



## EQUALITY IN THE WAR ON TERROR

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## INTRODUCTION

Though they often skirt the legal perimeter, the Bush Administration's national security policies are undoubtedly creative. The Administration's inventiveness demands a similar agility from the lawyers challenging these policies, particularly since the federal courts are understandably reluctant to interfere with the Executive in the midst of an armed conflict. While procedural arguments based on the separation of powers have met with some success in the courts, new legislation resulting from new Administration strategies requires a fresh approach. The Equal Protection Clause is a powerful and, thus far, unused arrow in the constitutional quiver. Its greatest utility is that, like the separation of powers claim, it can be styled as an avoidance argument.

It is too difficult and too soon for courts to decide whether all of the federal government's post-September 11, 2001 policies are *substantively* correct. Despite the waves of litigation and commentary charging that the Administration's actions are illegal to the core, neither the courts nor the public have reached agreement, in just over five years, on how to balance individual liberty and national security. The questions posed by terrorism are just too new

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and the dangers of asymmetric warfare (both in probability and extent of damage) too uncertain at this early date.

Modern constitutional law has developed a variety of doctrines for courts to employ when the boundaries of personal liberty are vague. Separation of powers doctrine has come into vogue, for example, as litigants stress the role of Congress in curbing Executive excesses. The petitioner in *Hamdan v. Rumsfeld*,<sup>1</sup> for example, emphasized that military commissions required congressional approval, not just presidential fiat, to survive. That litigation strategy avoided asking the Court to freeze a particular substantive conception of law into place; it stressed instead that the Court did not have to decide whether military commissions were constitutionally permissible until Congress first authorized them. In effect, the claims in *Hamdan* can be seen as a species of constitutional avoidance canons—at least insofar as they avoid individual-rights claims. Avoidance doctrines are crucial not simply to sidestep judicial review that invalidates the actions of the political branches, but also to avoid review that *ratifies* them by upholding them against constitutional challenge.<sup>2</sup>

*Hamdan v. Rumsfeld* addressed one particular question regarding the balance of rights and security, but it deferred for future resolution a second, substantively different, problem: discrimination against aliens. Since the September 11 attacks, the government has repeatedly singled out aliens for special disfavor. This trend began with the President's ill-fated November 13, 2001 Military Order to establish military commissions to try suspected war criminals.<sup>3</sup> That order only applied to foreigners; American citizens were intentionally made exempt from that backwards trial system. Justifying this policy, then Attorney General John Ashcroft told Congress:

To those who pit Americans against immigrants, citizens against non-citizens, to those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies and pause to America's friends. They encourage people of good will to remain silent in the face of evil.<sup>4</sup>

Some refused to stay silent, including the Supreme Court of the United States in *Hamdan*. After the Court struck down the military tribunal order,

1. 126 S. Ct. 2749, 2775 (2006).

2. Justice Jackson put the point this way in *Korematsu*:

[O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, . . . the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon . . . . Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.

*Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

3. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

4. *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the S. Comm. on the Judiciary*, 107th Cong. 313 (2001) (statement of John Ashcroft, Att'y Gen. of the United States).

however, Congress passed the Military Commissions Act (MCA),<sup>5</sup> which applied the same distinction between aliens and citizens. As such, the MCA shunts the millions of green card holders<sup>6</sup> and five billion people across the planet into a category that enables a different, and far inferior, trial procedure than what American citizens face. Since at least the ratification of the Fourteenth Amendment's equality guarantee, such legislation has never been placed in the United States Code. Particularly in an era of global constitutionalism and emphasis on the rule of law, such rank discrimination is constitutionally suspect.

The insistence on basic equality is the spirit animating the Fourteenth Amendment, the contemporaneous 1870 Enforcement Act, and repeated pronouncements in constitutional law about laws of general applicability from Chief Justice Marshall's decision in *McCulloch* to Justice Scalia's recent opinion in *Cruzan*.<sup>7</sup> It also tracks the modern revolution in the laws of war, codified most powerfully in the Geneva Conventions. And comparative experience suggests the importance of the principle in litigation, as recently underscored by the British House of Lords' decision to strike down its detention scheme on equality grounds because it discriminated against non-British citizens.<sup>8</sup>

While discrimination by the federal government against aliens might be justified when it is handing out government benefits, it is not appropriate when it determines whether someone can be put before a tribunal whose jurisdiction includes dispensing the most awesome powers of government, such as life imprisonment and the death penalty. When legislation singles out powerless aliens, moreover, the standard checks on government abuse, such as political accountability, fail to operate. The result is not only that the legislation runs afoul of the Constitution's guarantee of equal protection, it also eliminates that legislation from the zone of deference traditionally due to the political branches. To make matters worse, such line drawing on the basis of alienage also undermines effective fighting in the war on terror.

Now that Congress has begun to support, often hastily, some Bush Administration proposals, many are tempted to jump from the *how* of legislation to the *what*: questioning once again the substantive rights displaced

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5. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

6. While the government does not appear to maintain a precise listing of green card holders, from 1996-2005 approximately 8.75 million individuals obtained green cards. See OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2005 YEARBOOK OF IMMIGRATION STATISTICS 16 tbl.4 (2005), available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS\\_2005\\_Yearbook.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf) (author's calculation of total green-card awardees for the period based on figures in the table is 8,754,458). Some of those individuals may have moved out of the country, but the 8.75 million figure is still artificially low because it does not include anyone who obtained a green card before 1996.

7. See *infra* text accompanying note 14.

8. See *infra* text accompanying notes 107-10 (discussing *A v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [2005] 2 A.C. 68).

by government activity in the war on terror. This individual-liberty strategy risks placing undue pressure on the courts to rule in ways that, in some cases, may shackle the Executive Branch in a time of armed conflict. The logic of equal protection challenges, by contrast, does not require the political branches to attain any particular substantive standard of protection; it merely requires that the chosen standard be doled out evenhandedly to all persons. In short, instead of asking about the *how* or *what*, scholars and litigators should begin examining *who* is affected by the legal framework. Separately, analysis will need to focus on *where* the legal framework is operating—e.g., a battlefield, naval base, airport in Chicago, or elsewhere—as the scope of the equality guarantee may differ in each locale.<sup>9</sup>

#### I. THE EQUAL PROTECTION GUARANTEE AS A CONSTRAINT ON GOVERNMENT CONDUCT

Equality challenges have the potential to be the next big thing in the legal war on terror. Shortly after September 11, the impulse of many civil libertarians was to condemn legislation such as the PATRIOT Act as failing to comply with substantive constitutional guarantees. But those challenges largely failed or were deferred by the courts. Instead, the challenges that succeeded emphasized the lack of congressional support for actions taken by the Bush Administration. Now that Congress has begun to act in the war on terror, one might expect the focus of litigation to shift away from claims about the unilateral presidency to those about individual rights. But that path has considerable pitfalls, chief among them that it neglects the blatant discrimination against aliens in recent government policies.

Before getting into the main example of the MCA, let me offer the key argument in this Article: when the contours of personal liberty are not clear, insistence upon equality in treatment will often be a way to achieve an optimal result. This tradition, which favors laws of general applicability, can be located in many places, such as Congress's 1870 Enforcement Act. Section 16 of the Act, now codified as the familiar 42 U.S.C. § 1981 (with minor changes), provided as follows:

*And be it further enacted*, That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.<sup>10</sup>

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9. See text accompanying notes 55-63.

10. Enforcement Act of 1870, ch. 114, § 16, 16 Stat. 140, 144 (codified as amended at 42 U.S.C. § 1981 (2007)).

Most of this language, in turn, comes from its predecessor, the Civil Rights Act of 1866. It could be read, through our modern prism of race, to suggest that Congress was worried only about the newly freed slaves and race discrimination. That reading would not be without some justification, considering the drafters' repeated use of the word "white."<sup>11</sup> But the drafters of the Enforcement Act added language to the 1866 Act to focus on alienage. This is how they modified the next section of the Act, with the italicized words in 1870 replacing the predecessor (struckthrough) words from 1866:

And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected ~~by this act~~ *by the last preceding section of this act*, or to different punishment, pains, or penalties on account of such person ~~having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted~~ *being an alien*, or by reason of his color or race, than is prescribed for the punishment of ~~white persons~~ *citizens*, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.<sup>12</sup>

That statute is still on the books today, codified at 18 U.S.C. § 242, and reflects a powerful current in constitutional law. The Enforcement Act did not specify what punishment would look like; it merely said that in treating aliens, the punishment had to be symmetric with that of citizens. In this way, aliens would be "virtually" represented by citizens in the political process.

There is a deep logic to this point—a logic that goes back to Article IV's Privileges and Immunities Clause and to Chief Justice Marshall's majestic opinion in *McCulloch v. Maryland* when he contended that a state tax applying equally to in-staters and out-of-staters would be permissible.<sup>13</sup> Some of our most influential jurists in the modern era have voiced similar arguments.

