

CONGRESSIONAL DEVOLUTION OF IMMIGRATION POLICYMAKING: A SEPARATION OF POWERS CRITIQUE

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I

INTRODUCTION

For roughly a decade, federal legislation has devolved to the states some of Congress's authority to adopt immigration policies that discriminate against permanent resident aliens.¹ Equal protection challenges to discriminatory state policies so authorized by Congress raise the knotty issue of the appropriate scope of judicial review. Courts remain divided.² The source of the difficulty is that the equal protection "congruence principle" is not applicable to alienage discrimination.³ Unlike equal protection cases throughout most of constitutional law, the judiciary deploys different standards of judicial review in alienage discrimination cases depending on whether the discrimination arises under federal or state law.⁴

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1. See discussion *infra* notes 29–37 and accompanying text.
2. See cases cited *infra* note 41.
3. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (recognizing the "congruence" principle as requiring that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment" (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976))).
4. Equal protection challenges concerning discrimination against Native Americans are the only other enduring example of deviation from the equal protection congruence principle. See *Washington v. Yakima Indian Nation*, 439 U.S. 463, 500–01 (1979) (concluding that "[i]t is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to

Applying a highly deferential standard of review, courts normally uphold congressionally enacted immigration policies discriminating against aliens.⁵ By contrast, courts normally invoke strict judicial scrutiny to find state alienage discrimination unlawful.⁶ Congressional devolution legislation authorizing states to adopt policies that discriminate against aliens spawn equal protection challenges that do not fit neatly into either category of judicial review: the controversies entail state alienage discrimination but the discrimination being challenged is congressionally authorized. Devolution presents the question whether Congress should be able to immunize the states from strict judicial scrutiny by authorizing the states to adopt discriminatory immigration policies that Congress could itself adopt. That question is the subject of this Article.

In this Article, I show that, to date, the devolution debate has become mired, and is deadlocked, because it has failed to focus on the separation of powers implications of congressional devolution. I show that, properly understood, congressional devolution poses complex issues regarding the respective authority of Congress and the federal judiciary to superintend, and ultimately define, the

enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive [because] States do not enjoy this same unique relationship with Indians" (quoting *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974))). Prior to the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), there was a six-year period when courts applied disparate standards of judicial review to equal protection challenges of state and federal affirmative action programs. See Michael Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 561 n.344 (2001) (discussing the disparate standards of review accorded affirmative action programs prior to the Court's decision in *Adarand*).

5. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976) (applying rational basis scrutiny to federal alienage classification establishing discriminatory welfare eligibility policy). See discussion *infra* notes 13–18 and accompanying text.

6. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (applying strict judicial scrutiny to, and holding unconstitutional, a state welfare eligibility policy establishing discriminatory alienage classification because the discrimination did not advance a compelling state interest by the least restrictive means practically available). See cases cited *infra* notes 7–11 and discussion in accompanying text.

Constitution's equality norms. These separation of powers implications of congressional devolution are not likely to be overlooked when the devolution issue eventually reaches the Supreme Court. My thesis is that addressing congressional devolution as primarily a separation of powers problem holds the key to resolving the proper scope of judicial review of congressionally-authorized state alienage discrimination.

II

THE RATIONALE FOR ABANDONING THE "CONGRUENCE PRINCIPLE" AND THE RESULTING STRATIFICATION OF JUDICIAL REVIEW IN ALIENAGE DISCRIMINATION CASES

The Supreme Court's abandonment of the congruence principle for cases involving alienage discrimination reflects the Court's view that the judiciary's appropriate institutional role varies depending on whether a case challenges state or federal alienage discrimination. The reason state alienage classifications generally warrant strict judicial scrutiny⁷ is that aliens are a paradigmatic example of a

7. See, e.g., *Graham*, 403 U.S. at 372 (holding that alienage classifications are "inherently suspect and subject to close judicial scrutiny"). Strict judicial scrutiny has been used to review a variety of state and local alienage classifications. See *Nyquist v. Mauclet*, 432 U.S. 1, 9 (1977) (holding it unconstitutional to limit financial aid for higher education to citizens and those aliens who have declared an intent to become citizens); *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 606 (1976) (holding unconstitutional a rule permitting only citizens to work in private engineering practice).

Because "a democratic society is ruled by its people," *Foley v. Connelie*, 435 U.S. 291, 296 (1978), state and local governments need only demonstrate a rational basis to be permitted to reserve certain government jobs for citizens, thereby excluding aliens for all consideration. See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432, 447 (1982) (holding that states may exclude aliens from becoming probation officers); *Ambach v. Norwick*, 441 U.S. 68, 72 (1979) (holding that states may exclude aliens who have not declared their intent to become citizens from teaching in public schools); *Foley v. Connelie*, 435 U.S. 291, 293 (1978) (holding that police officers must be citizens). *But see Bernal v. Fainter*, 467 U.S. 216, 228 (1984) (holding that barring aliens from becoming notaries public is unconstitutional).

State discrimination against undocumented aliens has produced mixed results. The Court has applied rational basis scrutiny to state discrimination against undocumented aliens. See *DeCanas v. Bica*, 424 U.S. 351, 357 (1976) (holding that a state is not precluded from banning employment

“discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.”⁸ The need for strict judicial scrutiny is “premised on the Supreme Court’s view of the political process.”⁹ Suspect legislative classifications warrant heightened judicial scrutiny, because these classifications so often reflect legislative prejudice that it is unlikely that the legislative process will bring about repeal of undesirable legislation.¹⁰ Accordingly, those harmed by legislation creating suspect classifications “command extraordinary protection from the majoritarian political process.”¹¹

Federal laws discriminating against aliens are measured differently. The Court has never stated that federal law poses a lower risk than does state law of manifesting legislative prejudice, though this likely is the case.¹² Rather, the rationale is that “the responsibility

of undocumented aliens if that employment would adversely affect resident workers where such legislation is justified as an “attempt[] to protect [the state’s] fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens . . . and is tailored to combat effectively the perceived evils”). But a state is denied rational basis review when, for example, it denies a free public education to undocumented school-age children. Here, the Court deploys intermediate scrutiny to measure constitutionality. *See Plyler v. Doe*, 457 U.S. 202, 223–24 (1982) (explaining that the state has the burden of demonstrating that the classification is rationally related to a substantial state interest); *see also id.* at 238 (Powell, J., concurring) (acknowledging the Court’s use of a “heightened” standard of review and citing *Craig v. Boren*, 429 U.S. 190 (1976), the Court’s then relatively recent case that employed an intermediate standard of judicial review for gender cases.)

8. *Graham*, 403 U.S. at 372 (1971). The inability of aliens to vote contributes to their “political powerlessness,” which is a “traditional indicia of suspectness.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). *See also Foley v. Connelley*, 435 U.S. 291, 294 (1978) (recognizing that aliens’ inability to “have [a] direct voice in the political process[]” is a factor supporting heightened judicial scrutiny of alienage classifications).

9. *Aliessa v. Novello*, 754 N.E.2d 1085, 1095 (N.Y. 2001). *See also United States v. Carolene Prods Co.*, 304 U.S. 144, 152–53 n.4 (1938) (observing that “prejudice 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”).

10. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–42 (1985).

11. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

12. *See* discussion *supra* notes 9–11 and accompanying text (stating that strict judicial scrutiny is a reaction to the concern that state alienage discrimination may reflect legislation prejudice).

for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.”¹³ The Court accepts that “there may be overriding national interests which justify selective federal [alienage discrimination] that would be unacceptable for an individual State.”¹⁴ Applying these precepts in *Mathews v. Diaz*,¹⁵ the Court there upheld the constitutionality of a federal statute denying eligibility of certain lawful resident aliens for enrollment in the Medicare supplemental insurance program.¹⁶ The federal statute was constitutional, the Court reasoned, because exclusion was not “wholly irrational” and served a “legitimate” fiscal interest.¹⁷ The judiciary’s virtual abandonment of review of federal alienage discrimination reflects its conclusion that decisions made by the Congress or the President in the area of immigration and foreign affairs are in the nature of a political question that leaves little room for judicial oversight.¹⁸

13. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

14. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976) (recognizing the “paramount federal power over immigration and naturalization” as a significant restraint on judicial oversight of federal discrimination against aliens).

15. 426 U.S. 67 (1976).

16. *Id.* at 87 (upholding the constitutionality of a Social Security Act provision denying eligibility for enrollment in the Medicare part B supplemental insurance program to all aliens except those who have been admitted for permanent residence and have resided in the United States for at least five years).

17. *See id.* at 83–85. The Court accepted for sake of argument that the requirement of residence in the United States for five years before a resident alien becomes eligible for Medicaid was “longer than necessary to protect the fiscal integrity of the [Medicaid] program.” *Id.* at 83. That was not fatal to the federal legislation, however, because some durational period is appropriate, and it is up to Congress, not the judiciary, to draw the line because of the “exclusive federal power over the entrance and residence of aliens.” *Id.* at 83–84.

18. *See id.* at 81–82. (concluding that “such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.” (emphasis added)).

Diaz was decided June 1, 1976. Justice Stevens drafted the majority opinion. That same day, the Court decided *Hampton v. Mow Sun Wong*,¹⁹ in another majority opinion written by Justice Stevens. In contradistinction to the near total absence of *substantive* oversight expressed in *Diaz*, the Court in *Wong* imposed on federal alienage discrimination a rigorous *procedural* precondition. The Court held in *Wong* that judicial deference to discriminatory federal immigration policy generally is warranted only if the decision to discriminate was “expressly mandated by the Congress or the President.”²⁰ If a rule that discriminates against aliens is made by others, the Court will defer to the political judgment that the rule is needed to advance overriding national interests only when the entity making that judgment “has direct responsibility for fostering or protecting” the asserted overriding federal interests.²¹

The procedural preconditions detailed in *Wong* arise from the Court’s understanding of the requirements of the Due Process Clause in the Fifth Amendment.²² Due process, the Court held, requires that before a court may defer to the political judgments of the national government, it must have a “legitimate basis” for concluding two things: that “the asserted interest was the actual predicate for the rule” and that the asserted justifying interest is an “overriding” federal interest.²³ That “legitimate basis” does not arise from the

19. 426 U.S. 88 (1976).

20. *Id.* at 103.

21. *Id.*

22. U.S. CONST. amend. V (stating “No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”).

23. *Wong*, 426 U.S. at 103.

political judgments of just “any agent of the National Government.”²⁴ An “express[] mandate[] by the Congress or the President”²⁵ adopting a discriminatory immigration rule would be sufficient to provide the Court the requisite “legitimate basis” due process requires. The judiciary then comfortably could presume, without further inquiry, that the discrimination is justified by overriding federal interests. When neither the Congress nor the President “expressly mandate[]” a discriminatory rule, however, the Court is far more circumspect. Then, as noted above, the Court will find a “legitimate basis for presuming that the rule was actually intended to serve [an overriding federal] interest”²⁶ only when the discriminatory rule is promulgated by a congressional or presidential designee that “has direct responsibility for fostering or protecting” the asserted justifying federal interests.²⁷

24. *Id.* at 101 (concluding that “the federal power over aliens is [not] so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens”).

25. *Id.* at 103.

26. *Id.*

27. *Id.* *Wong* accommodated a tension that has existed in immigration law for over a century and relied on established distinctions for doing so. In the 1889 case *Chae Chan Ping v. United States* (Chinese Exclusion Case), 130 U.S. 581, 603–04, the Court upheld federal legislation to exclude Chinese laborers from immigrating to the United States, reasoning that exclusion of aliens is a plenary power inherent in sovereignty. The Court extended this reasoning to expulsion of aliens in *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893), explaining that the power to expel, like the power to exclude, is also a plenary power inherent in sovereignty and, since it is a power that affects foreign relations, is vested in the political departments of the government. In *Wong Wing v. United States*, 163 U.S. 228, 237 (1896), however, the Court held that there are constitutional limits on the federal government’s exercise of its immigration power. There, federal law provided for executive officers, not Article III judges, to impose imprisonment at hard labor prior to deportation for Chinese aliens found to be illegally residing in the United States. The Court held that “[i]t is not consistent with the theory of our government that the legislature should, after having defined an offence as an infamous crime, find the fact of guilt, and adjudge the punishment by one of its own agents.” *Id.* *Wong Wing* acknowledged a tension between the federal government’s plenary immigration power and the judiciary’s role in protecting individual rights and accommodated the competing legitimate interests by not questioning the substance of immigration law but insisting on certain procedural regularities in its execution. *Accord* *Yamataya v. Fisher* (Japanese Immigrant Case), 189 U.S. 86, 101 (1903) (concluding that courts will not scrutinize the substance of deportation rule but will be available to review that deportation

In short, *Wong* holds that the judiciary's willingness to accord *Diaz*-type deference varies depending on the institutional capacity of the decision maker that is the source of a challenged rule.²⁸ I shall refer to this holding as *Wong's* differential-deference principle.

III

DEVOLUTION OF FEDERAL IMMIGRATION POLICY AND ITS SEPARATION OF POWERS IMPLICATIONS

So things remained until 1996 when Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).²⁹ PRWORA greatly revamped federal welfare and immigration policy. In the process, PRWORA added a layer of uncertainty regarding the judiciary's proper role in adjudicating equal protection challenges to state policies discriminating against aliens.

Title IV of PRWORA, as modified several times after 1996, provides that aliens, who arrive in the United States after August 22, 1996, and currently are admitted for permanent residence under the Immigration and Nationality Act³⁰ (legal immigrants), are entirely ineligible for some federally financed "means-tested public benefits" and are ineligible for others for five years.³¹ PRWORA also

complies with procedural due process). *Hampton v. Wong* continued the distinction between substantive and procedural review, but the procedure it examined was that used to promulgate the challenged rule rather than that used to administer it.

28. In *Wong*, the federal Civil Service Commission had promulgated a rule limiting most federal employment to United States citizens. The Court was unwilling to conclude that the rule was promulgated to advance overriding federal interests because the rule was not promulgated by either the President or the Congress, and the Civil Service Commission was not directly responsible for fostering or promulgating immigration or foreign relations policy. *Id.* at 104-16.

29. Pub. L. No. 104-193 §§ 400-51, 110 Stat. 2105, 2260-77 (codified in scattered sections of 8, 42 U.S.C.) [hereinafter PRWORA].

30. 8 U.S.C. § 1101 *et. seq.*

31. See 8 U.S.C. §§ 1612(a)(2)-(3), 1613 (ineligibility for SSI and five-year bar for other "means-tested public benefits" including Medicaid and TANF); *id.* § 1612(a)(2) (five-year

authorizes states to maintain a portion of the ineligibility for federally-financed programs beyond the initial five-year bar.³² In addition, with some minor exceptions, “a State is authorized to determine the eligibility for any State public benefits of an alien who is a [legal immigrant].”³³ This last provision means states possess federally authorized discretion to exclude most legal immigrants from state-funded public benefits, as many states have done, even though the states provide those benefits for its own citizens.³⁴ Congress acquiesces in the states’ exercise of the discretion PRWORA grants in order to promote immigrant self-sufficiency—a “basic principle of United States immigration law” and to discourage immigration to the United States that is motivated by the immigrant’s desire to obtain public benefits.³⁵ Congress declared in PRWORA that meeting these goals is a “compelling government interest.”³⁶ Moreover, PRWORA provides that a state choosing “to follow the Federal classification in determining the eligibility of [immigrant] aliens shall be considered to have chosen the least restrictive means available for achieving the compelling government

ineligibility for Food Stamps for most legal immigrants); *id.* §1632(a) (state discretion to “deem[]” income of immigrant’s sponsors as income of immigrant in calculating eligibility for public benefits). For a detailed description of the PRWORA’s complex eligibility rules for aliens, see Audrey Singer, *Welfare Reform and Immigrants: A Policy Review*, in IMMIGRANTS, WELFARE REFORM, AND THE POVERTY OF POLICY (Philip Kretsedemas & Ana Aparicio eds., 2004), available at http://www.brookings.edu/metro/publications/200405_singer.htm.

