovereign nation has the power, as *inherent in sovereignty*, and essential to preservation, to forbid the entrance of foreigners in its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[41]

The inherently sovereign power over immigration is a power shared by all autonomous nations. All nations possess the power to control their borders, regardless of whether there are limitations placed upon their authority, as stated in a constitution or other articles. The power over immigration, as expressed through the inherently sovereign power theory, is therefore extra-constitutional.

There are other incidents of sovereignty apart from the power over immigration. The power to conduct foreign affairs also attaches to the sovereign power.[42] The Supreme Court announced the relationship between sovereign power and the power to conduct foreign relations as follows:

> As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. . . . The Union existed before the Constitution, which was ordained and established among others things to form "a more perfect Union. . . . It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.[43]

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41. Nishimura Ekiu v. United States, 142 U.S. 651 (1892) (emphasis added).

42. Curtiss-Wright Export Co. v. United States, 299 U.S. 304, 316-18 (1936).

43. *Id.*

Curtiss-Wright, from which the above quote is taken, involved the source of the foreign policy power, which the Court held to be an incident of sovereignty. The Court later held that the power to conduct foreign affairs is analogous to the immigration power.[44] Under the inherently sovereign power theory, the immigration power has an extra-constitutional source. Since the source of the immigration power is beyond the powers enumerated in the Constitution, constitutional jurisprudence has no place in the Court's consideration of the immigration laws. Furthermore, the Court has used the inherently sovereign power theory to limit the scope of judicial review on the substance of federal immigration statutes.[45] Consequently, the inherently sovereign power theory produces few, if any, constraints on the exercise of federal power over immigration, and cannot be delegated from the federal sovereign to dependent political entities, such as the states. To delegate a sovereign power is to tear it from its source.

The two theories are polar opposites, representing alternative justifications for the exercise of the immigration power. Nonetheless, both theories are apposite in analyzing IIRIRA section 553. The analysis begins with three important Supreme Court decisions: *Graham v. Richardson*, *DeCanas v. Bica*, and *Mathews v. Diaz*. First, in 1971 the Supreme Court considered *Graham v. Richardson*,[46] in which the Court held that state laws affecting immigrants were void. Second, in *DeCanas v. Bica*,[47] the Court upheld a state law which made it a crime to knowingly employ an illegal immigrant. Third, in *Mathews v. Diaz*,[48] the Court stated that the federal government can treat legal and illegal immigrants differently than citizens in federal public benefits programs.

IV. CASE LAW ON IMMIGRATION AND PUBLIC BENEFITS

A. *State Public Benefits Must Be Made Available to Immigrants Under Constitutionally Committed Theory:* Graham v. Richardson

The Supreme Court held in 1971 that a state law is invalid if it places restrictions on immigrants that the state government does not

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44. Galvan v. Press, 347 U.S. 522 (1954).

45. *See, e.g.*, Kliendienst v. Mandel, 408 U.S. 753, 770 (1972) (holding that when "the Executive exercises [its] power . . . on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against [other] interests . . . .").

46. 403 U.S. 365 (1971).

47. 424 U.S. 351 (1976).

48. 426 U.S. 67 (1976).

place on citizens.[49] In addition, the Court also held that a state law is invalid if it places restrictions on immigrants that the federal government does not place on immigrants.[50] The plaintiffs in *Graham v. Richardson* challenged states laws in Arizona and Pennsylvania on equal protection grounds.[51] The Arizona statute granted disability benefits, funded in part by the federal government, to citizens and to immigrants who had resided in the state for fifteen or more years.[52] The Pennsylvania statute granted disability benefits, funded entirely by the state, to citizens only.[53] *Richardson* held that the states' statutes were void on two grounds.[54] First, the Fourteenth Amendment does not permit a state to impose different requirements on aliens than on citizens, because both are "persons" under the Equal Protection Clause.[55] Second, the federal plenary power doctrine does not permit the state to make laws that are in conflict with congressional regulation of immigration.[56]

The first ground for the *Richardson* opinion is the equal protection clause of the 14th Amendment. Justice Blackmun, delivering the opinion of the Court, based the equal protection analysis upon the long-held rule that the term "person" in the 14th Amendment includes aliens as well as citizens.[57] The Court in *Richardson* borrows from its earlier decision in *Takahashi v. Fish & Game Commission.* In *Takahashi*, the Court held that a state could not prohibit aliens from harvesting fish from its waters where it allowed U.S. citizens to do so.[58] Applying traditional constitutional analysis, the Court held that the state law in *Takahashi* was void for impeding a person's right to make a living.[59]

Several consequences follow from the Court's interpretation of "person" in the 14th Amendment to include aliens. First, Blackmun states that the Court shall review state actions that classify people according to

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49. Graham v. Richardson, 403 U.S. 365 (1971).