11. The last portion of the statutory section reveals a slight focus on aliens: "No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void." *Id.*

12. Compare *id.* § 17, with Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27, 27. The 1870 Act was justified in terms that distinguished immigration:

Now . . . I am opposed to Asiatics being brought here. . . . While they are here I say it is our duty to protect them. . . . I would be less than man if I did not insist, and I do here insist that that provision shall go on this bill, and that the pledge of this nation shall be redeemed, that we will protect Chinese aliens or any other aliens whom we allow to come here, and give them a hearing in our courts; let them sue and be sued; let them be protected by all the laws and the same laws that other men are. That is all there is in that provision.

Cong. Globe, 41st Cong., 2d Sess. 3658 (May 20, 1870) (statement of Mr. Stewart).

13. 17 U.S. (4 Wheat.) 316, 436 (1819) ("This opinion . . . does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state.").

Consider Justice Scalia's words in the *Cruzan* case: "Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me."<sup>14</sup>

Justice Scalia's comments track those of Justice Jackson years earlier, who stated:

Invocation of the equal protection clause [compared to the due process clause] does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. . . . The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.<sup>15</sup>

Scholars such as John Hart Ely, Guido Calabresi, and David Cole have all made similar arguments.<sup>16</sup> The force of these principles is at their height when life and death decisions are on the line. In an era where the boundaries of national security and personal liberty are being shaped in all sorts of unforeseen ways due to rapid changes in technology and the modern transportation revolution, the insistence on evenhandedness can at times be more appropriate than the attempts to freeze substantive standards into the Constitution.

#### A. *The MCA and Alienage*

##### 1. *The military commission provisions*

The commissions set up by the MCA, like President Bush's first set of military commissions, appear to be the first ones in American history designed to apply only to foreigners. The United States first employed military commissions in the Mexican-American war and "a majority of the persons tried . . . were American citizens."<sup>17</sup> The tribunals in the Civil War naturally applied

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14. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

15. *Ry. Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

16. DAVID COLE, *ENEMY ALIENS* (2003); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 161-62 (1980); Guido Calabresi, *The Supreme Court: 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 92-93 (1991).

17. David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2030 (2003).

to citizens as well. And in *Quirin*, President Roosevelt applied the tribunals symmetrically to the saboteur who claimed to be an American citizen and the others who were indisputably German nationals, so much so that the Supreme Court was prompted to hold: “Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.”<sup>18</sup>

Congress justified the MCA in part on the ground that it spared American citizens,<sup>19</sup> but that very asymmetry is one of its constitutional defects. An American citizen, even one who commits the most horrible and treasonous act imaginable (such as the detonation of a weapon of mass destruction), gets the “Cadillac” version of justice—a civil trial in federal court. Yet a green card holder alleged to have committed a far less egregious offense—such as being a chef for this treasonous American citizen—gets the “beat up Chevy” version of justice: a military commission at Guantanamo. In that commission, that noncitizen chef will have few of the very rights America has championed abroad, and he can be sentenced to death.

Those who drafted the Equal Protection Clause knew all too well that discrimination against noncitizens required constitutional prohibition. The clause’s text itself reflects this principle; unlike the Privileges and Immunities Clause, which only applies to “citizens,” the drafters intentionally extended equal protection to “persons.”<sup>20</sup> Foremost in their minds was the language of *Dred Scott v. Sandford*, which had limited due process guarantees by framing them as nothing more than the “privileges of the citizen.”<sup>21</sup> This language was

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18. *Ex parte Quirin*, 317 U.S. 1, 37 (1942).

19. See, e.g., 152 CONG. REC. S10,355 (daily ed. Sept. 28, 2006) (statement of Sen. Kyl) (“[T]here is nothing wrong with this legislation before us limiting the rights of habeas to those who are citizens and not extending it to alien enemy combatants.”); 152 CONG. REC. S10,250 (daily ed. Sept. 27, 2006) (statement of Sen. Warner) (“It is wrong to say that this provision captures any U.S. citizens. It does not. It is only directed at aliens—aliens, not U.S. citizens—bomb-makers, wherever they are in the world; those who provide the money to carry out the terrorism, wherever they are—again, only aliens . . . .”); *id.* at S10,267 (statement of Sen. Kyl) (“This legislation has nothing to do with citizens.”); *id.* at S10,274 (statement of Sen. Bond) (“These people are not U.S. citizens, arrested in the U.S. on some civil offense; they are, by definition, aliens engaged in or supporting terrorist hostilities against the U.S., and doing so in violation of the laws of war.”); *id.* at H7542 (statement of Rep. Hunter) (“It does not take away the habeas rights of U.S. citizens.”); *id.* at H7544 (statement of Rep. Buyer) (“It will not apply to United States citizens.”); *id.* at S10,251 (statement of Sen. Graham) (“Under no circumstance can an American citizen be tried in a military commission.”); see also John M. Donnelly, *Democrats Eye Changes for Military Tribunals Law That Covers Detainees*, CQ TODAY, Dec. 1, 2006 (“Proponents of the law say . . . habeas corpus applies only to U.S. citizens, not alien combatants.”).

20. U.S. CONST. amend. XIV, § 1; see also John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1442-47 (1992) (providing evidence that the Equal Protection Clause was intentionally written as it was specifically in order to extend certain rights to aliens).

21. *Dred Scott v. Sandford*, 60 U.S. 393, 449 (1857). See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 170-72* (1998) (tracing the



repeatedly mentioned in the Senate debates on the Fourteenth Amendment, with the very first draft of the Amendment distinguishing between persons and citizens: “Congress shall have power to . . . secure to *all citizens* . . . the same political rights and privileges; and to *all persons in every State* equal protection in the enjoyment of life, liberty, and property.”<sup>22</sup> The Amendment’s principal author, Representative John Bingham, asked: “Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States? Is it not essential . . . that all persons, whether citizens or strangers, within this land, shall have equal protection . . . ?”<sup>23</sup>

As discussed above, Congress passed a contemporaneous law that underscored this guarantee of equal protection, the Enforcement Act of 1870.<sup>24</sup> The rank discrimination between foreigners and citizens on a matter of fundamental justice would thus appear to offend equal protection principles. Indeed, the foundational cases have consistently held that the Fourteenth Amendment and the Enforcement Act apply to all persons, citizens and aliens alike. In *Yick Wo v. Hopkins*, the first case in which the Supreme Court confronted the constitutional rights of noncitizens after the enactment of the Equal Protection Clause, the unanimous Court asserted, “The fourteenth amendment to the constitution is not confined to the protection of citizens. . . . [Its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, color, or of nationality . . . .”<sup>25</sup> It was for that reason, the Court said, that the 1870 Enforcement Act was “accordingly enacted.”<sup>26</sup>

The modern Supreme Court has held that state “classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny” since “[a]liens as a class are a prime example of a discrete and insular minority.”<sup>27</sup> After all, aliens pay taxes, work, and live

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historical origins of the Equal Protection Clause and its use of the word “persons” to *Dred Scott*); *id.* at 217-18 n.\* (stating that the Equal Protection Clause is “paradigmatically” concerned with “nonvoting aliens”).

22. AMAR, *supra* note 21, at 173 (quoting a draft of the Fourteenth Amendment) (emphasis added) (omissions in original).

23. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866). Similarly, Senator Howard stated that the Amendment was necessary to “disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State.” *Id.* at 2766.

24. *See supra* note 10.

25. 118 U.S. 356, 369 (1886). Similarly, in *Plyler v. Doe*, a landmark case concerning the rights of alien children to an education, the Supreme Court directed, “an alien is surely a ‘person’ in any ordinary sense of that term,” and therefore entitled to equal protection of the laws. 457 U.S. 202, 210 (1982).

26. *Yick Wo*, 118 U.S. at 369.

27. *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (internal quotation and citations omitted).

under our laws. They can even be drafted and must register for the Selective Service System.<sup>28</sup> Yet their exclusion from the franchise renders them politically weak.

More deferential standards of judicial review, such as scrutiny for a rational basis, operate under the background assumption that “even improvident decisions will eventually be rectified by the democratic processes.”<sup>29</sup> But there can be no warrant for such confidence when legislation only impacts those who cannot vote. As John Hart Ely put it, “[a]liens cannot vote in any state, which means that any representation they receive will be exclusively ‘virtual’” and “our legislatures are composed almost entirely of citizens who have always been such.”<sup>30</sup> It would therefore seem inappropriate to rely on the standard political check to correct errors when alienage distinctions are employed. Justice Blackmun put the point well in an opinion that deserves resuscitation today:

The very powerlessness of a discrete minority, then, is itself the factor that overcomes the usual presumption that even improvident decisions affecting minorities will eventually be rectified by the democratic process. If anything, the fact that aliens constitutionally may be—and generally are—formally and completely barred from participating in the process of self-government makes particularly profound the need for searching judicial review of classifications grounded on alienage.<sup>31</sup>

Justice Blackmun’s view here bears a striking similarity to that of the Pennsylvania Supreme Court in 1851:

[W]hen, in the exercise of proper legislative powers, general laws are enacted, which bear or may bear on the whole community, if they are unjust and against the spirit of the constitution, the whole community will be interested to procure their repeal by a voice potential. And that is the great security for just and fair legislation.

