ALIEN HUMAN-TRAFFICKING VICTIMS IN THE UNITED STATES:
EXAMINING THE CONSTITUTIONALITY OF THE TVPA AND INA'S ASSISTANCE REQUIREMENTS

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An estimated 17,500 foreigners are trafficked into the United States each year. Yet the T visa, created by the Trafficking Victims Protection Act (TVPA) and which provides legal stay for up to 5,000 alien trafficking victims per year, has reached at most 2,000 victims since TVPA’s original passage in 2000. While many scholars criticize TVPA’s assistance requirement for hinging T visa receipt on the arduous and overly broad requirement that alien victims provide any reasonable investigatory and prosecutorial assistance to law enforcement, this Article contributes a constitutional and policy analysis of the TVPA and its related Immigration and Nationality Act (INA) provisions. Through this analysis, this Article provides human and constitutional rights arguments for why rational basis remains an inadequate review standard for federal statutes tied to immigration law that discriminate on the basis of alienage.

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INTRODUCTION

Human trafficking occurs extensively within the United States and outside its borders. It generates billions of dollars in revenue for its perpetrators\(^1\) and is a violation of human rights under international law.\(^2\) Despite its pervasiveness, American legislators only began to develop response standards for victim treatment in the past fourteen years. The passage of the federal Victims of Trafficking and Violence Protection Act of 2000 (TVPA) was a critical first step in promoting victim assistance, especially in its providing of foreign victims trafficked into the United States with the opportunity to gain both legal status via T visas and also services via certification.\(^3\) TVPA’s reauthorizations (which for purposes of this Article will be collectively termed TVPA),\(^4\) were most recently made in 2013 as part of the Violence Against Women Act (VAWA),\(^5\) and demonstrate political willingness to help those forced into modern-day slavery.

Despite its history of revisions, TVPA is not without flaws. Specifically, the Act and its corresponding sections of the Immigration and Nationality Act (INA) require alien\(^6\) victims to meet any reasonable request by law enforcement officials for investigatory and prosecutorial assistance. Unless the United States Attorney General exempts victims from the requirement or they otherwise are excluded from its reach, alien trafficking victims must comply with the assistance requirement at every point in time after arrival in the United States to remain legally and to receive comprehensive state services.\(^7\)

The purpose of the assistance requirement is to support government efforts to prosecute human traffickers. While cooperation with government is a crucial component of any comprehensive state plan to decrease human trafficking rates, the assistance requirement is problematic—if not unconstitutional—because it places the burden of providing assistance to officials on alien victims for no reason other than their alienage. By contrast, victims of trafficking who are U.S. citizens or legal permanent residents (LPRs) need neither certification nor demonstration of willingness to assist law enforcement to receive federal and state aid.\(^8\)

\(^5\) Id.
\(^6\) The author appreciates that the use of the term “alien” to describe non-citizen foreigners remains controversial. Its use in this Article draws solely and directly from its normative usage in immigration law and is not intended to serve any pejorative or offensive purpose.

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Moreover, courts typically give Congress plenary power deference when reviewing immigration-related claims, such as those implicating the INA. While immigration law challenges are not usually reviewed by the courts due to deference, this Article proposes to circumvent the limitations on judicial review. This Article argues that after alien trafficking victims legally enter the country, any assistance requirements that are based upon alienage—and are required to receive further services or status adjustments—infringe upon their equal protection rights guaranteed by the Fourteenth Amendment, as incorporated by the Fifth. Extensive scholarship exists criticizing the TVPA and INA’s victim assistance requirement, but no literature examines the constitutionality of this requirement.

In Part I, this Article will describe human trafficking in the United States and legislation that has been passed to address the problem. Part II will review evidence demonstrating that the victim assistance requirement is onerous and undermines the efficacy of prosecution and thereby the TVPA itself. Part III will review federal Equal Protection case law covering controversial immigration legislation. It then will analyze both the INA and the TVPA’s respective assistance requirement sections under the rational basis review standard set precedent by the Supreme Court in Mathews v. Diaz. It will provide policy arguments for why the Court should recommend amendments to both statutory bodies. In Part IV, this Article will conclude with the final argument that where federal legislation, including immigration law, undermines human rights, equal treatment, and the liberty interests of aliens specifically on the basis of their alienage and after legal entry into the United States, the Court should apply a heightened review standard consistent with what is applied to state laws discriminating on the basis of alienage. Such review will ensure that whatever interests the political branches have in promulgating immigration-related rules, those interests do not trample other legitimate and fundamental constitutional interests in abolishing slavery and ensuring the equal protection of aliens legally present within the United States.

I. HUMAN TRAFFICKING IN THE UNITED STATES & LEGISLATIVE RESPONSES

A. Overview of Human Trafficking in the United States

Adult human trafficking victims are individuals who have been forced or coerced under the threat of physical or psychological violence into commercial sexual, labor, or other servitude. Victims can be domestic or foreign, and an estimated 17,500 non-citizen victims are (providing no language on what requirements exist for citizen or LPR victims to assist to receive services).

9 “In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. In the case of an alien excludable under [INA] § 212(a)(28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion … .” Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972).


11 Minors forced into sexual servitude also are considered human trafficking victims. Human trafficking, at its most basic level, is defined by the Trafficking Victims Protection Act of 2000 as (a) the recruitment, harboring, transporting, supplying, or obtaining a person for labor or services through the use of force, fraud, or coercion for the purpose of involuntary servitude or
trafficked into the United States each year.\textsuperscript{13} Examples of trafficking include the recruitment of individuals under false pretenses followed by their forced entry into prostitution by a pimp wielding physical and emotional violence over them; the recruitment of undocumented workers into agricultural work, in which they are physically abused, prevented from leaving, and provided with little to no income, thereby perpetuating debt bondage; and the recruitment of runaways into magazine-selling “gangs” that use terrifying threats to prevent recruits from escaping.\textsuperscript{14} The use of coercion—either physical or psychological—to force an individual into servitude is the key element to trafficking. Notably, victim consent at any time does not invalidate a trafficking claim when “threats, coercion, or the use of force” were used against the victim.\textsuperscript{15} For example, an alien victim who agreed to come to the United States to work as a domestic laborer, but thereafter was trafficked into domestic slavery, does not lose her standing as a trafficking victim because she sought out such work herself.\textsuperscript{16}

Originally passed in 2000 with the express purpose of supporting victims and prosecutorial efforts against traffickers, the TVPA provides that alien trafficking victims may be eligible for legal entry into the United States with special visas if they entered the United States due to human trafficking.\textsuperscript{17} Specifically, the T visa provides trafficking victims with the opportunity to remain within the United States legally, albeit as nonimmigrants.\textsuperscript{18} Aside from slavery; or (b) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform sex acts is under eighteen years of age.