50. *Id.*

51. *Id.* at 366.

52. *Id.* at 367.

53. *Id.* at 368.

54. *Id.* at 376.

55. *Id.* at 375. The Fourteenth Amendment states, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. The use of the word "person" in this amendment has been interpreted to include non-citizen aliens. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

56. *Richardson*, 403 U.S. at 378.

57. *Id.* at 371 (citing Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 420 (1948)).

58. *Takahashi*, 334 U.S. at 412, 420.

59. *Id.* at 420.

their immigration status with "close judicial scrutiny."[60] The Blackmun opinion states that this is the appropriate standard of review because aliens are a "discrete and insular minority."[61] Furthermore, in order to pass "close judicial scrutiny," the state must put forth a compelling reason that justifies classifying according to immigration status.[62] Second, the Blackmun opinion is notable for what it does not decide. The Court does not decide whether a fundamental right is at stake.[63] Instead, by ruling that the state has the onus of putting forth a compelling reason, the Court applies strict scrutiny without deciding whether the right to access public benefits is fundamental.[64] The Court also does not decide if the special public interest doctrine should be overruled.[65] By holding that an immigrant is a "person" in the view of the 14th Amendment, the Court prevents the state from claiming that welfare benefits are a special public interest, also called a "privilege" in prior case law.[66] Therefore, the state does not possess absolute authority in granting benefits, but must condition its exercise of power upon constitutional norms.[67]

The second ground for the *Richardson* decision rests upon the federal plenary power doctrine which does not permit the state to make laws that are in conflict with congressional regulation of immigration.[68] Justice Blackmun again borrows from the Court's earlier decision in *Takahashi v. Fish and Game Commission. Takahashi* held that a state can neither add, nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence.[69] The Court found that the public

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60. *Richardson*, 403 U.S. at 371-72.

61. *Id.* (citing United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938)).

62. *Id.* at 375.

63. *Id.* at 375-76.

64. *Id.* at 376.

65. *Id.* at 374. (The special public benefits doctrine drew a distinction between a "right" and a "privilege." Under this doctrine, public benefits, among other things, were characterized as a privilege. Therefore, under this doctrine, the state had broad discretion to exclude aliens from the privileges of citizenship. Although *Takahashi* did not explicitly overrule this doctrine, it substantially weakened it. *See* DAVID WEISSBRODT, IMMIGRATION LAW AND PROCEDURE 354-56 (3d ed. 1992)).

66. *Id.* at 374.

67. *Cf.* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545 (1990) (stating that constitutional jurisprudence created outside the immigration context has been used in the interpretation of immigration statutes, and thus has eroded the plenary power doctrine).

68. *Richardson*, 403 U.S. at 378.

69. Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 419 (1948) (stating that "[s]tates can neither add nor take away from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the

charge provision of Immigration and Nationality Act[70] precluded Arizona and Pennsylvania from passing the public welfare laws at issue in *Richardson*.[71] The public charge provisions of the INA state that an alien seeking entry into the United States is excludable if he or she is likely to become in need of public benefits.[72] When an alien seeks to enter the United States, the decision about the alien's likelihood to become a public charge is limited to the circumstances that exist at the time of the alien's entry.[73] Unforeseen events may occur after the alien's entry which may cause the alien to seek public benefits. At the time of the *Richardson* opinion, the occurrence of unforeseen events did not retroactively render the alien excludable because Congress had not shown intent to consider circumstances arising *after* the alien's entry. The Arizona and Pennsylvania statutes placed conditions on the alien after entry and were thereby preempted by the Congressional enactment.[74]

The Blackmun opinion approached the equal protection theory and the federal-state power theory with the underlying assumption that the immigration power is constitutionally committed.[75] In addressing the validity of the state laws, the Court applied the equal protection clause of the 14th Amendment.[76] In fact, all parties to the suit assumed that the 14th Amendment was applicable; even the defending states argued to the Court that their laws were in keeping with the equal protection requirement.[77] The Blackmun opinion assumes that the constitutionally committed theory underpins the immigration power. Consequences of this premise are apparent from the Court's action: (1) the Court reviews the merits of the statutes in question, and (2) the Court applies constitutional norms in making its review.