But when individuals are selected from the mass, and laws are enacted affecting their property, . . . who is to stand up for them, thus isolated from the mass, in injury and injustice, or where are they to seek relief from such acts of despotic power?<sup>32</sup>

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28. *See* Selective Serv. Sys., Who Must Register? (Apr. 30, 2002), <http://www.sss.gov/FSwho.htm>.

29. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

30. ELY, *supra* note 16, at 161-62.

31. *Toll v. Moreno*, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring) (internal quotation and citation omitted). Justice Stevens may be read as following Justice Blackmun’s strong view of accountability and equal protection. *See Hudson v. Palmer*, 468 U.S. 517, 557 & n.36 (1984) (Stevens, J., dissenting in part and concurring in part) (“Prisoners are truly the outcasts of society. Disenfranchised, scorned and feared, often deservedly so, shut away from public view, prisoners are surely a ‘discrete and insular minority.’”).

32. *Ervine’s Appeal*, 16 Pa. 256, 268 (1851).

Notably, the Justices answered this question by saying that “the courts” were where such relief should be sought.<sup>33</sup>

On the other hand, the text of the Equal Protection Clause does not bind the federal government, it only binds states. The Supreme Court has generally surmounted this textual hurdle by reading into the Fifth Amendment an equality guarantee, stating that there is a strong presumption of “congruence” under which “[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”<sup>34</sup> The Court has even gone so far as to say that “the equal protection obligations imposed by the Fifth and Fourteenth Amendments [are] indistinguishable.”<sup>35</sup> However, in a series of alienage cases, the Court has appeared to doubt the congruence principle.<sup>36</sup> Some of this language might be read to suggest that the strict judicial scrutiny to which state classifications based on citizenship are ordinarily subjected might arguably be inapplicable to the MCA’s stark discrimination between citizens and aliens.

The precedent that gives the federal government wide berth in making alienage classifications, however, concerns two areas of law: immigration and government benefits.<sup>37</sup> There is a rational basis, for example, for taxpayers to prefer doling out scarce welfare benefits to citizens. The decision about who may come onto our shores and make a life here is also one that the government by necessity has to make in ways that many would deem arbitrary. And immigration violations, too, are *sui generis* insofar as only aliens can commit them. In these settings, the government might conceivably be violating a philosophical sense of “equality,” but it is not denying equal *protection* of the law.

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33. *Id.*

34. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)); *see also* *Bolling v. Sharpe*, 347 U.S. 497 (1954).

35. *Adarand*, 515 U.S. at 217.

36. *See, e.g.*, *Fiallo v. Bell*, 430 U.S. 787, 796 (1977); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102, 104, 114-16 (1976); *Mathews v. Diaz*, 426 U.S. 67, 81-84 (1976).

37. A variety of laws restrict certain classifications of aliens from receiving government benefits. *See, e.g.*, 7 U.S.C. § 2015(f) (2007) (food stamps); 8 U.S.C. § 1611(a), (c)(1) (2007) (excluding undocumented aliens from any federal public benefit including “any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided . . . by an agency of the United States or by appropriated funds of the United States”); 8 U.S.C. § 1621 (2007) (prohibiting states from providing “any State or local public benefit” to undocumented aliens unless the state enacts a law affirmatively providing for such eligibility); 26 U.S.C. § 32(c)(1)(D) (2007) (earned income tax credit); 26 U.S.C. § 3304(a)(14)(A) (2007) (excluding undocumented aliens from unemployment insurance); 42 U.S.C. §§ 401-403, 405(c)(2)(B)(i) (2007) (limiting Social Security benefits). The Aviation and Transportation Security Act makes U.S. citizenship a qualification for airport security personnel. Pub. L. No. 107-71, § 111, 115 Stat. 597, 617 (2001) (codified at 49 U.S.C. § 44935 (2007)).

The maneuvering room accorded the political branches “in the area of immigration and naturalization” thus has not extended to laws which impinge rights “protected by the Due Process Clause.”<sup>38</sup> When liberty interests are at issue, “the Fifth Amendment . . . protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”<sup>39</sup> While courts have relaxed scrutiny when the government is handing out a “goody,” they have not done so when the disparity touches the raw nerve of equal justice under law. After all, the MCA curtails rights that, at least when made available to others similarly situated, have long been deemed too fundamental to be dispensed with using merely rational basis review.<sup>40</sup> Suppose, for example, that trial by jury for misdemeanor offenses were made available only to those who were willing to pay for it, say a \$5000 charge (to defray the marginal costs to government of actually putting on a jury trial, protecting jurors, and the like). In that setting, strict scrutiny, or something very close to it, would be mandatory,<sup>41</sup> despite the mantra that poverty is not a suspect, or even a semi-suspect, classification.<sup>42</sup>

The same follows when rights as basic as the jury trial are dispensed to citizens but not to aliens who are charged with identical offenses and who have exactly the same relationship to the *very same* international terrorist organizations with which we are at war.<sup>43</sup> In short, although we might afford

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38. *Diaz*, 426 U.S. at 78, 82.

39. *Id.* at 77 (citations omitted).

40. While the Court has not adopted a formula for heightened scrutiny when quasi-fundamental rights are at stake for quasi-suspect classes, several decisions essentially suggest such a principle. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 221, 230 (1982) (stating that because education plays a “fundamental role in maintaining the fabric of our society,” a Texas statute denying free public schooling to children who were not legally admitted into the United States must be justified by a “substantial state interest” and finding no such justification); *Craig v. Boren*, 429 U.S. 190, 210 n.\* (1976) (Powell, J., concurring) (suggesting that the cases reveal more than two tiers of equal protection analysis).

41. *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that due process and equal protection combine to prevent states from limiting appeals from custody-termination decisions to those parents who can afford record preparation fees); *see also infra* text accompanying notes 52-54 (discussing *Douglas v. California* and *Griffin v. Illinois*).

42. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 323 (1980) (“[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification.”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973) (rejecting strict scrutiny of Texas’s reliance on local property taxation in school system financing and stating that “where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages”).

43. A situation like that in *Ex parte Quirin*, 317 U.S. 1 (1942), in which we are at war with a particular nation, is one in which citizens of that nation who are soldiers (albeit not visibly) of its armed forces are distinguishable in principle from American citizens who join in their clandestine and hostile effort to injure Americans but are not members of any enemy nation or other organization with which we are at war. To be sure, the *Quirin* Court saw no justification for regarding such citizen turncoats as less eligible for trial by military tribunals than their noncitizen counterparts. But a distinction in that context between the two

considerable deference to the President in treating aliens less favorably than citizens in the distribution of social security or other similar benefits, or matters of employment, there is little room for such crudeness when doing so makes the difference between access to the fundamental protections of civilian justice—from indictment to a jury trial presided over by a judge independent from the prosecutor, not to mention access to an appeal before a tribunal independent of the prosecuting authority—and relegation to a distinctly less protective, and blatantly inferior, brand of adjudication.

The best defense of the government's alienage policy must rest upon the similarity it bears to the 1798 Alien Enemy Act. That Act, passed alongside the constitutionally dubious Sedition Act, treated aliens differently than citizens in wartime:

[W]henver there shall be a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion . . . by any foreign nation or government, and the President of the United States shall make public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies. And the President of the United States shall be, and he is hereby authorized . . . to direct . . . the manner and degree of the restraint to which they shall be subject, and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those not being permitted to reside within the United States . . . [p]rovided, that aliens resident within the United States, who shall become liable as enemies, in the manner aforesaid, and who shall not be chargeable with actual hostility, or other crime against the public safety, shall be allowed, for the recovery, disposal, and removal of their goods and effects, and for their departure, the full time which is, or shall be stipulated by any treaty, where any shall have been . . . and where no such treaty shall have existed, the President of the United States may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality.

