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Abstract

This Comment argues that the Ninth Circuit's apparently heightened review in National Center was appropriate. Part I sets forth the applicable standards of review under equal protection analysis for state and federal policies affecting aliens. Part II analyzes the statutory background and the INS regulation that sparked the conflict in National Center, and outlines the case's procedural history and holding. Part III explains that the court's analysis exceeded the traditional standard of review applied to immigration regulations, and argues that the standard used by the court is analogous to the equal protection intermediate level of review. This Comment concludes by urging the federal judiciary to apply heightened scrutiny to federal policies that classify on the basis of alienage when important interests are at stake and explicit foreign policy considerations are absent.

COMMENT

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC. v. IMMIGRATION AND NATURALIZATION SERVICE: TOWARD HEIGHTENED REVIEW OF FEDERAL IMMIGRATION POLICY

INTRODUCTION

Traditionally, the U.S. judiciary has shown great deference in reviewing federal immigration policies.[1] Federal policies affecting aliens receive minimal judicial scrutiny, while state policies may be subject to intensive review.[2] Until recently, federal courts have been willing to review federal policies affecting aliens only under the most deferential standard of review, despite the critical interests that may be at stake.[3]

One federal court decision invalidating a federal regulation concerning aliens is *National Center for Immigrants' Rights,*

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1. *See* INS v. Chadha, 462 U.S. 919, 940 (1983) (holding that Congress's plenary power over immigration "is not open to question"); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (stressing that immigration policy is "largely immune from judicial inquiry"); Lees v. United States, 150 U.S. 476, 480 (1893) (stating that congressional reasons for exclusion of certain groups of aliens are "not open to challenge in the courts"); *see also* Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Ludd, *Administrative Discretion and the Immigration and Naturalization Service: To Review or Not to Review?*, 8 T. MARSHALL L.J. 65 (1983); Santana, *The Proverbial Catch-22: The Unconstitutionality of Section Five of the Immigration Marriage Fraud Amendments of 1986*, 25 CAL. W.L. REV. 1 (1988-89); Saunders, *Agency Interpretations and Judicial Review: A Search for Limitations on the Controlling Effect Given Agency Statutory Constructions*, 30 ARIZ. L. REV. 769 (1988).

2. *See* Mathews v. Diaz, 426 U.S. 67, 81-82 (1976) (stressing "narrow standard of review" for federal immigration policies); *accord* Fiallo v. Bell, 430 U.S. 787, 792 (1977) (asserting "limited scope of judicial inquiry" within realm of immigration); Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976) (requiring only "legitimate basis" as normal review of immigration legislation); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893). *But see* In re Griffiths, 413 U.S. 717, 721 (1973) (applying close judicial scrutiny to strike down state requirement of citizenship for admission to bar); Graham v. Richardson, 403 U.S. 365, 372 (1971) (applying close judicial scrutiny to void state statute that denied welfare benefits to aliens who had not lived in state for specified period).

3. *See Fiallo*, 430 U.S. at 794 (applying minimal review to immigration statute that implicated "fundamental constitutional interest . . . in a familial relationship"); Anetekhai v. INS, 876 F.2d 1218 (5th Cir. 1989) (utilizing deferential standard of review to uphold federal statute interfering with alien's fundamental right to marry).

Inc. v. Immigration and Naturalization Service ("*National Center*").[4] In *National Center*, plaintiffs challenged a U.S. Immigration and Naturalization Service ("INS") regulation that imposed a mandatory no-work rider on all release bonds for aliens awaiting deportation hearings.[5] The U.S. Court of Appeals for the Ninth Circuit invalidated the regulation, holding that it was beyond the U.S. Attorney General's statutory authority.[6] Although the court's review was statutory, the court appears to have applied a standard of review analogous to the intermediate standard of review used in equal protection analysis.[7] The Ninth Circuit in *National Center* thus appears to have sanctioned a standard of review less deferential than that traditionally applied to federal policies affecting aliens.[8]

This Comment argues that the Ninth Circuit's apparently heightened review in *National Center* was appropriate. Part I sets forth the applicable standards of review under equal pro-

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4. 913 F.2d 1350 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991).

5. *Id.* at 1351-52. In 1983, the Immigration and Naturalization Service (the "INS") amended its regulation entitled "Powers and Duties of Service Officers: Surety Bonds" (the "Regulation"). *See* 8 C.F.R. § 103.6 (a)(2)(ii) & (iii) (1991). The amended Regulation provided that "[a] condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding or bond posted for the release of an alien in exclusion proceedings, unless the District Director determines that employment is appropriate." *Id.* § 103.6(a)(2)(ii).

6. *National Center*, 913 F.2d at 1358. The U.S. Court of Appeals for the Ninth Circuit found that the regulation was invalid because it imposed a mandatory or "blanket" condition on all release bonds and failed to provide for case-by-case determinations before imposing the release condition. *Id.* at 1364 & 1374. The Ninth Circuit described a mandatory condition as one that is "applied to individuals in a great variety of situations" without consideration of individual factors. *Id.* at 1357-58; *see infra* notes 103-42 and accompanying text (discussing court's invalidation of regulation).

The Reorganization Act of 1940 established the INS as a federal agency within the U.S. Department of Justice. *See* Reorganization Plan No. V of 1940, 8 U.S.C. § 1551 (1988). The U.S. Attorney General, as head of the Department of Justice, is also responsible for the administration and enforcement of the immigration laws. *See* 28 U.S.C. § 503 (1988) (setting forth Attorney General's role as head of Justice Department); 8 U.S.C. § 1103(a) (1988) (setting forth Attorney General's responsibility for administration and enforcement of immigration laws). The Attorney General delegates authority to the Commissioner of the INS, who, in turn, acts as the head of the INS. *See* 8 U.S.C. § 1103(b) (1988).

7. *National Center*, 913 F.2d at 1353-74. *See infra* notes 169-86 and accompanying text (discussing similarities between court's statutory review in *National Center* and intermediate level of review within equal protection analysis).

8. *See infra* notes 149-68 and accompanying text (comparing traditional standard of review to standard utilized in *National Center*).

tection analysis for state and federal policies affecting aliens. Part II analyzes the statutory background and the INS regulation that sparked the conflict in *National Center*, and outlines the case's procedural history and holding. Part III explains that the court's analysis exceeded the traditional standard of review applied to immigration regulations, and argues that the standard used by the court is analogous to the equal protection intermediate level of review. This Comment concludes by urging the federal judiciary to apply heightened scrutiny to federal policies that classify on the basis of alienage when important interests are at stake and explicit foreign policy considerations are absent.

I. *EQUAL PROTECTION RIGHTS OF ALIENS*

Aliens within the United States are considered "persons" under the U.S. Constitution and thus merit the equal protection of the laws.[9] Under equal protection analysis, policies that affect aliens receive differing levels of judicial scrutiny.[10] If a policy is promulgated under state law, courts review the policy under strict scrutiny.[11] If the federal government promulgated the policy, however, courts usually exercise great deference, reviewing the policy under rational basis review alone.[12]

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9. *See* Plyler v. Doe, 457 U.S. 202, 210 (1982) (asserting that aliens are within jurisdiction of United States and entitled to equal protection of laws); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (holding that fifth and fourteenth amendment protections extend to aliens within United States); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that fourteenth amendment protections extend not only to citizens, but to all persons within United States).

10. *See* 2 R. ROTUNDA, J. NOWAK & N. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.12(a), at 478-81 (1986) (explaining status of alienage classification under equal protection analysis).

11. *Id.*; *see* Graham v. Richardson, 403 U.S. 365 (1971) (applying strict scrutiny to state statute that denied welfare benefits to aliens on basis of residency requirement). The Supreme Court has allowed one exception to the general rule that alienage classifications be subject to strict scrutiny. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 438-40 (1982). Under the "political function exception", the Supreme Court has explained that "some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from these functions of all persons who have not become part of the process of self-government." Ambach v. Norwick, 441 U.S. 68, 73-74 (1979) (applying rational basis standard to New York statute that blocked aliens from certification as public school teachers); *see also Cabell*, 454 U.S. at 438-40 (upholding California statute that barred aliens from assuming positions as probation officers); Foley v. Connelie, 435 U.S. 291, 295-97 (1978) (upholding New York statute that prohibited aliens from joining state police force).

12. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976) (asserting that

A. *Fourteenth Amendment Equal Protection*

The fourteenth amendment to the U.S. Constitution requires that no state "deny to any person within its jurisdiction the equal protection of the laws."[13] It prohibits state or local governments from burdening certain classes of individuals and from restricting certain rights without compelling reason.[14] Furthermore, it requires states to extend similar treatment to persons who are similarly situated and to differentiate between persons who are not similarly situated.[15]

Three standards of review are available under equal protection analysis.[16] The basic and most deferential standard is "rational basis" review.[17] Under rational basis review, the court must uphold any regulation that meets some legitimate legislative purpose.[18] The court may thus uphold a regulation if any conceivably rational set of facts can justify it.[19]

The least deferential standard of review, on the other hand, is "strict scrutiny." Courts apply strict scrutiny when the government establishes "suspect" classifications.[20] A suspect

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"legitimate purpose" is sufficient basis to uphold federal immigration policy); *Mathews*, 426 U.S. at 81-82 (emphasizing "narrow standard of review" for federal immigration policy).

13. U.S. CONST. amend. XIV, § 1.

14. *See* 2 R. ROTUNDA, J. NOWAK & N. YOUNG, *supra* note 10, § 18.2, at 317.

15. *Id.* § 18.2, at 318. Scholars define equal protection as the guarantee that "similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same." *Id. See generally* Note, *Equal Protection and Due Process: Contrasting Methods of Review under Fourteenth Amendment Doctrine*, 14 HARV. C.R.-C.L. L. REV. 529 (1979).

16. *See* 2 R. ROTUNDA, J. NOWAK & N. YOUNG, *supra* note 10, § 18.3, at 324-28. These standards of review are rational basis, intermediate, and strict scrutiny. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (utilizing strict scrutiny); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (demonstrating analysis under intermediate review); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (applying rational basis review).

17. *See* Vance v. Bradley, 440 U.S. 93, 97 (1979) (stressing that unless legislature has acted irrationally, judicial intervention is unwarranted under rational basis review); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (refusing under rational basis review to analyze legislative rationale behind statute). Courts generally assume that rational basis will be the applicable standard of review. *See* Craig v. Boren, 429 U.S. 190, 220-21 (1976) (Rehnquist, J., dissenting) (referring to rational basis as "norm" in equal protection review).

18. *See Vance*, 440 U.S. at 97; *Williamson*, 348 U.S. at 487-88.

19. *See* McGowan v. Maryland, 366 U.S. 420, 426 (1961) (upholding state law that prohibited certain activities on Sundays on ground that law rationally related to local custom).

20. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

classification is one that targets "discrete and insular" minorities for particular treatment.[21] These minorities have faced considerable discrimination in the past, or may currently have limited access to the legislative process.[22] Courts also apply strict scrutiny when legislation hinders the exercise of a right so fundamental that it is considered "implicit in the concept of ordered liberty."[23] Under strict scrutiny, the court can uphold only those regulations that are necessary to meet a compelling state interest.[24] The court may not uphold the regulation if a less intrusive alternative is available.[25]

Between rational basis review and strict scrutiny is "intermediate review."[26] Courts generally utilize intermediate review when dealing with classifications based on gender or ille-

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In *Carolene Products*, Justice Stone stressed the need for intensified scrutiny of legislation where "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." *Id.*; *see* Korematsu v. United States, 323 U.S. 214, 216 (1944) (asserting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect").

Courts generally consider classifications based on race, alienage, or national origin to be suspect and thus subject to strict scrutiny. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (applying strict scrutiny to classification based on race); Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (applying strict scrutiny to classification based on alienage); Oyama v. California, 332 U.S. 637 (1948) (applying strict scrutiny to classification based on national origin); *see also* 2 R. ROTUNDA, J. NOWAK & N. YOUNG, *supra* note 10, § 18.3, at 324-26 (explaining application of strict scrutiny).

21. *See Carolene Prods.*, 304 U.S. at 152-53 n.4.

22. *Id.*; *see* San Antonio School District v. Rodriguez, 411 U.S. 1 (1973). In *San Antonio School District*, the Court described a suspect class as one "saddled with such, or subjugated to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28.

23. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (defining fundamental right as "principle of justice so rooted in the traditions and conscience of our people"); *see also* Reynolds v. Sims, 377 U.S. 533 (1964) (stressing that "right of suffrage is a fundamental matter in a free and democratic society"); Skinner v. Oklahoma, 316 U.S. 535 (1942) (stating that marriage and procreation are basic civil rights and thus fundamental).

24. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (holding that classification that denies fundamental right to travel can only be upheld if "necessary to promote a compelling governmental interest").

25. *See* Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (holding that under strict scrutiny classification cannot be upheld if it burdens constitutionally protected interest when less intrusive alternative is available).

26. *See* 2 R. ROTUNDA, J. NOWAK & N. YOUNG, *supra* note 10, § 18.3, at 326-28; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-32, at 1601-02 (2d ed. 1988).

gitimacy, or that restrict access to important interests.[27] Under intermediate review, courts must uphold only those regulations that bear a reasonable and substantial relationship to an important governmental interest.[28] These classifications merit judicial scrutiny more intensive than rational basis review for either of two reasons. First, they may burden individuals who are not responsible for their status, yet are classified on the basis of it.[29] Second, they may restrict important, albeit not fundamental, interests of the affected party.[30]

Equal protection guarantees extend to aliens.[31] Most courts agree that state classifications based on alienage are suspect and thus subject to strict judicial scrutiny.[32] As a result,

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27. *See* Plyler v. Doe, 457 U.S. 202, 230 (1982) (involving access to education); Craig v. Boren, 429 U.S. 190, 204 (1976) (concerning gender); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172-73 (1972) (concerning illegitimacy); *see also* L. TRIBE, *supra* note 26, § 16-33, at 1610-14.

28. *See* Mills v. Habluetzel, 456 U.S. 91, 99 (1982); *Craig*, 429 U.S. at 197 (asserting that gender classifications must "serve important government objectives and must be substantially related to achievement of those objectives"); *see also* 2 R. ROTUNDA, J. NOWAK & N. YOUNG, *supra* note 10, § 18.3, at 326; L. TRIBE, *supra* note 26, § 16-32, at 1602-03.

29. *See, e.g.*, *Plyler*, 457 U.S. at 230. In *Plyler*, the Supreme Court invalidated a state statute that barred the children of undocumented aliens from receiving free public education. *Id.* The Court justified its use of heightened scrutiny by the unique combination of factors in *Plyler*—the implication of an important interest (education) and the punishment of parties not responsible for their status (the children of undocumented aliens). Stressing that the children bore no responsibility for their parents' status, the Court held that "legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." *Id.* at 220; *see Weber*, 406 U.S. at 175. In *Weber*, the Court held that legislation may not penalize illegitimate children in an attempt to deter behavior by parents. *Id.* "[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Id.*; *see Craig*, 429 U.S. at 212 (invalidating gender classification as "objectionable because it is based on an accident of birth") (Stevens, J., concurring).

30. *See Plyler*, 457 U.S. at 221 (applying intermediate review, Court cited "importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child"); L. TRIBE, *supra* note 26, § 16-33, at 1610-12.

31. *See* Sugarman v. Dougall, 413 U.S. 634, 641 (1973) (stressing that aliens are entitled to equal protection of laws); Graham v. Richardson, 403 U.S. 365, 371 (1971) (asserting that alien is "person" within context of fourteenth amendment and thus entitled to equal protection of laws).

32. *See Graham*, 403 U.S. at 371-72 (stressing that alienage classifications are "inherently suspect and subject to close judicial scrutiny"). Unable to vote or to hold certain public offices, aliens are a politically vulnerable class and historically have been the victims of discrimination. *See* Note, *supra* note 15, at 536 n.35. Arguably, many alien groups constitute "discrete and insular minorit[ies]" due to language bar-

most state classifications burdening aliens have been invalidated as violative of the fourteenth amendment's equal protection clause.[33]

B. *Fifth Amendment Equal Protection*

Although the fifth amendment does not explicitly contain an equal protection clause, it guarantees the equal protection of the laws implicitly through its due process clause.[34] As a result, courts generally analyze federal policies under the same three tier standards of review as state policies receive under the fourteenth amendment.[35]

The primary exception to the rule equating equal protection analysis under the fourteenth and fifth amendments lies within the realm of immigration.[36] Immigration often involves

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riers or physical characteristics. *Id.*; *see* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

33. *See Sugarman*, 413 U.S. at 646; *Graham*, 403 U.S. at 376; Oyama v. California, 332 U.S. 633, 640 (1948).

34. *See* 2 R. ROTUNDA, J. NOWAK & N. YOUNG, *supra* note 10, § 18.1, at 315. Courts have interpreted equal protection to be a component of the fifth amendment even though the amendment does not explicitly guarantee the equal protection of the laws. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477 (1989) (noting equal protection component of fifth amendment); Buckley v. Valeo, 424 U.S. 1, 93 (1976) (per curiam) (equating equal protection analysis under fifth and fourteenth amendments); Bolling v. Sharpe, 347 U.S. 497, 499 (1954). *See generally* Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541 (1977).

35. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); *see supra* notes 16-30 and accompanying text (discussing three tiers of review). In *Weinberger*, the Supreme Court stressed that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger*, 420 U.S. at 638, n.2; *see* Karst, *supra* note 34.

36. *See* Karst, *supra* note 34, at 552-54 & 558-562 (describing "overriding national interests" exception). This exception was refined by the Supreme Court in two decisions. In *Mathews v. Diaz*, the Supreme Court upheld a residency requirement that affected aliens' ability to receive Medicare benefits. Mathews v. Diaz, 426 U.S. 67 (1976). Applying rational basis review, the Court relied upon the plenary power of the legislative and executive branches of government in promulgating federal immigration policy. *Id.* at 81-82.

The Court further clarified its position in *Hampton v. Mow Sun Wong*. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). In *Mow Sun Wong*, the Court invalidated a Civil Service Commission regulation that barred aliens from holding federal civil service jobs. *Id.* at 116-17. Refusing to apply traditional equal protection analysis, the Court held that "overriding national interests" may justify a federal regulation that would be unacceptable under state law. *Id.* at 100-01. Under the court's analysis, the fifth amendment required mere rational basis review for federal policies affecting aliens. *Id.* at 103. Despite the lenient standard of review established in *Mow Sun Wong*, the

consideration of foreign policy.[37] Under the U.S. Constitution, the political branches of the federal government have plenary power to promulgate foreign policy.[38] Thus, the judiciary has adopted a "hands-off" attitude, reviewing federal immigration policy under rational basis review alone.[39] As a result, the federal government may use foreign policy as a basis to promulgate legislation that would violate the fourteenth amendment if promulgated by state government.[40]

Unlike equal protection analysis under the fourteenth amendment, federal policies affecting aliens are subject to very limited judicial review. A federal policy affecting aliens may be upheld so long as it possesses some legitimate basis, despite the crucial interests that such policies may implicate.

II. NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC. v. IMMIGRATION AND NATURALIZATION SERVICE

National Center for Immigrants' Rights, Inc. v. Immigration and Naturalization Service involved a challenge to an INS regulation that denied aliens the right to work pending deportation hear-

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Court invalidated the regulation as beyond the statutory authority of the Civil Service Commission. *Id.* at 116-17. The Court strongly hinted, however, that a different result may have been reached had the regulation been promulgated by an agency more closely connected with immigration policy. *Id.* at 117 (Brennan, J., concurring).

37. *See Mathews*, 426 U.S. at 81; Kleindienst v. Mandel, 408 U.S. 753, 765-67 (1972); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Fong Yue Ting v. United States, 149 U.S. 698, 711-13 (1893).

38. *See* U.S. CONST. arts. I & II. Article I of the U.S. Constitution grants Congress control over naturalization and commerce with foreign nations. *Id.* art. I, § 8, cl. 3 & 4. Article II grants the President authority to make treaties subject to the consent of the Senate, and to enforce the naturalization laws. *Id.* art. II, § 2, cl. 2 & 3.

39. *See Mathews*, 426 U.S. at 81-82. The Court held that "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by Congress or the President in the area of immigration and naturalization." *Id.* (footnote omitted). The Court also voiced its reluctance to apply constitutional standards to immigration policy, stressing the "need for flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication." *Id.* at 81.

40. *See Mathews*, 426 U.S. at 79-80. In *Mathews*, the Court held that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.* Similarly, in *Mow Sun Wong*, the Court held that "overriding national interests may provide a justification for a citizenship requirement . . . even though an identical requirement may not be enforced by a State." *See Mow Sun Wong*, 426 U.S. at 101.

ings.[41] The regulation, which safeguarded employment opportunities for U.S. citizens, also restricted the alien's right to work and to be free from physical restraint.[42] The U.S. Court of Appeals for the Ninth Circuit weighed the relative worth of these conflicting positions and invalidated the regulation as beyond the U.S. Attorney General's statutory authority.[43]

A. *Statutory Background*

Although case precedent establishes the equal protection rights of aliens, the procedural rights of aliens are defined by statute.[44] Recent immigration legislation grants the Attorney General, as chief enforcer of the immigration laws, discretion to detain aliens or impose conditions upon their release.[45] This legislation fails, however, to define the exact extent of the Attorney General's discretion, thus leading to the conflict en-

41. National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991); *see* 8 C.F.R. § 103.6 (a)(2)(ii) (1991); *infra* notes 74-90 and accompanying text (discussing INS regulation and its effects on aliens). For text of the regulation, see *supra* note 5.