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several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with the constitutionally derived federal power to regulate immigration and have accordingly be held invalid.").

70. 8 U.S.C.A. §§ 1101-1645 (Supp. 1997) [hereinafter INA].

71. *Richardson*, 403 U.S. at 377 (citing 8 U.S.C. §§ 1182(a)(8), 1182(a)(15), and 1251(a)(8) (1970) (substantially similar provisions codified at 8 U.S.C.A. §§ 1182(a)(4) and 1251(a)(5) (Supp. 1997)).

72. 8 U.S.C.A. § 1182(a)(8) (Supp. 1997).

73. *Richardson*, 403 U.S. at 377.

74. *Id.* at 378.

75. *Id.* (stating that "[s]tate laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with . . . overriding national policies in an area *constitutionally entrusted* to the Federal Government.") (citation omitted) (emphasis added).

76. *Id.* at 376.

77. *Id.* at 370-71.

The Blackmun opinion follows from the unstated premise that the immigration power is constitutionally derived. This premise makes possible the equal protection analysis, where the Court confines state laws using immigration classifications within constitutional limits. The Blackmun opinion does not expand its rule to include *federal* laws using immigration classifications. The Blackmun opinion does not directly address whether the federal government may authorize states to classify according to immigration status in allotting public benefits.

B. *State Criminal Sanctions Affecting Immigration Are Permissible Under a Three-Part Test:* DeCanas v. Bica

In *DeCanas v. Bica*,[78] the Supreme Court held that state action may affect immigration under a three-part test: the state law is permissible so long as it does not amount to a "regulation" of immigration,[79] does not conflict with Congress's purpose to oust state authority,[80] and does not act as an obstacle to the execution of federal laws.[81] The *DeCanas* Court treats the immigration power under both the constitutionally-committed and inherently-sovereign theories.

At issue in *DeCanas* is whether California's authority enables it to enact laws making an employer criminally liable for knowingly employing an undocumented alien.[82] Laid-off migrant farmers, who were U.S. citizens, charged their former employers under the California statute, claiming that the employers had dismissed them because undocumented workers from Mexico were willing to take jobs for lower wages.[83] In upholding the state's criminal sanction, the Court articulated a three-part test for determining when a state law is in violation of the federal immigration power.

The first prong requires that the state law is void if it amounts to a "regulation" of immigration.[84] Writing for the Court, Justice Brennan defined the regulation of immigration as the power to "determin[e] who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[85] Although the Court agreed that the power to regulate immigration was exclusive to the federal gov-

78. DeCanas v. Bica, 424 U.S. 351 (1976).
79. *Id.* at 356.
80. *Id.* at 358.
81. *Id.* at 363.
82. *Id.* at 352-53.
83. *Id.* at 353.
84. *Id.* at 355.
85. *Id.*

ernment,[86] it found that the California law was not a regulation of immigration; the law was a regulation of employment.[87] The state's law affecting illegal immigration fell outside the Court's definition of "regulation," for the state's law did not affect the undocumented workers qua aliens; the state law affected them qua employees. In short, state laws which do not amount to a regulation of immigration are permissible.[88]

To determine whether a state enactment is a "regulation of immigration," the Court found that the state's action must be judged against Congressional action.[89] The Brennan opinion explained that "absent [C]ongressional action, [a state law] would not be an invalid state incursion on federal power."[90] The Court considered whether Congress intended the INA to be the exhaustive doctrine on immigration.[91] If so, then where Congress is silent, the Court must invalidate any state legislation in this field.[92] The Court stated that its prior jurisprudence has never held that Congressional power over immigration, whether latent or exercised, pre-empts any state legislation dealing with aliens.[93] Therefore, if Congress is silent on an issue affecting immigration, the first *DeCanas* test permits the state law so long as it does not regulate the alien qua alien, but according to some other attribute, such as the alien's employment status.[94]

The second prong requires that the state law is void if Congress has evinced a "clear and manifest purpose" to oust state authority.[95] The Court derived this test from the Supremacy Clause, which reads as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which

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86. *Id.* at 354.

87. *Id.* at 355.

88. *Id.* (stating that "the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised.")

89. *Id.* at 356.

90. *Id.*

91. *Id.* at 355.

92. *Id.* at 356 (citing Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963)).