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categories of unlawful belligerents would hardly have been irrational. In contrast, in a situation like the one we confront vis-à-vis al Qaeda, where we are at war with a supranational terrorist organization drawing support from many nations but being identifiable with none of them, it seems irrational to distinguish among unlawful belligerents—all of whom are members of the same terrorist group and with all of whom we are thus at war—on the basis of whether or not they happen also to be citizens of the United States as opposed to being citizens of, say, Saudi Arabia, France, or some other nation that may or may not be among the sponsors of terror but with which we are not, in any event, at war. In other words, it is one thing to give preferential treatment to U.S. citizens over their alien counterparts when that means giving less favorable treatment to citizens of a nation with which we are at war (and members of that enemy nation's military), and quite another thing to give preferential treatment to U.S. citizens when noncitizenship, rather than being a proxy for membership in the armed forces of the enemy, simply means that one is merely an unlawful belligerent rather than being a traitor as well—hardly a reason to be treated *more* harshly.

. . . [I]t shall be the duty of the several courts of the United States . . . to cause such alien or aliens to be duly apprehended and convened before such court, judge or justice; and after a full examination and hearing on such complaint, and sufficient cause therefor appearing, shall and may order such alien or aliens to be removed out of the territory of the United States, or to give sureties of their good behaviour, or to be otherwise restrained . . . .<sup>44</sup>

Even assuming that the 1798 Act survived the incorporation of the Fourteenth Amendment, note the several crucial limits built into it. Despite that historical moment—one marked by its insensitivity to constitutional rights, the Act only permitted banishment and detention, not criminal trial. The drafters took pains to make sure that it gave the government power to render individuals “apprehended, restrained, secured and removed, as alien enemies” and nothing more. There is at least some logic in saying that the privilege of residing on our territory shall not extend to citizens who have loyalty to a foreign government at war with our nation. (The Act might have even acted as an incentive program for individuals to renounce their citizenship to the enemy.) It is an entirely different ball of wax to say that the government is free to punish them—and perhaps even put them to death—under special rules only for aliens. This is particularly so when there is no citizenship in “al Qaeda” to renounce.

The 1798 Act also built in procedural safeguards, insisting that those not “chargeable with actual hostility”<sup>45</sup> be treated with particular rights. Indeed, the Act went so far as to require “a full examination and hearing on such complaint” for all aliens before the Act’s detention and removal could be triggered. These procedural and jurisdictional limits were accompanied by other well-known restrictions. The Act only applied—explicitly by its terms—to *declared* wars.<sup>46</sup> And it was further circumscribed by applying only to *nations* at war with the United States. Each of these restrictions exists in the modern day version of the Act—an Act that has not been a candidate for legislative revision in the modern era (and the political powerlessness of those affected by the Act offers a good explanation why).

In the “global war on terror,” the government has sought to convert the principles behind the Act into a license to go after nationals of friendly

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44. Act of July 6, 1798, ch. 66, §§ 1-2, 1 Stat. 577, 577-78.

45. *Id.* § 1.

46. The current version of the Act is found at 50 U.S.C. § 21, and in both the original form and the present version it is also triggered by a threatened or actual “invasion or predatory incursion . . . by any foreign nation or government.” See also *United States ex rel. Jaeger v. Carusi*, 342 U.S. 347, 348 (1952) (“The statutory power of the Attorney General to remove petitioner as an enemy alien ended when Congress terminated the war with Germany. Thus petitioner is no longer removable under the Alien Enemy Act.” (footnote omitted)); *Ludecke v. Watkins*, 335 U.S. 160, 166 n.11 (1948) (rejecting the view that the legislative history of the Alien Enemy Act shows that “declared war” meant “state of actual hostilities”); J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1402 (1992) (describing the Alien Enemy Act and stating that “a formal declaration of war” is “valuable” because it “forces Congress to acknowledge publicly, and to accept, that one cost of waging war is that individual liberty in the United States might have to suffer”).

countries, such as Australia, Britain, and Saudi Arabia. It has sought to do so when war has not been declared, and to do so under a theory with a perpetual basis. The government has further sought to use these powers to put people to death and impose the stigma of a criminal conviction upon them, instead of simply making them subject to mere banishment. And it has even said that it can divest *accused* detainees of the writ of habeas corpus, so that, unlike those subject to the 1798 Act, they may receive no prompt federal court hearing on their status. Whatever the status of the alien-enemy doctrine may be today, it has historically been circumscribed by time (declared war) and manner (nations with whom the United States is at war). Eliminating those constraints gives the President a much larger set of powers.

It is no small matter for a U.S. citizen to take up with the enemy and proceed by stealth to slaughter his fellow citizens.<sup>47</sup> Given the absence of any apparent reason to suppose that whatever considerations make military commissions better suited to the national interest in the case of foreign belligerents than in the case of American citizens who turn on their nation, the line drawn by the MCA would appear to be wholly irrational, or at least not justified as clearly as a line bearing on access to such fundamental rights must be.

When defenders of the line being drawn can, in truth, invoke little beyond the obvious political convenience of stilling the voices that might otherwise rise up in protest were American citizens included in the MCA, due process of law demands more evenhanded treatment by the government. As the Court established in *Wong Wing v. United States*, “even aliens shall not be held to answer for a capital or other infamous crime” without the protections of the Fifth Amendment.<sup>48</sup> In *Wong Wing*, the government intended to deport four noncitizens for illegal presence, but first sentenced them to sixty days in jail. The Court upheld the deportation order, but invalidated the sixty-day sentence because it had been issued without the constitutional safeguards that would have protected a similarly situated citizen. *Wong Wing* continues to be invoked for the proposition that aliens are entitled to the same constitutional protections as are citizens in criminal proceedings. The war on terror demands nothing less. If that war requires military commissions, then they should be imposed on citizen and enemy alike. And, if citizen detainees require full habeas corpus rights, alien detainees require them, too.

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47. U.S. CONST. art. III, § 3, cl. 1 (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”).

48. 163 U.S. 228, 238 (1896).

## 2. *The habeas corpus stripping provisions*

The MCA does not use alienage only as a basis to decide who is subject to commission trial. Crucially, it purports to deny the writ of habeas corpus to *any* alien detained by the United States.<sup>49</sup> As the text of the MCA makes clear, its habeas stripping provisions are not limited to those detained at Guantanamo. Rather, it deprives those rights from *all* aliens, even lawful resident aliens living within the United States. Once again, citizens remain free to challenge their detention in civilian courts, while aliens remain subject to executive determination of their combatant status. Timothy McVeigh would be permitted to file a habeas claim, but an alien alleged to be McVeigh's low-level sympathizer would be barred from filing a petition, even if the alien never killed anyone or harbored any intention of doing so.

Shutting our courthouse doors to alien detainees, both green card holders and foreigners, sends the message that *their* rights are less worthy of protection than those of U.S. citizens. Yet everything about the Equal Protection Clause—from its plain text to its original intent—shudders at the notion that access to justice could be conditioned on citizenship.

The MCA obstructs access to what is arguably the Constitution's most fundamental right—the right to seek relief under habeas corpus. As the Court declared in *Coolidge v. New Hampshire*, habeas is among the rights “to be regarded as of the very essence of constitutional liberty.”<sup>50</sup> The right of access to habeas is indeed so important to our constitutional tradition that it is singled out for constitutional protection.<sup>51</sup>

The MCA's attempt to blockade alien detainees from access to habeas cannot survive the exacting scrutiny triggered by the infringement of such a fundamental right. Far less intrusive barriers to court access have been subject to strict scrutiny under equal protection, and have failed to survive. For example, in *Douglas v. California*,<sup>52</sup> the Court struck down on equal protection grounds a California law that allowed the appellate court to pick and choose whether indigent defendants would be entitled to appellate counsel. And in *Griffin v. Illinois*,<sup>53</sup> the Court invalidated a regulation that denied defendants access to the trial court transcript necessary for appellate review. As the Court noted, “our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.”<sup>54</sup> The right

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49. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36 (codified at 10 U.S.C. § 2241 (2007)).

50. 403 U.S. 443, 454 n.4 (1971); *see also* *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (noting that habeas is “shaped to guarantee the most fundamental of all rights”).

51. U.S. CONST. art. I, § 9, cl. 2.

52. 372 U.S. 353, 358 (1963).

53. 351 U.S. 12 (1956).

54. *Id.* at 17.



of habeas is antecedent to any other right to court access. The MCA barricades courthouse doors against alien detainees, silencing their ability to challenge their detentions and nullifying their exercise of any due process rights.

Nor can the MCA's distinction be justified as a codification of *Johnson v. Eisentrager*,<sup>55</sup> the 1950 Supreme Court decision that said that enemy aliens outside the United States lacked access to the writ. That decision relied in part on the 1798 Act—an Act that bears little resemblance to the MCA, as explained above, for reasons of scope, duration, and impact.<sup>56</sup> In addition, the text of the MCA permits suspension of habeas corpus in the continental United States, and the government has recently invoked that very provision in court to bar an immigrant in the continental United States from access to the writ.<sup>57</sup>

Moreover, the MCA attempts to strip access to the writ from the detainees at Guantanamo, despite the fact that the Court has suggested that Guantanamo is quite different than the prison at issue in *Eisentrager*. *Eisentrager* suggests, after all, that equal protection guarantees cannot apply with full force throughout the globe. The text of the 1870 Enforcement Act itself reflects its geographic limitations, referring to those “under the jurisdiction of the United States.”<sup>58</sup> Whatever the outer bounds of such limitations may be (e.g., does “jurisdiction” extend to all enemy combatant trials, whether in Africa or Manhattan?), *Rasul v. Bush*,<sup>59</sup> read carefully, shows that Guantanamo falls within its scope.