\textsuperscript{15} Logan et al., supra note 11, at 4.

\textsuperscript{16} See \textit{Myths and Misconceptions}, POLARIS PROJECT, http://www.polarisproject.org/human-trafficking/overview/myths-and-misconceptions (last visited Dec. 7, 2013) (noting that initial consent by or payment to the victim does not undermine trafficking status; victims cannot consent to being trafficked).

\textsuperscript{17} See 146 \textit{Cong. Rec.} 124 (daily ed. Oct. 6, 2000), http://www.gpo.gov/fdsys/pkg/CREC-2000-10-06/html/CREC-2000-10-06-pt1-PgS10081-2.htm (“[T]he House has agreed to the report of the committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 3244) to combat trafficking of persons, especially into the sex trade, slavery, and slavery-like conditions, in the United States and countries around the world through prevention, through prosecution and enforcement against traffickers, and through protection and assistance to victims of trafficking.”).  

\textsuperscript{18} See \textit{Victims of Human Trafficking: T Nonimmigrant Status}, U.S. CITIZENSHIP \\& IMMIGRATION SERVICES (Oct. 3, 2011), http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ae89243c6a75436d1a/\?vgnextoid=02ed3e4d77d3210VgnVCM100000082ca0aRCRD&vgnextchannel=02ed3e4d77d3210VgnVCM100000082ca0aRCRD [hereinafter \textit{Victims of Human Trafficking}]. The T visa is offered to victims of criminal activity that occurred in violation of U.S. laws. This Article will focus on the T visa, because it is specifically indicated for trafficking victims.
receiving a visa to stay, trafficking victims can also remain legally after receiving “Continued Presence” status (“CP”), which federal authorities grant to allow “victims of human trafficking to remain in the United States temporarily during the ongoing investigation into the human trafficking-related crimes committed against them.”19 However, unlike the T visa, CP status does not enable individuals to pursue legal permanent residence.20 After three years, a T visa recipient can apply for legal permanent resident (LPR) status to stay in the United States.21

All victims of human trafficking, regardless of immigration status, may receive state benefits equivalent to those available to refugees if they meet certification requirements. Certification itself is not an immigration status grant, but rather a designation by the Department of Health and Human Services confirming that an individual is or was a human trafficking victim and is therefore eligible for state or federal benefits.22 However, because certification does not provide immigration status, a victim must receive either CP status or a visa in order to remain legally in the United States while receiving certification benefits and absent other federal authorization.

B. Domestic Trafficking Legislation and Its Requirements for Alien Victims

Discussion about government services available to human trafficking victims necessarily involves a review of legislation on point. Part I (1) of this Article cited the TVPA, which Congress most recently reauthorized within the Violence Against Women Act in April 2013.23 Sections 101 and 245 of the Immigration and Nationality Act (INA) provide additional relevant law. Section 101 defines nonimmigrant human trafficking victims, and Section 245 provides guidance on when a T visa recipient can receive legal permanent resident status.24 However, certification rules provide an introductory point for exploring immigration law, as victims technically can avail certification benefits regardless of their immigration status. On certification, the TVPA states:

19 Continued Presence: Temporary Immigration Status for Victims of Human Trafficking, DEP’T OF HOMELAND SECURITY 2 (Aug. 2010), available at http://www.dhs.gov/xlibrary/assets/ht-uscis-continued-presence.pdf. James Dold, former Senior Policy Counsel of the Polaris Project, comments that since law enforcement officials must grant CP status, foreign victims can remain without status for upwards of over a year until they receive a T visa grant, as victim service providers encounter great difficulty in persuading law enforcement to request CP status on behalf of victims. Email interview with James Dold, former Senior Policy Counsel, Polaris Project (Aug. 23, 2013).

20 Continued Presence is a status allowing a victim to remain in the country only when authorized by the INS or other authorized official. 28 C.F.R. § 1100.35(b)(2) (2013). Therefore, if the INS or any other authorized official does not grant CP to a human trafficking victim, she may be placed into removal proceedings.


(E) CERTIFICATION—

(i) . . . [A] certification by the Secretary of Health and Human Services, after consultation with the Attorney General, that the person referred to in subparagraph (C)(ii)(II)—

(I) is willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons; and

(II) . . . (bb) is a person whose continued presence in the United States the Attorney General is ensuring in order to effectuate prosecution of traffickers in persons.25

The certification subsection within the TVPA cites INA § 101(a)(15), which provides:

The term “immigrant” means every alien except an alien who is within one of the following classes of nonimmigrant aliens— . . . (T)

(i) . . . an alien who the Secretary of Homeland Security, [in certain circumstances] in consultation with the Attorney General, determines—

(I) is or has been a victim of a severe form of trafficking in persons, 26 as defined in section 7102 of title 22;

(II) is physically present in the United States . . . on account of such trafficking, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking;

(III)

(aa) has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the

25 Id. (emphasis added). This certification language has not been amended since its first appearance in the Victims of Trafficking and Violence Protection Act of 2000 § 107(E) (2000), http://www.state.gov/documents/organization/10492.pdf; it has been reauthorized in identical form since 2000.


The term ‘severe forms of trafficking in persons’ means— [(8)][A] sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery. (9) . . .

The term ‘sex trafficking’ means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.


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investigation of crime where acts of trafficking are at least one central reason for the commission of that crime;

(bb) in consultation with the Attorney General, as appropriate, is unable to cooperate with a request described in item (aa) due to physical or psychological trauma; or

(cc) has not attained 18 years of age. . . . 27

Nonimmigrants designated as such under INA § 101 are eligible for legal permanent residency status adjustments under § 245, which provides in part:

(1) If, in the opinion of the Secretary of Homeland Security [and possibly] the Attorney General, . . . a nonimmigrant admitted . . . under [INA 101] of this title—

(A) has been physically present in the United States for a continuous period of at least 3 years since the date of admission . . ., or has been physically present in the United States for a continuous period during the investigation or prosecution of acts of trafficking and that, in the opinion of the Attorney General, the investigation or prosecution is complete, whichever period of time is less; 

(C)(i) has, during such period, complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking. . . . 28

All three subsections of the TVPA and INA therefore require alien trafficking victims to comply with “any reasonable request for assistance in the investigation or prosecution of acts of trafficking” to be eligible for comprehensive welfare or legal services.