93. *Id.* (stating that "[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised."). It is important to note that the Brennan opinion assumes that the power over immigration is a constitutionally committed power. *See id.*

94. *Id.* at 357.

95. *Id.*

> shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[96]

Using this clause of the Constitution, the Court ruled that a state action affecting immigration is void if Congress has evinced a clear and manifest purpose to oust state authority.[97] The second *DeCanas* test is lenient toward state action that touches upon immigration because Congressional intent must be "clear and manifest" in order to remove state action from the field.[98] In addition, the Court portrays Congress as the "ouster" of state authority.[99] The term "oust" carries with it the connotation that the state occupies the field by default, such as when Congress is silent on an issue. Furthermore, from the language of the rule, the Court appears to place the onus on Congress of "ousting" state action from the field.[100] "Only a demonstration that *complete* ouster of state power including state power to promulgate laws not in conflict with federal laws was 'the clear and manifest purpose of Congress' " would justify the conclusion that the state law was preempted.[101] The Brennan opinion recognizes that the state's police power authorizes it to legislate employment relationships.[102] The federal government may only thwart this power when some "persuasive reason" exists.[103]

The third prong requires that the state law is void if it acts as an obstacle to the execution of federal laws.[104] The Brennan opinion does not reach the merits of this test, stating that it is for the state court to construe the California law and to decide whether its construction interferes with the INA.[105] It is important to note that the theory underpinning the third *DeCanas* test is the theory which holds that the immigration power is inherent in sovereignty. In the sovereign power theory, the immigration

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96. U.S. CONST. art. VI, cl. 2.

97. *DeCanas*, 424 U.S. at 357.

98. *Id.* at 360 n.8.

99. *Id.* at 357.

100. *Id.*

101. *Id.* (quoting Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 146 (1963)) (emphasis added) (internal quotations in original).

102. *Id.* at 356.

103. *Id.* The Court's rule is very permissive of state regulation of employment. *Id.* at 357. However, the Court recognizes that the California law is consistent with 1974 amendments to the Farm Labor Contractor Registration Act. *Id.* at 361.

104. *Id.* at 363 (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

105. *Id.* at 364-65.

power is analogous to the power over foreign policy.[106] The purpose and objectives of Congress, like foreign policy, may change when the appropriate branch of the federal government responds to changing circumstances. The alterable quality of the exercise of the immigration power is unlike Congressional action under the commerce clause, for the commerce power is confined by Constitutional limits.[107] In saying that the state law is void only if it stands as "an obstacle to the accomplishment and execution of the full purpose and objectives of Congress," the third *DeCanas* test recognizes that the state power may be exercised under a particular Congressional immigration policy.[108] However, if the Congressional policy changes, the once permissible state law may become void. In addition, under the third *DeCanas* test, immigration is the sacrosanct power of the sovereign and not delegatable to the state in the guise of the state's police power.[109]

On the other hand, the first two *DeCanas* tests assume that the immigration power is a constitutionally committed power.[110] The first two tests permit states to exercise some authority, so long as it is consistent with federal mandate. In formulating the first test, the Court refers to the power over immigration as a "constitutional power," and therefore permits some state action.[111] Under this test, Congressional silence does not permit the Court to negate all state laws affecting immigration.[112]

Likewise, the Court uses the second *DeCanas* test to treat the immigration power as a constitutionally committed power.[113] In the second test, the Court derives the power over immigration from the Supremacy Clause.[114] Reading the immigration power in tandem with the Supremacy Clause indicates that the immigration power functions as a constitutionally committed power. Under this test, Congress must clearly demonstrate that it wishes to "oust" state power in the field.[115] This description assumes that the state authority is logically prior to the federal authority and indicates that the state retains some residual power over immigration which fills the voids created by Congressional silence.

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106. *See, e.g.*, Galvan v. Press, 347 U.S. 522, 530 (1954).

107. *See supra* Part II.A.

108. *DeCanas*, 424 U.S. at 363 (quoting *Hines v. Davidowitz*, 312 U.S. at 67).

109. *Id.* at 354.

110. *Id.* at 355-56.

111. *Id.* at 355.

112. *Id.*

113. *Id.* at 356.

114. *Id.*

115. *Id.* at 357.