42. *See* Brief for Appellants at 13, National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350 (9th Cir. 1990) (No. 88-5774) [hereinafter Brief for Appellants]. In its brief, the INS asserted that "[s]pecifically, the regulation at issue furthers the goal of our immigration laws of preventing the displacement of American workers by illegal aliens." *Id.*; *see* Appellee's Opening Brief at 3-4, National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350 (9th Cir. 1990) (No. 88-5774) [hereinafter Appellee's Opening Brief]. Plaintiffs alleged that

> the regulations demand that working people choose either their stomachs or their constitutional right to a deportation hearing. . . . INS will permit arrested persons to exercise their statutory and constitutional rights to a due process deportation hearing, but suspected aliens must do so while cold, hungry, homeless and without the ability to retain counsel.

Id.

43. *See National Center*, 913 F.2d at 1374.

44. *See* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (stressing that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"); Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (codified at scattered sections of 8 U.S.C. (1988)); Immigration and Nationality Act ("INA"), ch. 477, 66 Stat. 163 (1952) (codified as amended at scattered sections of 8 U.S.C. (1988)); Internal Security Act of 1950, ch. 1024, 64 Stat. 987, tit. 1 (Subversive Activities Control Act of 1950) ("SACA") (codified as amended at scattered sections of 8 U.S.C. (1988)).

45. *See* IRCA, Pub. L. No. 99-603, 100 Stat. 3359 (codified at scattered sections of 8 U.S.C. (1988)); INA, ch. 477, 66 Stat. 163 (1952) (codified as amended at scattered sections of 8 U.S.C. (1988)); SACA, ch. 1024, 64 Stat. 987, tit. 1 (codified as amended at scattered sections of 8 U.S.C. (1988)).

countered in *National Center*.[46]

In 1950, the U.S. Congress passed the Subversive Activities Control Act ("SACA") in response to a growing fear of Communism.[47] SACA's purpose was to deport all alien Communists and any other aliens who might present a threat to national safety or the public welfare.[48] Under SACA, Congress authorized the Attorney General to release aliens on bond at his discretion.[49] Release on bond was not an automatic right, but was granted when the Attorney General determined that individual circumstances merited release.[50] SACA also granted the Attorney General discretion to impose conditions on the bond.[51] The only condition required by statute was that the alien appear at future proceedings.[52]

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46. *See infra* notes 53-73 and accompanying text (discussing conflicting interpretations of immigration legislation).

47. *See* SACA, 64 Stat. at 987-89. SACA provided that

> [t]he Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress . . . enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

Id. at 989.

48. *Id.* at 987-89. SACA also concerned aliens already found to be deportable who were "in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control." *Id.* at 989.

49. *Id.* at 1011. SACA provided that "[p]ending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General." *Id.*

50. *See* Carlson v. Landon, 342 U.S. 524, 540 (1952). For further discussion of the *Carlson* holding, see *infra* note 52. Prior to the enactment of SACA, courts were split as to whether release on bond was an automatic right. *Carlson*, 342 U.S. at 539-40. Congress ended the controversy by giving the Attorney General discretion to release some aliens and detain others, clarifying that release on bond was not an automatic right. *Id.*

51. SACA, 64 Stat. at 1011.

52. *Id.* SACA provided that "[i]t shall be among the conditions of any such bond . . . that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody." *Id.*

In practice, SACA gave the Attorney General broad discretion to detain aliens suspected of being Communist sympathizers. *See* SACA, ch. 1024, 64 Stat. 987, tit. 1 (codified as amended at scattered sections of 8 U.S.C. (1988)). In *Carlson v. Landon*, for instance, the Supreme Court upheld the denial of bail to five aliens alleged to be

Although Congress failed to define the breadth of the Attorney General's discretion in imposing conditions on release, SACA's legislative history addressed the issue.[53] Both the House and Senate reports indicate that the Attorney General was to have "untrammeled" authority in imposing bond conditions.[54] The conditions listed in the reports as examples of the Attorney General's discretion, however, relate exclusively to ensuring the alien's future appearance.[55] It is therefore unclear from the legislative history whether the Attorney General had wide discretion to impose any conditions or only those necessary to ensure future appearance.[56]

In 1952, Congress passed the Immigration and Nationality

Communist party members. Carlson v. Landon, 432 U.S. 524, 546 (1952). The Attorney General had withheld bail solely on the basis of party membership, without evidence of any further subversive activity. *Id.* at 528. The plaintiffs, at least superficially, did not appear to pose a threat to national security. *Id.* at 549 (Black, J., dissenting). One of the plaintiffs, Zydok, had lived in the United States for thirty-nine years without any incident of subversion. *Id.* During the Second World War, he had sold US$50,000 worth of U.S. war bonds and had given blood seven times to help the war effort. *Id.* Despite these factors, the Court found that he could be held without bond based merely on his alleged Communist party membership. *Id.* at 541. By presuming that SACA authorized the Attorney General's action, the Court reinforced the Attorney General's broad discretion to detain aliens. *Id.* at 540. The Court held that the Attorney General's "discretion can be overturned only on a showing of clear abuse" and that such discretion was "presumptively correct and unassailable except for abuse." *Id.*

53. *See* H.R. REP. No. 1192, 81st Cong., 1st Sess., pt. 5, at 6 (1949); S. REP. No. 2239, 81st Cong., 2d Sess., pt. 5, at 5 (1950). The Senate Report states that "[t]he bill intends that the Attorney General shall have full discretion in imposing any other conditions or terms in the bond . . . agreement which he may see fit to include." *Id.* The Senate Report further states that "[t]he bill intends that the Attorney General shall have untrammeled authority to impose such conditions or terms as he sees fit in releasing an alien under bond." *Id.*

54. *See* H.R. REP. No. 1192, 81st Cong., 1st Sess., pt. 5, at 6 (1949); S. REP. No. 2239, 81st Cong., 2d Sess., pt. 5, at 5 (1950).

55. *See* H.R. REP. No. 1192, 81st Cong., 1st Sess., pt. 5, at 6 (1949); S. REP. No. 2239, 81st Cong., 2d Sess., pt. 5, at 5 (1950). The Senate Report includes the conditions that "the alien shall be produced when required for defense against the charges upon which he appears to be deportable[;] . . . that he also be subject to make periodic reports to the immigration officials as to his whereabouts and furnish other desired information[;] . . . [and] that upon demand by the Attorney General the existing bond shall be surrendered and a new bond in greater or less amount or other conditions shall be furnished." *Id.*

56. *See* National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1359 (9th Cir. 1990) (stressing ambiguity of legislative history of SACA), *cert. granted*, 111 S. Ct. 1412 (1991).

Act (the "INA").[57] Through the INA, Congress attempted to combine all existing immigration legislation into one statute.[58] The INA defines the grounds for deportation[59] and sets forth the procedural rights of aliens in deportation hearings.[60]

The INA mirrors the language of SACA concerning the release of aliens in deportation proceedings.[61] Its legislative history suggests that Congress intended to follow the goals and procedures established in SACA.[62] Like SACA, the INA fails to define precisely the scope of the Attorney General's authority.[63]

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57. Ch. 477, 66 Stat. 163 (1952) (codified as amended at scattered sections of 8 U.S.C. (1988)).

58. *See* H.R. REP. No. 1365, 82d Cong., 2d Sess., pt. 1, at 27, *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1677.

59. 8 U.S.C. § 1251(a) (1988) (setting forth nineteen general grounds for deportation, including conviction for crime involving moral turpitude within five years of entry, conviction for possession of firearm, or addiction to narcotics).

60. *Id.* § 1252(b). Section 1252(b) sets forth requirements for deportation hearings. These requirements include the following: 1) notice of charges pending and time and location of proceedings, 2) representation by counsel, and 3) presentation of evidence on the alien's behalf and cross-examination of witnesses testifying against the alien. *Id.* In addition, the decision to deport must be based upon reasonable, substantial, and probative evidence. *Id.*; *see* 2 G. GORDON & C. GORDON, IMMIGRATION LAW & PROCEDURE: PRACTICE AND STRATEGY §§ 16.03, 17.03 (1991).

61. 8 U.S.C. § 1252(a) (1988) (discussing release of aliens pending deportation proceedings). Section 1252(a) provides that

> [p]ending a determination of deportability . . . such alien may, upon warrant of the Attorney General, be arrested and taken into custody. . . . Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe.

Id. Compare id. with SACA, ch. 1024, 64 Stat. 987, tit. 1 (codified as amended at scattered sections of 8 U.S.C. (1988)).

62. *See* H.R. REP. No. 1365, 82d Cong., 2d Sess., pt. 1, at 57, *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1711 (demonstrating that INA followed procedure established in SACA); H.R. REP. No. 1365, 82d Cong., 2d Sess., pt. 1, at 49, *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1703 (demonstrating emphasis within INA on deporting subversives).

63. SACA and the INA have been interpreted both to expand and restrict the Attorney General's authority. *See supra* notes 47-62 and accompanying text (discussing differing interpretations of immigration statutes and their legislative histories). Thus, the INS has interpreted the statutes to give the Attorney General "untrammelled" authority. *See* Brief for Appellants, *supra* note 42, at 22. The Ninth Circuit, however, has interpreted the statutes to restrict the Attorney General's discretion. *See, e.g.*, National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991). It limits the conditions that may be im-

In 1986, Congress amended the INA by enacting the Immigration Reform and Control Act ("IRCA").[64] Through IRCA, Congress strove to reduce illegal immigration by strengthening border control and by reducing the incentives for aliens to enter the United States.[65] One of IRCA's primary provisions is the imposition of sanctions against employers who knowingly hire undocumented aliens.[66] Through employer sanctions, Congress hoped to reduce illegal immigration by making it harder for undocumented aliens to secure jobs.[67]

IRCA does not directly address the scope of the Attorney General's discretion in imposing conditions on release.[68] It

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posed to those that would ensure the alien's appearance at future proceedings or protect the nation from subversion. *Id.* at 1373-74.