32. See 8 U.S.C. § 1612(b)(1) (giving states the option to extend ineligibility beyond five years for Medicaid and TANF).

33. 8 U.S.C. § 1622(a) (permitting states unlimited authority to set eligibility standards for state public benefits programs for most legal immigrants).

34. See Wendy Zimmerman & Karen C. Tumlin, *Patchwork Policies: State Assistance for Immigrants Under Welfare Reform*, 24 THE URBAN INSTITUTE 1, 30 and Table 4 (1999), available at <http://www.urban.org/publications/309007.html> (providing state-by-state breakdown of states’ response to PRWORA’s authorization to discriminate against lawful immigrants).

35. 8 U.S.C. § 1601(1).

36. *Id.* § 1601(5)–(6).

interest of assuring that aliens be self-reliant in accordance with national immigration policy.”³⁷

The intended legal effect of PRWORA’s devolution provisions is to render lawful some state welfare-eligibility policies that the judiciary otherwise would hold are unconstitutional.³⁸ PRWORA might achieve this goal through either of two strategies. First, as summarized above, PRWORA declares that the requirements of strict judicial scrutiny are satisfied when states discriminate in ways that PRWORA condones.³⁹ In the alternative, PRWORA introduces the possibility that when states engage in PRWORA-authorized alienage discrimination, PRWORA transfers to the states the deferential rational basis standard of judicial review *Diaz* accords the federal government’s own alienage classifications.⁴⁰ These strategies present the question of whether, by legislatively expressing its approval, Congress should be able to authorize state policy choices that in the absence of congressional consent would run afoul of the Constitution when Congress is constitutionally permitted to adopt directly the same policies itself. For ease of reference, let us call this the “devolution issue.” After more than ten years since PRWORA’s

37. *Id.* § 1601(7).

38. See *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (holding in two consolidated cases that it is a violation of equal protection to make non-citizens ineligible for public assistance or to condition receipt of benefits to aliens’ residence in state for at least 15 years).

39. See discussion *supra* notes 36–37 and accompanying text.

40. The lower courts have consistently upheld federal statutes prohibiting states from providing certain federally-financed welfare benefits to legal aliens. See, e.g., *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001) (upholding under rational basis review PRWORA restrictions on alien eligibility for state-administered pre-natal Medicaid benefits); *City of Chicago v. Shalala*, 189 F.3d 598, 603–05 (7th Cir. 1999) (upholding similar restrictions on supplemental security income (SSI) and food stamps under rational basis review); *Aleman v. Glickman*, 217 F.3d 1191, 1197 (9th Cir. 2000) (using rational basis review to uphold restrictions on food stamps); *Rodriguez v. United States*, 169 F.3d 1342, 1346–50 (11th Cir. 1999) (applying rational basis reviews to uphold SSI and food stamps restrictions). The devolution issue is different since it arises when Congress has not expressly mandated any state action but rather provides the states discretion to choose whether to enact discriminatory policies.

enactment, the lower courts remain divided over the proper resolution of the devolution issue.⁴¹ The Supreme Court has not yet considered the question.⁴²

It is useful in pondering the devolution issue to appreciate that if Congress possesses the legislative power to inoculate the states with its own protection from strict judicial scrutiny, Congress also

41. *Compare* Erlich v. Perez, 2006 WL 2882834, at *18 (Md. 2006) (holding that constitutional challenge to PRWORA-authorized state policy to deny benefits to lawful permanent resident aliens likely to succeed on the merits), *and* Aliessa v. Novello, 754 N.E.2d 1085, 1096 (N.Y. 2001) (holding unconstitutional termination of non-emergency, state-funded medical benefits for legal immigrants who were ineligible for federal benefits despite explicit authorization in federal law giving states complete discretion to determine eligibility for any state public benefit of a legal immigrant who has resided in the United States for less than five years), *with* Soskin v. Reinerston, 353 F.3d 1242, 1255 (10th Cir. 2004) (concluding that “[o]nce Congress has expressed [a] policy [to give states the discretion to deny state-funded welfare benefits to certain legal immigrants], the courts must be deferential [recognizing] that a state’s exercise of discretion can also effectuate national policy”).

42. The Court has decided a related issue PRWORA created. PRWORA added a provision to federal welfare policy also entailing federal devolution of welfare eligibility policy, but not welfare policy directed at aliens. PRWORA authorized any state receiving block grants under the Temporary Assistance to Needy Families (TANF) federal welfare program to apply the state’s own benefit amounts to a family seeking TANF benefits. However, if the benefit amounts of the TANF program of another state from which the family has moved are lower, the current state, the one from which the family currently is seeking TANF benefits, may apply those lower amounts if the family has resided in the current state for less than 12 months. 110 Stat. 2124, 42 U.S.C. § 604(c). The Supreme Court ruled this 12-month waiting period unconstitutional in *Saenz v. Roe*, 526 U.S. 489, 507 (1999). The 12-month waiting period authorized by TANF violates the right to travel enshrined in the Fourteenth Amendment’s Privileges and Immunities Clause. *Id.* at 498–507. Most important for the present discussion, the Court in *Saenz* held that congressional approval of the durational residency requirement does not “resuscitate[] the constitutionality” of the waiting period. *Id.* at 507. The Court reasoned that “the protection afforded to the citizen by the Citizenship Clause of [the Fourteenth] Amendment is a limitation on the powers of the National Government as well as the States.” *Id.* at 507–08. The Court also reasoned, “we have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment.” *Id.* at 507 (citing *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) (“Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause”) (citing *Townsend v. Swank*, 404 U.S. 282, 291 (1971))). *See also* *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732–33 (1982) (holding the Congressional Section 5 power to enforce the provisions of the Fourteenth Amendment does not empower Congress to “validate a law that denies the rights guaranteed by the Fourteenth Amendment”).

Saenz left the “devolution issue” unresolved since it was not necessary for the Court to decide whether the outcome would be different if the state discriminatory policy federal law authorizes states to adopt were, unlike the situation in *Saenz*, a policy that Congress could constitutionally adopt directly.

possesses, in effect, the authority to act as the final arbiter of the constitutionality of state alienage discrimination.⁴³ One should not be misled that this gatekeeper function can be easily cabined. If federal regulation of immigration and foreign affairs is a political question that leaves little room for judicial oversight, as the Court has stated,⁴⁴ Congress itself may presumably legislate alienage classifications affecting its entire plenary authority to regulate immigration and naturalization.⁴⁵ Congress could itself, for example, 1) bar states from granting financial aid for higher education for aliens; 2) require states to make free public education available only to citizens; 3) deny aliens a license to fish in coastal waters; 4) render aliens ineligible for any state or local civil service job;⁴⁶ 5) permit only citizens to be licensed to engage in the private practice of engineering; or even 6) exclude aliens from being licensed as attorneys. Moreover, if PRWORA's strategy is successful, and courts

43. This is because either Congress possesses the authority to declare that the requirements of strict judicial scrutiny are satisfied when states discriminate in ways federal law permits or that such state legislation is to be evaluated using the deferential rational basis review. See discussion *supra* notes 39–40 and accompanying text.

44. See discussion *supra* note 13–18 and accompanying text.

45. Three months after the Court's decision in *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976), President Gerald Ford issued an Executive Order establishing an alienage classification substantially similar to that struck down in *Wong*. See generally Exec. Order No. 11935, 3 C.F.R. § 146 (1976), reprinted as amended in 5 U.S.C. § 3301 (1976). Its constitutionality has been upheld based on the overriding federal interest of providing an incentive for citizenship. See *Mow Sun Wong v. Campbell*, 626 F.2d 739, 744–45 (9th Cir. 1980), cert. denied *sub nom.* *Lum v. Campbell*, 450 U.S. 959 (1981). Accord *Jalil v. Campbell*, 590 F.2d 1120, 1123 n.3 (1978); *Vergara v. Hampton*, 581 F.2d 1281, 1287 (7th Cir. 1978), cert. denied, 441 U.S. 905 (1979); *Santin Ramos v. U.S. Civil Serv. Comm'n*, 430 F. Supp. 422, 425 (P.R. 1977). This is not to say that Congress could constitutionally enact legislation that discriminates against aliens if motivated by antipathy or prejudice. See *Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (holding that equal protection means “that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest”). Accord *Romer v. Evans*, 517 U.S. 620, 634 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (concluding that equal protection is violated when legislation is motivated by “irrational prejudice”).

46. Or at least Congress could make accepting such a civil service position a basis for deportation.

uphold the constitutionality of the PRWORA-authorized state discrimination against aliens, Congress's ability to immunize states from constitutional attack would transcend immigration policy related to welfare eligibility. Indeed, there is every reason to believe that the congressional power to consent to state discrimination could be applied to any or all of the federal discriminatory immigration policy choices listed above. Yet such unbridled devolution would give Congress the power to reverse almost sixty years of Supreme Court precedent holding state and local alienage discrimination unconstitutional. The precedent is clear because over that period the Court has held that it is a violation of the Equal Protection Clause⁴⁷ for the states to 1) prohibit state financial aid for higher education for aliens;⁴⁸ 2) deny free public education to aliens—even undocumented aliens;⁴⁹ 3) deny aliens a license to fish in coastal waters;⁵⁰ 4) render aliens ineligible for any state or local civil service job;⁵¹ 5) permit only citizens to be licensed to practice engineering;⁵² or 6) exclude aliens from being licensed as attorneys.⁵³

In short, devolution surely poses important individual rights and federalism issues. But the devolution issue also raises equally important separation of powers questions involving the Congress's authority to manipulate the scope of judicial scrutiny deployed to evaluate equal protection challenges to state alienage discrimination.

47. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

48. *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977).

49. *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

50. *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 420 (1948).

51. *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973).

52. *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 601 (1976). *See also* *Ariz. State Liquor Bd. v. Ali*, 550 P.2d 663, 669 (Ariz. Ct. App. 1976) (holding it unconstitutional to exclude all aliens from eligibility to obtain spirituous liquor license).

53. *In re Griffiths*, 413 U.S. 717, 722–23 (1973).

It would be foolish to discount the separation of powers implications of the devolution issue simply because current federal legislation has exported to the States little of the federal government's authority to discriminate against aliens.⁵⁴ Signs of a national nativist backlash abound. For example, "Nuestro Himno," the Spanish-language adaptation of the National Anthem, "has been greeted with an unprecedented and, indeed, astonishing wave of denunciations all over the United States."⁵⁵ With this reaction comes increased concern over immigration, seen in events such as "vigilante Minutemen [volunteering to defend our borders] . . . , more calls for deporting all illegal workers, more demands that an impenetrable wall be built [to quell illegal immigration, and] more attempts to dismantle bilingual education in U.S. schools."⁵⁶ Congress can, and has, become aroused over the foreign influences that have insinuated themselves into modern American life, as evidenced by the calls from both conservative and liberal members of the Supreme Court for Congress to cease its efforts to enact legislation that would prevent

54. Federal devolution raising the issues addressed in this Article is currently limited to eligibility for government-funded benefits. See discussion *supra* notes 30–40 and accompanying text.

55. Ariel Dorfman, *Waving the Star-Spanglish Banner*, WASH. POST, May 9, 2006, at B2, available at 2006 WLNR 7938063.

56. *Id.* Even ordering a Philly cheesesteak sandwich can become problematic for those unable to order in English since one legendary outlet for such a delicacy is reported to have placed a sign in the order window that instructs customers, "This is America: When Ordering Speak English." *Wit Cheese, Not Con Queso*, WASH. POST, June 18, 2006, at A2, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/06/17/AR2006061700753.html?nav=rss_print/asection (including a photograph of the order window and showing below it another sign stating "Management Reserves The Right To Refuse Service" and reporting the proprietor's view that decreeing English-only at the ordering window will teach immigrants to "know how lucky they are [to live in America]"); *id.* (reporting also that at this English-only establishment, obtaining onions on the sandwich is accomplished efficiently—just by saying "wit"). In addition, citizen initiatives have placed many proposals that all municipal business be conducted in English on local ballots. See, e.g., Ashley Powers, *Proposal on Migrant Issues Will Go to Voters*, L.A. TIMES, May 16, 2006, available at 2006 WLNR 8382696.

the Supreme Court from using foreign law in its constitutional rulings.⁵⁷

Despite all of this, it remains true that there has been no wholesale congressional delegation to the States of the federal authority to adopt discriminatory policies affecting aliens. One would be naive, however, to conclude that Congress will not be pressed vigorously to enact legislation that authorizes the states to discriminate against aliens—especially if the Supreme Court were to uphold PRWORA’s devolution provisions.⁵⁸ One need only consider the lingering dissatisfaction with the Court’s decision in *In re Griffiths*,⁵⁹ which held that states may not limit the practice of law to United States citizens. States still discriminate against aliens with respect to admission to legal practice, more so today than just a few years ago.⁶⁰ This discrimination has been upheld by giving *Griffiths* a restrictive interpretation.⁶¹ The opposition to the holding in *Griffiths* has been intense. In 1979, for example, in *Wyoming v. State Board of*

57. See Charles Lane, *Scalia Tells Congress to Mind Its Own Business*, WASH. POST, May 19, 2006, at A19, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/05/18/AR2006051801961_pf.html.

58. See, e.g., Michael J. Wishnie, *Immigration and Federalism*, 58 N.Y.U. ANN. SURV. AM. L. 283, 285 (2002) (arguing that “the overall public support for devolution is unlikely to evaporate”).

59. 413 U.S. 717 (1973).

60. For example, the Louisiana Supreme Court recently changed its definition of “resident alien” so as to deny eligibility to practice law to all aliens except those “who have attained permanent resident status in the United States.” *In re Bourke*, 819 So. 2d 1020, 1022 (La. 2002) (expressly *overruling In re Appert*, 444 So. 2d 1208, 1208 (La. 1984), which had defined “resident alien” to include any “foreign national[] lawfully within the United States”).

61. Louisiana’s current restriction of aliens’ eligibility to practice law (see discussion *supra* note 60) has been upheld by the 5th Circuit Court of Appeals. *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005). That court reasoned that *Griffiths* (and indeed all of the Supreme Court’s cases applying strict judicial scrutiny to state and local alienage discrimination) requires the application of strict scrutiny only with respect to discrimination against legal immigrant aliens—those who have achieved legal residency status in the United States. *Id.* at 419 (“[W]e conclude that although aliens are a suspect class in general, they are not homogeneous and precedent does not support the proposition that nonimmigrant aliens are a suspect class entitled to have state legislative classifications concerning them subjected to strict scrutiny.”). Discrimination against legal nonimmigrant aliens receives a rational basis level of judicial scrutiny. *Id.* at 419–20.