Normative rules of statutory interpretation confirm the meaning of the TVPA and INA sections, 29 and a reading of the statutes’ plain language provides an additional baseline for understanding the requirements placed upon victims at different points in time. 30 Per the TVPA, during the pre-certification period a victim “must be willing” to assist in every reasonable way in the investigation and prosecution of trafficking. 31 Additionally, the victim must have either already applied for a T visa or, if she has not applied, she must have received CP status from the

29 “In construing a statute, the court must first glean the intent of the legislature by examining the language, nature, and purpose of the statute. Legislative intent is chiefly derived from the language of the statute itself.” Glenda K. Harnad, et al., 82 C.J.S. STATUTES § 395, CORPUS JURIS SECUNDUM (updated Sept. 2013) (internal citations excluded).
30 See In re George J., 279 P.3d 187, 189 (Nev. 2012) (“When interpreting a statute, the Supreme Court first examines the statute’s plain language to determine the Legislature’s intent behind the statute.”); Barbour v. Int’l Union, 640 F.3d 599, 610 (4th Cir. 2011) (“When interpreting any statute, [federal courts] . . . must first and foremost strive to implement congressional intent by examining the plain language of the statute.”); U.S. v. Abdelshafi, 592 F.3d 602, 607 (4th Cir. 2010) ("[A]bsent ambiguity or a clearly expressed legislative intent to the contrary, [the Court of Appeals] thus give[s] a statute its "plain meaning."").
31 See Fact Sheet, supra note 8.
United States government to aid in the prosecution of traffickers. The plain meaning of the tense used in TVPA’s pre-certification statutory language emphasizes the present and future acts of the victim; she “must be willing,” which implies the requisite willingness to assist both at the time of certification application and anytime thereafter.

Similarly, the INA presumes cooperation by the victim prior to application. In both the pre-certification and post-certification period under the INA, the victim who already applied for a T visa and received it, or who applied for legal permanent residency after receipt of the T visa, must “ha[ve] complied” with any reasonable assistance request. The use of the past-tense verb phrase “has complied” suggests that at the time of application, the victim already supported reasonable investigation or prosecutorial assistance requests. Since the INA’s language does not suggest compliance as an optional element, as a whole the statute reads to mean that both T visa nonimmigrants and applicants for legal permanent status adjustment must have complied with any reasonable assistance requests before applying. Without such compliance, an alien victim apparently cannot attain a T visa or gain LPR status. A plain-language reading of these three statutes therefore demonstrates that, from certification to LPR grant, victims must comply with any reasonable investigatory or prosecutorial assistance requirement.

A review of how the statutes interact also helps clarify how they affect victims. During the time period between arrival in the United States and T visa grant, victims need certification to receive federal and state benefits, though certification itself requires neither the receipt of CP status nor an application for a T visa. Upon entering the United States and going through initial processing, trafficked aliens likely will remain in the country under CP status grants; victims may be unfamiliar with the T visa and therefore not know how to apply for it. After a CP status is granted, victims can apply either for certification, a T visa, or both. If a victim receives the T visa, she can apply for status adjustment to become an LPR after three years. During this entire period—between arrival and CP status grant; between CP status grant and T visa receipt; and then between T visa receipt and LPR grant—the victim must comply with any reasonable prosecutorial or investigatory request. Unwillingness or a refusal to comply with an ongoing investigation may result in fewer services available to the victim, as well as possible deportation—even after HHS has certified that the alien has suffered from human trafficking.

32 See id.
33 Services Available to Victims of Human Trafficking: A Resource Guide for Social Services Providers, U.S. DEP’T OF HEALTH & HUMAN SERVICES 1 (May 2012), http://www.acf.hhs.gov/sites/default/files/orr/traffickingservices_0.pdf. Interim pre-certification benefits may be available, but come from non-profit and non-governmental organizations, and therefore are not guaranteed. Id. at 2-4.
34 However, exceptions to this rule sometimes occur. Some victims are required to receive a T visa before they can be certified for benefits. See April Rieger, Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States, 30 HARV. J. L & GENDER 231, 248 (2007).
35 By contrast, consider Finland’s reflection period policy, which grants trafficking victims up to six months of legal stay in the country without an obligation to assist ongoing investigation. Prolonged stay after the six-month (or otherwise determined) period requires victim cooperation with law enforcement agents. Other countries with multi-month reflection periods that are not hinged upon law enforcement assistance include Norway, Italy, Sweden, and Iceland. ANETTE BRUNOVSKIS, NORDIC COUNCIL OF MINISTERS, BALANCING PROTECTION AND PROSECUTION IN ANTI-TRAFFICKING POLICIES: A COMPARATIVE ANALYSIS OF REFLECTION PERIODS AND RELATED TEMPORARY RESIDENCE PERMITS FOR VICTIMS OF TRAFFICKING IN THE NORDIC COUNTRIES, BELGIUM AND ITALY 31 (2012), available at http://ec.europa.eu/anti-trafficking/download.action?nodePath=/Publications/Balancing+protection+and+prosecution+in+anti-trafficking+polices.pdf&fileName=Balancing+protection+and+prosecution+in+anti-trafficking+polices.pdf.
36 Song & Lee, supra note 3, at 151 (“Under certain applications of the law, victims of trafficking are
In short, while the TVPA and INA provide some assistance and reflect an improvement over the absence of any protections for human trafficking victims, they also require victims to provide assistance both before and after immigration status grants allow them to legally reside in country. The laws thus differ from immigration statutes solely governing alien action prior to entry into the United States. They also differ from laws governing the rights and remedies available to victims of other human rights violations. For example, asylum seekers need not assist in any government investigation against their persecutors to maintain eligibility for asylum visas, even if the acts underlying their persecution violate the law. It is clear that the alien trafficking victim, not the trafficker, bears the additional burdens of mandatory assistance requirements because of her perpetrator’s decision to violate the law. For all the language in the TVPA—including its title—that suggests the law exists to benefit victims, statutory analysis reveals that since its passage in 2000, its primary purpose has been to benefit the government in its prosecutorial efforts, and secondarily to assist victims.