In *Rasul*, the Court appears to have rejected the government's assertion that Guantanamo is a land outside U.S. jurisdiction.<sup>60</sup> Indeed, as “[t]he United States exercises ‘complete jurisdiction and control’ over the Guantanamo Bay Naval Base,”<sup>61</sup> the Court observed that alien detainees held at Guantanamo are not categorically barred from raising constitutional claims. The majority dropped a pointed footnote, strongly suggesting that the detainees were protected by the Constitution.<sup>62</sup> Indeed, Justice Kennedy separately concluded

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55. 339 U.S. 763 (1950).

56. See *supra* text accompanying notes 44-47; see also *Eisentrager*, 339 U.S. at 775 (describing how the Alien Enemy Act is triggered only by a declaration of war and opining that when such a state of war exists, “courts will not inquire into any other issue as to [an alien enemy's] internment”).

57. See Respondent-Appellee's Reply in Support of Motion to Dismiss for Lack of Jurisdiction at 3, *Al-Marri v. Wright*, No. 06-7427 (4th Cir. Dec. 29, 2006), available at [http://www.brennancenter.org/dynamic/subpages/download\\_file\\_47350.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_47350.pdf).

58. Enforcement Act of 1870, ch. 114, § 16, 16 Stat. 140, 144 (codified as amended at 42 U.S.C. § 1981 (2007)).

59. 542 U.S. 466 (2004).

60. *Id.*

61. *Id.* at 467.

62. The footnote states:

Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—

that Guantanamo detainees had a constitutional right, unlike the petitioners in *Eisentrager*, to bring habeas petitions.<sup>63</sup> It makes sense not to constitutionalize the battlefield; but a long-term, concerted punishment system in an area far from active hostilities, like the one in operation at Guantanamo Bay, looks nothing like a battlefield.

## II. THE EQUAL PROTECTION GUARANTEE AND LEGAL PROCESS

Strong reasons undergird America's traditional insistence on basic equality when the most awesome, punitive powers of government are at stake. As we saw in the Introduction, Justice Scalia, among others, has strongly argued that the Constitution's guarantee of equal protection stands as a way to ensure that the most weak and vulnerable are represented by the powerful. If Congress deems terror suspects too great a threat to warrant access to federal courts, at a minimum they must deny such access for all persons, and not selectively target only those without a political voice. This Part considers three advantages of such an approach: sidestepping the substantive constitutionalization of the war on terror; enabling deference to government decisionmaking; and bolstering national security.

### A. Substantive Constitutionalization in the War on Terror

It is a truism in war powers analysis that the courts fear rigid rules that might deprive the President of tools he needs to wage war effectively. For that reason, a tremendous amount of substantive litigation—on war powers, covert operations, intelligence-gathering techniques, and the like is often never adjudicated on the merits.<sup>64</sup> The Court adopts a Bickelian passive-virtues approach<sup>65</sup> to defer such inquiries, sometimes going even beyond Bickel to the point of not reaching them at all.<sup>66</sup> Substantive challenges rarely succeed for these reasons.

Procedural challenges, however, are more plausible candidates for success. Two of the Supreme Court's strongest rebukes to the President during armed

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unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring), and cases cited therein.

*Id.* at 484 n.15. This passage obviously concerns constitutional violations, otherwise the Court's citation to pages in Justice Kennedy's *Verdugo* concurrence would make no sense, as those pages deal exclusively with the Constitution's applicability.

63. *Id.* at 487-88 (Kennedy, J., concurring in the judgment).

64. See JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 56 (1993).

65. See Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

66. See Neal Kumar Katyal, *The Supreme Court, 2005 Term—Comment: Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 84-86 (2006).

conflict, *Youngstown* and *Hamdan*, both placed the Court in the position of not having to freeze a substantive view of the law into place. Instead, the Court held that the relevant action had to be authorized by Congress, not the President. Justice Black said in *Youngstown* that seizing the mills was “a job for the Nation’s lawmakers, not for its military authorities.”<sup>67</sup> In *Hamdan*, Justice Breyer’s concurrence said “[n]othing prevents the President from returning to Congress to seek the authority he believes necessary.”<sup>68</sup> To be sure, there were Justices who went further: Justice Douglas said the seizure of the steel mills could not be done without paying just compensation for example.<sup>69</sup> And Justice Kennedy in *Hamdan* stated that “[i]f Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.”<sup>70</sup> But much of the action in these cases is at the level of process.

Equal protection offers another vehicle to achieve a focus on process instead of substance. The Court, when it confronts an equal protection challenge, is not being asked to codify a particular substantive standard into law. Equal protection challenges to the MCA, for example, do not ask whether Congress can authorize military commissions or strip habeas rights; they simply say that whatever substantive rules Congress settles upon, it must apply them symmetrically to all persons.

In this way, equal protection challenges can become the enemy of individual liberty ones. The legislative response to a Court decision striking down the MCA on equal protection grounds might be to make *everyone* eligible for military commissions—citizens and aliens alike. For that reason, it misses the mark for the government to assert “national security” in response to equal protection challenges, for it very well may be that the nation’s security is increased, not diminished, by a successful equal protection challenge. The upshot may be to have more, not fewer, commission trials.

The structural logic of insisting on equality in this area has, as its starting point, a deep unease about the proper substantive standard. Instead, the focus rests upon the decisionmaking process and ensuring that the interests of those that do not have a voice in the legislature are effectively represented by those that do. Under those conditions, the legislature will be less likely to externalize their problems onto the powerless, and more likely to reach a better decision. The powerless, in effect, give their proxy vote to the powerful, knowing that when the powerful are brought within the ambit of the laws, lawmaking is likely to become fairer. The process of virtual representation, with a pedigree going back even further than *McCulloch*, also has the benefit of forcing legislative reconsideration of questionable choices.

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67. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

68. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799 (2006) (Breyer, J., concurring).

69. *Youngstown*, 343 U.S. at 631 (Douglas, J., concurring).

70. *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring in part) (emphasis added).

This type of move might be understood as a species of constitutional avoidance doctrine. Obviously, it does not sidestep all of the constitutional questions. Rather, the equality move posits a constitutional baseline, similar to separation of powers, that the Court is to enforce, but it then permits the legislature room for rethinking and recognizes its primacy. One lens through which to view such moves is Sager's underenforcement paradigm.<sup>71</sup> Sager pointed out that, due to institutional competence and other limitations, courts are unable to define constitutional protections with completeness and that sometimes Congress will be better poised to define these "underenforced" rights. The paradigm, applied to the modern day, would suggest that for understandable institutional competence limitations, the judiciary cannot adequately police the boundaries of individual liberty in the war on terror. The most courts can effectively do when so many variables are in flux is to create deliberation-forcing mechanisms, as *Hamdan* did.

This is not to say that deliberation forcing will itself be successful. Sager's theory works best when Congress is poised to respect constitutional rights that the courts are structurally incapable of vindicating. But sometimes legislative underenforcement of constitutional protections is just as serious a problem as judicial underenforcement. This scenario is most likely to unfold when the legislature is passing laws that carve out the powerless for special disfavor. Accordingly, for deliberation-forcing doctrines to work correctly, courts cannot simply resuscitate the role of Congress via separation of powers (such as *Hamdan*), they must also enforce equality guarantees as well. This is a corollary to judicial underenforcement: that "second look" or "legislative remand" doctrines might need to remedy political process failures in order for the doctrines to be effective.

### B. Deference

When legislation is of general applicability, it is not only likely to be fairer, it is also likely to be brought within traditional canons that permit it to receive deference from the courts. Political accountability is a crucial component for deference, and when legislation only impacts people without a vote, it cannot be easily justified under that matrix. Indeed, there are good reasons for taking legislative activity out of the realm of deference altogether when the action directly affects only the powerless.<sup>72</sup> Executives that seek to harness the

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

72. See Calabresi, *supra* note 16, at 92-93 ("The ultimate question must be: *in practice* do [the laws] burden all of us, or only those who do not carry weight in the legislature? If the latter is the case, legislatures cannot be relied upon."). Calabresi focused on a somewhat different claim here—that it would be up to courts to assess whether the law would have passed had it been more broadly applicable: "Courts must . . . determine for themselves whether the legislature would have passed such a law if the burden rested on those to whom

benefits of deference in court would therefore be well advised to avoid blatant discrimination on the basis of alienage.