64. Pub. L. No. 99-603, 100 Stat. 3359 (codified at scattered sections of 8 U.S.C. (1988)).

65. *See* H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 49 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5653. The House Report stressed that the "Committee has consistently supported increased resources for the Border Patrol to stem the massive illegal entry of aliens and [IRCA] specifically authorizes additional enforcement funds for this purpose." *Id.*; *see* H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 46 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5650. The House Report additionally stressed that "[e]mployment is the magnet that attracts aliens here illegally. . . . Employers will be deterred by the penalties in [IRCA] from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally." *Id.*

66. *See* 8 U.S.C. § 1324 (a) (1988); H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 45 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649; *see* Statement by President Ronald Reagan upon Signing S. 1200, 22 WEEKLY COMP. PRES. DOC. 1534 (Nov. 10, 1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5856-1. The President emphasized that "[t]he employer sanctions program is the keystone and major element [of IRCA]. It will remove the incentive for illegal immigration by eliminating the job opportunities which draw illegal aliens here." *Id.*

67. *See* 8 U.S.C. § 1324 (a) (1988); H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 45 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649-50; *see* Statement by President Ronald Reagan upon Signing S. 1200, 22 WEEKLY COMP. PRES. DOC. 1534 (Nov. 10, 1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5856-1. Another primary provision was legalization. *See* H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 49 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5653. Congress granted legal status to aliens who had worked continuously in the United States since January 1, 1982. *See* 8 U.S.C. § 1255(a) (1988). The government hoped to address the existence of a subclass of aliens, afraid to seek medical care or police protection, and vulnerable to exploitation. *See* H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 49 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 5653.

68. *See* IRCA, Pub. L. No. 99-603, 100 Stat. 3359 (codified at scattered sections of 8 U.S.C. (1988)).

has, however, been subject to two differing interpretations.[69] When Congress enacted IRCA, it chose to deter illegal immigration through employer sanctions, rather than employee sanctions.[70] As a result, it is arguable that the Attorney General has no discretion to impose conditions on release that, in effect, sanction the employee.[71] On the other hand, it is also arguable that the Attorney General may impose any regulation that furthers IRCA's general purpose of curbing illegal immigration.[72] Under this reasoning, a regulation imposing conditions on release would further IRCA's goal by preventing undocumented aliens from working, and thus would be valid.[73]

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69. *See infra* notes 70-73 and accompanying text (discussing differing interpretations of IRCA).

70. 8 U.S.C. § 1324(a) (1988). IRCA imposed penalties on employers who knowingly hire undocumented aliens, but did not penalize the undocumented alien who accepts work. *Id.* Moreover, the legislative history of previous immigration legislation suggests that employee sanctions previously had been considered but rejected by Congress. *See* 118 CONG. REC. H30155 (daily ed. Sept. 12, 1972) (statement of Rep. Rodino, Chairman of House Judiciary Committee). Representative Rodino noted that

> we have avoided imposing any additional criminal sanctions on the alien who enters illegally and obtains employment. . . . The [House Judiciary C]ommittee felt that additional penalties would serve no useful purpose and experience has shown that the present criminal penalties on aliens who enter without inspection have proved to be an ineffective deterrent.

Id.

71. *See* National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1367-70 (9th Cir. 1990) (holding that regulation could not detain aliens as means of sanctioning them for accepting employment pending deportation proceedings), *cert. granted*, 111 S. Ct. 1412 (1991). Advocates of this argument point to the legislative history of IRCA, which stressed that employer sanctions and increased border control were the only effective means to curb illegal immigration. *See id.* at 1367. The House Judiciary Committee Report stated that "[s]anctions, coupled with improved border enforcement, is [sic] the only effective way to reduce illegal entry and in the Committee's judgment it is [sic] the most practical and cost-effective way to address this complex problem." *See* H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 49, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5653.

72. *See* Doe v. Reivitz, 830 F.2d 1441, 1450 n.16 (7th Cir. 1987) (asserting that IRCA "simply adds additional sanctions for conduct that was effectively already illegal").

73. *See* Reply Brief for Appellants at 16-20, National Center for Immigrants' Rights v. INS, 913 F.2d 1350 (9th Cir. 1990) (No. 88-5774) [hereinafter Appellant's Reply Brief]. In its reply brief, the INS argued that IRCA did not prohibit the use of employee sanctions. *Id.* at 18-20. It argued that "neither logic nor precedent supports the notion that because Congress has adopted one specific means of addressing a problem, it necessarily meant to cut off other, pre-existing means of attacking the same problem." *Id.* at 19.

B. *The Challenged Regulation*

In 1983, the INS revised its regulation concerning the imposition of conditions on release bonds.[74] For the first time, the INS required that all bonds include a condition barring employment for aliens awaiting deportation proceedings unless an INS district director determined otherwise.[75] Under the regulation, the alien had to establish "compelling" reasons to be allowed to work.[76] Although the alien had not yet been adjudged deportable,[77] a presumption of illegal status would now bar the alien from working pending final resolution of the deportation proceeding.[78]

The new regulation marked a significant change from the regulation that had been in effect since 1973.[79] Under the prior regulation, the INS allowed the alien to work pending his deportation proceedings.[80] A condition against unauthorized employment was only attached to the bond at the discretion of an INS district director and with the approval of an INS regional commissioner.[81] In deciding whether to deny employment, INS officers were to consider a range of factors.[82] The

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74. *See* 8 C.F.R. § 103.6 (1991).

75. *Id.* § 103.6(a)(2)(ii) (1991). The new regulation required that "[a] condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding or bond posted for the release of an alien in exclusion proceedings, unless the District Director determines that employment is appropriate." *Id.*

76. *Id.* § 103.6(a)(2)(iii). The regulation provided that "[o]nly those aliens who . . . establish compelling reasons for granting employment authorization may be authorized to accept employment." *Id.*

77. 8 U.S.C. § 1252(b) (1988) (defining deportation proceedings as "sole and exclusive procedure for determining the deportability of an alien"). Prior to the hearing, the deportable alien faces potential deportation, but is not yet subject to an order of deportation. *Id.*

78. *See* National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1357-58 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991).

79. *Compare* 8 C.F.R. § 103.6(a)(2)(ii) (1983) *with* 8 C.F.R. § 103.6 (a)(2)(ii) (1991). The previous regulation provided that "[i]n the discretion of the district director and with the prior approval of the regional commissioner, a condition barring *un*authorized employment *may* be included in an appearance and delivery bond in connection with a deportation proceeding." 8 C.F.R. § 103.6(a)(2)(ii) (1983) (emphasis added).

80. 8 C.F.R. § 103.6 (a)(2)(ii) (1983).

81. *Id.*

82. *Id.* § 103.6(a)(2)(iii) (1983). The regulation suggested nine factors that, among others, may be considered. *Id.* These included "[s]afeguarding employment opportunities for United States citizens and legal resident aliens; . . . the recentness

factors suggested by the previous regulation were seemingly more extensive and more favorable to the alien than those to be considered under the revised regulation.[83]

The new regulation posed substantial problems for aliens awaiting deportation proceedings.[84] The regulation forced many aliens to choose between detention or release without means of support.[85] As a result, many aliens would be forced to stay in detention[86] or to leave the United States, abandoning their right to procedural due process.[87]

The INS justified the new regulation as a means of limiting the employment of undocumented aliens.[88] The regulation would further the overall purpose of immigration statutes, to

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of the alien's arrival in the United States; [and] . . . whether a spouse or children are dependent on the alien for support." *Id.*

83. *See* 8 C.F.R. § 103.6 (a)(2)(iii) (1991). The revised regulation listed four factors which, among others, may be considered. *See id.* These factors are worded in a manner to work against the alien. *See id.* One of the factors to be considered under the new regulation was "whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support." *Id. Compare id. with* 8 C.F.R. § 103.6 (a)(2)(iii) (1983). The previous regulation allowed consideration of whether the alien had a spouse or children dependent on the alien for support, regardless of the immigration status of the spouse or children. *See* 8 C.F.R. § 103.6 (a)(2)(iii) (1983). The previous regulation also stressed the non-exclusivity of the listed considerations. *See id.*

84. *See* Appellee's Opening Brief, *supra* note 42, at 3-4; *see supra* note 42 and accompanying text (citing language of Appellee's Opening Brief describing harsh effects of new regulation on aliens).

85. *See* National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1356-57 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991). Those aliens who could not rely upon friends, family or assets for support pending their proceedings would be forced to stay in detention for their basic survival needs. *Id.*; *see* Appellee's Opening Brief, *supra* note 42, at 2-5.

86. *See* Appellee's Opening Brief, *supra* note 42, at 2-4. The regulation led to greater reluctance among bondsmen to post bond for aliens who could not work to pay it back. *See National Center*, 913 F.2d at 1357 n.7. Aliens who would be able to survive on release without working thus faced increased difficulty in raising the bond necessary to secure release. *Id.* The INS conceded that more aliens would remain in detention, but considered this to be an acceptable consequence. *See* Employment Authorization, 48 Fed. Reg. 51,142 & 51,143 (1983).

87. *See* Appellee's Opening Brief, *supra* note 42, at 2-4. An alien may choose to leave the United States voluntarily instead of challenging a deportation order. 8 U.S.C. § 1254(e) (1988). The vast majority (97.5%) of aliens who are detained by the INS opt for voluntary departure. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1044 (1984). The small percentage that challenges deportation despite the difficulties involved may have the greatest claim to U.S. residency, yet still may be burdened by the regulation.

88. *See* Employment Authorization, 48 Fed. Reg. 51,142-43 (1983).

safeguard the employment opportunities of U.S. citizens.[89] On a practical level, the regulation would facilitate the procedure by which the INS denies work authorization to unsuitable aliens.[90]

C. *Procedural History*

On December 6, 1983, plaintiffs[91] initiated an action to enjoin enforcement of the new regulation.[92] The U.S. District Court for the Central District of California (the "District Court") granted a preliminary injunction.[93] On appeal, the U.S. Court of Appeals for the Ninth Circuit upheld the injunction, but remanded the case for class certification.[94]

On remand, the District Court certified a class of plaintiffs and granted summary judgment in the plaintiffs' favor.[95] Up-

89. *See* Brief for Appellants, *supra* note 42, at 28-41.

90. *See* Employment Authorization, 48 Fed. Reg. 51,142 (1983). Under the old regulation, work authorization only could be denied by securing the approval of both an INS regional commissioner and an INS district director. *See* 8 C.F.R. § 103.6 (a)(2)(ii) (1983). Under the new regulation, work authorization is automatically denied; the burden is placed on the alien to secure work authorization. *See* 8 C.F.R. § 103.6 (a)(2)(ii) (1991). By shifting this burden to the alien, the INS hoped to "remove an economic incentive for illegal entry for the purpose of engaging in unlawful employment and to remove an incentive to delay deportation proceedings when an alien is apprehended." *See* Brief for Appellants, *supra* note 42, at 8-9.

91. Plaintiffs included twenty non-profit organizations, a local affiliate of the United Automobile Workers Union, and fifteen individually named aliens. *See* First Amended Complaint for Injunctive and Declaratory Relief at 5-17, National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350 (9th Cir. 1990) (No. CV-83-7927-KN (JRx)) [hereinafter Complaint]. Also included was a Jane Doe plaintiff who had planned to surrender herself to the INS to get statutory benefits but who now will not for fear of detention. *Id.* at 16-17.