II. THE ASSISTANCE REQUIREMENT’S BURDENS

Proponents of the current TVPA and related INA sections might ask why assisting investigatory or prosecutorial processes burdens human trafficking victims. It may not in all cases. However, there are many reasons why victims may not want to provide assistance. Commonly cited reasons include victims’ fear of retaliation by their traffickers, either against themselves or their families. One scholar has commented:

Even a victim from a smaller-scale trafficking ring may face serious risk because traffickers are often men from the victim’s home country or even hometown who fraudulently brought her to [the] United States with promises of legitimate work. Although the TVPA provides for some witness protection measures for victims, and occasionally for their families, these measures are shockingly insufficient.

Moreover, for victims of repeated sexual assaults, testifying against perpetrators can facilitate re-victimization, as they must re-live their experiences while sharing them with law enforcement officials or in court. Some victims develop Stockholm syndrome or “trauma essentially confronted with arrest, detention, deportation and the subsequent threat of death, serious bodily injury, or other extreme hardship, unless they cooperate with U.S. law enforcement. It is difficult to imagine that this is how Congress intended to protect survivors, prevent trafficking, and prosecute traffickers.”).
bonding” during captivity and therefore refuse to support prosecutorial efforts against traffickers with whom they associate positive feelings.\(^{41}\) Others simply are so traumatized or otherwise psychologically affected by their trafficking that they are unable to communicate.\(^{42}\)

Trafficking victims may also not trust United States law enforcement officials, as they may have been trafficked by law enforcement officers from their home or transit countries.\(^{43}\) They may also fear self-criminalization or deportation based on their own real or perceived histories of crime, drug use, or other activities unrelated or related to the trafficking itself.\(^{44}\) Finally, victims may come from different cultural backgrounds or normative belief systems and therefore be prohibitively uncomfortable or unwilling to speak about their abuse with officials.\(^{45}\)

Critics of the assistance requirement have used these reasons to justify TVPA and related INA sections reform.\(^{46}\) Moreover, they have tied the requirement to a decreased number of visas granted.\(^{47}\) While the TVPA and INA authorize 5,000 T visa grants annually, at most 2,000 have been filled in total since 2000, despite estimates of annual alien human trafficking victims greatly exceeding 5,000.\(^{48}\) Critics thus argue that the assistance requirement is too onerous, and that it therefore undermines the purpose and value that the TVPA provides to human trafficking victims.\(^{49}\)

Ultimately, TVPA and INA legislative reforms must result from Congressional action. However, the Court may pressure Congress by resolving an Equal Protection claim that challenges the constitutionality of the TVPA and INA’s assistance requirements for aliens already granted legal entry into the United States as nonimmigrants. Whereas Parts I and II sought to provide an overview of human trafficking and shortcomings in related legislation, Part III will explore how the Court might analyze such a claim and provide policy reasons for why it should

\(^{41}\) McGough, supra note 38, at 27–28; see Fact Sheet, supra note 8.

\(^{42}\) See Fact Sheet, supra note 8.


\(^{45}\) Resources, supra note 44; MaryAnne Reynolds, The Trafficking Victims Protection Act: Has the Legislation Fallen Short of its Goals, 15 POL’Y. PERSP. 33, 40 (2008).

\(^{46}\) See, e.g., Song & Lee, supra note 3, at 136-140; see generally Reynolds, supra note 45, at 33-35.

\(^{47}\) See, e.g., Rieger, supra note 34, at 250.


\(^{49}\) See generally Rieger, supra note 34; Reynolds, supra note 45; Song & Lee, supra note 3.
support TVPA and INA reforms to promote alien victim welfare.

III. CHALLENGING THE TVPA & INA IN FEDERAL COURT

A. Distinguishing Between Plenary Power and Rational Basis

When reviewing federal immigration statutes, including those like INA Sections 101 and 245, the Court has long provided Congress with immense discretion. Legal scholars note court classification of federal immigration statutes under two non-exclusive prongs: laws that govern the entry and exclusion of aliens, and laws that govern aliens within the country but are not tied to their immigration status. The former nearly always receive plenary power deference and have never been scrutinized on their merits by courts, which view naturalization and immigration issues as matters of national self-definition and foreign policy, and therefore not appropriate for judicial review. The latter however sometimes have been evaluated under a rational basis review test. In comparison, state statutes restricting the rights of aliens legally present in the United States and on the basis of their alienage are reviewed under a strict scrutiny standard, the highest

50 Court deference to lawmakers over immigration statutes was established by the Chinese Exclusion Cases in the late 1800s and has not been substantively overruled since then. Matthew J. Lindsay, Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power, 45 HARV. C.R.-C.L. L. REV. 1, 3 (2010).

51 "[In the First Category,] naturalization laws create uniform requirements and procedures which aliens must follow to become United States citizens. These areas of law fall under the federal government’s exclusive jurisdiction. . . Further, Congress’ power to fashion a uniform rule of naturalization is explicitly granted by the Constitution. The second category consists of all other laws—state and federal—that address resident aliens. These laws generally treat aliens less favorably than citizens and have primarily a domestic focus and impact. They have no practical connection to immigration or foreign policy and affect only the status of aliens residing within U.S. borders. Examples from the past and present include laws that prohibit aliens from owning land, impose greater tax burdens on aliens, bar aliens from certain types of employment, and disqualify aliens from receiving public benefits.”


52 Boyd, supra note 51, at 321; T. Alexander Aleinikoff, Federal Regulation of Aliens and the Constitution, 83 AM. J. INT’L L. 862, 865 (1989) (“The ‘plenary power’ cases—harsh in their implications as they are—have been reaffirmed and even extended in the Constitution’s second hundred years. Immigration law has remained blissfully untouched by the virtual revolution in constitutional law since World War II, impervious to developments in due process, equal protection and criminal procedure.”).