Law Examiners,⁶² the Wyoming Supreme Court reluctantly declared unconstitutional a Wyoming statute excluding all but United States citizens from the practice of law, concluding that it must do so because *Griffiths* “represents the ‘supreme law of the land’ which we must follow.”⁶³ Then-Chief Justice Raper, concurring, expressed his view that the Wyoming legislature should not strike from the state’s statutes the requirement of United States citizenship to practice law. He argued that maintaining the provision would be a symbolic expression of loyalty⁶⁴ and expressed his fervent hope that “some day [the statute’s] requirement may have its full and intended viability restored. United States citizenship is of greater value than *Griffiths* and our decision here assigns it United States citizenship should not be eroded in any fashion by even a hint of insignificance. The creeping, insidious deterioration of basic values is foreboding.”⁶⁵

It is likely, certainly plausible, that states increasingly will insist that Congress exercise a “consent power”⁶⁶ to enact additional immigration legislation that authorizes the states to exercise the federal government’s power to discriminate against aliens.⁶⁷ If such insistence results in congressional devolution in broad areas of immigration policy, states may assert in litigation that

62. 601 P.2d 174 (Wyo. 1979).

63. *Id.* at 176.

64. *Id.* at 176 (Raper, C.J., concurring) (“[Maintaining the statutory provision] has symbolic value as well as a real significance as an expression of our loyalty and recognition as a State of the importance of United State citizenship and the ideals of a free people, which attorneys and counselors are especially sworn to uphold.”).

65. *Id.*

66. See William Cohen, *Congressional Power to Validate State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 393 (1983) (naming Congress’s devolution authority the “consent power”).

67. See Wishnie, *supra* note 4, at 497–98 (concluding that “there will come a time when state budgets are not so flush, and when episodic American nativism returns. Then, more states will try to balance their budgets on the backs of indigent immigrants”).

congressionally authorized alienage discrimination is immune from heightened judicial scrutiny. Should these arguments prevail, Congress in effect will have commandeered much of the judiciary's "province and duty . . . to say what the law is."⁶⁸ Accordingly, the devolution debate ought to focus on the separation of powers implications of devolution. It has not yet done so, as I show next.

IV

NEGLECTING SEPARATION OF POWERS ISSUES IN THE CURRENT DEVOLUTION DEBATE

Immediately following the Court's decision in *Diaz*, academic literature strongly criticized the rule handed down, urging either its reversal or limitation. Michael Perry advocated a complete reversal, arguing that "[i]f it is unjust for a state to treat a person as inferior on the basis of a morally irrelevant trait, there is no conceivable basis for concluding that it is any less unjust for the federal government to do the same."⁶⁹ Gerald Rosberg argued that, at least with respect to welfare policy and federal employment, there needed to be a return to strict judicial scrutiny of federal alienage classifications because "deference to the political branches on immigration matters [does] not seem to have any force [since] the Court can scrutinize the legislation without fear of enmeshing itself in the complex process of formulating immigration policy."⁷⁰

68. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). *Accord* *United States v. Nixon*, 418 U.S. 683, 703 (1974) (affirming Chief Justice Marshall's claim in *Marbury*). The Courts have forcefully asserted the federal judiciary's role as ultimate constitutional arbiter. *See, e.g.,* *Cooper v. Aaron*, 358 U.S. 1, 17–19 (1958) (dictum) (quoting from and expounding upon *Marbury*); *Powell v. McCormack*, 395 U.S. 486, 549 (1969) (stating the Court is "to act as the ultimate interpreter of the Constitution").

69. Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1062 (1979).

70. Gerald D. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 328 (1978).

In 1983, William Cohen wrote an important article that anticipated the current devolution debate.⁷¹ Identifying examples of permissible delegation of congressional power to the states with respect to Congress's power to tax and regulate interstate commerce, Cohen argued for the general principle that

Congress should be able to remove constitutional limits on state power if those limits stem solely from divisions of power within the federal system. In other words, Congress should be able to approve unconstitutional policy choices in state laws when Congress is not constitutionally prohibited from directly adopting the same policy itself.⁷²

Cohen named this the "congressional consent power."⁷³ He obliquely acknowledged a possible separation of powers quagmire lurking in this "consent power" when he acknowledged, "[m]y thesis may appear to allow Congress to amend the Constitution and to deny the Supreme Court's role as ultimate interpreter of constitutional provisions."⁷⁴ But Cohen was dismissive of these concerns, concluding that "these theoretical objections stem largely from abstract, nineteenth century notions of sovereignty that fail to provide useful guidance to practical problems of federalism."⁷⁵

Gilbert Carrasco also anticipated the devolution issue in 1994, two years before the enactment of PRWORA.⁷⁶ Carrasco argued that "[i]t is a fundamental precept of constitutional law that Congress

71. Cohen, *supra* note 66.

72. *Id.* at 388. Cohen further argued that "[i]n appropriate circumstances, Congress should be able to authorize the states to enact legislation that, in the absence of congressional consent, would run afoul of the . . . equal protection clause[]." *Id.*

73. *Id.* at 393.

74. *Id.* at 388.

75. *Id.*

76. Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591 (1994).

may not authorize states to violate the Fourteenth Amendment, whether through its Section Five power⁷⁷ or based on some other source of constitutional authority.”⁷⁸ Carrasco added an argument that has become a mainstay within the devolution debate—that the Congress’s power “to establish an [sic] uniform rule for naturalization”⁷⁹ precludes congressional delegation of discretion to the states to frame immigration policy because, by definition, United States immigration policy would then no longer be “uniform.”⁸⁰

Following the 1996 enactment of PRWORA came a flurry of articles, all published in 1997. Most renewed the attack on *Diaz*. The student work primarily advanced the views of either Perry,⁸¹ or Rosberg,⁸² or of both.⁸³ Victor Romero chose a different tack, urging

77. U.S. CONST. amend XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

78. Carrasco, *supra* note 76, at 623. In support of his argument that Congress lacks authority to diminish the scope of constitutional rights through its Fourteenth Amendment Section 5 power, Carrasco relied on the so-called “ratchet theory,” expressed in *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966) (stating that “[w]e emphasize that Congress’ power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees”).

79. U.S. CONST. art. I, § 8, cl. 4.

80. Carrasco, *supra* note 76, at 631–38. It was necessary for Carrasco to distinguish federal authority to regulate immigration from other federal powers because, as he points out, it is well established that “Congress has some ability to delegate its law-making” to administrative agencies, to the executive branch, to private parties, and to states and state officials. *Id.* at 626. Carrasco argues that accepting his thesis will have the salutary effect of “forc[ing] . . . Congress to make the most difficult policy choices.” *Id.* at 628.

81. See Valerie L. Barth, Comment, *Anti-Immigrant Backlash and the Role of the Judiciary: A Proposal for Heightened Review of Federal Laws Affecting Immigrants*, 29 ST. MARY’S L.J. 105, 147–48 (1997) (urging a return to strict judicial scrutiny of federal alienage classifications “[i]n light of the similarities between legal immigrants and citizens . . . notwithstanding the federal government’s plenary power”).

82. Connie Chang, Comment, *Immigrants Under the New Welfare Law: A Call for Uniformity, a Call for Justice*, 45 UCLA L. REV. 205, 249–52, 262, 269–72 (1997) (summarizing and urging adoption of Rosberg’s reasoning). See also Recent Legislation, *Welfare Reform—Treatment of Legal Immigrants—Congress Authorizes States to Deny Public Benefits to Noncitizens and Excludes Legal Immigrants from Federal Aid Programs—Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 110 HARV. L. REV. 1191, 1195 (1997) (advancing the view that Congress should be constitutionally barred from discrimination against aliens with respect to

a reexamination of *Diaz* in light of post-*Diaz* judicial developments.⁸⁴ One 1997 article, by Peter Spiro, strongly supported congressional devolution power, but less on legal than on policy grounds.⁸⁵ Spiro argued that, with devolution, immigration policy “will more efficiently represent wide state-to-state variations in voter preferences and that may ultimately benefit aliens as a group.”⁸⁶ He gave two reasons for this beneficial effect. First, devolution has the “steam-valve” virtues of federalism, in that it diminishes insistence that Congress adopt nationwide discriminatory policies.⁸⁷ Second, devolution will not have a “race-to-the-bottom” effect.⁸⁸ Spiro acknowledged the competing legal arguments that had been raised regarding the constitutionality of devolution but urged his readers to focus on the reality that “[t]he merits of these novel arguments aside, one might only note . . . that were Congress barred from delegation,

eligibility for benefits because such laws do not warrant the extreme judicial deference given to laws principally relating to immigration policy).

83. Recent Legislation, *supra* note 82, at 1194–95 (attacking *Diaz* based on the arguments of both Rosberg and Perry).

84. Victor Romero, *Equal Protection Held Hostage: Ransoming the Constitutionality of the Hostage Taking Act*, 91 NW. U. L. REV. 573, 574–75, 599–605 (1997) (urging reconsideration of *Diaz* in light of the congruence principle reaffirmed in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) and the application of “heightened scrutiny” in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)).

85. See generally Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1627 (1997).

86. *Id.*

87. *Id.* (explaining that “state-level authority will allow those states harboring intense anti-alien sentiment to act on those sentiments at the state level, thus diminishing any interest on their part to seek national legislation to [achieve] similarly restrictionist ends. [Thus] one state’s preferences, frustrated at home, are not visited on the rest of us by way of Washington”).

88. *Id.* at 1627–28. (arguing that “[u]nder a model of competitive federalism, states will be forced to weigh the assumed savings of anti-alien measures against the costs associated with interstate and international opprobrium provoked by such discrimination. . . . Some states will still discriminate against aliens; persistent state-to-state variations will more efficiently allocate the burdens of immigration among the states as aliens themselves respond to such variations by moving to more hospitable jurisdictions. But the balance likely precludes a scenario in which all states maximally discriminate within the constraints of federal law”).

it would in most cases opt for uniformity by canceling, not extending, benefits across the board.”⁸⁹

The devolution debate became even more elevated, and eloquently argued, with the publication of Michael Wishnie’s ground-breaking 2001 article, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*.⁹⁰ It crafted the fiercest post-PRWORA attack on devolution up to that time and within a year generated an equally well-argued, and withering, rebuttal.⁹¹ Wishnie expanded on Carrasco’s argument that the power to set immigration policy is exclusively federal and cannot be delegated to the states. Wishnie did not rely on the literal text of the Naturalization Clause, as did Carrasco. Rather, he argued the broader proposition that Congress lacks constitutional authority to grant states the discretion to decide whether aliens should have access to public benefits because this constitutes an unconstitutional delegation to the states of the power to set immigration policy. His claim was that “the federal power to regulate immigration, a power not specifically enumerated in the Constitution but universally recognized for over a century, is among those that are exclusively national and incapable of devolution to the states.”⁹² The argument began with a demonstration that the Supreme Court consistently has located the Congress’s non-textual authority to regulate immigration in the inherent sovereignty of the United States.⁹³ Accordingly,

89. *Id.* at 1629 n.41.

90. *See* Wishnie, *supra* note 4.

91. *See infra* notes 97–113 and accompanying text (discussing Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SURV. AM. L. 357 (2002)).

92. Wishnie, *supra* note 4, at 494.

93. *Id.* at 550 (“Given the consistent reference in the foreign affairs cases to immigration cases citing inherent sovereignty, it seems likely that the Supreme Court would apply its broader analysis of inherent sovereignty to the specific context of immigration.”).

Wishnie argued, since “powers incident to the nation’s sovereignty are exclusively federal powers[, i]t would seem to follow that only the sovereign can exercise sovereign powers, for transfer or devolution of such powers is a surrender of sovereignty itself.”⁹⁴ To this, Wishnie added two supporting policy rationales. The first was what might be called the equality argument: devolution should be rejected to preserve the vitality of the Constitution’s equality values. “[D]evolution would erode the antidiscrimination and anticaste principles that are at the heart of our Constitution and that long have protected noncitizens at the subfederal level.”⁹⁵ The second was the “possibility of a race-to-the-bottom among the States.”⁹⁶

The following year, Howard Chang mounted a vigorous counter-argument to what he called the “nondevolvability principle” championed by Wishnie and Carrasco.⁹⁷ Chang began by stating that it begs the question to claim that the devolution issue amounts to nothing more than the question of whether Congress has the power to authorize the States to violate the Constitution. Why, he asked, “should we think that the states are still violating the Equal

94. *Id.* at 552.

95. *Id.* at 553. Wishnie further explained this:

The plenary power doctrine of immigration law inevitably shields governmental action from the level of judicial scrutiny that ordinarily would be applied, distorting constitutional jurisprudence and countenancing what otherwise would be invalidated as arbitrary or discriminatory government behavior. Permitting devolution would amplify this distortion, privileging the plenary power doctrine over equal protection norms at the state and local level. Given the choice, one should reject a constitutional theory that endorses the creation of state and local laboratories of bigotry against immigrants. If devolution were permissible, the corrosive effects of the plenary power doctrine on equality norms would not necessarily be limited to the realm of welfare rules.

Id.

96. *Id.* at 554.

97. Chang, *supra* note 91, at 358.

Protection clause when they act with federal authorization?”⁹⁸ Chang is correct to the extent he argues that the issue devolution raises is whether federal authorization for states to discriminate, granted in the exercise of Congress’s plenary power to regulate immigration and other aspects of foreign affairs, should affect the degree of scrutiny that courts apply when states adopt congressionally-authorized discriminatory policies burdening aliens.⁹⁹ Whatever the answer, that question is quite distinct from, and more nuanced than, an inquiry as to whether Congress may authorize the States to violate the Constitution.

Having cleared the brush and clarified the issue, Chang challenged directly one of the most facially appealing arguments advanced by critics of devolution,¹⁰⁰ that devolution is unconstitutional because it results in “divergent state policies” contrary to the uniformity limitations found in the Constitution’s Naturalization Clause.¹⁰¹ To this, Chang argued first that the federal

98. *Id.* Chang pointed out that, throughout constitutional law, Congress permissibly “authorize[s] state laws that would be unconstitutional in the absence of such authorization,” citing the congressional power to authorize States to enact laws that without such authorization would violate the Commerce Clause, the federal government’s foreign affairs power and power to regulate foreign commerce, and the power to regulate the affairs of Native Americans. *Id.* at 359 n.13. Wishnie had also addressed and distinguished this precedent. See Wishnie, *supra* note 4, at 539–41, 546–47, 561.

99. Chang, *supra* note 91, at 367. Chang answered this question by stating, “[g]iven the degree of judicial deference accorded to the decisions made by the political branches of the federal government on these matters, it seems logical that authorization by these branches should imply similar deference for state laws enacted with prior federal approval.” *Id.* For the argument in this Article that existing Supreme Court precedent demonstrates that deference to federal “approval” of state discretion to discriminate is not a “logical” extension of the deference given to federal “decisions” to discriminate, see discussion *infra* notes 155–181 and accompanying text.