The tradition of deference is built on, *inter alia*, the rock of political accountability—that Congress is accountable in ways that the federal courts are not. That is why, in cases such as *City of Cleburne v. Cleburne Living Center*, the Court has held that certain classifications, including those based on alienage, are “so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy” and has imposed strict scrutiny “because such discrimination is unlikely to be soon rectified by legislative means.”<sup>73</sup> One can see the emphasis on accountability explicitly in the caselaw,<sup>74</sup> and in the fact that federal agencies (who possess some accountability and much expertise) will lose when they conflict with the far more directly accountable Congress.<sup>75</sup> And when accountability is lacking, the case for deference is much weaker. As Justice Powell put it in *Chadha*: “Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to ‘the tyranny of a shifting majority.’”<sup>76</sup> A similar point has been made in widely different areas of constitutional law.<sup>77</sup>

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the legislators had to answer at the polls and not just on ‘outcasts.’” *Id.* at 94. The approach in this Article differs, for it gives primacy to institutional competence limitations, one of which is that courts lack the ability to determine whether a law might have passed were it worded differently. Instead, when a court is faced with a discriminatory law such as the MCA, the proper course is to strike it down and wait for the legislature to pass a more generally applicable one if the votes can be mustered.

73. 473 U.S. 432, 440 (1985).

74. In the recent compelled funding case *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550 (2005), the Court upheld a beef advertisement program over a First Amendment challenge. The Court observed that some of its decisions “have justified compelled funding of government speech by pointing out that government speech is subject to democratic accountability.” *Id.* at 563. It stressed the oversight roles played by the Secretary of Agriculture and, more abstractly, Congress, in the beef program. *Id.* at 563-64.

75. For example, in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Court held that the FDA did not have the authority to regulate tobacco because Congress had reserved that authority for itself. In a note at the end of the majority opinion, the Court stated that “regardless of how likely the public is to hold the Executive Branch politically accountable . . . an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.” *Id.* at 161. This sentence directly confronts the dissent (penned by Justice Breyer, with three justices concurring) that suggested that agencies and Congress stood on equal footing with respect to democratic accountability. *See id.* at 190 (Breyer, J., dissenting).

76. *INS v. Chadha*, 462 U.S. 919, 966 (1983) (Powell, J., concurring in the judgment).

77. For example, the Free Exercise Clause proscribes “prohibition[s] that society is prepared to impose upon [religious minorities] but not upon itself,” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545 (1993) (quotation omitted), but does not restrict “neutral law[s] of general applicability” resulting from the normal “political process” in our “democratic government,” *Employment Div. v. Smith*, 494 U.S. 872, 879, 890 (1990). Similarly, when tax laws “single[] out the press,” the Court has struck them

With respect to certain constitutional clauses, the Court has been particularly deferential to the accountable legislature. For example, in the seminal eminent domain decision *Berman v. Parker*,<sup>78</sup> the Court observed that “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”<sup>79</sup> Therefore, “[t]he role of the judiciary . . . is an extremely narrow one.”<sup>80</sup> And in a decision equally important to the Eighth Amendment, *Gregg v. Georgia*, the decision reinstating the death penalty, the Court noted that “the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards.”<sup>81</sup>

Nevertheless, the Court does not appear to have grappled recently with a circumstance where the *lack* of accountability has led to more rigorous judicial scrutiny. For example, the Court has acknowledged, but has not fully recognized, how the threat of a veto affects legislative decisionmaking.<sup>82</sup> The wheel need not be reinvented, however, as it happens to be supported by the most important footnote in all of constitutional law. The basic contours of the point—that the lack of accountability removes a key basis for judicial deference—are evident in *Carolene Products*. With our modern blinkered tiers of scrutiny and jargon, we forget that *Carolene Products* was not even an equal protection case.<sup>83</sup> But the Court went out of its way to explain why the case for

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down because “the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened,” whereas general taxation laws are upheld because there is little cause to “fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.” *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983). A similar point can be made about the Commerce Clause. *See* S.C. State Highway Dep’t v. *Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938) (requiring heightened scrutiny of laws whose “burden falls principally upon those without the state” because such laws are “not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state”).

78. 348 U.S. 26 (1954).

79. *Id.* at 32. Its broad reading of public purpose was recently endorsed in *Kelo v. City of New London*, 545 U.S. 469, 480-81 (2005).

80. *Berman*, 348 U.S. at 32.

81. 428 U.S. 153, 175 (1976).

82. When the Court evaluated an airport commission overseen by the House of Representatives, it found impermissible encroachment by the legislature that would interfere with accountability. *See* *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991) (“The threat of the veto hangs . . . like the sword over Damocles, creating a ‘here-and-now subservience’ to the [House] Board of Review sufficient to raise constitutional questions.”).

83. *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 151 (1938) (“Appellee raises no valid objection to the present statute by arguing that its prohibition has not been extended to oleomargarine or other butter substitutes in which vegetable fats or oils are substituted for butter fat. The Fifth Amendment has no equal protection clause, and even that of the Fourteenth, applicable only to the states, does not compel their Legislatures to prohibit all like evils, or none.”). Only with *Bolling v. Sharpe*, 347 U.S. 497 (1954), was the equality guarantee extended to the federal government.

deference was weaker when legislation was aimed at a discrete and insular minority:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; whether 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, and which may call for a correspondingly more searching judicial inquiry.<sup>84</sup>

In short, footnote four suggests that the political powerlessness of a group affected by a law is a reason against evaluating that law under deferential rational basis review. And just in case there was any doubt, Justice Stone added a pointed citation at the end of the footnote to justify “more searching judicial inquiry,” citing the precise page of *McCulloch* where Chief Justice Marshall had made his point about virtual representation.

In a 1971 alienage case, the Court revitalized the footnote and placed it centrally within equal protection jurisprudence.<sup>85</sup> Modern cases have suggested that legislation aimed at the powerless is less likely to be the result of good-faith efforts in Congress. For example, in *Plyler v. Doe*, the Court suggested that the label “suspect class” represents a probability that legislation singling out that group lacks a “legitimate objective” and is the result of prejudice, not good faith policymaking.<sup>86</sup> In settings such as *Plyler* and *Cleburne*,<sup>87</sup> the Court is vindicating a view of human nature that goes back to Madison in *Federalist 51*, that government is necessary because men are not angels and therefore need some apparatus of restraint—including the “external” restraint of popular accountability.<sup>88</sup>

There are, of course, other reasons for deference apart from political accountability. Justice Frankfurter’s classic treatment rooted the doctrine in notions of accountability alongside institutional competence and the fact that members of Congress take an oath to uphold the Constitution: “Courts are not representative bodies. They are not designed to be a good reflex of a

84. 304 U.S. at 152 n.4 (citations omitted).

85. See *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (stating that aliens are “a prime example of a ‘discrete and insular’ minority”).

86. 457 U.S. 202, 216 n.14 (1982).

87. See *supra* text accompanying note 29.

88. See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (“Ambition must be made to counteract ambition. . . . If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”).

democratic society.”<sup>89</sup> But some of these claims, such as “representative[ness],” will naturally depend on whether the specific population affected by a proposed law is being represented in the legislative process. That is not to say that other rationales for judicial restraint are irrelevant,<sup>90</sup> but simply to note that the case for restraint is more muted in such a setting.

Concerns about institutional competence are also less relevant when the courts are examining issues of fundamental justice, as they sometimes are in the war on terror cases. In such settings, the courts tread on familiar ground, and there often is a self-dealing aspect to some of the legislation, such as when a law blocks the ability of federal courts to even hear challenges to legislation (for example, the MCA’s prohibition on aliens seeking writs of habeas corpus).<sup>91</sup> The Court, for example, does not extend deference when Congress legislates a standard of review under the aegis of its Fourteenth Amendment remedial and prophylactic powers.<sup>92</sup>

To be sure, there is always *some* political accountability when the legislature absolutely deprives aliens of their rights. For example, American citizens could be aghast at the MCA and vote out those who voted for it in Congress. But that form of accountability is too weak, as it posits an *uber*-empathetic voting population so concerned for the rights of others that they will vote on the basis of policies that do not impact their own lives. This is just too fanciful. Virtual representation cannot be effective if it depends on heroic assumptions of empathy, just as our early countrymen recognized by placing the Privileges and Immunities Clause in Article IV and writing *McCulloch* with virtual representation in mind.

One final point follows from this lack of representation: its impact on the statutory precedent doctrine. Typically, courts award strong *stare decisis* effect to previous interpretations of a statute.<sup>93</sup> The idea is that Congress can override any judicial mistake about a statute; when they choose not to and instead leave a statutory interpretation undisturbed, then that precedent attains special force. But if the legislation is one that singles out only the powerless, or if its vague language is read by a court to do so, there is no reason to award that level of

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89. *Dennis v. United States*, 341 U.S. 494, 525 (1951); *see also* *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring).