In conclusion, the *DeCanas* decision blurs the distinction between the two theories of the immigration power. The first and second of the *DeCanas* tests come from the premise that the immigration power operates as a constitutionally-committed power. The third test presumes that the power is inherent in sovereignty. The Brennan opinion attempts to synthesize two theories which are incapable of uniting. The theory which views the immigration power as delegatable treats the power as a constitutionally-derived power.[116] The sovereign power theory treats the power over immigration as extra-constitutional.[117] The immigration power cannot at once be constitutionally-derived and extra-constitutional. Nonetheless, later Court decisions and IIRIRA continue to blend the two theories.

C. *Federal Government's Sovereign Power Is Absolute in Allotting Public Benefits to Immigrants:* Mathews v. Diaz

Although there are limits to the state authority in the immigration context, no such limit exists on federal authority.[118] In *Mathews v. Diaz,* the Supreme Court considered whether the federal government could treat lawful permanent residents differently than citizens in the administration of the federally funded Medicaid Program.[119] At issue in *Diaz* were restrictions which required the recipients of Medicaid benefits to be 65 years of age or older and which required noncitizens to reside five or more years in the United States.[120] The federal law, therefore, classified according to immigration status, placing greater restrictions on legal immigrants than on citizens.

Justice Stevens wrote the unanimous opinion of the Court, which held that the federal government could set any limits that were "not wholly irrational" on immigrant access to public benefits.[121] In *Diaz,* plaintiff Espinosa brought a due process claim under the Fifth Amendment in federal district court.[122] She was a lawful permanent resident of

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116. *See supra* part II.A.

117. *See supra* part II.B.

118. Mathews v. Diaz, 426 U.S. 67 (1976).

119. *Id.*

120. *Id.* at 69.

121. *Id.* at 83.

122. *Id.* at 74. Only one of the three named plaintiffs in the suit, Espinosa, was a lawful permanent resident disputing the five year requirement. *Id.* The other plaintiffs were not lawful permanent residents. *Id.* The Court considered Espinosa's claims separately because it felt that his claims called into question the federal government's authority in light of Fifth Amendment due process protection. *Id.* Espinosa's claim questioned to what extent federal plenary power over immigration was conditioned by the Fifth Amendment due process clause. *Id.*

the United States; she met the age requirement, but, she had not been in the United States for the required five years.[123] The district court granted the relief she sought, and the Secretary of Health, Education and Welfare appealed directly to the Supreme Court.[124] The Stevens opinion held that the federal government may condition a legal immigrant's receipt of federal medical assistance program upon a five-year residency requirement, and thereby treat legal immigrants differently than citizens.[125]

The Stevens opinion blends elements of both theories in the *Diaz* opinion, but favors the sovereign power theory. Stevens tried to harmonize the constitutionally committed theory with the sovereign power theory.[126] Analysis of the Stevens opinion demonstrates that the Court is at the crossroads between the two theories underlying the immigration power.[127] Many aspects of the *Diaz* opinion indicate that the Court is persuaded more by the theory that immigration power is rooted in sovereignty.[128] Nonetheless, elements of the opposing theory, which likens the immigration power to a constitutionally committed power, are commingled in the opinion.[129]

Primarily, Justice Stevens justifies the federal government's power to discriminate on the basis of citizenship by citing to its sovereign power.[130] In keeping with the sovereign power theory, the *Diaz* Court states that the regulation of immigration is a political question.[131] As patterns of immigration are subject to changing world forces, the federal government must be unhindered to deal with immigration's fluctuation. Justice Stevens warns that any constitutional law that would inhibit the flexibility of the political branches from responding to changing world conditions can only be entered into with a great deal of caution.[132]

Nontheless, the *Diaz* Court also treats the immigration power as

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123. *Id.* at 71.

124. *Id.* at 74.

125. *Id.* at 87.

126. *Id.* at 84-85. The Court claims that the two theories can be harmonized when in making the distinction between state and federal governments. However, immigration classifications in public benefits made by a state government are invidious. Graham v. Richardson, 403 U.S. 365 (1971). The same classifications made by the federal government are not invidious according to the *Diaz* Court. The stark contrast in outcomes is not harmonious.

127. *Diaz*, 426 U.S. at 80. Justice Stevens refers to the "naturalization and immigration power," calling to mind the constitutional provision. *Id.* Also, Justice Stevens reminds us that immigration involves relations with foreign powers. *Id.* at 81.

128. *Id.* at 81.

129. *Id.* at 80.

130. *Id.* at 81.