100. See Carrasco, *supra* note 76, at 631–38; Wishnie, *supra* note 4, at 566.

101. U.S. CONST. art. I, § 8, cl. 4 (empowering Congress to enact “an uniform Rule of Naturalization”). Chang acknowledged that the Supreme Court in *Graham v. Richardson*, 403 U.S. 365, 382 (1971), had identified the uniformity requirement in the Naturalization Clause as a possible bar to congressional devolution to the States of its authority to make discriminatory immigration policy choices. See *Graham*, 402 U.S. at 382 (stating that a “congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship

power to set immigration policy is not founded entirely on the Naturalization Clause,¹⁰² and second, that immigration policy is, and has been for years, informed by “divergent state laws.”¹⁰³ He concluded that established norms of immigration law “leave it to Congress to decide whether this state role and the discretion it allows for the adoption of divergent policies serves federal policies regarding the treatment of aliens.”¹⁰⁴ In this regard, Chang reminded his readers of the Court’s decision in *De Canas v. Bica*.¹⁰⁵ There, the Court upheld California’s decision to prohibit the employment of undocumented aliens because the state law was not inconsistent with federal policy.¹⁰⁶ Finally, Chang reasoned, variation among the states is inevitable with respect to the availability of welfare benefits for aliens because some states may not provide public benefits for either aliens or their own citizens and even when they do, the benefit levels and eligibility criteria will vary.¹⁰⁷

Chang completed his attempted deconstruction of the “nondevolvability principle” by addressing Wishnie’s two policy arguments: the equality argument and the “race-to-the-bottom”

requirements for federally supported welfare programs would appear to contravene [the] explicit constitutional requirement of uniformity”). Chang dismissed this as dictum. Chang, *supra* note 91 at 359. See also *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982) (stating in dictum that “[i]f the Federal Government has by *uniform* rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction”) (emphasis added).

102. It resides also, he argued, in the Constitution’s Foreign Affairs Clauses and the Foreign Commerce Clause. See Chang, *supra* note 91, at 360 & n.18.

103. *Id.* Chang gave as examples the reliance on each state’s definition of marriage to determine the availability of a visa and the reliance on each state’s choice of which crimes involve “moral turpitude” and the maximum sentence that may be imposed for a crime, choices that affect inadmissibility and deportability.

104. *Id.* at 361.

105. 424 U.S. 351 (1976).

106. *Id.* at 361–62. See discussion in Chang, *supra* note 91, at 361.

107. *Id.*

concern.¹⁰⁸ He rejected Wishnie's argument that devolution will exacerbate subversion of the Constitution's "antidiscrimination and anticaste principles," even more than *Diaz* already subverts them, by permitting the States also to be able to discriminate.¹⁰⁹ His response adopted Spiro's earlier argument that "were Congress barred from delegation, it would in most cases opt for uniformity by canceling, not extending, benefits across the board."¹¹⁰ Chang's be-careful-what-you-wish-for warning was put this way: "[I]f we insist on nondevolvability, then we may well get uniform discrimination as a result. What reason do we have for thinking that a rule of nondevolvability will lead to uniform access [to public benefits] rather than uniform exclusion?"¹¹¹ Nor is a race-to-the-bottom among the states an inevitable consequence of devolution, in Chang's view. A Congress that believed most states would discriminate against aliens, if so permitted, could, and would, simply legislate that same discrimination itself if devolution were unconstitutional.¹¹² In other words, there may be a race-to-the-bottom, but it is not caused by devolution.¹¹³

In short, beginning soon after the 1976 decision in *Diaz*, and increasingly since the 1996 enactment of PRWORA, there has been a

108. See discussion *supra* notes 95–96 and accompanying text.

109. Chang, *supra* note 91, at 361.

110. Spiro, *supra* note 85, at 1638 n.41.

111. Chang, *supra* note 91, at 363. Chang even suggested, contrary to Wishnie's concern that devolution will create "laboratories of bigotry against aliens," that it may well create "laboratories of generosity toward immigrants." *Id.* at 364.

112. *Id.* at 364–66.

113. As to Carrasco's claim that nondelegation should be revived to promote political accountability by Congress (see Carrasco, *supra* note 76, at 628), Chang responded that "[t]he desire to make Congress more politically accountable . . . is quite general" and advocates of nondevolvability have the burden to demonstrate "why these concerns are especially acute when Congress authorizes the states to restrict alien access to public benefits [compared to when it delegates responsibility in other contexts]." Chang, *supra* note 91, at 368.

lively debate over the doctrinal and policy implications of devolution. The participants have been many and have advanced intelligent, sophisticated, and sometimes compelling arguments built around divergent views regarding individual rights, the nature of Congress's enumerated and non-enumerated powers, and federalism. Missing in action, however, is any serious evaluation, or even meaningful recognition, of the separation of powers implications of devolution.¹¹⁴ The high quality of the debate to date makes that absence all the more astonishing.¹¹⁵ I show next that issues concerning the respective authority of Congress and the federal judiciary to establish the degree of judicial oversight in litigation involving individual rights have been at the forefront of Supreme Court litigation over the past decade, that these issues are not likely to be overlooked when the devolution issue eventually reaches the

114. William Cohen did hint in 1983 that devolution might be understood to raise a separation of powers issue but dismissed the concern without engaging it. See discussion *supra* notes 71–75 and accompanying text.

115. Neither of the two lower court decisions that have litigated the constitutionality of PRWORA's delegation to the states of the federal authority to determine benefit eligibility of aliens has focused on the separation of powers issue that devolution creates. The first case decided was *Aliessa v. Novello*, 96 N.Y.2d 418 (2001). It held that abolition of state-funded medical assistance coverage for legal immigrants was unconstitutional notwithstanding congressional authority to do so. The court mentioned in passing that separation of powers precludes Congress from declaring legislatively that a statute satisfies strict scrutiny. *Id.* at 432. However, the court's ruling relied primarily on the conclusion that congressional delegation violates the uniformity requirement in the Naturalization Clause. *Id.* at 432–37.

Soskin v. Reinerston, 353 F.3d 1242 (10th Cir. 2004), upheld PRWORA's devolution without addressing separation of powers issues. The court concluded that “[o]nce Congress has expressed [a] policy [to give States the discretion to deny welfare benefits to certain legal immigrants], the courts must be deferential. . . . [this recognizes] that a state’s exercise of discretion can also effectuate national policy.” *Id.* at 1255. The court ruled that congressional delegation did not violate the Naturalization Clause. First, “Congressional power over aliens derives from more than just the Naturalization Clause. Other sources of Congressional authority include ‘its plenary authority with respect to foreign relations and international commerce, and . . . the inherent power of a sovereign to close its borders.’” *Id.* at 1256 (quoting *Plyler v. Doe*, 457 U.S. 202, 225 (1982)). Moreover, the uniformity required in the Naturalization Clause was intended to prohibit states from adopting lenient standards for the naturalization of aliens and then imposing those more lenient standards on other states. “Here, the choice by one state to grant or deny Medicaid benefits to an alien does not require another state to follow suit.” *Id.* at 1257.

Supreme Court, and that resolution of these separation of powers issues holds the key to resolving the devolution issue.

V

A SEPARATION OF POWERS CRITIQUE OF THE “DEVOLUTION ISSUE”

Those writing about devolution prior to 1997 might be excused for failing to focus on the lurking separation of powers issues. For it was in 1997 that the Supreme Court announced its seminal decision in *City of Boerne v. Flores*,¹¹⁶ holding that Congress had exceeded its Fourteenth Amendment Section 5 power when it enacted and made applicable to the states the Religious Freedom Restoration Act of 1993 (RFRA).¹¹⁷ In *Boerne*, the Court clarified the federal judiciary’s relationship with the Congress and reasserted the federal judiciary’s (and particularly the Supreme Court’s) preeminent role in defining the rights guaranteed by the Fourteenth Amendment.¹¹⁸

To appreciate the relationship between *Boerne* and devolution, it is useful to recall that devolution curtails (at least attempts to curtail) the scrutiny courts give to state alienage discrimination. Two alternative strategies are deployed: legislative determination that strict scrutiny is satisfied, and immunizing the states from the requirements of strict scrutiny by transferring to the states the federal government’s own immunity from strict scrutiny.¹¹⁹ In either case, devolution attempts to manipulate the judicial review of

116. 521 U.S. 507 (1997).

117. 42 U.S.C. §§ 2000bb *et seq.* (2000). RFRA also was made applicable to the federal government, and that application of RFRA is constitutional. See *Gonzales v. Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006) (deciding that RFRA precludes federal government from enforcing federal controlled substance legislation against small church’s use of sacramental hallucinogenic tea).

118. See discussion *supra* notes 25–29 and accompanying text.

119. See discussion *supra* notes 39–40 and accompanying text.

discriminatory state legislation and thereby reverse the effects of previous Supreme Court decisions. An attempted manipulation of judicial review is exactly what Congress attempted when it enacted RFRA in an unsuccessful effort to reverse the effect of the 1990 Supreme Court decision in *Employment Division v. Smith*.¹²⁰

For many years prior to *Smith*, the Supreme Court had held that facially neutral laws of general application that impose a substantial burden on the free exercise of religion are unconstitutional unless justified as necessary to advance a compelling state interest.¹²¹ In *Smith* the Court reversed course, holding that the Free Exercise Clause of the First Amendment does not provide protection from the incidental burdens on religious expression that may result from the nondiscriminatory application of facially neutral laws of general application.¹²² As the *Boerne* court recalled, *Smith* held that “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.”¹²³ RFRA attempted to reverse that outcome by providing that laws that “substantially burden” the exercise of religion are unlawful unless they advance a “compelling governmental interest” and are “the least restrictive means of furthering that compelling governmental interest.”¹²⁴ In other words, Congress attempted to override *Smith*'s

120. 494 U.S. 872 (1990).

121. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (holding denial of claimant's unemployment benefits for refusing to work on the Sabbath to be unconstitutional). See also *Boerne*, 521 U.S. at 513 (concluding that under *Sherbert*, “we would have asked whether [a state's] prohibition substantially burdened a religious practice and, if it did, whether the burden was justified by a compelling government interest”).

122. *Smith*, 494 U.S. at 874. In *Smith*, members of the Native American Church presented the claim that a state law barring the use of peyote violated their religious freedom since for them peyote was a sacrament.

123. *Boerne*, 521 U.S. at 514.

124. 42 U.S.C. § 2000bb-1(a), (b).

neutrality test and require that all laws that substantially burden free exercise must be subjected to strict scrutiny review.

In *Boerne*, the Court concluded RFRA was unconstitutional because it “contradicts vital principles necessary to maintain separation of powers”¹²⁵ The Court in *Boerne* rejected the view that Congress’s Section 5 power enables it to expand constitutional rights by defining for itself what the Fourteenth Amendment prohibits and legislating against it.¹²⁶ In language whose clarity could not easily have been lost on members of Congress, the Court in *Boerne* held that “Congress has [no] power to decree the substance of the Fourteenth Amendment’s restrictions on the States.”¹²⁷ “Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce’ not the power to determine what constitutes a constitutional violation.”¹²⁸ Congress’s power is “corrective or preventive, not definitional”¹²⁹ A Court willing to deploy such robust language is not likely to be willing to entertain a vision of congressional authority that undercuts, even indirectly, the federal judiciary’s supremacy to enforce constitutional limitations.¹³⁰ What needs to be determined is whether devolution

125. *Boerne*, 521 U.S. at 536 (holding also that RFRA violated federalism principles).

126. *Id.* For a defense of the view rejected, see, e.g., Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 107 (1966) (stating that “Congress, in the field of state activities and except as confined by the Bill of Rights, has the power to enact any law which may be viewed as a measure for correction of any condition which Congress might believe involves a denial of equality or other fourteenth amendment rights”). See also *Katzenbach v. Morgan*, 384 U.S. 641, 648–49 (1966) (suggesting that requiring the judiciary to find a constitutional violation before upholding a Section 5 based congressional enactment would unnecessarily limit legislative power).

127. *Boerne*, 521 U.S. at 519.

128. *Id.* at 508.

129. *Id.* at 525.

130. The Court did acknowledge in *Boerne* that “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’s enforcement power even if in the process it prohibits conduct which is not itself unconstitutional” *Id.* at 518. The challenge is

contravenes the separation of power principles *Boerne* so ardently champions.

Certainly, a congressional attempt to legislatively decree that a state statute satisfies the rigors of strict judicial scrutiny squarely offends *Boerne*'s separation of powers foundations. Otherwise, Congress, not the judiciary, becomes the arbiter of what state legislation will survive strict judicial review. But what if devolution were viewed as a scrutiny-shifting mechanism intended to modify not the application, but rather the standard of judicial review by transforming from strict scrutiny to rational basis the level of judicial review given to state alienage discrimination? Would this represent an effort by Congress to "decree the substance of the Fourteenth Amendment's restrictions on the States"¹³¹ or "determine what constitutes a constitutional violation [for the states]?"¹³² Since a shift to rational basis would result in a denial of most equal protection

to devise a method to distinguish when the aim of federal legislation is really to deter unconstitutional behavior and when it actually is intended to expand the Fourteenth Amendment's substantive sweep. The Court rejected the guidance in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), that courts should uphold congressional exercise of the Section 5 power if they could "perceive a basis" upon which to conclude that legislation was aimed at enforcing rights guaranteed by the Fourteenth Amendment. *Katzenbach*, 384 U.S. at 653. Considering itself too feeble for the task of uncovering Congress's true aim, the Court rejected what has been characterized as the "limitless deference" of a rational basis level of judicial scrutiny. See Christopher L. Eisgruber and Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1987 SUP. CT. REV. 79, 94 (1997). The Court chose instead a heightened level of judicial scrutiny by adopting the now familiar "congruence and proportionality" test. *Boerne*, 421 U.S. at 520 (stating that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect"). The Court in *Boerne* concluded the following:

RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.

Id. at 532.

131. *Boerne*, 521 U.S. at 519.

132. *Id.*

challenges to state alienage discrimination statutes, a court reasonably could conclude that, like RFRA, devolution does have the practical effect of “determin[ing] what constitutes a constitutional violation [for the states].”¹³³

These similarities between devolution and RFRA notwithstanding, one enormous difference stands out. Devolution, unlike RFRA, entails Congress authorizing the states to adopt policies that Congress lawfully could adopt itself. Wishnie called it a “striking proposition” that Congress constitutionally is precluded from authorizing the states to undertake action that would be permissible if done directly by Congress itself.¹³⁴ He frames the question as, “[w]hy is Congress barred from doing indirectly what it could do directly?”¹³⁵

One answer might be that Congress is not so barred. Perhaps devolution does not violate the *Boerne* principles—because of *Diaz*. The argument might be that the Court never surrendered to the Congress the responsibility to determine the scope of religious liberty guaranteed in the Constitution. Accordingly, when Congress took it upon itself in RFRA to make that determination, it intruded upon the Court’s essential constitutional function to determine the Constitution’s substantive sweep. But if *Diaz* is understood as a virtual surrender to the Congress of the authority to determine the scope of the Constitution’s equality norm in the context of alienage classifications, then that distinction from *Boerne* may settle the

133. *Id.* To be sure, devolution attempts to *expand* the powers of the states by *limiting* the scope of judicial review, while RFRA attempted to *limit* the powers of the states by *expanding* the scope of judicial review that otherwise would be available. The common denominator of both RFRA and devolution, however, is a congressional effort to delimit the judiciary’s authority to find constitutional violations by manipulating the scope of judicial review.