90. Institutional competence concerns may explain why *Hampton* permitted a looser standard of scrutiny for a federal alienage classification, despite having recognized the political powerlessness of aliens. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976).

91. *Cf. Morrison v. Olson*, 487 U.S. 654, 704-05 (1988) (Scalia, J., dissenting) (“Where a private citizen challenges action of the Government on grounds unrelated to separation of powers, harmonious functioning of the system demands that we ordinarily give some deference, or a presumption of validity, to the actions of the political branches in what is agreed, between themselves at least, to be within their respective spheres. But where the issue pertains to separation of powers, and the political branches are (as here) in disagreement, neither can be presumed correct.”).

92. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

93. *See, e.g., Flood v. Kuhn*, 407 U.S. 258 (1972).



respect to a previous judicial interpretation. For all of the process failure reasons discussed above, it is very unlikely for that statute to be a viable candidate for legislative revision, even when the courts made a mistake and improperly interpreted the statute. Accordingly, precedents that single out aliens for special disfavor do not have all the characteristics of stability that evenhanded laws possess, and do not deserve the same level of deference as an ordinary statutory precedent.

*C. The Undermining of National Security Policy and U.S. Reputation Abroad*

The disparity between the rights of alien and citizen detainees presumes the former are more dangerous, so much so that the confines of our constitutional protections cannot contain them. But our country knows all too well that the kind of hatred and evil that has led to the massacre of innocent civilians is born both at home and abroad. The threat of terrorism knows no nationality; rather, it is a global plague, and its perpetrators must be brought to justice no matter what their country of origin. Terrorism does not discriminate in choosing its disciples. If anything, we can expect organizations such as al Qaeda to select, wherever possible, American citizens to carry out its despicable bidding. The Attorney General himself has recently reminded us that “[t]he threat of homegrown terrorist cells . . . may be as dangerous as groups like al Qaeda, if not more so.”<sup>94</sup>

Nothing in the MCA, nor the Detainee Treatment Act<sup>95</sup> or the Military Order that preceded it, suggests that military commissions are more necessary for aliens than for citizens suspected of terrorist activities. Indeed, both the Executive and Congress appear to believe that citizens and noncitizens pose an equal threat in the war on terror. Since the attacks of September 11th, the Executive has argued for presidential authority to detain and prosecute U.S. citizens as terrorists in cases such as *Padilla* and *Hamdi*. And in the latter, the Supreme Court agreed that “[a] citizen, no less than an alien, can be part of or supporting forces hostile to the United States or coalition partners and engaged in an armed conflict against the United States, such a citizen, if released, would

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94. Alberto Gonzalez, U.S. Att’y Gen., Remarks at the World Affairs Council of Pittsburgh on Stopping Terrorists Before They Strike: The Justice Department’s Power of Prevention (Aug. 16, 2006) (transcript available at [http://www.usdoj.gov/ag/speeches/2006/ag\\_speech\\_060816.html](http://www.usdoj.gov/ag/speeches/2006/ag_speech_060816.html)); see also *Foiled Dirty-Bomb Plot Reveals Chilling New Threats*, USA TODAY, June 11, 2002, at 10A (reporting that when announcing Jose Padilla’s arrest in 2002 for suspicion of planning a dirty bomb attack on U.S. soil, Attorney General John Ashcroft described Padilla’s American citizenship as attractive to al Qaeda because Padilla could move freely and easily within the United States); Jessica Stern, Op-Ed., *Al Qaeda, American Style*, N.Y. TIMES, July 15, 2006, at A15 (fearing that al Qaeda is aiming to recruit American citizens for domestic terror attacks).

95. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§1001-1006, 119 Stat. 2739 (codified in different sections of 10, 28, and 42 U.S.C.).

pose the same threat of returning to the front during the ongoing conflict.”<sup>96</sup> Likewise, Congress did not differentiate between citizens and noncitizens in the Authorization for the Use of Military Force, which provided the President with the authority to “use all necessary and appropriate force against those nations, organizations, or *persons* he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”<sup>97</sup>

There is simply no reason why the government must subject aliens who are alleged to have participated in acts of terrorism to military commissions, but need not do so for citizens suspected of the same crimes. If it is truly necessary to treat aliens this way to combat terrorism effectively, then the very same need would exist for citizens as well. A citizen who commits a terrorist act is just as culpable as the alien who commits that act. Indeed, there is an argument that the citizen’s actions are worse—since he is guilty of treason in addition to whatever else he has perpetrated.

The breakdown in parity between citizen and alien post-9/11 is a new, and disturbing, trend. Even the horrendous internment of Japanese Americans in World War II applied symmetrically to citizens and aliens.<sup>98</sup> The policy was memorably defended by Lieutenant General John DeWitt before Congress: “A Jap’s a Jap. It makes no difference whether he is an American citizen or not.”<sup>99</sup> Some, such as former Chief Justice Rehnquist, have disagreed, arguing that the problem in World War II was applying these exclusion orders to citizens. His argument was grounded entirely upon the Alien Enemy Act, which he recognized permitted only the “summary arrest, internment and deportation wherever a declared war exists.”<sup>100</sup> Entirely missing from this account was any discussion of whether a disparity between alien and citizen might have made matters worse, instead of better. After all, the one positive thing that can be said in the policy’s favor was that at least it affected a few people who could vote.<sup>101</sup>

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96. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (internal quotation omitted).

97. Pub. L. No. 107-40, 115 Stat. 224 (2001) (emphasis added).

98. For example, the Los Angeles evacuation order evidently provided that “[a]ll persons of Japanese ancestry, both alien and non-alien, will be evacuated.” Civilian Exclusion Order No. 34, 7 Fed. Reg. 3967 (May 28, 1942).

99. Constitutional Rights Found., *America Responds to Terrorism: Wartime and the Bill of Rights: The Korematsu Case*, <http://www.crf-usa.org/terror/korematsu.htm> (quoting DeWitt).

100. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 210 (1998) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 775 (1950)).

101. Carving out particular races for special disfavor can pose some of the same process concerns as carving out noncitizens. In both, empathy failure can be an important variable: government officials behind the detention faced no risk whatsoever that they would be interned—they could never be accused of being Japanese. It is notable that, despite the massive threat posed by Germany, German-Americans were not subject to a similar mass detention order. There can be no doubt that equality grounds would have condemned the World War II internment of Japanese-Americans.

To say this is not to argue that liberty concerns are always inappropriate and that the government has *carte blanche* when it acts evenhandedly. There are some substantive constitutional principles—such as prohibiting the mass detention of an entire race of people without any individualized basis—that properly should be frozen into constitutional law. But when the boundaries of liberty are uncertain, as they tend to be today, equality arguments offer a mechanism to prompt legislative reconsideration and democratic accountability.

Laws of general applicability are not only preferable, they also keep us safer. In affording the same process to alien and citizen detainees, we maintain the superiority of our judicial system. The federal courts have a tried and true record of discerning the guilty from the innocent without turning to arbitrary distinctions such as alienage. Our civilian courts have handled a variety of challenges and complicated cases—from the trial of the Oklahoma City bombers to the awful spying of Aldrich Ames and others. They have tried the 1993 World Trade Center bombers, Manuel Noriega, and dozens of other cases. They have prosecuted cases where the crimes were committed abroad. Indeed, the Justice Department has recently extolled its resounding success in terrorism cases in federal civilian court—where it has proceeded to charge nearly 500 individuals with crimes of terrorism.<sup>102</sup> Our national security policy requires adherence to a judicial process that works for *all* terrorist suspects. A two-tiered justice system jeopardizes not only the rights of alien suspects, but also the safety of American citizens.

As the world becomes even smaller, and the movement of people across borders becomes even more fluid, we need a unitary legal system that is capable of embracing all those in our jurisdiction: one that does not pick and choose who gets fundamental protections. Only then can we be assured that the real terrorists are brought to justice.

Moreover, legislation should not play on post-9/11 xenophobia. In the wake of terrorism, fears are heightened, rationality is muted, and it is the government's responsibility to be the source of reason amidst the chaos, not to fan fears and stimulate even greater hatred. In pointing toward alien detainees as the sole source of danger, however, legislation such as the MCA fails to provide actual solutions to the threat of terrorism. Our policy cannot afford to dally under any delusions that foreigners are the sole source of terrorist impulses. The threat of terrorism permeates all borders, and only fair and evenhanded laws can effectively ferret out that threat. Allowing rank discrimination to drive policy takes attention away from national security and focuses on meaningless distinctions of “us” versus “them.”<sup>103</sup>

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102. Paul J. McNulty, U.S. Deputy Att’y Gen., Prepared Remarks at the American Enterprise Institute (May 24, 2006) (transcript available at [http://www.usdoj.gov/dag/speech/2006/dag\\_speech\\_060524.html](http://www.usdoj.gov/dag/speech/2006/dag_speech_060524.html)).