53 See, e.g., Mathews v. Diaz, 426 U.S. 67, 82–83 (1976) (establishing that Congress need not afford the same privileges to aliens as those enjoyed by citizens, and that insofar as a national welfare rule impacting aliens was reasonable, it was acceptable); Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976) (providing that where a federal rule violates aliens’ Constitutional rights, “due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest . . . [or] if the rule were expressly mandated by the Congress or the President . . . that any interest which might rationally be served by the rule did in fact give rise to its adoption.”).
judicial review standard possible for claims challenging the constitutionality of laws. As the INA and its T Visa and LPR requirements are federal law, they presumably cannot receive strict scrutiny review and so appear either unreviewable per Congress’ plenary powers or reviewable under a rational-basis test.

The INA’s assistance requirements under Sections 101 and 245 might—at face value—appear to determine admission into the United States. For example, should a trafficking victim refuse to aid in investigation or prosecution, she can be denied a T visa and thereby deported if she lacks CP status. As harsh as it may seem to be to hinge the ability of a victim to both legally stay in the United States and avoid returning to a trafficking country on her willingness to provide assistance, such a requirement will not receive review by courts adhering to plenary power doctrines since Congress has plenary authority to enact entry requirements in immigration law.

However, the trouble that the INA encounters in its statutory language is that the assistance requirement is not expressly limited to the pre-CP period. That is, on its face, INA Section 101 can be read to require human trafficking victims to continue to provide prosecutorial assistance once admitted with nonimmigrant CP status. Therefore, the scope of the assistance requirement does not end at the CP status grant. Similarly, the wording of INA Section 245 also can be read to require that a T visa nonimmigrant continue to provide prosecutorial assistance after visa receipt in order to maintain LPR eligibility. Thus, the ambiguous wording of the sections and their implications—that they mandate alien victims legally present in the United States to provide assistance because they are aliens after entry—potentially allows the INA to escape plenary power preclusions insofar as the Court is willing to critically scrutinize it as a potentially unconstitutional infringement on the Fifth Amendment Rights of alien human

54 See Examining Bd. of Eng’rs, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 602 (1976). The validity of the statute must be determined under the principles “that state classifications based on alienage are subject to ‘strict judicial scrutiny.’” Id. Laws containing such classifications will be upheld only if the State imposing them can sufficiently demonstrate “that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is ‘necessary . . . to the accomplishment’ of its purpose or the safeguarding of its interest.” Id. (citing In re Griffiths, 413 U.S. 717, 721-722 (1973)). See also Graham v. Richardson, 403 U.S. 365, 371-372 (1971) (“Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis. But the Court’s decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”) (citations omitted); Dandamudi v. Tisch, 686 F.3d 66, 75 (2d Cir. 2012) (establishing that New York law discriminating against nonimmigrant aliens will be subject to strict scrutiny review).

55 Because this is federal law, a Fifth Amendment Equal Protection Claim as a part of due process is appropriate, via an incorporation of the Fourteenth Amendment’s Equal Protection requirements on the states into the Fifth Amendment’s Due Process clause. See Ann K. Wooster, Annotation, Equal Protection and Due Process Clause Challenges Based on Racial Discrimination—Supreme Court Cases, 172 A.L.R. FED. 1 (2001) (“The Supreme Court of the United States has stated explicitly that its approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims brought under the Fourteenth Amendment.”).

Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments. Indeed, we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government [citing Mathews v. Diaz, 426 U.S. 67, 77 (1976)].

Plyler v. Doe, 457 U.S. 202, 210 (1982) (internal citations omitted); but see, Kenji Yoshino, The New Equal Protection, 124 HARV. L.REV. 747, 748 (2011) (noting that the Supreme Court has moved away from group-based claims under the
trafficking victims legally admitted into the country as nonimmigrants.

Recent cases suggest that the Court is willing to review immigration-related statutes limiting aliens legally in country under a rational basis test. Therefore, the TVPA and the related INA rules can receive rational basis review. This test is difficult to overcome because courts require a showing that the rule is a wholly irrational means to achieve the end purported. Moreover, even if the Court views the law as presenting poor public policy or creating disparate treatment, it will not overrule the law so long as some plausible, reasonable basis for it was purported by lawmakers. Consequently, rational basis test application results in a similar outcome to plenary deference: a minimal judicial review of the infringing law. Regardless of whether an alien trafficking victim has yet to enter the United States or already has entered, federal legislation affecting her rights likely will receive little substantive court review.

That said, the use of rational basis review for the TVPA and INA may be problematic due to the way the laws interact to govern trafficking victims. Specifically, the anti-trafficking end goals purported within the TVPA are separate from the immigration means provided by the INA to achieve those ends. The TVPA provides the end goal (victim assistance, decreased trafficking) and cites the INA as means to that end. The INA provides the immigration means to allow alien victims to stay within the country and receive benefits, thereby supporting the TVPA goal. But the INA’s own goals in relation to human trafficking remain unstated; the presumption thus is that the INA’s predominant goal is to govern entry and exit. This separation can allow a court to look at the INA and TVPA as two different entities and then to question whether each set of laws, separately, survives rational basis review.

B. Discrimination on the Basis of Alien Victim Subclass and Rational Basis Review

Attacking the INA in court is difficult, precisely because it governs the entry and exit of aliens and therefore likely will receive plenary deference. However, even where INA Sections 101 and 245 are interpreted to limit the further entry rights of already legally present aliens, Mathews

Fifth and Fourteenth Amendments).

Mathews, 426 U.S. at 82-83, explained by Rodriguez ex rel. Rodriguez v. United States, 169 F.3d 1342, 1347 (11th Cir. 1999) (“[T]he Court [in Mathews] concluded that the classifications [distinguishing amongst legally present aliens] were constitutionally permissible because they were not ‘wholly irrational.’ (emphasis added). Although the Court did not actually use the phrase ‘rational basis scrutiny’ to describe its ‘narrow standard of review,’ it did apply as the decisional criterion a ‘wholly irrational’ standard, and that is merely another way of stating the rational basis test. Neither party in this case contends there is any difference between a statute lacking a rational basis and being wholly irrational, and we perceive none.”).

“In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision-maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.”

Nordlinger v. Hahn, 505 US 1, 11 (1992); but see Vance v. Bradley, 440 US 93, 97 (1979) (“The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature’s actions were irrational.”).