134. Wishnie, *supra* note 4, at 520.

135. *Id.* at 521.

question of whether devolution violates *Boerne*'s separation of powers principles. Let me state this another way. If the Court and the Congress were to develop conceptually different visions of the equality norm in the Equal Protection Clause in the context of alienage discrimination, does *Diaz* require that the Court yield to the Congress's vision? If the answer is yes, then *Diaz* distinguishes devolution from *Boerne* because the Court never relinquished its claimed right to assert its own vision of religious liberty. RFRA embraced a conceptually different vision of religious liberty from that held by the Court and that largely explains the outcome in *Boerne*.¹³⁶

But, *Diaz* was not a judicial surrender to the Congress of the authority to determine the scope of the Constitution's equality norm regarding alienage classifications. Even though the Court has virtually abandoned its scrutiny of congressional or presidential decisions to discriminate against aliens in federal immigration policy, it could (and should) cry foul if Congress attempts to inoculate the states against strict judicial scrutiny and thereby preclude the Court from exercising its traditional heightened supervision over state alienage discrimination. As I show next, the reason is that what the Court surrendered in *Diaz* was a significant institutional role in reviewing alienage classifications made by the Congress or the President. But the Court in *Diaz* never surrendered to the Congress its institutional prerogative (and responsibility) to insist upon acceptance of its own vision of the equality norm found in the Equal Protection Clause. If those two statements seem incongruous, it is because of the need to clarify the distinction between the breadth of state and federal behavior that the Equal Protection Clause's equality

136. This understanding of *Boerne*, accurate in my view, was first expressed by Eisengruber and Sager. See Eisengruber and Sager, *supra* note 130, at 97–105.

norms in fact proscribe and the proscriptions that the Court, limited by institutional constraints, will enforce.

Lawrence Sager's straightforward, yet stunning, article, published nearly thirty years ago,¹³⁷ explains this distinction. Sager makes the point that we have become acculturated to the view that the scope of constitutional limits on the behavior of state or federal officials extends only as far the judiciary is willing to enforce those limits.¹³⁸ Sager persuasively argues against that view. He shows that many constitutional norms, particularly the equality norms found in the Equal Protection Clause, are "underenforced" by the federal courts due largely to self-imposed restraints arising out of institutional considerations.¹³⁹ These institutional concerns may relate to "the competence of federal courts to prescribe workable standards of . . . conduct and devise measures to enforce them."¹⁴⁰ Or, "the claims for restraint [may] turn on the propriety of unelected federal judges displacing the judgments of elected [governmental] officials. . . ."¹⁴¹ In other words, there is a "slippage" between a constitutional norm

137. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

138. *Id.* at 1213 (stating that "[m]odern convention treats the legal scope of a constitutional norm as inevitably coterminous with the scope of its federal judicial enforcement").

139. *Id.* (arguing that the Supreme Court, "because of institutional concerns, has failed to enforce . . . the Constitution to its full conceptual boundaries").

140. *Id.* at 1217. Sager cites *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 41–44 (1973) (explaining that the Court ought to exercise restraint in imposing "inflexible constitutional restraints" due to concerns related to the judiciary's competence to formulate taxation schemes, its lack of "expertise and . . . familiarity with local problems," and the complexities of school finance and management.). Regarding this language in *Rodriguez*, Sager concludes that "[w]hatever view one takes of these concerns, it is difficult to understand them as speaking even indirectly to the scope or content of the concept of equal protection; rather, they are claims which address the question of [the] limits the federal judiciary should [self-impose] in interpreting and enforcing that concept." Sager, *supra* note 137, at 1218.

141. *Id.* at 1217; see, e.g., *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (reiterating the importance of maintaining the "proper—and properly limited—role of the courts in a democratic society").

and its enforcement.”¹⁴² Sager reminds us that the doctrine of judicial restraint, and the rule of “clear mistake” eloquently articulated during the Nineteenth Century by James Bradley Thayer, are “not founded on the idea that only manifestly abusive legislative enactments are unconstitutional, but rather on the idea that only such manifest error entitles a court to displace the prior constitutional ruling of the enacting legislature.”¹⁴³ Sager argues that the Court’s reluctance to decide the merits of a constitutional dispute because it raises a political question proves most eloquently that a “distinction between the scope of the norms of the Constitution and the scope of their judicial enforcement is inherent in the doctrine of judicial restraint”¹⁴⁴ Yet, outside the political question doctrine, “when institutional concerns [also] lead . . . to limited federal enforcement of the constitutional norm in question, we treat the absence of judicial intervention as an authoritative statement about the norm itself.”¹⁴⁵ Sager urges that we rethink conventional wisdom regarding what it means for the Court to rule on a case and accept the following:

142. Sager, *supra* note 137, at 1213.

143. *Id.* at 1223 (citing James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893)).

144. *Id.* at 1224; *see id.* at 1226 (arguing that “[w]hen institutional concerns result in the invocation of the political question doctrine, we understand the constitutional norm at issue to retain its legal validity”). One might add that Sager’s thesis is apparent in the standing doctrine. A court might decide that no one has standing to challenge a blatantly unconstitutional law, based on judicially self-imposed institutional restraints (prudential concerns). Yet, that refusal to provide a judicial remedy says nothing about the constitutionality of the challenged statute. That question simply is left to other authoritative decision makers. *See United States v. Richardson*, 418 U.S. 166, 179 (1974) (stating that “[i]t can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process”); *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (concluding that “[o]ur system of government leaves many crucial decisions to the political processes”).

145. Sager, *supra* note 137, at 1226.

[When a constitutional limitation] is found not to extend to certain official behavior because of institutional concerns rather than analytical perceptions, . . . the resulting decision [should not be viewed] as a statement about the meaning of the constitutional norm in question. After all, what the members of the federal tribunal have actually determined is that there are good reasons for stopping short of exhausting the content of the constitutional concept with which they are dealing”¹⁴⁶

Sager’s insight that a governmental official’s compliance with a judicial determination should not lead to the conclusion that the challenged official behavior is fully compatible with the constitutional provision¹⁴⁷ illuminates why the Court’s decision in *Diaz* does not make *Boerne* inapposite for resolving the devolution issue. Let us return to Michael Perry’s protestation, discussed above, that “[i]f it is unjust for a state to treat a person as inferior on the basis of a morally irrelevant trait [such as alienage], there is no conceivable basis for concluding that it is any less unjust for the federal government to do the same.”¹⁴⁸ Perry used this argument to urge a reversal of *Diaz*. But the argument fails because the holding in *Diaz* is not inconsistent with Perry’s observation. That is the whole point of Sager’s insight. Yes, “it is unjust for a state to treat a person as inferior on the basis of a morally irrelevant trait [such as alienage]” and yes one reasonably could determine that “there is no conceivable basis for concluding that it is any less unjust for the federal government to do the same”¹⁴⁹—at least in most cases. But the Supreme Court in *Diaz* never said it was “any less unjust” for the federal government to burden a class of persons based on “a morally irrelevant trait” such as alienage. The Court in *Diaz* never addressed

146. *Id.* at 1221.

147. *See id.* at 1226.

148. Perry, *supra* note 69, at 1062.

149. *Id.*

the merits of the argument that federal alienage discrimination violates the Equal Protection Clause's equality norm.¹⁵⁰ All the Court held in *Diaz* was that judicial review of federal laws discriminating against aliens employs a different level of judicial scrutiny than similar state laws because "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."¹⁵¹ As it noted in *Wong*, the Court thus accepts, without deciding, that "there *may be* overriding national interests which justify selective federal [alienage discrimination] that would be unacceptable for an individual State."¹⁵² Because "such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary[,] . . . [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."¹⁵³

In other words, *Diaz* does not exonerate federal officials from their obligation to comply with the full breadth of the Equal Protection Clause's equality norms as the Court defines those norms. *Diaz* does *not* hold that federal alienage discrimination is any less invidious, or less "unjust" as Perry puts it, than identical state alienage discrimination. Accordingly, if particular federal discrimination against aliens in fact violates the Constitution's

150. Note that in *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976), Justice Stevens, who also authored the *Diaz* opinion, begins his legal analysis with the simple observation that "[t]he federal sovereign, like the States, must govern impartially." *Id.* at 100. This states the norm but neither the *Wong* nor the *Diaz* opinion apply its full contours to the facts by deciding whether federal alienage discrimination in employment, or otherwise, violates that norm.

151. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

152. *Wong*, 426 U.S. at 100 (emphasis added).

153. *Diaz*, 426 U.S. at 82 (emphasis added).

equality norms, but because of institutional considerations no judicial tribunal is prepared to acknowledge the violation, congressional authorization for the states to engage in identical discrimination cannot cure the constitutional defect. The judiciary in *Diaz* simply did not surrender its institutional prerogative (and responsibility) to insist upon acceptance of its own vision of the equality norm found in the Equal Protection Clause. It only surrendered, for institutional reasons, a right to insist on enforcing that vision in the context of immigration rules “made by the Congress or the President”¹⁵⁴ that discriminate against aliens. Accordingly, the issue devolution presents to the judiciary is whether the institutional restraints that keep a federal court from adjudicating the Constitution’s equality norm to its full extent in cases challenging an express congressional mandate to discriminate should operate equally to disqualify a federal court from enforcing the equality norm to the full extent of its conceptional boundaries when state officials’ congressionally-authorized behavior is at issue. This is a normative question for the judiciary, not the Congress, to answer.

Thus the issue is framed: Is there any evidence that the Court would (should) hold that the institutional restraints that explain the outcome in *Diaz* are inapplicable to restrain the Court when presented with challenges to state alienage discrimination that Congress has authorized? The answer is yes, there is evidence that those restraints are inapplicable. Devolution does not transfer to the states the federal government’s claim, recognized in *Diaz*, of a deferential standard of judicial review—at least in most cases. That evidence is found in *Hampton v. Mow Sun Wong*,¹⁵⁵ decided the same

154. *Id.*

155. 426 U.S. at 88.

day as *Diaz*. Specifically, that evidence is found in *Wong*'s differential-deference principle.¹⁵⁶

It will be recalled,¹⁵⁷ that in *Wong* the Court was presented with a case involving congressional devolution of its authority to discriminate against aliens. There Congress and the President devolved to a federal agency, the Civil Service Commission, authority to set immigration policy regarding federal employment. In *Wong*, plaintiffs successfully challenged the Civil Service Commission rule making citizenship a condition for eligibility for most federal employment. The Civil Service Commission, not the President or the Congress, had promulgated the citizenship regulation.¹⁵⁸ Neither Congress nor the President ever required the rule or ever gave explicit approval or disapproval to it.¹⁵⁹ The Court did conclude that “both the Legislature and the President have been aware of the policy and have acquiesced in it.”¹⁶⁰ Nevertheless, the Court held that such acquiescence does not warrant judicial deference to the Civil Service Commission’s judgment that the rule was intended to advance overriding federal interests. The primary reason was because the rule was not the result of the “considered judgment” of either the President or the Congress.¹⁶¹ As the Court had already stated in *Diaz*, “[t]he reasons that preclude judicial review of political questions also

156. See discussion *supra* notes 22–28 and accompanying text.

157. See discussion *supra* notes 19–28 and accompanying text.

158. *Wong*, 426 U.S. at 91–93, 105.

159. *Id.* at 109–10.

160. *Id.* at 106. The Court also found that Congress never repudiated, or gave considered judgment to repudiating, the Commission policy. *Id.* at 108.

161. *Id.* at 107. The Court explained that “[i]n order to decide whether . . . acquiescence should give the Commission rule the same support as an express statutory or Presidential command, it is appropriate to review the extent to which the policy has been given consideration by Congress or the President and the nature of the authority specifically delegated to the Commission. *Id.* at 105.

dictate a narrow standard of review of decisions *made by the Congress or the President* in the area of immigration and naturalization.”¹⁶²

In *Wong*, the President had promulgated an Executive Order devolving to the Commission the discretion “to establish standards with respect to citizenship,”¹⁶³ but the Court held that this “is not necessarily a *command* to require citizenship as a general condition of eligibility for federal employment.”¹⁶⁴ Most significantly for resolution of the “devolution issue,” the Court held that even assuming this Executive Order were susceptible of a reading “which might *permit* the Commission to decide that citizenship should be required for all federal positions, *it would remain true that the decision to impose the requirement was made by the Commission rather than the President.*”¹⁶⁵ Indeed, the Commission was delegated so much discretion that it could retain, modify, or repeal the citizenship requirement “without further authorization from Congress or the President.”¹⁶⁶ This level of discretion delegated to the Commission by the Congress and the President disqualifies the Commission’s rule from any claim that the Court, applying a deferential standard of judicial review, should uphold the rule merely because it could find that the rule might advance some plausible legitimate governmental interest.

Instead, where the decision to discriminate is not made by the Congress or the President, a heightened standard of judicial review is required. The Due Process Clause of the Fifth Amendment requires

162. *Diaz*, 426 U.S. at 82 (emphasis added).

163. *Wong*, 426 U.S. at 111–12.

164. *Id.* at 112 (emphasis added).

165. *Id.* (emphasis added).

166. *Id.* at 113.

the Court to find a “legitimate basis” for concluding that the interests asserted in support of alienage discrimination are genuine (that they were “consciously adopted”¹⁶⁷ as the “actual predicate for the rule” rather than just being plausible) and that they advance an “overriding” federal interest.¹⁶⁸ This “legitimate basis” due process requires cannot be grounded on the rule-promulgating actions of a delegee of the Congress or the President unless that policy-promulgating delegee is one having “direct responsibility for fostering or protecting [the allegedly overriding] interest [that] was the actual predicate for the rule.”¹⁶⁹ In *Wong*, the Court held it had no “legitimate basis” to conclude either that the represented reason for the citizenship requirement is genuine—that the represented reason for the requirement was “consciously adopted”¹⁷⁰ and was in fact the “actual predicate for the rule”—or that this asserted justification for the citizenship requirement constitutes an “overriding” federal interest.¹⁷¹ Neither the Congress nor the President had mandated the rule and the Civil Service Commission had no responsibility related to the interests advanced in support of the citizenship requirement.¹⁷²

167. *Id.* at 113 n.46 (concluding that “in view of the consequences of the [citizenship] rule it would be appropriate to require a much more explicit directive from either the Congress or the President before accepting the conclusion that the political branches of Government . . . consciously adopt[ed] a policy raising the constitutional question presented by this rule”).

168. *Id.* at 103.

169. *Id.*

170. *Id.* at 113 n.46.

171. *Id.* at 103.

172. The Court pointed out that the Commission has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies. “Indeed, it is not even within the responsibility of the Commission to be concerned with the economic consequences of permitting or prohibiting participation by aliens in employment opportunities in different parts of the national market.” *Id.* at 114.