131. *Id.*

132. *Id.*

having a constitutional basis.[133] For example, Justice Stevens writes, "whereas the Constitution inhibits every State's power to restrict travel across its own borders, Congress is explicitly empowered to exercise that type of control over travel across the borders of the United States."[134] The *Diaz* Court reasons that the plenary immigration power which permits a sovereign to exclude aliens likewise enables any nation to exclude aliens from public benefits.[135] Therefore, the power to exclude from benefits permits classification on the basis of citizenship.[136] Justice Stevens links the power to discriminate on basis on citizenship and the power to exclude in the following:

> In the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry. The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is "invidious".[137]

The power to exclude from national shores includes the power to exclude from other benefits of citizenship.[138] In particular, the sovereign power justifies the exclusion of lawful permanent residents who have been in the United States for less than five years from Medicaid benefits. Lawful permanent residents, unlike citizens, are not full members of the political community.[139]

Furthermore, the unanimous opinion in *Diaz* mentions the "bounty" of wealth in the nation and concludes that the United States is permitted to withhold this bounty with those who do not have full membership in the body politic.[140]

> [T]he fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for *all* aliens. Neither the overnight visitor, the unfriendly agent of a hostile

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133. *Id.*

134. *Id.* at 85.

135. *Id.* at 82 ("[I]t is obvious that Congress has no constitutional duty to provide all aliens with the welfare benefits provided to citizens . . . .") (emphasis omitted).

136. *Id.* at 80.

137. *Id.* (emphasis in the original) (citations omitted).

138. *See id.* at 82.

139. *See id.*

140. *See id.* at 80.

> foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that the conscientious sovereign makes available to its own citizens and *some* of its guests.[141]

Congress is in the position to decide which of the guests receive benefits, and the criteria for choosing is almost unbounded, subject only to the requirement that the classification is not "wholly irrational."[142] The "not wholly irrational" standard is an extremely low standard of review, in keeping with American jurisprudence concerning the federal government's power to exclude aliens.[143]

As early as 1889, the Court has held that the federal power to exclude immigrants, regardless of the criteria for exclusion, is the ultimate and only consideration.[144] The entering alien has precious few rights in the eyes of the sovereign, who may select almost arbitrary criteria for exclusion and enforce these criteria with an iron fist.[145] This hard policy has changed very little since its inception. The Court only limited it in minor ways, by announcing that admission criteria cannot be completely arbitrary.[146] A federal law regulating the admission of aliens to the United States may be based on a "facially legitimate and bona fide reason."[147] Despite the slight softening of the exclusion power, the harsh effects of the policy remain because the "facially legitimate" requirement is a level of scrutiny below even the "rational basis" requirement for classifications arising under constitutional analysis.[148] Therefore, despite this ap-

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141. *Id.*

142. *Id.* at 83.

143. *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

144. Chae Chan Ping v. United States, 130 U.S. 581 (1889).

145. *Chae Chan Ping* is a bald example of the sovereign's ultimate power. The Court considered a federal exclusion law that had been passed after Chinese immigrants had been permitted to enter the United States. The law required that the resident aliens obtain a certificate in order to maintain lawful status. The Chinese immigrants were further compelled to have two *white* witnesses testify on their behalf. The Court held that this law was a valid exercise of the federal power over immigration. In the Court's view at the time, the power of the sovereign to maintain the political identity of the state was paramount. Issues of political identity are alive today, although not presently based on such arbitrary and racial criteria.

146. *See* Fiallo v. Bell, 430 U.S. 787, 799 (1977).

147. *Id.* at 794.

148. *Cf.* New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) (holding that there was no equal protection violation in disqualifying persons from employment on the basis of methadone use) *Id.* at 594. The Court found that there was a rational basis

parent limitation on exclusion criteria, the federal government maintains broad discretion to regulate immigration.

The Court distinguishes *Diaz* from *Richardson* by virtue of the level of government making the classifications.[149] "[*Richardson*] involves significantly different considerations because it concerns the relationship between the alien and the States rather than aliens and the Federal Government."[150] The federal government, by virtue of its sovereignty, may legitimately classify on the basis of citizenship.[151] The individual states are not entirely sovereign, and therefore cannot put forth citizenship as a means by which to classify those under its jurisdictions.[152]

The Court's opinion in *Diaz* contains elements of the alternate theory for the immigration power, namely, the constitutional theory.[153] In discussing possible rationales for classification based on citizenship, the *Diaz* Court states that Congress may consider an alien's stake in the United States.[154] As stated in the introduction, legal immigrants have a mixed status. They are similar to citizens in that they have entered into most areas of the body politic.[155] Yet, as quasi-members of the political community, they remain distinct from the citizenry.[156] The more ties the immigrant has to the United States, the higher stake s/he may claim and the more like a citizen the immigrant is.[157]