Published by Penn Law: Legal Scholarship Repository, 2014
v. Diaz may provide guidance on how the sections could be evaluated under a rational basis review standard. In Mathews, the Court determined that the plaintiff’s claim challenged federal statutory discrimination on the basis of a legally present alien subclass. It used rational basis review to uphold the federal statute.\(^{58}\) The INA’s divergent entry requirements for trafficking victims versus refugees gives rise to the same Mathews v. Diaz issue—the acceptability of a federal law that discriminates on the basis of legally present alien subclass. Therefore, the INA Sections 101 and 245 could receive rational basis review. Moreover, the Court has never established that rational basis review is appropriate where immigration law discriminates within victim alien subclasses on the basis of the crimes that establish their victimhood.\(^{59}\) Therefore, a window potentially opens here for the Court to introduce a higher standard of review than rational basis.

Yet until the Court creates a heightened review standard, at most rational basis applies. One possible rational basis justification for maintaining the INA as-is is that discriminating on the basis of crime perpetrated against the victim alien is in the national interest where the crime itself reaches the shores or occurs within the borders of the United States and therefore is of national interest to prosecute. National interest concerns do not arise as such with crimes that remain outside the United States and the national capacity to challenge them, which is the case with foreign persecution acts.\(^{60}\) In this way alien trafficking victims do differ categorically from alien refugees, even if they are treated the same for the purposes of federal services.

However, if the Court accepts a rational basis argument that national interest necessitates discrimination against subclasses of aliens on the basis of their victimhood, it must be willing to accept the necessary result that such discrimination re-victimizes previously enslaved individuals. In turn, the Court must admit that it accepts the prioritization of a national interest in fighting trafficking over the rights of the people already subjected to injustices outlawed by the Thirteenth Amendment itself, and for the purpose to maintain the supposed straightforwardness of a judiciary test.\(^{61}\) Even more questionably, the Court must accept the prioritization to the extent that

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\(^{58}\) See Mathews, 426 U.S. at 81–84 (suggesting that a rational basis review was acceptable to evaluate a federal law discriminating between subclasses of aliens based on the length of time they had stayed in the U.S., thereby showing a greater affinity to the U.S. over those who had stayed for a shorter period of time).

\(^{59}\) Cf. id. While the Court accepted in Mathews that line drawing between classes of aliens was acceptable unless the plaintiff could provide a “principled basis” for why such drawing was inappropriate, it never explains what a “principled basis” is, so this Article instead explains in this Section why such line drawing is poor policy.

\(^{60}\) Refugees by definition under INA § 101(a)(42) (2012) are:

(A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or were persecuted abroad, whereas trafficking victims were mistreated in violation of U.S. law... [or as otherwise allowed by the U.S. President].

Therefore under the INA, refugees are individuals who fled their origin countries due to persecution in those countries.

\(^{61}\) Notably, many scholars have argued that the rational basis standard of review is hardly straightforward at all. See, e.g., Yoshino, supra note 55, at 759–61 (describing the various forms of rational basis review delineated by scholars but unacknowledged by the Court); see generally Jeremy B. Smith, The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation, 73 FORDHAM L. REV. 2769 (2004-2005); Suzanne B. Goldberg, Equality Without Tiers, 77 S. CAL. L. REV. 481 (2003-2004).
victims can be deported back to countries with circumstances that facilitated their original enslavement62 because these victims could not assist for reasons created by the enslavement itself. The Court, in short, must accept that it punishes the victim for being a victim.

Of course, the Court can go this route; however, whether it should in light of these severe, if not Constitutionally adverse policy ramifications, is another story. The better route for the Court to take is to acknowledge both arguments as valid, but to scrutinize the INA’s current language. The Court may suggest instead that INA Sections 101 and 245 prioritize the rights of the legally present victim over the prosecutorial interests of the government by removing assistance requirements after CP status or T visa entry as conditions for subsequent T visa or LPR status grants. This change allows the government to retain its ability to work with or even subpoena63 victims to provide assistance, but victims no longer risk deportation because their continued legal presence in the United States depends on that assistance.

C. Discrimination on the Basis of Alienage and Rational Basis Review

Where judicial review of the INA is limited, review of the TVPA provides greater opportunity. First, trafficking at or within U.S. borders of alien and citizen victims is the same crime. No distinction expressly exists in law or policy demonstrating that the government has a greater national interest in investigating and prosecuting traffickers who traffic alien victims over those who traffic citizen victims.64 The Thirteenth Amendment constitutional rights of both groups of victims were violated65 and both were enslaved in the United States. Consequently, the rational basis review standard allowing discrimination between subclasses of alien victims of different crimes may not apply to subclasses of victims of the same crime. Rather, the Court faces a puzzling issue: the TVPA requires alien trafficking victims legally present in the United States to assist investigation and prosecution to receive federal benefits, while federal law does not require the same of citizen victims.66 If the crime is the same and it remains in the national interest to fight it and to provide victim support, why should the government adamantly seek alien assistance but not require similar assistance from citizens?

Mathews v. Diaz again appears to limit court review of the issue, as it seminally and simply provides that Congress may distinguish between the benefits available to citizens versus aliens.67 However “since Diaz, federal alienage discrimination has survived constitutional


63 FED. R. CIV. P. 17; see also Song & Lee, supra note 3, at 152–55 (discussing the various law enforcement tools available to achieve witness cooperation without legislatively mandating it through immigration legislation).

64 Theoretically a plausible argument may exist that the U.S. has some national interest in distinguishing victims based on citizenship status; the author could not find any evidence to this point.

65 The Thirteenth Amendment applies to all persons, regardless of immigration status. Victims of Human Trafficking, supra note 18.

66 Since analysis of the INA’s assistance requirements was presented in Part II (2), it will not be presented here.

67 Mathews, 426 U.S. at 68 (“Congress, which has broad power over immigration and naturalization and regularly makes rules regarding aliens that would be unacceptable if applied to citizens, has no constitutional duty to provide all aliens with the welfare benefits provided to citizens. . .”). This Article does not address how Hampton v. Mow
scrutiny as long as Congress articulates a relationship between the regulation of noncitizens within the border and immigration policy.”68 Notably, Congress never articulated an immigration-policy purpose for why it distinguished alien victims and the rights and services they receive based on their alienage within the TVPA. Since 2000, the TVPA was purposed “to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”69 No immigration policy rationale was given in this statutory language. Absent any rationale to the contrary, the TVPA and its certification requirements are not related to immigration policy, even though they reference the INA.