The Court did conclude that the Commission had responsibility for one of the justifications of the citizenship requirement—“the administrative desirability of having one simple rule excluding all noncitizens when it is manifest that citizenship is an appropriate and legitimate requirement for some important and sensitive positions.” *Id.* at 115. This interest was found insufficient to

Wong's holding compellingly supports the conclusion that congressional legislation acquiescing in state alienage discrimination does not transfer to the states a *Diaz*-type scope of deferential judicial review.¹⁷³ As *Wong* makes plain, "it would be appropriate to require [an] explicit directive from either the Congress or the President before accepting the conclusion that the political branches of Government . . . consciously adopt[ed] a policy raising the constitutional question presented by [the challenged] rule."¹⁷⁴ The devolution discussed in this essay can never meet that standard. The devolution we have been discussing does not entail Congress or the President communicating "a[n] explicit directive" to the states. Congress's devolution to the states to set immigration policy is strikingly similar to the devolution in *Wong* where Congress and the President acquiesce in the exercise of discretion provided for in federal law but never mandate the challenged discriminatory policy.¹⁷⁵ Such acquiescence will not support judicial deference. That is *Wong*'s point. The Fifth Amendment's Due Process Clause normally precludes judicial deference to federal alienage discrimination when Congress or the President merely acquiesce in

support judicial deference to the Commission's citizenship rule in *Wong* because there was nothing in the record "to indicate that the Commission actually made any considered judgment of the relative desirability of a simple exclusionary rule on the one hand, or the value of the service of enlarging the pool of eligible employees on the other." *Id.* Without such a "considered evaluation," the Court concluded, the administrative convenience justification may be nothing more than a "hypothetical justification"—hardly sufficient to justify the "wholesale deprivation of employment opportunities caused by the Commission's indiscriminate policy." *Id.* at 115–16.

173. *Wong* entailed devolution to a federal agency, while the devolution we are discussing delegates congressional policy-making authority to the states. That difference does not disable *Wong* from serving as precedent in cases involving devolution to the states. See discussion *infra* notes 174–181 and accompanying text.

174. *Id.* at 114 n.46.

175. See discussion *supra* notes 30–37 and accompanying text.

the discriminatory rule rather than “impose” it.¹⁷⁶ The only policy “consciously adopted” by Congress when enacting the devolution legislation we have been considering is the policy to defer to a state’s exercise of discretion. That is a federalism-based decision to forego any preemption claim should a state choose to exercise the discretion federal law provides. That policy judgment is not the “policy raising the constitutional question presented by [the challenged] rule.”¹⁷⁷ Congress’s decision to devolve some of its powers to the states and provide the states a defense against a preemption challenge may be the essential condition for the equal protection constitutional controversy to arise. But the fact remains that the rule that precipitates an equal protection challenge is one that the state promulgated, just as in *Wong* it was the rule of the Commission that precipitated the challenge.¹⁷⁸ The key point is that the challenged rule is not the result of any mandate from either the Congress or the President. Of course, *Wong* also states that, in limited circumstances, the Fifth Amendment’s Due Process Clause permits the judiciary to defer to representations of the overriding need to discriminate that are advanced by an agent of the Congress or the President.¹⁷⁹ In such cases, the judiciary may presume that the “political branches of Government . . . consciously adopted [a] policy” advancing an overriding national interest, but only when the policy-promulgating entity is one having “direct responsibility for fostering or protecting

176. *Id.* at 112. (concluding that “even though . . . an interpretation [of federal law] might permit the Commission to decide that citizenship should be required for all federal positions, it would remain true that the decision to impose the requirement was made by the Commission rather than the President”) (emphasis added).

177. *Id.* at 114 n.46.

178. Compare discussion *supra* notes 30–37 and accompanying text with discussion *supra* notes 157–166 and accompanying text.

179. See discussion *supra* notes 167–172 and accompanying text.

[the] interest [that] was the actual predicate for the rule.”¹⁸⁰ In the devolution cases arising under PRWORA, that policy-promulgating entity is a state or local government, but these entities have no “direct responsibility for fostering or protecting” the interests PRWORA seeks to advance: promoting immigrant self-sufficiency “a basic principle of United States immigration law,” and discouraging immigration motivated by a desire to avail the immigrant of public benefits.¹⁸¹ Like the Civil Service Commission, the states have no responsibility for foreign affairs,¹⁸² for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies.¹⁸³

Accordingly, *Wong*’s reasoning supports the conclusion that a state’s discriminatory welfare eligibility policies that are permitted, but not required, by PRWORA do not qualify for a deferential rational basis level of judicial review.¹⁸⁴

180. *Id.* at 103.

181. *See* 8 U.S.C. § 1601(1)–(2).

182. *See* *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (holding “intrusion by the State into the field of foreign affairs [unconstitutional because] the Constitution entrusts [regulation of foreign affairs] to the President and Congress”).

183. *See* *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (“[T]he power to regulate immigration is unquestionably exclusively a federal power.”). Indeed the predicate for the field preemption of state law with respect to regulating immigration arises from the exclusivity of federal power to regulate immigration and naturalization. *See* *Graham v. Richardson*, 403 U.S. 365, 380 (1971) (state alienage classifications “encroach[ing] upon federal power” preempted).

184. The Court’s decision in *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979) does not require a contrary result. There, the issue presented was whether partial assumption of criminal and civil jurisdiction in Indian lands by the State of Washington constituted a violation of equal protection and, specifically, what standard of judicial review was appropriate to decide that question. In *Yakima*, the Court acknowledged that “[i]t is settled that ‘the unique legal status of Indian tribes under federal law’ permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive [because] States do not enjoy this same unique relationship with Indians.” *Id.* at 500–01 (quoting *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974)). Nevertheless, because “Washington was legislating under explicit authority granted by Congress in the exercise of . . . federal [plenary] power [over Indian tribes],” the Court evaluated the equal protection challenge to Washington’s legislation by the same rational basis standard it would apply had the federal government itself promulgated the challenged rule.

There are two final points about *Wong* and PRWORA. First, in PRWORA Congress made a legislative finding that the goals of PRWORA, encouraging immigrant self-sufficiency and discouraging immigration to the United States that is motivated by the immigrant's desire to obtain public benefits,¹⁸⁵ are "compelling government interest[s]."¹⁸⁶ *Wong* contained no similar legislative or presidential findings regarding the importance of limiting federal employment to citizens. This raises the question whether PRWORA's legislative finding distinguishes PRWORA from *Wong* and provides the Court the requisite "legitimate basis" to defer to state alienage discrimination authorized by PRWORA. In other words, what if we were to hypothesize that in *Wong* the President or

Yakima is not inconsistent with *Wong*'s differential-deference principle. It does not support the proposition that Congress may shift the standard of review of state alienage discrimination from strict scrutiny to rational basis by legislatively authorizing states to engage in alienage discrimination. What makes state alienage discrimination "constitutionally offensive" and subject to strict judicial scrutiny is that aliens are a "discrete and insular minority" warranting "unique protection from the majoritarian political process." See discussion *supra* notes 8–11 and accompanying text. Alienage classifications, moreover, are the equivalent of racial classifications. See *Graham v. Richardson*, 403 U.S. 365, 372 (1971). By contrast, in *Yakima*, the Court concluded that classifications based on tribal status are not invidious and are not directed at a discrete and insular minority, making it "untenable" to "argu[e] that . . . classifications [based on tribal status] are 'suspect' . . ." *Id.* at 501. This is well-established. See *Mancari*, 417 U.S. at 553 n.24 (explaining that tribal status classifications are not racial classifications; they are "not directed towards a 'racial' group consisting of 'Indians.' . . . [They are] political rather than racial in nature."). The non-invidious nature of tribal status classifications distinguishes *Yakima* from *Wong*. What renders state classifications based on tribal status "constitutionally offensive" is not the invidiousness of such classifications (the classifications simply are not invidious) but rather the State's lack of any "unique relationship with Indians." *Yakima*, 439 U.S. at 500. The significance of this distinction was made plain in *Mancari* where the Court explained that "[a]s long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Mancari*, 417 U.S. at 554. Without congressional authorization, states can never meet that standard since states do not share "Congress' unique obligation toward the Indians." All *Yakima* holds is Congress may choose to share that unique obligation with the states and, when it does, the rational basis level of judicial review transfers. Nothing in *Yakima* remotely suggests that Congress may insulate the states from a judicial determination that state alienage discrimination is invidious and unconstitutional unless justified as necessary to advance a compelling state interest.

185. See 8 U.S.C. § 1601(1)–(2).

186. See *id.* § 1601(5)–(6).

the Congress had made a finding that a rule encouraging legal aliens to become naturalized citizens would advance a compelling governmental interest? Would that require a different outcome in *Wong* if the Civil Service Commission had represented that it had promulgated the citizenship requirement to encourage legal immigrants to become citizens? The answer is no, and, again, viewing *Wong* through the lens of separation of powers illuminates the reason. A congressional or presidential finding that some interest is compelling or overriding would give the court assurance that, if it deferred, the represented basis for the discriminatory rule would constitute a weighty governmental interest (because Congress had so decided). Yet, there remains the second concern that animated the Court's inability to defer to the Commission in *Wong*—that there also must be a “legitimate basis” to conclude that the represented reason was “consciously adopted”¹⁸⁷ and was in fact the “actual predicate for the rule.”¹⁸⁸ Nothing in Congress identifying some interest as compelling, either in *Wong* or in PRWORA, provides any assurance to the Court that the legislatively identified overriding interest was in fact the “actual predicate for the rule” that raises the constitutional challenge. What gives the Court *that* assurance is that the rule was mandated by either the Congress or the President. In both the *Wong* hypothetical and in PRWORA, that remains the missing piece.

Finally, could states acquire a rational basis standard of judicial review for their congressionally-authorize alienage discrimination if

187. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 113 n.46 (1976) (concluding that “in light of the consequences of the [citizenship] rule it would be appropriate to require a much more explicit directive from either the Congress or the President before accepting the conclusion that the political branches of Government . . . consciously adopt[ed] a policy raising the constitutional question presented by this rule”).

188. *Id.* at 103.

a court were to determine that another congressional goal of PRWORA, or some other federal devolution statute, is to permit each state the option to preserve its resources for its own citizens? The answer is no, as a close reading of *Wong* shows. The federal district court in *Wong* had accepted the Civil Service Commission's justification for the citizenship rule in that case on the ground that "the Executive may intend that the economic security of its citizens be served by the reservation of competitive civil service positions to them, rather than to aliens."¹⁸⁹ After the district court had decided *Wong*, but before the case reached the Supreme Court, the Court decided *Sugarman v. Dougal*.¹⁹⁰ In its *Sugarman* decision, the Court rejected New York's argument that "its special interest in the advancement of profit of its own citizens could justify confinement of the State's civil service to citizens of the United States."¹⁹¹ What New York meant by this rejected argument was that the state should be able to "restrict[] the resources of the state to the advancement and profit of the [citizens] of the state."¹⁹² In rejecting this justification, the Court in *Sugarman* explained that "[a] resident alien may reside lawfully in [the state] for a long period of time. He must pay taxes. And he is subject to service in this country's Armed Forces. The [special public interest] doctrine, rooted as it is in . . . the desirability of confining the use of public resources [to those who have contributed], has no applicability in this case."¹⁹³ In *Wong*, Justice Stevens discussed *Sugarman* and its rejection of the "special public interest" defense and opined that "our discussion of the

189. *Id.* at 94.

190. 413 U.S. 634 (1973).

191. *Id.* at 643–45.

192. *Id.* at 643–44 (quoting *People v. Crane*, 108 N.E. 427, 429, *aff'd*, 239 U.S. 195, 36 (1915)).

193. *Id.* at 645.

‘special public interest’ doctrine in [*Sugarman*] no doubt explains the petitioner’s failure to press this argument in this case [and thus] [w]e have no occasion . . . to decide when, if ever, that doctrine might justify federal legislation.”¹⁹⁴

This sidebar discussion in *Wong* of the Court’s previous rejection of the “special public interest” justification for alienage discrimination could prove very instructive in devolution cases should future federal legislation seek to justify devolution based on the interest of permitting each state the option to preserve its resources for its own citizens. *Sugarman* rejected this as being even a legitimate state interest, at least with respect to state discrimination against permanent resident aliens who contribute to American society.¹⁹⁵ Therefore even though this is an interest for which the states have a direct responsibility for fostering and protecting, it may not be used to justify a transformation of the standard of judicial review from strict scrutiny to rational basis.¹⁹⁶

194. *Wong*, 426 U.S. at 95, 104 n.24.

195. See *Sugarman*, 413 U.S. at 645 (holding that because permanent resident aliens “must pay taxes [and are] subject to service in this country’s Armed Forces, [the special public interest] doctrine, rooted as it is in . . . the desirability of confining the use of public resources [to those who have contributed] has no applicability”).

196. Nor, by extension, can Congress effect a scrutiny shift by stating that the goal of devolution legislation is permitting each state to maintain the fiscal integrity of its public benefit programs and declaring that this is a compelling interest. This is nothing but a repackaging of the state’s interest, rejected in *Sugarman*, of restricting state resources for the advancement and profit of state citizens. See *Memorial Hosp. V. Maricopa County*, 415 U.S. 250, 263–68 (1974) (holding that maintaining fiscal integrity of a public-benefit program is not a compelling state interest); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (“The saving of welfare costs cannot justify an otherwise invidious classification.”); see also *Ehrlich v. Perez*, 2006 WL 2882834, at *18 (Md. 2006) (holding that a constitutional challenge to a PRWORA-authorized state policy to deny benefits to lawful permanent resident aliens is likely to succeed and concluding that “preserving the fiscal integrity of a state benefit program” is insufficient justification for such discrimination).

VI

WRAPPING UP SOME LOOSE ENDS: A CASE FOR KEEPING WONG

To recapitulate, the argument advanced in this essay reduces to the application of four straightforward propositions. First, in devolution legislation Congress does not, because it cannot, authorize the states to violate the Constitution.¹⁹⁷ Second, nor can Congress bind the judiciary through legislative decrees that the prerequisites of strict judicial scrutiny are satisfied when states discriminate in ways federal devolution legislation authorizes. The separation of powers underpinnings of *City of Boerne v. Flores*¹⁹⁸ preclude such congressional dominance of the judicial function.¹⁹⁹ Third, the devolution issue, accordingly, is best understood as a separation of powers based normative question reserved for judicial branch determination: Should the judiciary exercise *Diaz*-type judicial restraint in constitutional controversies involving congressionally authorized, but not mandated, state policies that discriminate against aliens when Congress could have enacted those policies itself?²⁰⁰ Fourth, *Wong*'s due process-based differential-deference principle resolves the devolution issue by requiring that there be proper grounds for judicial deference of discriminatory policies, or as the Court puts it in *Wong*, a "legitimate basis for presuming that the [discriminatory] rule was actually intended to serve [an overriding national] interest."²⁰¹ Such a "legitimate basis" normally exists only when the decision to discriminate is mandated

197. See discussion *supra* notes 42, 98–99 and accompanying text.

198. 521 U.S. 507 (1997).

199. See discussion *supra* notes 116–130.

200. See discussion *supra* notes 131–154 and accompanying text.

201. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976). See discussion *supra* notes 155–181 and accompanying text.

either by Congress or the President.²⁰² Devolution legislation that permits states to adopt discriminatory immigration policies that Congress is permitted to adopt itself does not qualify for deference under *Wong's* differential-deference principle because a state governor or legislature, not Congress or the President, has mandated the challenged discriminatory policy.²⁰³

Before proceeding, it also may be beneficial to emphasize two things the above argument *does not* entail. First, nothing I have argued above depends on a resolution of the debate as to whether Congress may or may not delegate to the states a portion of its authority to set immigration policy.²⁰⁴ *Wong* simply teaches that assuming *arguendo* that Congress possesses devolution authority, and chooses to exercise it by granting states some discretion to set immigration policy, the resulting state legislation most likely will be subject to the strict judicial scrutiny normally accorded state alienage classifications.²⁰⁵ Second, it is important to distinguish *Wong's*

202. The sole exception is the unusual case where a delegee of Congress or the President has “direct responsibility for fostering or protecting [the overriding national] interest, . . . [that] was the actual predicate for the [federally-authorized and state-promulgated discriminatory immigration] rule.” *Id.* See discussion *supra* notes 177–180 and accompanying text.