One sample plaintiff is Mirza Odilia Hernandez Diaz. *Id.* at 8-9. When Ms. Diaz was arrested, bond was set at US$4,000 and automatically included a no-work condition. *Id.* An Immigration Judge reduced the bond to US$2,000, but would not remove the no-work condition. *Id.* Ms. Diaz secured release after a friend liened property to a bonding company. *Id.* Ms. Diaz cannot afford to live without working, nor can she afford to hire an attorney to represent her at her deportation proceedings. *Id.* Ms. Diaz subsequently failed to appear at her deportation proceedings. *See* Answer to First Amended Complaint at 6, National Center for Immigrants' Rights, Inc. v. INS, No. CV 83-7927-KN (JRx) (C.D. Cal. Sept. 4, 1984).

92. *See* Complaint, *supra* note 91, at 22-23.

93. *See* National Center for Immigrants' Rights, Inc. v. INS, No. CV 83-7927-KN (JRx) (Dec. 16, 1984) (Order Granting Preliminary Injunction).

94. National Center for Immigrants' Rights, Inc. v. INS, 743 F.2d 1365 (9th Cir. 1984).

95. National Center for Immigrants' Rights, Inc. v. INS, 644 F. Supp. 5 (C.D. Cal. 1985), *aff'd*, 791 F.2d 1351 (9th Cir. 1986), *cert. granted and decision vacated*, 481

holding the decision, the appellate court found that the Attorney General lacked the statutory authority to impose a mandatory condition on release.[96] Instead, the court found that the Attorney General should impose conditions on a case-by-case basis.[97] Moreover, under the appellate court's holding, the Attorney General could only impose conditions that ensured the alien's future appearance at deportation proceedings.[98]

In 1987, the Supreme Court granted the INS's petition for certiorari and remanded the case for further consideration in light of IRCA.[99] The appellate court in turn remanded the case to the District Court,[100] which reaffirmed its previous holding.[101] The case returned to the appellate court after an appeal by the INS.[102]

D. *The Appellate Court's Holding on Remand*

In its *de novo* review of the District Court's grant of summary judgment, the appellate court determined that the Attorney General had exceeded his statutory authority in promul-

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U.S. 1009 (1987). The district court certified the class as "all those persons who have been or may in the future be denied the right to work pursuant to 8 C.F.R. § 103.6." National Center for Immigrants' Rights, Inc. v. INS, No. CV 83-7927-KN (C.D. Cal. July 9, 1985) (Order Certifying Class). Ironically, the INS was the party that had moved for summary judgment. *National Center*, 644 F. Supp. at 6. The appellate court justified its grant of summary judgment to the non-moving party on the ground that the INS had been given ample opportunity to demonstrate a genuine issue of material fact, but had failed to do so. *Id.*

96. National Center for Immigrants' Rights v. INS, 791 F.2d 1351, 1356 (9th Cir. 1986), *cert. granted and decision vacated*, 481 U.S. 1009 (1987).

97. *Id.* at 1355-56.

98. *Id.* at 1356.

99. National Center for Immigrants' Rights, Inc. v. INS, 481 U.S. 1009 (1987), *remanded*, 818 F.2d 869 (9th Cir. 1987), *aff'd on reh'g*, Order, (C.D. Cal. Dec. 31, 1987) (CV 83-7927-KN), *aff'd*, 913 F.2d 1350 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991).

100. National Center for Immigrants' Rights v. INS, 818 F.2d 869 (9th Cir. 1987), *aff'd on reh'g*, Order, (C.D. Cal. Dec. 31, 1987) (CV 83-7927-KN), *aff'd*, 913 F.2d 1350 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991).

101. *See* National Center for Immigrants' Rights, Inc. v. INS, Order, (C.D. Cal. Dec. 31, 1987) (CV 83-7927-KN), *aff'd*, 913 F.2d 1350 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991).

102. National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991).

gating the new regulation.[103] The court found the regulation to be invalid for two reasons. First, the regulation imposed a mandatory condition on release.[104] Second, it failed to relate to a permissible statutory purpose.[105] The appellate court reasoned that, if allowed to stand, the regulation would grant the Attorney General much more discretion than Congress had intended.[106]

The appellate court found that the regulation impermissibly imposed a mandatory condition on release in several ways.[107] First, it affected all detained aliens rather than discriminating between the different classes of aliens established by the INS in a previous regulation.[108] The new regulation prohibited all aliens from working unless they were able to prove permanent resident status or a "colorable claim of citizenship."[109] Although the INS in *National Center* asserted that

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103. *National Center*, 913 F.2d at 1374; *see infra* notes 104-42 and accompanying text (discussing appellate court's invalidation of regulation).

104. *National Center*, 913 F.2d at 1353-58. Holding that the regulation could not impose a mandatory condition, the court asserted that "[t]he significant power which is placed in the Attorney General must be exercised on the specific, individual circumstances" of the detained alien. *Id.* at 1363; *see infra* notes 107-20 and accompanying text (discussing appellate court's invalidation of regulation due to its imposition of mandatory condition of release).

105. *National Center*, 913 F.2d at 1358-74. The court analyzed case history to determine the purposes that would be permissible for the detention of aliens. *Id.* at 1360-66 & 1370-74. It concluded that the regulation must relate either to ensuring the alien's appearance at future proceedings or protecting the nation from danger. *Id.* at 1374. The regulation failed to relate significantly to either of these purposes and thus was invalid. *Id.*; *see infra* notes 121-37 and accompanying text (discussing regulation's failure to relate to permissible statutory purpose).

106. *National Center*, 913 F.2d at 1368. The court stressed that "[b]y administrative decree, the [INS] would now adopt a drastic employee sanction in contravention of a contrary determination by the legislature." *Id.* at 1369.

107. *Id.* at 1353-56.

108. *Id.* at 1354-56; *see* 8 C.F.R. § 274a.12 (1991). Under section 274a.12, the Attorney General had established various categories of deportable aliens, including ten classes of aliens authorized to accept employment without seeking INS work authorization; fifteen classes of aliens able to work for a specific employer without INS employment authorization; and sixteen classes of aliens who must apply for work authorization before pursuing employment. *Id.* The regulation, with its mandatory condition, essentially made these classifications meaningless, according to the court. *See National Center*, 913 F.2d at 1354-56.

109. National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1355 (9th Cir. 1990) (quoting language from regulation's operating instructions), *cert. granted*, 111 S. Ct. 1412 (1991). The court noted the ambiguity of the term "colorable claim of citizenship" and the difficulty in determining such claim in light of the complex and constantly changing citizenship laws. *Id.* at 1355 n.6.

certain classes of aliens were exempt from the condition and thus would not be affected,[110] the appellate court found that all detained aliens would be affected, even if only temporarily.[111]

Second, the court found that the condition barred both authorized and unauthorized employment.[112] The court was persuaded by the text of the regulation,[113] the INS's numerous references to a no-work rider,[114] the language stamped on the aliens' release papers,[115] and the apparently intentional change in wording from the previous regulation,[116] to conclude that

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110. *See* Employment Authorization, 48 Fed. Reg. 51,142 & 51,143 (1983) (noting that permanent resident aliens and aliens who have applied for asylum would not be affected by regulation). The INS asserted that "statuses that confer work authorization entail documentation that should permit an alien readily to prove such authorization." *See* Brief for Appellants, *supra* note 42, at 44. The INS also claimed that "work authorization is usually a mechanical matter subject to prompt resolution." *Id.* at 45.

111. *National Center*, 913 F.2d at 1355. In asserting that aliens could easily prove their eligibility to work, the INS assumed that aliens always have in their possession documentation that would prove authorization. *See* Brief for Appellants, *supra* note 42, at 44-45. The court, however, focused on the regulation's sweeping language, and determined that the vast majority of aliens would be deprived of authorization. *National Center*, 913 F.2d at 1355. The Ninth Circuit believed that because the condition would be imposed automatically, even those aliens who should be exempted would be affected. *Id.* Even if imposed for a short time, such deprivation was unacceptable. *Id.* at 1355-56.

112. *National Center*, 913 F.2d at 1353-54.

113. 8 C.F.R. § 103.6(a)(2)(ii) (1991). Although the heading of the section read "[c]ondition against unauthorized employment," the text of the section established "a condition barring employment." *Id.* The court asserted that the heading of the text could not limit the meaning of the text itself. *See* National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1353 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991); *see* Railroad Trainmen v. B. & O.R. Co., 331 U.S. 519 (1947) (providing support for Ninth Circuit's assertion that heading of section cannot limit meaning of text itself). The court read the text of the regulation at face value. *National Center*, 913 F.2d at 1353.

114. *See* National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1354 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991). In the notice accompanying the final rule, the condition was referred to as a "no-work rider," and as a condition "barring employment." *See* Employment Authorization, 48 Fed. Reg. 51,142-43 (1983).

115. *National Center*, 913 F.2d at 1354. The court stressed that "it is the bond condition itself which will be seen and relied upon by the individuals to whom it is applied, employers, and the authorities who decide whether the condition has been violated—and this condition bars 'employment.' " *Id.* "Bond - Employment Not Authorized" is the language seen by those employers or authorities who must determine whether the alien is entitled to employment.

116. *Compare* 8 C.F.R. § 103.6(a)(2)(ii) (1983) (providing for "condition barring unauthorized employment") *with* 8 C.F.R. § 103.6(a)(2)(ii) (1991) (imposing "condition barring employment").

the condition indeed barred all employment.[117]

Furthermore, the court reasoned that the Attorney General must exercise his discretion to detain an alien on an individualized basis.[118] The regulation could not stand because the condition it imposed on release was mandatory. The court ruled that the Attorney General's determinations must be reasonable and must focus upon facts particular to each alien.[119] The regulation failed to provide for individual determinations, and thus, under the court's reasoning, it could not stand.[120]

The regulation also failed under rational basis review.[121] The court found that the regulation's prohibition of employment effectively increased the number of aliens detained.[122] According to the court, once the regulation implicated detention, only two statutory purposes were permissible.[123] These purposes were to ensure the alien's appearance at future proceedings, and to protect the nation from danger.[124] The court

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117. *See National Center*, 913 F.2d at 1353-54.

118. National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1361-64 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991). The appellate court again relied on Carlson v. Landon, 342 U.S. 524 (1952). *See National Center*, 913 F.2d at 1360-64. In *Carlson*, the Supreme Court held that "purpose to injure could not be imputed generally to all aliens subject to deportation." *Carlson*, 342 U.S. at 538. Thus, the appellate court reasoned that the Attorney General must exercise his discretion to detain or to impose conditions on release in an individualized manner. *National Center*, 913 F.2d at 1360-64. Citing *Carlson*, the appellate court held that "[t]he significant power which is placed in the Attorney General must be exercised on the specific, individual circumstances of the person who faces the determination of . . . deportability." *Id.* at 1363.