Consideration of individual stake makes the *Diaz* opinion similar to the focus on individual rights in *Richardson*. However, under *Diaz*, the federal government's plenary power trumps the individual's stake. Justice Stevens writes, "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."[158] A residency requirement such as five years has a rational link to the immigrant's stake, for an alien gains stronger ties to the United States with time. The Court indicates the reasonableness of the five-year requirement, in saying, "[t]hose who are most like citizens

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for the disparate treatment without requiring a close fit between the policy and its purpose. "[I]t is of no constitutional significance that the degree of rationality is not as great with respect to certain ill-defined subparts of the classification as it is with respect to the classification as a whole." *Id.* at 593.

149. Mathews v. Diaz, 426 U.S. 67, 84 (1976).
150. *Id.* at 84-85.
151. *Id.* at 84.
152. *Id.*
153. *Id.* at 80.
154. *Id.*
155. *Id.*
156. *See, e.g., id.*
157. *Id.*
158. *Id.*

qualify. Those who are less like citizens do not."[159]

The statement "those who are most like citizens qualify" is the rational basis for the classification. However, this classification is self-referential and redundant. Defining who is a citizen and who is "most like" a citizen is a direct expression of political identity. With the statute at issue in *Diaz*, Congress defined those who are "most like citizens" by setting a five-year residency cut-off. The judiciary uses the sovereign power theory to side-step having to assess whether what is meant by "most like citizens" is reasonable in practice. In other words, the sovereign power theory permits any conceivable connection that might exist between the classification and a federal interest to pass muster under the Fifth Amendment.

V. CONCLUSION: SECTION 553 OF IIRIRA IS INVALID DUE TO THE FUNDAMENTAL CONFLICT BETWEEN THE TWO THEORIES OF IMMIGRATION POWER

The two theories of immigration power come from mutually exclusive sources. The sovereign power theory, in its purest form, makes it impossible for any power over immigration to be delegated to the states. To delegate a sovereign power is to tear it from its source. As a flower cut from the vine withers shortly afterward, so does the power of the sovereign cease to exist when separated from its source. On the other hand, if the immigration power is constitutionally derived, it is capable of being delegated. However, under this theory, the immigration power is constrained by other constitutional powers affecting personal rights. The Constitution conditions the exercise of governmental power, setting limits on the ways in which governments may regulate "persons." The three cases that have shaped this inquiry into the validity of IIRIRA demonstrate this fundamental conflict between the two theories. The three cases also demonstrate the present trend toward blending the two theories together so as to maximize governmental power to the disadvantage of legal immigrants.

Starting from its decision in *DeCanas*, the Court began to blur the distinction between the inherently sovereign theory and the constitutionally committed theory.[160] The fundamental conflict between the two theories springs from the fact that the immigration power cannot at once be constitutionally derived and extra-constitutional. Furthermore, the disharmony between the two theories is shown in the divergent holdings of *Richardson* and *Diaz*. These two opinions offer a striking contrast: both

159. *Id.* at 83.

160. *See supra* notes 109-10 and accompanying text.

cases questioned whether a government actor could condition the receipt of public benefits upon a residency requirement. The *Diaz* Court held that the federal government may use such a residency requirement, and thereby classify according to immigration status.[161] The *Richardson* Court held that the state government may not classify according to immigration status, labeling such classifications made by a state actor "invidious."[162] On the one hand, the sovereign power theory permits the federal government to use criteria under a theory even more lenient than rational basis.[163] On the other hand, the constitutionally committed theory bars the state from using the same criteria unless under a strict scrutiny analysis.

Title V of IIRIRA apparently authorizes state governments to restrict access to public benefits by various classifications of immigrants. In particular, section 553 establishes that the state or its political subdivisions may restrict its own public assistance funds according to immigrant classifications.[164] This provision seems to contemplate the case that had been joined to *Richardson*, where an alien successfully challenged Pennsylvania's restrictions on public assistance funded solely by that state.[165] Furthermore, section 553 establishes that the state's exercise of authority may not exceed the restrictions that the federal government places upon comparable public assistance programs.[166] This provision of IIRIRA

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161. Mathews v. Diaz, 426 U.S. 67 (1976).