203. See discussion *supra* note 181 and accompanying text.

204. Compare Wishnie, *supra* note 4, at 494 (“[T]he federal power to regulate immigration, a power not specifically enumerated in the Constitution but universally recognized for over a century, is among those that are exclusively national and incapable of devolution to the states.”) and Carrasco, *supra* note 76, at 631–38 (arguing that the Article I, Section 8, Clause 4 power “to establish a uniform rule for naturalization” precludes congressional delegation of discretion to the states to frame immigration policy because, by definition, United States immigration policy no longer would be “uniform”) with Chang, *supra* note 91, at 360 & n.18 (arguing that federal power to set immigration policy may be delegated to the states because first, it is not founded entirely on the Naturalization Clause and second, that immigration policy is, and has been for years, informed by “divergent state laws”). Focusing on *Wong* clarifies that the devolution issue is not whether federal immigration power may be delegated to the states but rather whether with that delegation Congress may transfer to the states the federal government’s immunization from strict judicial scrutiny.

205. If the resulting state legislation discriminates based on alienage, the normal rule is that the courts will apply a heightened judicial scrutiny to evaluate the legislation’s constitutionality. See discussion *supra* notes 7–11 and accompanying text. Of course, if the resulting state

separation of powers grounded and due process based differential-deference principle from cases denying governmental entities' power to act because federal legislation never authorized the challenged action in the first place.²⁰⁶ In *Wong*, the Court assumed that the Civil Service Commission possessed authority to promulgate the challenged citizenship rule.²⁰⁷ The rule was not struck down for lack of the Commission's authority to promulgate it, but rather because the Due Process Clause of the Fifth Amendment precluded judicial deference because neither the President nor the Congress had mandated it.²⁰⁸ In short, understanding *Wong* through the lens of separation of powers principles clarifies that the critical question in *Wong* is not whether an "agent of the National Government" seeking deference has been authorized by Congress to act but whether the agent devolution legislation delegates is an appropriate agent, that is, one whose judgments provide the Court a "legitimate basis" to defer.

legislation is even-handed to both aliens and citizens, then no heightened judicial scrutiny is warranted and *Wong's* due process principle is not implicated. See discussion *infra* note 228.

206. See, e.g., *Cnty. Television of S. Cal. v. Gottfried*, 459 U.S. 498 (1983) (holding that the Federal Rehabilitation Act creates no special obligation for the FCC to evaluate a public television station's service to the disabled community since the FCC is not a funding agency and has no responsibility for enforcing the Rehabilitation Act); *NAACP v. Fed. Power Comm'n.*, 425 U.S. 662, 669–70 (1976) (holding that the Federal Power Act delegated to the Federal Power Commission authority to consider evidence and make inquiries to determine whether a regulatee had incurred unnecessary costs because of racially discriminatory employment practices, but use of the words "public interest" in Act is not a broad license for the agency to promote the general public welfare by eradicating employment discrimination).

207. The Commission's delegated authority was so broad that the Commission possessed authority to retain, modify, or repeal the citizenship requirement "without further authorization from Congress or the President." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 113 (1976).

208. Moreover, deference to the Commission's judgment that the rule was needed to advance a compelling federal interest was not warranted because the Commission lacked the direct responsibility for fostering and protecting the interests the Commission advanced to justify the rule. See discussion *supra* notes 177–180 and accompanying text; Mark V. Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809, 817 (1983) (explaining that the Court did not invalidate the regulation in *Wong* because the Commission had exceeded its delegated authority, and concluding that otherwise *Wong* "would be an ordinary case in administrative law, a case about an agency that exceeded the bounds of its statutory authority").

The final point of inquiry needed to close this essay is assaying the continued viability of the Court's holding in *Wong*. One might ask whether *Wong's* thirty-year old, 5-4 reading of the Fifth Amendment Due Process Clause limitation on judicial deference is sensible, and should continue, when applied to Twenty-First Century federal authority to promulgate immigration policy. That is to say, should we keep *Wong*, knowing that most congressionally-authorized state alienage discrimination will be found unconstitutional,²⁰⁹ with the consequence that the courts will remand to Congress or the President to determine the immigration policy question that federal devolution legislation had authorized the states to decide?

On what grounds might one even think to question the continuing viability of the holding in *Wong*? Is it *Wong's* pedigree? *Wong* came to us somewhat circuitously. It and *Diaz* had been argued on January 13, 1975, but both cases were held over and reargued the next term.²¹⁰ Justice Douglas had suffered a debilitating stroke in Nassau, Bahamas on New Year's Eve, 1974 which left him "physically and mentally disabled."²¹¹ He did not return to the Court to hear oral arguments until March 24, 1975 and, on April 10th, returned to Walter Reed Hospital.²¹² He was in and out of the hospital in the Spring of 1975 and was a patient at the Rusk Institute

209. Courts will conclude that congressionally-authorized state alienage discrimination is unlawful because *Wong's* reasoning precludes the federal government's rational basis level of judicial review from transferring to the states, and the state discriminatory policies cannot meet the rigors of strict judicial scrutiny. See cases discussed *supra* notes 48, 50-53 (holding state alienage discrimination unconstitutional when strict judicial scrutiny is applied).

210. See *Wong*, 426 U.S. at 88; *Mathews v. Diaz*, 426 U.S. 67, 67 (1976) (captions showing that these cases were argued on January 13, 1975 and reargued on January 12, 1976).

211. Bob Woodward & Scott Armstrong, *THE BRETHERN* at 357, 367 (1979).

212. *Id.* at 361-62, 364, 367, 384-85.

in New York City as the 1974 Term closed.²¹³ Because the Justices increasingly feared that Justice Douglas was mentally incapacitated, and because they wanted to avoid a blitz of reversals should President Ford appoint a conservative to fill a vacancy that Justice Douglas's death or resignation would create, a consensus developed among the Justices that all 5-4 cases in which Justice Douglas was in the majority "would be treated as if they were 4-to-4 ties, and they would be put over for reargument the next term."²¹⁴ Justice Douglas resigned from the Court in November, 1975. Justice Stevens was confirmed as his replacement in December, 1975, and "[o]n Steven's first day on the bench for oral argument [January 12, 1976], the Court heard . . . *Hampton v. Mow Sun Wong* . . ."²¹⁵ "The conference split 4-to-4 [in *Wong*], along the same lines as it had the previous term [leaving] it up to Stevens"²¹⁶ who wrote the majority decision.²¹⁷ Five members of the Court comprised the majority in *Wong* but there was not a majority on the Court who agreed entirely with Justice Stevens' view of the case.²¹⁸

However uncertain one might consider *Wong's* inception, its core principle that the federal judiciary will not defer to just any agent of the national government was not novel and has been reaffirmed.

213. *Id.* at 402.

214. *Id.* at 367.

215. *Id.* at 402.

216. *Id.* On the other hand, *Mathews v. Diaz*, 426 U.S. 67 (1976), was unanimous.

217. Justice Stevens was also assigned to write the decision in *Diaz*.

218. Justice Stevens believed that the Civil Service Commission could not constitutionally promulgate the rule barring aliens from federal employment but the President or the Congress could. There was not a majority on the Court who agreed with him. This is evidenced by the fact that Justices Brennan and Marshall joined Justice Stevens's opinion in *Wong* but Justice Brennan filed a concurring opinion, joined by Justice Marshall, emphasizing his understanding that the Court had "reserved the equal protection questions that would be raised by congressional or [p]residential enactment of a bar on employment of aliens by the Federal Government." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 117 (1976) (Brennan, J., concurring).

Prior to *Wong*, in *Greene v. McElroy*,²¹⁹ the Court had adopted a rule quite similar to that developed more fully in *Wong*. In *McElroy*, the Defense Department had withdrawn a security clearance by adopting procedures that did not conform to traditional notions of due process.²²⁰ The Court refused to defer to the agency's argument that the procedures employed were needed to preserve national security. The Court held the following:

before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use.²²¹

Since *Wong*, the Court has continued to insist that justifications requiring overriding governmental interests be advanced by an appropriate governmental entity—Congress or the President. Justice Powell's decision in *Regents of the University of California v. Bakke*²²² is, perhaps, the best known subsequent reliance on *Wong*. Justice Powell cited *Wong* in support in his majority opinion when arguing that race-conscious preferential classifications would be upheld to remedy past discrimination when the finding of such past discrimination had been made, for example, by "particular administrative bodies [that] have been charged with monitoring various activities in order to detect such violations and formulate appropriate remedies."²²³ Citing *Wong* again, Justice Powell's *Bakke*

219. 360 U.S. 474 (1959).

220. *Id.* at 507.

221. *Id.*

222. 438 U.S. 265 (1978).

223. *Id.* at 302 n.41.

decision rejected the affirmative action plan of the State Regents, in part, because the Regents, rather than the legislature, had adopted it. As Justice Powell explained, the Regents lacked the “capability” to make the necessary findings and adopt the policy: doing so is not their “broad mission” and the Regents had not been “mandate[d]” to do so by the state legislature.²²⁴

In *Fullilove v. Klutznick*,²²⁵ a plurality of the Court upheld a race-conscious contract-set-aside program in part because Congress had mandated it. Justice Powell, in a concurring opinion, again relied on *Wong’s* due-process-based differential-deference principle for determining whether judicial deference is warranted, this time finding deference appropriate because Congress had determined the need for the set-aside program to ameliorate the disabling effects of identified discrimination. Citing *Wong*, Justice Powell stated that “the legitimate interest in creating a race-conscious remedy is not compelling unless an *appropriate governmental authority* has found that [past discrimination] has occurred.”²²⁶

These cases confirm that *Wong’s* principle is not a one-time ticket “good for this day and train only.”²²⁷ They show the principle predated *Wong* and extends to state-initiated, as well as federally-initiated, discrimination. Nor is the principle limited only to discriminatory immigration policy. *Wong* is solidly grounded constitutional law. Its differential-deference principle applies

224. *Id.* at 309 (finding that the Board of Regents was in “no position to make [the requisite] findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality [, and] isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria”).

225. 448 U.S. 448 (1980).

226. *Id.* at 498 (Powell J., concurring) (emphasis added).

227. *Smith v. Allwright*, 321 U. S. 649, 669 (1944) (Roberts, J., dissenting).

whenever unique circumstances call upon the Court, for institutional reasons, to depart from heightened judicial scrutiny and defer to the judgments made by other decision-makers that there exists a compelling need to discriminate and the challenged legislation in fact was enacted to promote that compelling need.²²⁸

But imagine for a moment that there were no *Wong*. Why, if at all, would we want a constitutional law principle holding that when a rule depends for its constitutional justification upon an “overriding national interest,” due process requires that there be a “legitimate basis for presuming that the rule was actually intended to serve that [overriding] interest?”²²⁹ Similarly, why, if at all, would we want a rule, such as that argued by Justice Powell in *Fullilove*, that the Court will not find a “legitimate basis” to presume that an asserted interest is genuine and compelling, unless the governmental entity making the assertion possesses “appropriate governmental authority.”²³⁰ In short, can a case be made for *Wong* independent of the fact that its

228. Three years after *Wong* the Court decided *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), another majority opinion written by Justice Stevens. *Beazer* shows that *Wong*’s due process-based principle limiting judicial review applies only to equal protection cases involving credible claims of impermissible bias against a special class (suspect classifications). In *Beazer*, the Court upheld a general rule barring employment of those using narcotic drugs, including methadone, reasoning that the prohibition was a rule of general application and did not single out methadone users for special discrimination. *Id.* at 588. Rational basis review thus was the normal judicial scrutiny given to such legislation. Accordingly, the dissent, citing *Wong*, achieved no traction arguing that the challenged rule should be struck down because “it was not the result of a reasoned policy decision” and the Transit Authority was not “directly accountable to the public” and “not the type of official body that normally makes legislative judgments of fact such as those relied upon by the majority today, and [petitioners] are by nature more concerned with business efficiency than with other public policies for which they have no direct responsibility.” *Id.* at 609 n.15 (White, J., dissenting). These things may be true but they are inapposite outside the context of discrimination normally warranting strict judicial scrutiny.

229. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976).

230. *Fullilove*, 448 U.S. at 498.

due process-based limitation on judicial deference has been part of our constitutional fabric for over thirty years?²³¹

Initially, it is worth noting that the result in *Wong* makes sense on its facts. It is sensible for the judiciary to interpret the Fifth Amendment Due Process Clause to permit judicial deference to a discriminatory immigration rule only when the rule is mandated by the heads of the co-equal branches of the federal government—the Congress and the President. After all, the reason the Court is deferring in the first place is that immigration policy is beyond the competence of courts to scrutinize because it involves a political question²³² involving foreign affairs.²³³ Given this rationale for deferring, it makes no sense for the Court to defer to a federal agency

231. Of course, as with any Supreme Court majority opinion, *Wong* has the claim of stare decisis, a claim that I do not mean to discount. Stare decisis is an important influence in constitutional law. The restraint it imposes on the Court enhances the public perception of the Court's integrity, and concomitantly, its authority. See *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986) (reasoning that stare decisis “permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact”); Lewis F. Powell, *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990) (stating that “the elimination of constitutional stare decisis would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is [, thus] undermin[ing] the rule of law”). Reliance on precedent gives judicial decisions predictability. It provides neutral principles around which to render decisions. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES POLITICS AND FUNDAMENTAL LAW 3, 27 (1961) (stating that “[a] principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved”). Also, adherence to stare decisis helps reduce the “counter-majoritarian difficulty” of judicial review by requiring explicit justifications for departures from precedent, thus “allaying suspicion that the Justices base their decisions upon personal preferences.” Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1350 (1990).

232. See *Wong*, 426 U.S. at 101–02 n.21 (concluding that “the power over aliens is of a political character and therefore subject only to narrow judicial review”).

233. See discussion *supra* notes 13–18 and accompanying text; see also *Baker v. Carr*, 369 U.S. 186, 211 (1962) (explaining that “[n]ot only does resolution of [foreign relations] issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views”); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (stating that “[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative . . . Departments”).

whose broad responsibilities are unrelated to the formation and execution of foreign affairs or immigration policy.²³⁴ By extension, it makes no sense to expect the Court to defer when a state legislature or a governor, for example, adopts an immigration policy that discriminates against aliens, even if such a policy is permitted by federal law. For here also, the Court lacks any legitimate basis to presume that the “actual predicate” for the rule is the interest asserted as justifying the legislation or to presume that a state government has the requisite institutional competence (certainly none that exceeds the Court’s own) to provide the Court assurance that the asserted predicate for the rule constitutes an “overriding” governmental interest.

234. Discussing *Wong*, Lawrence Sager has explained that the Court was presented there with two justifications for the Commission’s policy of alien exclusion: The policy provided the President a “token” for foreign affairs bargaining, and it encouraged legal immigrants to become citizens. Lawrence G. Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enter., Inc.*, 91 HARV. L. REV. 1373, 1417 (1978). Sager explains his rationale:

These interests can be viewed as beyond accurate judicial assessment for two reasons. First, consideration of their importance involves technical judgments informed by a range of material to which the judiciary does not have full access; and second, the interests, though potentially quite weighty, are discretionary in the sense that they depend for their importance on prior decisions of policy or strategy made by the President or Congress. These factors combine to result in a judiciary largely dependent upon the judgment of either the President or Congress as to whether there are ‘overriding national interests’ which justify the exclusion policy; thus, when the judiciary is confronted with the enactment of such an exclusion by either of these two entities, it will defer broadly to the judgment thus manifested.