Under Mathews the TVPA simply may not survive constitutional scrutiny, or it may be reviewed under rational basis. On the other hand, Mathews may not provide a precedential review standard at all for the TVPA, which discriminates on the basis of alienage and with no purported connection to immigration policy. In the latter case, a separate standard of review for equal protection claims may be carved out where Congress does not articulate a relationship between the discriminatory rule and immigration policy. This is significant for review of the TVPA, even more so given the TVPA’s existence as a regular federal law. The INA conversely has a history of receiving deference and therefore is a special entity. Since the TVPA does not have special status entitling it to deference or demonstrate any immigration policy rationales, it may be scrutinized for its constitutionality under the Mathews rational basis rule. Even more favorably, it may then be scrutinized under a higher standard of review without escape under some protected immigration-law umbrella.

Even if the Court applies a form of rational basis review70 to the TVPA, there is arguably no rational basis upon which the discrimination can survive. First, certification falls under the victim-protection prong of the TVPA. The interest here is victim protection. Discrimination on the basis of alienage for certification purposes and that makes it more difficult for aliens to receive services does not promote victim protection. Rather, the assistance requirement contradicts protection by precluding it until the requirement is met.

Another possible interest is promoting trafficker prosecution. However, discrimination on the basis of alienage to block certification and federal services receipt unless the alien victim is willing to testify does not serve this interest either. Without removal from traumatizing ICE detention or HHS processing, and without healthcare, counseling, English-language assistance, and other long-term services that can rebuild a victim’s sense of security and individual personhood, how capable or effective can a victim actually be in assisting an investigation or prosecution?71 Limiting the care received by an alien victim by hinging service receipt on

Sun Wong, 426 U.S. 88 (1978)) might apply to the issue here, because there the Court problematically addressed a due process claim conflated with an equal protection claim. See Eugene Doherty, Equal Protection Under the Fifth and Fourteenth Amendments: Patterns of Congruence, Divergence and Judicial Deference, 16 OHIO N.U. L. R. 591, 604 (1989) (referring to Justice Stevens’ treatment of Due Process and Equal Protection as “hopeless[] melding”). A full analysis of how the Mow Sun Wong standard of review might apply to trafficking laws exceeds the scope of this Article, but should be provided elsewhere.

70 In its simplest form, rational basis review requires that the discriminatory rule is “rationally related to a legitimate government interest.” U.S. Dep’t of Agriculture v. Moreno, 413 U.S. 528, 533 (1973).
71 Multiple European countries with histories of combatting human trafficking, for example, provide

https://scholarship.law.upenn.edu/jlasc/vol17/iss1/3
willingness to assist undermines the victim’s actual capacity to assist, and thereby does not support the prosecutorial interest purported by the TVPA. Here, the discrimination contravenes the interest alleged rather than supports it.

A final possible reason for why Congress differentiates between citizens and aliens with regard to services is economic: simply, the government does not have the financial resources to provide services to all human trafficking victims presenting as such and so has to line draw to preserve the quality of resources provided to eligible victims. This is plausible. However should the Court uphold the TVPA’s assistance requirement to obtain federal services for economic reasons, it will undermine the legitimacy of a statute promulgated for the broad, internationally directed goal to assist human trafficking victims regardless of their nationality. Instead, it will write into precedent that the economic capacity of the federal government limits victim access to services, and that such limitations justify the disparate treatment of alien victims. In turn, this holding can signal to traffickers that so long as they traffic aliens and threaten them into silence, and the United States likewise retains its line drawing to discriminate against those same aliens, then traffickers can escape prosecution while their victims remain terrified, in deportation limbo, and without services. By accepting that citizens and alien victims should differ in the services they receive, and the Court would appear to accept laws that both inadvertently incentivize traffickers to target aliens, and deprioritize alien victims’ needs.

As was the case in changing INA language, the better option is that the Court should recommend the TVPA remove its assistance requirement as a condition for certification and services receipt. Federal and state investigators and prosecutors can still seek out or subpoena the assistance of alien and citizen victims. However alien victim services receipt will not be hinged on willingness to assist, and predictably, post-service receipt aliens may be more willing to come forward to assist, thereby increasing their likelihood for receiving CP status. In turn, investigators and prosecutors may receive more information to help fight trafficking, which could justify increased federal budget allocations toward victim services programs.

IV. CALL FOR A HEIGHTENED REVIEW STANDARD

Beyond the policy arguments provided in Part III for why the Court should question the current language of the INA and TVPA, this Part demonstrates that the greatest challenges to judicial review of both the INA and TVPA are the deferential standards used by the Court in cases related to immigration. While it is difficult to overcome plenary deference in the case of INA reflection periods before requiring victims to provide assistance to remain legally in country, with legal experts noting:

[F]or police and investigative needs, the most beneficial model was a short reflection period, followed by temporary residence for victims who decided to cooperate. This is because information quickly dates; information given after for instance a six month period will often not lead anywhere in terms of investigation. Phone data may be deleted or addresses vacated. On the other hand, shorter reflection periods may offer little incentive for victims to come forward.

BRUNOVSKIS, supra note 35, at 12; see also Reflection Period, UNITED NATIONS FOR GENDER EQUALITY AND THE EMPOWERMENT OF WOMEN (2012), http://www.endvawnow.org/en/articles/563-reflection-period.html (emphasizing that the United States’ absence of a reflection period is “unduly harsh” on human trafficking victims suffering the traumatic effects of trafficking).

See, e.g., Reporting of Sexual Violence Incidents, NAT’L INST. OF JUSTICE (Oct. 26, 2010), http://www.nij.gov/topics/crime/rape-sexual-violence/rape-notification.htm (noting that greater access to and provision of services increased the likelihood that sexual violence and rape victims would report their crimes).
rules governing entry and exit, and also rational basis review for either the INA or the TVPA, the absence of a case deliberating the constitutionality of alien discrimination on the basis of victimhood by class or by alienage provides the Court with an opportunity to establish a heightened review standard beyond mere rationality. The INA and TVPA’s victim assistance requirements do little to support investigatory and prosecutorial efforts, for the variety of factors that inhibit victim capacity to assist. Moreover, the government has other legal tools in place to compel victims to provide assistance regardless of their service receipt or status. Therefore, the Court at least should question whether the assistance requirement and its targeting of only alien victims furthers an important government interest in a substantially relevant way to the TVPA’s end goals: to assist victims and to prosecute trafficking. So long as the Court relies on rational basis review, however, it cannot substantively ask this question.