162. These divergent holdings in jurisprudence of immigration and public benefits reflects the state of racial classifications in 1990, when the Court had thought that the federal government had more freedom than the states to make race-based classifications. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). The Court later changed this opinion. Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995). Justice O'Connor announced the concepts of skepticism, consistency and congruence. Of these, "congruence" stands for the proposition that the Court shall use the same standard when reviewing classifications it deems suspect, whether the classification is used by the state or federal government. *Id.* at 224 (citing Buckley v. Valeo, 424 U.S. 1, 93 (1976)).

163. *Diaz*, 426 U.S. at 83.

164. Section 553 as codified is entitled, "Authority of states and political subdivisions of states to limit assistance to aliens and to distinguish among classes of aliens in providing general cash public assistance." 8 U.S.C.A. § 1624 (West Supp. 1997). The full text of section 553(a) as codified reads as follows:

> Subject to subsection (b) of this section and notwithstanding any other provision of law, a State or political subdivision of a State is authorized to prohibit or otherwise limit or restrict the eligibility of aliens or classes of aliens for programs of general cash public assistance furnished under the law of the State or political subdivision of a State.

Id.

165. Sailor v. Leger, 403 U.S. 365 (1971).

166. The full text of section 553(b) as codified reads as follows:

> The authority provided for under subsection (a) of this section may be exercised only to the extent that any prohibitions, limitations, or restrictions imposed by a

seems to contemplate the third *DeCanas* test. The third *DeCanas* test permits a state to apply immigration classifications to prohibit the employment of illegal aliens so long as the classifications do not act as an obstacle to Congressional objectives.[167] Section 553 of IIRIRA is valid only if *DeCanas* is controlling authority. However, §553 incorrectly assumes that *DeCanas* is controlling authority. The rule of *DeCanas* contemplates illegal immigration in the employment context. This context is distinct from the context of section 553, which deals with state authority over public benefits to legal immigrants.

Section 553 of IIRIRA is the unfortunate offspring of the union of the two theories. The House report that accompanies the legislation states that "it is the sense of Congress that a court should apply the same standard of review to an applicable State law as that court uses in determining whether an Act of Congress regulating the eligibility of aliens for public benefits meets constitutional scrutiny."[168] In other words, the House report indicates that the level of review used in *Diaz*, where a federal regulation of public benefits was considered, is applicable to the governments of the individual states. In *Diaz*, the Court ruled that any federal restriction was permissible so long as it was "not wholly irrational."[169] This standard of review is consistent with the view that the immigration power is inherent in sovereignty, where the federal sovereign is empowered to determine who is admitted into the political community.

As seen in the House Committee Report accompanying the law, Congress intends to allow states to restrict public benefits under the leni-

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State or political subdivision of a State are not more restrictive than the prohibitions, limitations, or restrictions imposed under comparable Federal programs. For purposes of this section, attribution to an alien of a sponsor's income and resources (as described in section 1631 of this title) for purposes of determining eligibility for, and the amount of, benefits shall be considered less restrictive than a prohibition of eligibility for such benefits.

8 U.S.C.A. § 1624(b) (West Supp. 1997).

167. DeCanas v. Bica, 424 U.S. 351 (1976).

168. H.R. REP. No. 828, 104th Cong., 2d Sess. 127 (1996). The report, along with the legislation, bring up important questions of the law's validity which are beyond the scope of this inquiry. To wit, the issue is whether Congress can mandate the level of judicial review of its enactments, for the level of view correlates to a finding whether a constitutional violation has ocurred. A similar issue was rasied by the Religious Freedom Restoration Act of 1993 (RFRA). 42 U.S.C. § 2000bb (1993). In RFRA, Congress sought to legislate the standards of judicial review. However, the Supreme Court recently held in *City of Boerne v. Flores*, — U.S. —, 117 S.Ct. 2157, 2164 (1997), "[C]ongress has been given the power "to enforce," not the power to determine what constitutes a constitutional violation." (quotations in original).

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

ent "not wholly irrational" standard. In other words, Congress intends to delegate to the states the panoply of federal authority, which allegedly empowers the states to determine the requirements for public benefits using immigration classifications. This delegation of the immigration power is tantamount to transferring the federal sovereign power to the states. Therefore, Congress has attempted in section 553 to delegate a power that it also treats as inherent in sovereignty. This attempted delegation of the immigration power is logically impossible, for it asks us to treat the immigration power as simultaneously delegatable and inherent. In conclusion, section 553 of IIRIRA is impermissible because it is relies upon blending two mutually exclusive theories.