In contrast, when a body—like the Civil Service Commission in *Mow Sun Wong*—which lacks the information, expertise, and discretion as to policy and strategy enacts such a rule, [if] the courts . . . sustain the enactment, thus endorsing a transgression of constitutional principles [, they do so] without any assurance that it is justified by weighty national interests

Id. Surely the same can be said of judgments made by state governors and legislatures. These entities also “lack[] the information, expertise, and discretion as to policy and strategy [needed for the Court to have] assurance that [the policy] is justified by weighty national interests.” *Id.* The appropriate course in each case is the one the Court chose in *Wong*: “in effect . . . remand to the decision-making body able to make appropriate policy judgments for an initial assessment of the validity of the enactment.” *Id.*

Not only does *Wong's* differential-deference principle make logical and practical sense, it also promotes important constitutional values. When it is applied to preclude states from claiming a rational basis standard of judicial review for evaluating the constitutionality of congressionally-authorized state alienage discrimination, *Wong's* principle has two primary effects: 1) states normally are banned from adopting the challenged discriminatory policy and 2) the courts remand to the Congress or the President the policy question states are precluded from deciding. Each of these consequences is salutary.

First, adhering to strict judicial scrutiny of state alienage discrimination, even when congressionally authorized (in effect banning most of that discrimination), advances the “antidiscrimination and anticaste principles that are at the heart of our Constitution and that long have protected noncitizens at the subfederal level,” as Wishnie has argued.²³⁵ The default in our constitutional system, after all, is equality for all persons lawfully in this Country.²³⁶ Discrimination is the aberrant condition justified only by overriding governmental exigencies.²³⁷ *Wong* serves to

235. Wishnie, *supra* note 4, at 553. Wishnie posits that the Constitution bans all delegation of federal immigration authority as a means of protecting this “antidiscrimination and anticaste principle.” See discussion *supra* notes 90–94 and accompanying text. My argument assumes for sake of argument that this is incorrect, that the federal government may devolve to the states authority to set immigration policy but if the immigration policies states thereby adopt discriminate against aliens, the discrimination will be subject to strict judicial scrutiny, not rational basis review. See discussion *supra* notes 156–181 and accompanying text.

236. See *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948) (“The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide ‘in any state’ on an equality of legal privileges with all citizens under non-discriminatory laws.”).

237. It is a mistake to read *Diaz* and *Wong* as holding that anything less than an overriding national interest can justify state or federal alienage discrimination. It is true that *Diaz* requires only that federal officials demonstrate a rational basis to advance some legitimate governmental interest when federal alienage discrimination is challenged. That does not mean, however, that the federal government may rely on anything less than an overriding national interest to satisfy the Constitution’s equality norms. See discussion *supra* notes 137–154 and accompanying text for a discussion of the distinction between what the Constitution requires and what a court, given its

preserve the vitality of this equality principle. Without *Wong* and its effect of barring states from claiming a rational basis level of judicial review of congressionally-authorized alienage discrimination, courts would be required to defer not just to the political judgments of the Congress and the President that alienage discrimination is necessary, but also would need to defer to those same judgments made by state governors and legislatures. Soon *Diaz's* narrow exception from the default of equality could overwhelm the equality norm as more devolution legislation swelled the demand for judicial deference to state alienage discrimination. In that scenario, it is not difficult to imagine alienage discrimination becoming the default and equality the exception.

With a proliferation of judicially-permitted state alienage discrimination authorized by federal law, some state officials easily could acquire a taste for alienage discrimination. Public sentiment could become accustomed to it—indeed approve of it and desire it. Then Congress inevitably would be under increased pressure to devolve to the states increased authority to adopt discriminatory immigration policies. Courts should not indulge themselves in thinking they would be held harmless if judicial deferral to congressionally-authorized state alienage discrimination became widespread. In a system of “rule of law” there is no justification for permitting unlawfulness where a court is institutionally competent to redress the violation. The citizenry may accept that courts lack the institutional capability to scrutinize strictly congressional or

institutional restraints, will enforce. *Wong* erases any doubt that the federal government may not discriminate against aliens absent an overriding national interest. Recall that in *Wong* the Court states that “[w]hen 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 [*overriding*] interest.” *Wong*, 426 U.S. at 103 (emphasis added).

presidential judgments regarding immigration policy. As *Diaz* concludes, these judgments are essentially political since they are so entwined with policies related to foreign affairs.²³⁸ But courts do possess the institutional competence to continue to hold states to a standard of strict judicial scrutiny when they adopt policies that discriminate against aliens. Courts have been exercising that competence for over half a century.²³⁹ Plus, the logic of *Wong* is straightforward and compelling: entities such as the Civil Service Commission (and, by extension, the states) lack the institutional capacity to provide sufficient assurance to the Court (and to us) that their discriminatory policies in fact are predicated upon the advancement of overriding governmental interests. Given the logic of *Wong* and the long history of courts strictly scrutinizing state alienage discrimination, courts would be hard-pressed to explain why, now, they lack the institutional competence to continue to protect the Constitution's equality norm simply because Congress has chosen to acquiesce in the alienage discrimination which states legislate.²⁴⁰

238. See discussion *supra* notes 13–18 and accompanying text.

239. See *Takahashi*, 334 U.S. at 410 and discussion *supra* notes 48, 51–53 and accompanying text.

240. Nor should it be any consolation that courts may be saved from public contempt by the rising acceptance of alienage discrimination that the absence of judicial involvement will bring. Law conditions values, and permitting the states to discriminate against aliens inevitably will send the signal that such discrimination is consistent with the Constitution's equality norms. Lawrence Sager reminds us that "our tendency . . . [is] to equate the existence of a constitutional norm with the possibility of its enforcement against an offending official." Lawrence Sager, *supra* note 137, at 1221. A failure to apply strict judicial scrutiny of congressionally-authorized state alienage discrimination is particularly worrisome when one considers Professor H.L.A. Hart's observation that one of the essential conditions for the existence of a legal system is that the legal system's rules of behavior must be "accepted as common public standards of official behavior by its officials." H.L.A. HART, *THE CONCEPT OF LAW* 113 (1961). Not only will the incidence of alienage discrimination rise with the easing of judicial scrutiny of official alienage discrimination, but one can expect some skewing of official and public views in the direction of accepting that this discrimination is consonant with the Constitution's equality norms.

Not only does *Wong* promise benefits that flow from a continuation of the ban on state alienage discrimination, but benefits accrue also from the remand back to the political branches of the federal government to take a more studied, and perhaps more sensitive, look at “policy judgments that threaten important constitutional values.”²⁴¹ This includes those judgments animating governmental policies that discriminate against aliens. Dan Coenen’s exhaustive study makes a convincing case that *Wong* represents merely one of a myriad of “process-centered rules” the Court has developed over the years to encourage “the policymaker’s use of quality-enhancing *processes* and *structures* . . . [designed to] safeguard[] substantive constitutional values”²⁴² What is gained by rules, which “pay[] attention to the decisionmaker rather than to the decision,”²⁴³ is the promise of greater engagement by politically responsible rule-promulgating officials and more deliberation and care in crafting rules that implicate sensitive constitutional values. Plus, a rule such as *Wong*’s differential-deference rule helps maintain a “proper—and properly limited role—of the courts in a democratic society,”²⁴⁴ because Congress always has the final say: following remand, Congress may reinstate any state-enacted discrimination against aliens that the Court has rejected, assuming there is a rational basis for Congress’s action. *Wong*, in short invites a “collaboration” between the courts and Congress in the elaboration of policies that

241. Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1582 (2001).

242. *Id.* at 1583.

243. Tushnet, *supra* note 9, at 816.

244. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

discriminate against aliens in the hope that this will improve the quality of resulting policies.²⁴⁵

Dan Coenen calls *Wong*-type rules “proper-decision-maker rules.”²⁴⁶ They evaluate the “differing capacities of different government decision makers[,] . . . tak[e] account of [their] structural strengths or weaknesses . . . [and] channel important decisions from one set of political-branch policymakers to another”²⁴⁷ For example, the *Wong* case itself might properly be understood as a judgment by the Court that the President, to whom the challenged rule in that case was remanded, will be more reflective, will more likely add a measure of care, deliberation, and considered judgment to the policymaking process, or will more likely provide a systematic, and thoughtful, treatment of the subject.²⁴⁸ One plausibly can predict that these same benefits will flow should *Wong* be applied to bar devolution to the states of Congress’s authority to adopt discriminatory policies harming aliens.²⁴⁹

245. See Coenen, *supra* note 242, at 1589 (suggesting that viewing elaboration of constitutional values as a shared process between the judicial and nonjudicial authorities assumes that constitutional rights are not fixed and unbending but rather “operate as embodiments of enduring values that the Court must balance against competing interests said to justify what the government has done”); see also Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2795 (2003) (pointing out that one advantage of a “provisional review” technique such as that employed in *Wong* is that it “allows the courts to bring to the legislature’s attention constitutional values that it may have overlooked or given less value than the courts think it should have”).

246. Coenen, *supra* note 242, at 1773.

247. *Id.* at 1775–76.

248. See *id.* at 1727–29; see also Sager, *supra* note 137, at 1414 (elaborating the point that *Wong* postulates a view of due process requiring “that some legislative actions be undertaken only by a governmental entity which is so structured and so charged as to make possible a reflective determination that the action contemplated is fair, reasonable, and not at odds with specific prohibitions in the Constitution”).

249. Or, courts may wish to take the congressionally-authorized immigration policymaking function away from state or local governments because they “lack . . . interest, information, or expertise [and are] unlikely to act rationally, and hence are not competent lawmakers.” Jonathan C. Carlson & Alan D. Smith, Comment, *The Emerging Constitutional Jurisprudence of Justice Stevens*, 46 U. CHI. L. REV. 155, 230 (1978).

Cass Sunstein has focused more on the “democracy-forcing” function served by *Wong*²⁵⁰ than on its potential to enhance the quality of resulting decisions. He argues that *Wong*’s differential-deference principle “was expressly founded on the idea that publicly accountable bodies should make the contested decision that was challenged in the case.”²⁵¹ The reasoning in *Bakke*²⁵² and *Fullilove*²⁵³ support that view. They show how *Wong* can serve the important function of channeling policymaking to “broadly representative and politically accountable officials who operate in conditions of high visibility.”²⁵⁴ The gains from this are enhanced political accountability and protection from interest group influence by moving decisions away from faction-dominated state entities to a presumably more temperate congressional legislative process.²⁵⁵

250. Cass R. Sunstein, *The Supreme Court, 1995 Term-Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 48 (1996).

251. *Id.*; see also Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 317 (2000) (concluding that *Wong* is one of the Constitution’s “nondelegation canons [that] represent a salutary kind of democracy-forcing minimalism, designed to ensure that certain choices are made by an institution with a superior democratic pedigree . . . [and that] protect[s] individual rights, and other important interests . . . [by requiring that i]n certain cases, Congress must decide the key questions on its own”).

252. See generally *Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265 (1978).

253. See generally *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

254. Coenen, *supra* note 242, at 1778–79.

255. Justice Scalia, in his concurring opinion in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 522 (1989) (Scalia, J., concurring), advanced a convincing argument that “[a] sound distinction between federal and state (or local) action based on race rests . . . upon social reality and governmental theory.” Justice Scalia’s reasoning applies equally to alienage discrimination. Justice Scalia argued that Congress possesses an institutional competence to legislate discriminatory outcomes that is not possessed by state and local governments. He thought it problematic, even at the national level, that Congress would act with the dispassion and objectivity needed to legislate in a race-conscious way with “the single objective of eliminating the effects of past or present discrimination.” *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 527 (1980) (Stewart, J., with whom Rehnquist, J., joined, dissenting)). But at the local level, this dispassion “is substantially less likely to exist [because invidious discrimination] has historically been a struggle by the national society against oppression in the individual States.” *Id.* (Scalia, J., concurring). Justice Scalia reasoned as follows:

Moreover, moving the policymaking forum from the local to the national level decreases the likelihood that discriminatory immigration policies will reflect parochial views that opt for short-term benefits for state citizens and concomitant burdens for non-citizens who are unrepresented in the legislature.²⁵⁶ Plus, the discriminatory policies harming aliens that do emerge have the

What the record shows, . . . is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history. See G. Wood, *The Creation of the American Republic, 1776–1787*, pp. 499–506 (1969). As James Madison observed in support of the proposed Constitution's enhancement of national powers:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.

The Federalist No. 10, pp. 82–84 (C. Rossiter ed. 1961).

Id. at 523 (Scalia, J., concurring). The greater potential for discrimination at the state and local levels of government argues strongly for the result in *Wong*, which conditions judicial deference on clear directions from either Congress or the President mandating a discriminatory rule.

256. Gerald Neuman has advanced several reasons why state and local governments, as opposed to federal, have a greater propensity to oppress aliens. Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1436–37 (1995). These include the socio-economic reality that immigrants are not evenly distributed throughout the United States, resulting in “localized anti-alien movements” and “racial or ethnic conflict.” *Id.* at 1436. Moreover, state and local alienage classifications easily can hide ethnic animosity given the “susceptibility of alienage labels to provide a code in which ethnically specific appeals can be couched.” *Id.* at 1452. Neuman argues that, by contrast, “[l]ocal anti-foreign movements may have difficulty enlisting the national government in their crusades, in part because emotions are not running so high . . . and in part because aliens have some virtual representation in Washington by means of the foreign affairs establishment, which knows that the United States will have to answer in the international community for actions taken at home.” *Id.* at 1436–37. Finally, Neuman argues that “[t]he constitutional division of authority between the state and federal governments puts aliens at risk” from state, but not federal, discrimination because “States lack control over the entry of aliens, and this sometimes leads them to channel their frustration and resentment about unwelcome federal policies into hostility toward the aliens who are admitted.” *Id.* at 1437.

imprimatur of approval from highly visible, broad-based democratic institutions, deploying deliberative legislative techniques. This adds legitimacy and greater public acceptance to the eventual policy position that emerges. The judiciary benefits also from a more reflective, deliberative lawmaking process. The remand to Congress or the President to make the immigration policy choice provides the judiciary a measure of assurance that its deference will be limited to more nuanced immigration policies that protect overriding national interests while not unduly damaging the Constitution's equality norms. With such assurance, courts can be expected to be more willing to defer to the judgments of the political branches of the federal government, a result that comports with "the basic constitutional commitment to democratic self-government."²⁵⁷

If keeping *Wong* provides even some of the benefits potentially available from continuing the ban on state alienage discrimination and remanding the policy choices to a deliberative democratic process at the national level, and if keeping *Wong* results in encouraging greater dialogue and reflection, we can expect a net increase in the moderation we exhibit to legal immigrants as we collectively struggle to accommodate the competing legitimate interests that arise in crafting an intelligent immigration policy. That alone makes a strong case for keeping *Wong*.

257. Coenen, *supra* note 242, at 1843.