119. *See National Center*, 913 F.2d at 1360-64. The appellate court referred to several other cases concerning the detention of suspected Communist party members. *Id.*; *see* Ocon v. Landon, 218 F.2d 320, 324 (9th Cir. 1954) (holding that Attorney General must act "upon an *informed* discretion") (emphasis in original); Rubinstein v. Brownell, 206 F.2d 449, 455 (D.C. Cir. 1953) (holding that exercise of discretion must be reasonable), *aff'd*, 346 U.S. 929 (1954); Mangaoang v. Boyd, 186 F.2d 191, 196 (9th Cir. 1950) (requiring that "denial of bail be based upon some specific fact pointing to the petitioners as bad risks to enlargement on bail").

120. *See National Center*, 913 F.2d at 1360-64.

121. *Id.* at 1358-73. The court analyzed case precedent and found that the regulation failed to relate to a permissible statutory purpose. *Id.*

122. *Id.* at 1356; *see* Employment Authorization, 48 Fed. Reg. 51,142 & 51,143 (1983). The INS conceded that the regulation would increase the number of aliens in detention, but accepted this as a cost of preventing undocumented aliens from taking jobs from U.S. citizens. *Id.*; *see supra* note 86 and accompanying text (discussing INS admission that regulation would increase the number of aliens in detention).

123. *See* National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1358-64 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991).

124. *Id.* at 1360-63. The appellate court relied on Carlson v. Landon, 342 U.S.

held that the employment of aliens was not such a danger.[125] Furthermore, the regulation's primary purpose was not to ensure future appearance.[126] Under the court's analysis, the regulation failed to achieve a permissible statutory purpose and therefore was invalid under rational basis review.[127]

The appellate court further reasoned that Congress, in fashioning the INA, never intended aliens to be detained as a consequence of working.[128] The imposition of a no-work rider on all release bonds defeated the logic of the INA, which carefully distinguished between many classes of aliens.[129] The court reasoned that at the time Congress drafted the INA, courts perceived employment as a positive release factor that evidenced the alien's stability.[130] The court thus considered it unlikely that Congress would have intended to prohibit the employment of aliens pending deportation proceedings.[131]

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524 (1952). *See supra* note 52 (discussing *Carlson* holding). In *Carlson*, the Supreme Court held that the Attorney General had power to deny bail to aliens who posed a threat to national security. *Carlson*, 342 U.S. at 541-42. The appellate court relied on the language of SACA and INA to demonstrate that the regulation should relate to ensuring future appearance. *National Center*, 913 F.2d at 1359 & 1364-66; *see supra* notes 47-63 and accompanying text (discussing purposes and effects of SACA and INA).

125. *National Center*, 913 F.2d at 1364-70. Rather, the primary goal of SACA and a major goal of INA was to protect the nation from the danger of active subversion by Communist party members. *Id.*

126. *See* Employment Authorization, 48 Fed. Reg. 51,143 (1983); *see supra* notes 88-90 and accompanying text (discussing INS goals in implementing regulation). Although the regulation may have ensured future appearance by detaining more aliens, this purpose was purely tangential. *See* Employment Authorization, 48 Fed. Reg. 51,142 & 51,143 (1983). Instead, the main goal of the regulation was to preserve employment opportunities for U.S. citizens. *Id.*

127. National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1370-73 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991). The Ninth Circuit used identical considerations to define the Attorney General's discretion to impose conditions on release. *Id.* The court held that the power to impose conditions on release mirrors the power to detain. *Id.* The court adhered to case precedent concerning the Attorney General's supervisory power over aliens already found to be deportable. *Id.* It limited this power to imposing conditions related to ensuring future appearance and to protecting the nation from danger. *Id.*

128. *Id.* at 1364-65.

129. *Id.* at 1364-66; *see supra* notes 57-63 and accompanying text (discussing INA goals and procedures).

130. *National Center*, 913 F.2d at 1364. Courts considered employment a tie to the community, making the alien less likely to abscond. *Id.*

131. *Id.* at 1364-66. The appellate court stressed that even INS practices since the passage of INA reject the detention of aliens for working pending deportation proceedings. *Id.* at 1365. Rather than re-detain an alien who violated a condition

Moreover, the court noted that Congress did not intend IRCA to authorize the detention of aliens as a penalty for working.[132] The court relied upon the humanitarian concerns embodied in the legislative history of IRCA.[133] Additionally, the court looked to Congress's imposition of sanctions against employers who knowingly hire undocumented aliens rather than against employees.[134] The court reasoned that the INS could not subvert the will of Congress by imposing sanctions on aliens administratively.[135] The court pointed out that IRCA's legislative history suggested that Congress had previously considered and rejected the use of employee sanctions.[136] The INS thus could not subvert Congress's clear in-

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against employment, the INS would appropriate the alien's bond money. *Id.* The Ninth Circuit quoted Matter of Toscano-Rivas, 14 I&N 523, 539 Int. Dec. #2256 (1973). "The threat of forfeiture of the bond is a deterrent. Custody is something else. Even if the bond is breached, it by no means follows that confinement is desirable." *National Center*, 913 F.2d at 1365. In *Toscano-Rivas*, the Attorney General himself suggested that employment-related bond conditions may be appropriate, but stressed the need for additional substantive safeguards and individualized determinations. *Toscano-Rivas*, 14 I&N at 556-57 & n.23. Thus, the INS itself failed to anticipate the use of a mandatory no-work rider or the detention of aliens due to employment. *See National Center*, 913 F.2d at 1365.

132. *See* National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1367-68 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991).

133. *Id.* at 1366. The appellate court cited the language of IRCA. "[I]n the enforcement of such laws, the Attorney General shall take due and deliberate actions necessary to safeguard the constitutional rights, personal safety, and human dignity of United States citizens and aliens." IRCA, 100 Stat. at 3384.

134. *See National Center*, 913 F.2d at 1368. The Ninth Circuit held that "Congress quite clearly was willing to deter illegal immigration by making jobs less available to illegal aliens but not by incarcerating or fining aliens who succeeded in obtaining work." *Id.*

135. *Id.* at 1366. The court of appeals considered IRCA "a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected." *Id.* It then held that, "[t]he INS regulation would override the clear policy choice which Congress made in IRCA, and would upset the careful balance which Congress achieved in that legislation." *Id.* at 1369.

136. *See Immigration Reform and Control Act of 1985: Hearings on S. 1200 before the Senate Subcommittee on Immigration and Refugee Policy*, 99th Cong., 1st Sess. 56 (1985) (statement of Sen. Simpson). Senator Simpson, the Committee Chair, rejected employee sanctions as "politically harsh [and] unrealistic." *Id.* He suggested instead that Congress utilize employer sanctions, as the "most humane" and "the most sensible humanitarian approach." *Id.* at 59.

The court also referred to several statements made by INS personnel during previous hearings concerning the detention of aliens as a means of curtailing employment by undocumented aliens. *National Center*, 913 F.2d at 1368-69; *see Illegal Aliens: Hearings before Subcommittee No. 1 of the House Judiciary Committee*, 92nd Cong., 1st Sess.,

tent by implementing employee sanctions.[137]

The INS regulation, therefore, failed on several grounds. First, the regulation imposed a mandatory condition.[138] Under the court's analysis, the Attorney General may only impose conditions barring employment on a case-by-case basis after making individualized determinations.[139] Second, the regulation failed to relate to a permissible statutory purpose.[140] The Attorney General, the court found, may only detain aliens or impose conditions on release to ensure the alien's future appearance or to protect the nation from danger.[141] On these bases, the regulation was statutorily invalid.[142]

One judge dissented from the majority opinion, arguing that the INS regulation did not need to relate to ensuring future appearance or protecting national security.[143] He asserted that the regulation related to the general purpose of both the INA and IRCA—protecting the employment opportunities of U.S. citizens. As such, he asserted, the regulation was valid.[144]

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pt. 3, at 919 (1972) (statement of Thomas M. Pederson, INS District Director) (rejecting fine or imprisonment as sanction against aliens who work without authorization); *Illegal Aliens: Hearings before Subcommittee No. 1 of the House Judiciary Committee*, 92d Cong., 1st Sess., pt. 1, at 46 (1971) (statement of James L. Hennessey, Executive Assistant to the Commissioner, INS). Executive Assistant Hennessey asserted that "[w]e will not expect the individual to starve in the United States while he is exhausting both the administrative and judicial roads that [IRCA] gives him." *Id.*

137. National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1353-58 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991).

138. *See* 8 C.F.R. § 103.6(a)(2)(ii), (iii) (1991); *see also National Center*, 913 F.2d at 1353-58; *supra* notes 107-17 and accompanying text (discussing court's interpretation of regulation).

139. *National Center*, 913 F.2d at 1358-64.

140. *See* 8 C.F.R. § 103.6(a)(2)(ii), (iii) (1991); *National Center*, 913 F.2d at 1358-74; *see supra* notes 123-37 and accompanying text (discussing court's interpretation of permissible purposes for detention of aliens).

141. *National Center*, 913 F.2d at 1358-74.

142. National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1358-74 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991).

143. *Id.* at 1374-75.

144. *Id.*; *see supra* notes 61-73 and accompanying text (discussing overall purposes of INA and IRCA).

III. NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC. v. IMMIGRATION AND NATURALIZATION SERVICE: *TOWARD HEIGHTENED SCRUTINY*

In *National Center for Immigrants' Rights, Inc. v. Immigration and Naturalization Service*, the Ninth Circuit invalidated the INS's no-work rider as beyond the statutory authority of the Attorney General.[145] The regulation was flawed in part because it lacked a rational relationship to a valid statutory purpose.[146] In its review, however, the court surpassed the traditional standard of review for immigration regulations.[147] In several ways, the court appears to have applied a more searching review, analogous to the intermediate level of equal protection analysis.[148]

A. *Beyond Traditional Deferential Standard of Review*

In *National Center*, the Ninth Circuit recognized rational basis to be the proper standard of review for a statutory challenge to an INS regulation.[149] Under this standard, courts have upheld INS regulations that reasonably relate to permissible statutory purposes.[150] The judiciary has treated immigration policies as presumptively correct, to be overturned only

145. *National Center*, 913 F.2d at 1374.

146. *Id.* at 1358-73; *see supra* notes 121-37 and accompanying text (discussing court's invalidation of INS regulation under rational basis standard).

147. *See infra* notes 149-68 and accompanying text (demonstrating that court applied standard of review less deferential than rational basis review).

148. *See infra* notes 149-86 and accompanying text (detailing how court's review exceeded traditional standard and thus mirrored intermediate review).

149. *See* National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1360 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991). The court recognized the standard utilized previously in other statutory challenges to INS regulations. *Id.*; *see* Sam Andrews' Sons v. Mitchell, 457 F.2d 745, 748 (9th Cir. 1972). This standard required that "the Attorney General's regulations must be upheld if they are founded on considerations rationally related to the statute he is administering." *See National Center*, 913 F.2d at 1360.