103. Computer security expert Bruce Schneier has put the point well: Profiling can also blind you to threats outside the profile. If U.S. border guards stop and

Finally, in the wake of international disdain for the military tribunals authorized by President Bush, our country is already under global scrutiny for its disparate treatment of non-U.S. citizens. We must be careful not to further the perception that, in matters of justice, the U.S. government adopts special rules that single out foreigners for disfavor. Otherwise, the result will be more international condemnation and increased enmity about Americans worldwide. The predictable result will be less cooperation and intelligence sharing, and fewer extraditions to boot.

In this respect, the laws of war have changed markedly in recent years, and now reflect the basic equality principle. The Geneva Conventions, for example, require a signatory to treat enemy prisoners of war the same way as it treats its own soldiers.<sup>104</sup> Even for non-prisoners of war, the minimum requirements of Common Article 3 require trials to take place in a “regularly constituted court.”<sup>105</sup> As the International Committee of the Red Cross Commentary puts it:

[C]ourt proceedings should be carried out in a uniform manner, whatever the nationality of the accused. Nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same courts. There is therefore no question of setting up special tribunals to try war criminals of enemy nationality.<sup>106</sup>

Again, the logic of such provisions is best understood as creating virtual representation—ensuring that the interests of accused enemies will be vindicated by the application of longstanding procedural rules for the trial of the signatory power’s own troops.

Fidelity to these precepts, far from undermining the war on terror, is the best way to win it. By demonstrating that America is not being unfair—and by subjecting those from other lands to the same justice Americans face for the same crimes—America projects not only benevolence, but strength. America’s soft power depends, in no small part, on being able to rise above pettiness and to highlight the vitality of our system. Carving out special rules for “them” and reserving different rules for “us” is no way to win respect internationally.

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search everyone who’s young, Arab, and male, they’re not going to have the time to stop and search all sorts of other people, no matter how hinky they might be acting. . . . [I]t actually can reduce security by blinding people to the real threats. Institutionalized profiling can ossify a mind, and a person’s mind is the most important security countermeasure we have.

BRUCE SCHNEIER, *BEYOND FEAR: THINKING SENSIBLY ABOUT SECURITY IN AN UNCERTAIN WORLD* 136-37 (2003).

104. Geneva Convention Relative to the Treatment of Prisoners of War art. 102, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

105. *See id.* art. 3(1)(d).

106. *See* INT’L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 623 (Jean S. Pictet ed., A.P. de Heney trans., 1960). The International Covenant on Civil and Political Rights (ICCPR), which the U.S. government has ratified, sets out in article 14(1) that all persons “shall be equal before the courts and tribunals.” International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171.

The British experience provides a useful contrast. The House of Lords in *A v. Secretary of State for the Home Department*,<sup>107</sup> struck down the terrorist detention policy on equality grounds. They found that there was no reasonable or objective justification why a non-U.K. national suspected of being a terrorist could be detained while a U.K. national would be allowed to go free. The Lords rejected the Attorney General's arguments that immigration law and international law justified differential treatment, including detention, of aliens in times of war or public emergency.<sup>108</sup> As Lord Nicholls put it, "The principal weakness in the Government's case lies in the different treatment accorded to nationals and non-nationals. . . . The Government has vouchsafed no persuasive explanation of why national security calls for a power of indefinite detention in one case but not the other."<sup>109</sup> The upshot was that it was "difficult to see how the extreme circumstances, which alone would justify such detention, can exist when lesser protective steps apparently suffice in the case of British citizens suspected of being international terrorists."<sup>110</sup>

Sadly, the experience of Britain under the European Convention on Human Rights is far truer to our backbone of equality than that of our own politicians under our own Constitution, who conveniently forget about equality even on fundamental decisions such as who would face a military trial with the death penalty at stake. Indeed, the United Kingdom reacted to the decision by adopting laws that treated citizens and foreigners alike.<sup>111</sup> Although our Founders broke away from Britain in part because of the King's refusal to adhere to the basic proposition that "all men are created equal," it is now Britain that is teaching us about the meaning of those words.

In sum, by splitting our legal standards on the basis of alienage, we are in effect jeopardizing our own safety and national interest. When terror policy is driven by anti-alien sentiment, the result is only our own isolation. It will not only chill relations with key allies abroad and disrupt extraditions, it will also alienate many of our own citizens who have relied on our country's longstanding commitment to equal justice for all.

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107. [2004] UKHL 56, [2005] 2 A.C. 68.

108. "The Secretary of State was, of course, entitled to discriminate between British nationals on the one hand and foreign nationals on the other for all the purposes of immigration control . . . . What he was not entitled to do was to treat the right to liberty . . . of foreign nationals who happen to be in this country for whatever reason as different in any respect from that enjoyed by British nationals." *Id.* at 134.

109. *Id.* at 127-28.

110. *Id.* at 127.

111. *Compare* Anti-terrorism, Crime and Security Act, 2001, c. 24, § 21 (applying only to "international terrorist[s]"), *with* Prevention of Terrorism Act, 2005, c. 2, § 1(9)(d) (applying to all "individuals who are known or believe to be involved in terrorism-related activity"). As the Secretary of State for the Home Department, Charles Clarke, put it in supporting the new Act: "I accept, too, the Lords' judgment that new legislative measures must apply equally to nationals as well as to non-nationals." 430 PARL. DEB., H.C. (6th Ser.) (Jan. 26, 2005) 306 (statement of Charles Clarke).

## CONCLUSION

The *who* question tends to be submerged for many academics and litigators. These individuals would prefer instead to think about big philosophical questions about the balance between liberty and security. In this symposium piece, I've tried to be analytic, rather than personal. But for me, at least, the son of immigrants who were green card holders and thus subject to the President's order as noncitizens, the equality arguments are at least as important.

I remember the first time I traveled down to Guantanamo Bay. It was November 6, 2004. I had been trying to go to Guantanamo for many months to see Mr. Hamdan, as I had already filed the habeas petition in his case and argued it in the district court. But the government for many months said I had no "need to know"—no reason to be there to meet him. I ultimately received permission, and embarked on the over twenty-four-hour trip to Cuba. When I finally got to the camp where they were detaining him, Mr. Hamdan kicked everyone out of the room except for me. I thought he was going to yell at me—as by that point he had been detained for nearly three years, with ten of those months in solitary confinement. Instead, he looked at me, and said "I have just one question for you: Why are you doing this? Wasn't your last client Al Gore? Why go from him to me?"

The question took me by surprise. I was so immersed in the details of the legal battle I had forgotten to think about the meta-reason why I was in it at all. There were a million smaller reasons, to be sure, but I paused for about a half minute while I weighed some of them in my mind. One stood out then, and still does today. I told him that my parents came here from India, with eight dollars in their pockets, and chose this land because of its central commitment to equality. They knew they could arrive on our shores and be treated fairly, and that their children would be treated fairly. There is no nation on earth, I told Mr. Hamdan, that would have given me—the son of immigrants—the opportunities I had. The education, the chance to work in the Supreme Court, to handle some of the most sensitive national security matters for the Clinton Administration. I told him that I was deeply patriotic for these reasons, and that when President Bush issued his order, it was the first time in my life that I felt that this vision of America—my parents' vision—was being violated. I told him that was why I had to do something.

Discrimination against aliens is particularly pernicious given our nation's history. We are a land of immigrants. The Declaration of Independence lists as *first* among its "self-evident truths" the idea that "all men are created equal." So important was the concept that it appears before the commonly quoted protection of "Life, Liberty and the pursuit of Happiness." To be sure, it took the Fourteenth Amendment and Representative Bingham to make the equality promise of the Declaration real. But real they have been. While being afraid is not easy, neither is abandoning our most fundamental precepts. A two-track

system of justice is so deeply in tension with the American ideal of equality—an ideal that stretches from the Declaration to the Fourteenth Amendment, from *McCulloch* to the Enforcement Act, from Justice Jackson to Justice Scalia—as to caution the greatest of prudence in departing from it.

Once again, I conclude with a reminder of the powerful words of an American patriot, Thomas Paine, who encapsulated our American promise in a single sentence: “He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.”<sup>112</sup>

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112. See Transcript of Oral Argument at 83, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-184.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-184.pdf) (quoting Thomas Paine, *Dissertation on First Principles of Government* (July 1795), in 2 *THE COMPLETE WRITINGS OF THOMAS PAINE* 570, 588 (Philip S. Foner ed., 1945)); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 *YALE L.J.* 1259, 1310 (2002) (quoting *In re Yamashita*, 327 U.S. 1, 81 (1946) (Murphy, J., dissenting) (quoting Paine)).