The implications of the rational basis review allowance are stark, especially as applied to the TVPA, which serves no express immigration policy purpose. If the Court allows the TVPA to stand as-is with its alienage discriminations because the statute references the INA for supportive guidance on when victims can enter or exit the United States, then the Court will set precedent to allow any federal legislation that discriminates on the basis of alienage to stand merely because it interacts with the INA. However, any federal legislation impacting aliens, including those within the country, likely will bear some connection with the INA since the INA defines the alien class. This will occur even if the legislation itself has no immigration-related purpose. Consequently if the Court, using rational basis review, allows the TVPA—and in turn federal legislation generally—to distinguish and discriminate on the basis of alienage even though the law bears no relationship to immigration policy, then the Court will undermine Carolene Products, which provided heightened review for discrimination against the discrete and insular minority alien class. In turn, it will stretch respect for the political branches beyond its own established reasoning and to the point to accommodate their discrimination against legally present aliens.

However, the most problematic aspect for the Court in upholding the TVPA without challenging its discriminatory language is that per U.S. Citizenship and Immigration Services, the TVPA exists to promote 13th Amendment rights. Yet the current language does little to protect the 13th Amendment rights of aliens. If the Court upholds the current language out of respect for Congressional authority under rational basis review, then effectively the Court will prioritize constitutionally mandated deference over constitutionally mandated anti-slavery protections. The Court can do this, but whether it should in light of the policy ramifications is another story. Simply, the federal political arms may not always care for the best interests of legally present aliens. Per Mathews, this is acceptable. However, when that ambivalence facilitates removal, deportation, and thus the re-victimization of previously enslaved individuals already legally within a staunchly abolitionist country, the Court should tread carefully so to ensure that its jurisprudential modes do not undermine the reach of the 13th Amendment.

In light of these and the aforementioned significant policy ramifications, and given that the Court already reviews state legislation that discriminates against aliens under a strict scrutiny

73 See, e.g., U.S. v. O’Brien, 391 U.S. 367, 377 (1968) (“Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on . . . freedoms is no greater than is essential to the furtherance of that interest.”).


75 Victims of Human Trafficking: T Nonimmigrant Status, supra note 18.
review standard, the Court should review the TVPA and other federal legislation unrelated to immigration policy but that discriminates against aliens under a higher review standard than rational basis. Doing so would allow it to remain consistent with its own judicial precedent regarding the treatment of minority classes. It would also allow the Court to maintain respectfully comparable review standards for both Congress and state legislatures, thereby avoiding allegations of federal favoritism; to protect the constitutional and international human rights of a victim class of aliens; and to close a loophole in federal lawmaking that enables the political branches to discriminate against aliens based on their alienage or subclass therein. Most importantly, it would enable the Court to signal to alien human trafficking victims already denied their freedom that it will protect their rights, and that it will not casually accept further, unnecessary, and burdensome arm-twisting by the government for a purported law enforcement aim.

V. CONCLUSION

This Article aimed to provide a constitutional and policy analysis for why the TVPA and INA require scrutiny under a heightened standard of review by the Court. Human trafficking within the United States occurs expansively and impacts both aliens and citizens alike. Yet, the TVPA and INA hinge federal services and immigration status grants on the willingness and ability of alien victims to provide investigatory and prosecutorial assistance. This requirement remains after alien victims are granted legal entry into the United States through CP status or T visas, and it neither applies to citizen or LPR victims, nor to refugee victims admitted under asylum grants after persecution abroad.

Yet, human trafficking victims often lack the capacity to assist due to the heinous, coercive, and life-threatening nature of the crimes committed against them and for why the TVPA was established originally. Thus, hinging services and status grants on victim assistance for alien human trafficking victims not only prevents aliens from receiving the help that they need, but facilitates their removal and deportation back to countries where they likely were trafficked in the first place. The connection between assistance and services or status grants and the low numbers of T visa grants confirms its harmful effect on the achievement of the TVPA’s goals. Thus, the assistance requirement not only places an onerous, discriminatory burden on alien victims, but it undermines the TVPA.

The discriminatory impact of the TVPA and INA on specifically alien victims of human trafficking warrants Court review under a Fifth Amendment equal protection claim. The Court’s historical plenary deference to the legislative and executive branches for issues pertaining to the entry and exit of foreigners limits its ability to substantively review INA sections detailing how people can legally enter the United States. However, where federal legislation—including potentially the INA—discriminates against aliens who have already legally entered, the Court can allow review under a rational basis test. Mathews v. Diaz provides the most appropriate guidance here, establishing that the Court can review federal laws that discriminate against legally present aliens under a rational basis review test.

Still, given the special nature of the INA as a primarily entry and exit-aimed body of legislation, rational basis review of it likely will not result in outcomes that advance alien trafficking victim interests, despite policy arguments against such an approach. The better strategy is to challenge the TVPA itself, which only references the INA but does not implicate immigration policy. While the TVPA’s victim assistance requirement language presents its own respective policy problems, it also may escape Mathews rational basis review because it does not
invoke immigration policy.

Consequently, a challenge to the TVPA in federal court for its potentially unconstitutional discriminatory requirement for alien victims not only should survive per *Mathews* and alert the Court to apply minimally rational basis review, but more importantly it should give the Court an opportunity to establish a much-needed heightened review standard for federal legislation unrelated to immigration policy but that discriminates on the basis of alienage. Such a standard need not be as high as the strict scrutiny one placed upon states in *Graham v. Richardson* in light of the concededly important role the government has in ensuring citizenship confers benefits that incentivize individuals to seek it. However, it must be higher than rational basis to ensure that the Court remains consistent with its own treatment of aliens generally, and with the Constitution’s Equal Protection and Anti-Slavery clauses specifically. Promoting the rights of human trafficking victims by criticizing the TVPA’s assistance requirement provides a first step for the Court to prevent unnecessary federal alienage discrimination. This first step is one that the Court should take.