150. *See* Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1979) (holding that "statute need not specifically authorize each and every action taken by the Attorney General, so long as his action is reasonably related to the duties imposed upon him"), *cert. denied*, 446 U.S. 957 (1980); *Sam Andrews' Sons*, 457 F.2d at 748 (asserting that courts must uphold INS regulations that rationally relate to statute); Fook Hong Mak v. INS, 435 F.2d 728, 730 (2d Cir. 1970) (stressing that Attorney General's actions must be upheld "if his determination is founded on considerations rationally related to the statute he is administering").

upon a clear showing of discretionary abuse.[151]

The Ninth Circuit in *National Center*, however, appears to have applied more intense scrutiny than that traditionally applied to immigration regulations.[152] The court appears to have bypassed the traditional deference to immigration policy in several ways. First, the court found that the regulation did not relate to a permissible statutory purpose.[153] The court was not satisfied with the asserted purpose of the regulation—the protection of employment opportunities for U.S. workers and the alleviation of a cumbersome administrative procedure.[154] Although the court recognized that employment was a major focus of recent immigration legislation, the court nonetheless required further justification for the regulation.[155] The regulation thus passed traditional rationality review by relating to a legitimate statutory purpose, but failed under the court's more strenuous analysis.[156]

Second, the court invalidated the regulation because it affected all detained aliens rather than focussing upon specific aliens.[157] The court thus appears to have invalidated the regulation as overly broad.[158] Under the traditional deference stan-

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151. *See* Carlson v. Landon, 342 U.S. 524, 540 (1952) (stressing that actions by Attorney General were "overturned only on a showing of clear abuse" and "presumptively correct and unassailable except for abuse").

152. *See* National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1373-74 (9th Cir. 1990) (concluding and summarizing court's holding), *cert. granted*, 111 S. Ct. 1412 (1991); *see supra* notes 150-51 and accompanying text (setting forth standard that typically is utilized in analysis of statutory challenges of INS regulations); *infra* notes 153-68 and accompanying text (analyzing standard of review applied within *National Center*).

153. *National Center*, 913 F.2d at 1360-74. *See supra* notes 121-37 and accompanying text (discussing court's invalidation of regulation under rational basis standard).

154. *National Center*, 913 F.2d at 1364.

155. *Id.* The court conceded that "[v]irtually every immigration act and amendment has dealt in some fashion with employment policy." *Id.* The court nevertheless stressed that "even if employment is an important concern of immigration law, it does not at all follow that detention and bond conditions related to employment either cohere with the legislative scheme or are within the discretion of the Attorney General." *Id.*

156. *National Center*, 913 F.2d at 1374.

157. *See* National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1354-56 & 1363-64 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991). The court criticized the regulation, asserting that the "regulation is mandatory and the condition will be applied to individuals in a great variety of situations." *Id.* at 1357.

158. *National Center*, 913 F.2d at 1357. The court adopted language typically used within an equal protection analysis to describe over-inclusive laws, finding that

dard, however, the court's analysis would have been complete once the INS demonstrated that the regulation had a facially legitimate purpose.[159] By questioning whether the regulation was precisely tailored to achieve its goals, the court again surpassed the traditional standard of review.[160]

Finally, the Ninth Circuit surpassed traditional rationality review in its analysis of the regulation's impact on aliens' personal liberty.[161] Under the traditional standard of review, the court should not balance the importance of the affected interests against the regulation's asserted goals.[162] In *National Center*, however, the court questioned whether the Attorney General could restrict aliens' personal liberty to achieve the goals set forth in the regulation.[163] The court weighed the importance of the aliens' right to liberty against the goals of the regulation.[164] By balancing the fundamental rights of the affected party against the proferred purpose of the regulation,

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"[a]lthough people subject to this condition are differently situated with regard to work, they are similarly situated with regard to detention." *Id.*; *see* 2 R. ROTUNDA, J. NOWAK & N. YOUNG, *supra* note 10, § 18.2 at 320 (describing law as over-inclusive when "legislative classification includes all persons who are similarly situated in terms of the law plus an additional group of persons"); L. TRIBE, *supra* note 26, § 16-4, at 1449.

159. *See, e.g.*, Carlson v. Landon, 342 U.S. 524, 540 (1952) (emphasizing that Attorney General's actions should be considered "presumptively correct and unassailable except for abuse"); Bertrand v. Sava, 684 F.2d 204, 212-13 (2d Cir. 1982) (viewing Attorney General's actions as "presumptively legitimate and bona fide in the absence of strong proof to the contrary"); El-Werfalli v. Smith, 547 F. Supp. 152, 153 (S.D.N.Y. 1982) (stating that court's review is complete once it finds "facially legitimate and bona fide reason" for Attorney General's action).

160. *See supra* notes 107-20 and accompanying text (describing court's criticism of regulation as overly broad).

161. *National Center*, 913 F.2d at 1356-57 & 1359-70. The court found that the regulation not only implicated the aliens' ability to work pending deportation proceedings, but also their freedom from detention. *Id.* at 1356-57; *see infra* notes 163-65 and accompanying text (analyzing court's emphasis on effect of regulation upon detention).

162. *See El-Werfalli*, 547 F. Supp. at 153. In *El-Werfalli*, the court emphasized that under this standard, the court may "inquire as to the Government's reasons, but proscribes its probing into their wisdom or basis." *Id.*; *see supra* notes 150-51 and accompanying text (setting forth standard of review).

163. *See* National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1360 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991). The court inquired "whether the regulation is rationally related to the Attorney General's detention power." *Id.*

164. *National Center*, 913 F.2d at 1358-70. In the balance, the right to be free from detention weighed heavily; the INS could infringe it only to protect the nation from danger and to ensure future appearance. *Id.* at 1364. The INS goal of protect-

the court exceeded standard rationality review.[165]

In *National Center*, the Ninth Circuit thus appears to have applied a less deferential standard of review than that typically applied in the statutory analysis of immigration regulations.[166] Traditionally presumed to be valid, immigration regulations are upheld if supported by any facially legitimate purpose.[167] Here, a facially legitimate purpose existed for the regulation, yet the court found it to be insufficient in light of the regulation's overly broad character and infringement upon personal liberty.[168]

B. *Comparison to Heightened Review Within the Equal Protection Context*

The Ninth Circuit's heightened review in *National Center* is analogous to the intermediate level of review applied within equal protection analysis.[169] Courts generally apply the intermediate level of review to classifications based on gender or illegitimacy, or classifications that restrict important interests.[170] These classifications merit intermediate review due to the class of persons involved or the importance of the interests that are implicated.[171] In *National Center*, the Ninth Circuit's

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ing employment, on the other hand, was insufficient to act as a counterweight. *Id.* at 1364-70. As a result, the regulation could not stand. *Id.* at 1374.

165. *See supra* notes 150-51 and accompanying text (setting forth standards under traditional rationality review).

166. *See supra* notes 152-65 and accompanying text (describing factors within *National Center* that indicate heightened standard of review).

167. *See supra* notes 150-51 and accompanying text (explaining standard traditionally utilized in analysis of statutory challenges to INS regulations).

168. *See supra* notes 149-65 and accompanying text (describing how court exceeded traditional rationality review).

169. *See* 2 R. ROTUNDA, J. NOWAK & N. YOUNG, *supra* note 10, § 18.3, at 326-28; *see infra* notes 173-86 and accompanying text (detailing similarity between court's holding and equal protection intermediate review).

170. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 230 (1982) (restriction of access to education); Craig v. Boren, 429 U.S. 190, 212 (1976) (gender); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172-73 (1972) (illegitimacy); 2 R. ROTUNDA, J. NOWAK & N. YOUNG, *supra* note 10, § 18.3, at 326-28; L. TRIBE, *supra* note 26, § 16-33, at 1610-14.

171. *See, e.g.*, *Plyler*, 457 U.S. at 230. In *Plyler*, the Supreme Court invalidated a state statute that prevented the children of undocumented aliens from receiving free public education. *Id.* The Court applied intermediate review, finding that the children had no control over their undocumented status and thus should not be penalized for such status. *Id.* at 220. In deciding to apply intermediate review, the Court also considered that the statute denied children an important interest—the interest in a free public education. *Id.* at 221.

emphasis on the party and interests affected by the regulation makes its decision analogous to the intermediate standard of review applied in equal protection analysis.[172]

1. Class of Persons Affected

In *National Center*, the Ninth Circuit expressed concern that all aliens would be burdened by the INS no-work rider, including those who otherwise would be authorized to work.[173] The court believed that many aliens with work authorization would be detained or prohibited from working in the attempt to prohibit unauthorized aliens from accepting employment.[174] This analysis reflects the concern of courts applying equal protection intermediate review that legislation not penalize individuals for the actions of others.[175] Thus, legislation cannot penalize illegitimate children in an attempt to reach their parents or to compel others to comply with social norms.[176] Similarly, legislation cannot deny education to undocumented alien children who are not personally responsible for their illegal status.[177] Through its concern for persons who are penalized through no fault of their own, the *National Center* decision reflects a concern expressed within intermediate level equal protection analysis.[178]

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172. National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991); *see* 2 R. ROTUNDA, J. NOWAK & N. YOUNG, *supra* note 10, § 18.3, at 326-28; L. TRIBE, *supra* note 26, § 16-33, at 1610-14; *infra* notes 173-86 and accompanying text (comparing court's analysis to equal protection intermediate review).

173. *National Center*, 913 F.2d at 1354-56. "For all those released on bond while awaiting determinations of deportability, the regulation imposes a 'condition against employment' on all appearance and delivery bonds; it is not limited by status, work authorization, or the reasons deportation is sought." *Id.* at 1354.

174. *Id.* at 1355-56.

175. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 220 (1982) (stressing that "legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice"); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (emphasizing that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing").

176. *See* Trimble v. Gordon, 430 U.S. 762, 770 (1977); *Weber*, 406 U.S. at 175 (stressing that "no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent").

177. *See Plyler*, 457 U.S. at 220.

178. *See supra* notes 173-77 and accompanying text (discussing similarity be-

2. Interests at Stake

Under equal protection intermediate review, courts must uphold only those regulations that bear a substantial relationship to an important governmental interest.[179] Courts balance the importance of the governmental goal against the means used to achieve that goal, including the interest of the individuals at stake.[180] In *National Center*, the Ninth Circuit appears to have effected such balancing through its concern for the aliens' liberty interests implicated by the INS no-work rider.[181]

A primary rationale for the court's invalidation of the no-work rider in *National Center* was the regulation's failure to relate to a permissible statutory purpose.[182] The court held that to detain aliens, the regulation must purport to protect the nation from danger or ensure the alien's appearance at future

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tween court's emphasis on aliens unfairly burdened by regulation and intermediate review's concern that legislation not penalize innocent parties).

One noted difference exists between the traditional intermediate level classifications and alienage. Unlike gender or illegitimacy, alienage is a voluntarily-entered classification, and one that can change. *See Plyler*, 457 U.S. at 220. Although this difference is appreciable, alienage classifications may still merit intermediate review. *Id.* at 230. Aliens with authorization to work cannot be responsible for the actions of those aliens without work authorization. Moreover, aliens with work authorization are processed through a system over which they have limited control; although they may wish to become citizens immediately, most must endure lengthy waiting periods. *See* 1 C. GORDON & S. MAILMAN, IMMIGRATION LAW & PROCEDURE § 1.03 [9][e][i] (noting that five year period as lawful permanent resident must precede application for citizenship) (rev. ed. 1991); 3 C. GORDON & S. MAILMAN, IMMIGRATION LAW & PROCEDURE § 31.03 [2][b] (noting backlog of several years for award of immigrant visa) (rev. ed. 1991).

179. *See* Mills v. Habluetzel, 456 U.S. 91, 99 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976) (asserting that gender classifications must "serve important government objectives and must be substantially related to achievement of those objectives"); *see* 2 R. ROTUNDA, J. NOWAK & N. YOUNG, *supra* note 10, § 18.3, at 326; L. TRIBE, *supra* note 26, § 16-32, at 1602-03.

180. *See* Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring) (stressing that "as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational determinations").

181. *See* National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1356-58, 1364-70 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991). The court found that the regulation implicated both the right to the opportunity to work and the right to be free from physical restraint pending deportation proceedings. *Id.* at 1356-58. The court concluded that the purposes of the regulation as asserted by the INS were insufficient reasons to detain aliens. *Id.* at 1364-70.

182. *Id.* at 1358-74.

proceedings.[183] The primary purpose of the no-work rider, on the other hand, was to protect the employment opportunities of U.S. citizens.[184] The court invalidated the regulation, emphasizing that the protection of employment opportunities was insufficient reason to detain aliens.[185] By balancing the aliens' liberty interest against the government's goal in promulgating the regulation, the Ninth Circuit adopted a standard of review analogous to the intermediate level of equal protection analysis.[186]

C. *Heightened Review was Appropriate within the Context of* National Center

Federal immigration policy receives considerable judicial deference primarily due to its implication of foreign policy concerns.[187] In *National Center*, however, domestic, not foreign

183. *Id.* at 1364. The court held that "[t]he detention power which the Attorney General is granted discretion to exercise is one concerned—in addition to ensuring appearance—with protecting the nation from danger, from active subversion." *Id.*

184. *See id.* at 1360; Employment Authorization, 48 Fed. Reg. at 51,142; Brief for Appellants, *supra* note 42, at 8-9 & 39-40. In its brief, the INS asserted that "the displacement of American workers is one of the primary concerns of immigration laws. . . . These are precisely the policies that the Attorney General has sought to advance through the regulations at issue here." *Id.* at 39-40.

185. *National Center*, 913 F.2d at 1364-70. The court held that "[t]he detention presented by the regulation at issue here—detention to prevent unauthorized employment—runs contrary to the fundamental policy determinations made by Congress in enacting [immigration] legislation." *Id.* at 1370.

186. *See* U.S. Dep't of Agric. v. Murry, 413 U.S. 508, 519 (1973) (Marshall, J., concurring) (emphasizing need to "assess the public and private interests affected by a statutory classification and then decide in each instance whether individualized determination is required or categorical treatment is permitted by the Constitution"); Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring) (weighing value of individual interest against state interest); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972) (finding that "essential inquiry . . . is . . . inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?").

187. *See* Mathews v. Diaz, 426 U.S. 67, 81 (1976). In *Mathews*, the Court asserted that "since decisions in [immigration] matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary." *See* Kleindienst v. Mandel, 408 U.S. 753, 766 n.6 (1972); Galvan v. Press, 347 U.S. 522, 530 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 588-91 (1952); *see also* 2 R. ROTUNDA, J. NOWAK & N. YOUNG, *supra* note 10, § 18.12, at 479 (asserting that "federal interest in international affairs, as well as the federal power over immigration and naturalization, should justify the use of alienage classifications").

policy, provided the impetus for the INS no-work rider.[188] Although the regulation may have deterred illegal immigration by limiting the employment and liberty rights of aliens, this purpose was not set forth in the regulation.[189] Instead, the purposes of the regulation were to alleviate a cumbersome administrative procedure and to protect the employment opportunities of U.S. citizens.[190] Motivated by domestic needs, the regulation did not implicate traditional foreign policy concerns.[191]

When immigration policies do not implicate foreign policy, courts may scrutinize the policies closely.[192] Indeed, courts analyze state policies classifying on the basis of alienage under the most intense scrutiny.[193] Yet the same factors that compel the treatment of alienage as a suspect classification for the analysis of state policies were also present in *National Center*.[194] Given the lack of significant foreign policy considerations in *National Center*, heightened review, if not strict scrutiny,

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188. *See* National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1360 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991); Employment Authorization, 48 Fed. Reg. 51,142 (1983); Brief for Appellants, *supra* note 42, at 8-9 & 39-40 (asserting that preventing "displacement of American workers" was "precisely the polic[y]" motivating regulation).

189. *See* Employment Authorization, 48 Fed. Reg. 51,142 (1983); Brief for Appellants, *supra* note 42, at 8-9 & 39-40. Through the regulation, the INS "intended to remove an economic incentive for illegal entry for the purpose of engaging in unlawful employment." *Id.* at 8-9.

190. *See* Employment Authorization, 48 Fed. Reg. at 51,142; *see* Brief for Appellants, *supra* note 42, at 8-9 & 39-40.

191. This regulation differs from others that have implicated foreign policy considerations. Traditionally, policies that encompass foreign policy concerns focus on specific nationalities. *See* Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir.), *cert. denied*, 446 U.S. 957 (1980). Instead, the regulation challenged in *National Center* affects all aliens, regardless of national origin. *See* 8 C.F.R. § 103.6(a) (1991).

192. *See* 2 R. ROTUNDA, J. NOWAK & N. YOUNG, *supra* note 10, § 18.12, at 481. Professors Rotunda, Nowak, and Young assert that "[t]he federal government should be allowed to classify persons by their citizenship when that classification is arguably related to foreign policy interests. . . . However, if the federal government does not appear to be pursuing such ends, it should not be allowed the freedom to engage in invidious classification of aliens." *Id.*

193. *See* Sugarman v. Dougall, 413 U.S. 634, 642-43 (1973); Graham v. Richardson, 403 U.S. 365, 371 (1971) (asserting that "classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny" (footnotes omitted)).

194. *See Graham*, 403 U.S. at 371-72 (stressing that "aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate"); *see supra* note 32 and accompanying text (explaining why alienage is considered suspect classification).

was appropriate.[195]

Heightened review was also appropriate in light of the liberty interests threatened by the INS regulation.[196] Recently, the U.S. Supreme Court has refined the purposes for which the government may infringe liberty interests.[197] These purposes include the preservation of life,[198] the safe operation of U.S. transportation systems,[199] and the protection of the public against physical violence.[200] Such purposes connote a concern for the protection of individuals against bodily harm.[201] The protection of employment opportunities does not rise to the same level of urgency as does the need to protect human life or physical safety. The Ninth Circuit's heightened review appropriately guarded against the infringement upon liberty by the

195. *See supra* notes 187-94 and accompanying text (discussing propriety of heightened review of regulation due to absence of significant foreign policy considerations).

196. *See* National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1356-58 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991); *see also* Employment Authorization, 48 Fed. Reg. at 51,142 & 51,143 (1983) (conceding that detention of aliens was considered to be "acceptable consequence" of regulation).

197. *See, e.g.*, Cruzan v. Missouri Dep't of Health, 110 S. Ct. 2841 (1990); Washington v. Harper, 110 S. Ct. 1028 (1990); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

198. *See Cruzan*, 110 S. Ct. at 2852-53. In *Cruzan*, the Supreme Court restricted the individual's fundamental right to refuse medical treatment. *Id.* at 2851-53. The Court justified its restriction by the state's more pressing interest in the preservation of human life. *Id.* at 2852-53. The Court did not altogether cut off the individual's ability to refuse medical treatment, but required a high standard of proof when family members act on behalf of an incompetent. *Id.* at 2851-53.

199. *See Skinner*, 489 U.S. at 606-08. In *Skinner*, the Court upheld the use of breath and urine tests as a means of ensuring that railroad employees were not under the influence of intoxicants while on the job. *Id.* at 634. The Court justified the infringement of the fundamental right to be free from unreasonable search and seizure by the need for safety in U.S. transportation systems. *Id.* at 620-21. In deciding *Skinner*, the Court examined empirical evidence demonstrating that a large number of deaths caused by train accidents had resulted when railroad personnel were intoxicated during employment. *Id.* at 607-08.

200. *See Washington*, 110 S. Ct. at 1036-38. In *Washington*, the Supreme Court held that a medical institution may administer antipsychotic drugs to an unwilling patient if that patient threatens violence against himself or others in the community. *Id.* The Court thus infringed upon the fundamental right to refuse medical treatment, regarding it as less important than the state's interest in protecting the community at large from physical violence. *Id.*

201. *See Cruzan*, 110 S. Ct. at 2852-53 (protecting life of incompetent patient); *Washington*, 110 S. Ct. at 1036-38 (protecting community from violent acts of mentally unstable patient); *Skinner*, 489 U.S. at 606-08 (limiting number of deaths or injuries caused by train accidents).

government without sufficient reason.[202]

In light of the liberty interests jeopardized by the INS regulation and the absence of significant foreign policy considerations, the Ninth Circuit properly applied heightened review in *National Center*.[203] State classifications based on alienage receive the most intense scrutiny because they do not implicate foreign policy considerations.[204] Federal immigration policies that fail to implicate foreign policy, yet restrict important interests, should also merit heightened scrutiny.[205]

CONCLUSION

Within the United States, aliens constitute a class of persons that is politically disadvantaged and subject to exploitation. Courts often defer to federal policies affecting aliens, citing judicial inability to interfere with foreign policy matters. Judicial deference is not appropriate, however, for the review of regulations that infringe upon important liberty interests while failing to implicate foreign policy. The judiciary should not retreat from fully analyzing policies affecting aliens merely because those policies are promulgated by the federal government. The infringement upon important rights without sufficient reason, by any arm of government, should not be tolerated by the U.S. judicial system.

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202. *See supra* notes 196-201 and accompanying text (discussing propriety of heightened review as means to guard important liberty interests).

203. *See* National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991); *see supra* notes 187-202 and accompanying text (discussing need for heightened review within *National Center*).

204. *See supra* notes 31-33 and accompanying text (discussing use of strict scrutiny for state classifications based on alienage).

205. *See supra* notes 187-202 and accompanying text (discussing rationale for applying heightened scrutiny to federal immigration policies in certain situations).

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