EQUAL PROTECTION EXCEPTIONALISM

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Abstract

Equal protection doctrine addressed to immigrants' rights is thoroughly exceptional. It is an amalgam of super-deference, suspect class treatment, and even intermediate scrutiny, depending upon whether immigrants are present in the United States lawfully or not, and whether a state or federal classification is at issue. No other area of equal protection law modulates equal protection scrutiny in this way, producing unparalleled complexity and tension within the doctrine—and ultimately undermining equality. It is time to rethink the doctrine.

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I. INTRODUCTION

It is time to rethink how courts scrutinize laws classifying on the basis of immigration status. During a period in America when racist, anti-immigrant rhetoric is infecting mainstream political discourse[1] and nativist impulses wield influence here and abroad,[2] the importance of effective and coherent judicial tools to root out unjustified discrimination against immigrants cannot be underestimated. Unfortunately, there is good reason to question whether the U.S. Supreme Court's equal protection jurisprudence is fully up to the task.

Although the Supreme Court held 130 years ago in *Yick Wo v. Hopkins* that non-citizens are "persons" entitled to equal protection of the law,[3] in the years since that significant holding, the Court has constructed a rigid and highly compartmentalized approach to determining the scope of immigrants' rights.[4] Indeed, it has put tiered scrutiny to exceptionally variable use in delineating what equality means for immigrants.[5] The result is equal protection exceptionalism: an uneven and, at times, contradictory doctrine, unlike any other area of the Court's equal protection jurisprudence, that ultimately diminishes equality for immigrants.

Specifically, the Supreme Court's approach to discrimination

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1. *See* Editorial Board, *G.O.P Follows Trump to the Bottom on Immigration*, N.Y. TIMES (Aug. 20, 2015), http://www.nytimes.com/2015/08/20/opinion/gop-candidates-follow-trump-to-the-bottom-on-immigration.html; William Saletan, *Trump's Attack on a Federal Judge Is an Open Appeal to Racism*, SLATE (Jun. 1, 2016), http://www.slate.com/articles/news_and_politics/politics/2016/06/trump_s_attack_on_a_federal_judge_is_an_open_appeal_to_racism.html.

2. *See* Krishnadev Calamur, *The Immigration Battle at the Heart of Brexit*, ATLANTIC (Jun. 20, 2016), http://www.theatlantic.com/news/archive/2016/06/brexit-immigration/487880/; Owen Matthews, *Beyond Brexit: Europe's Populist Backlash Against Immigration and Globalization*, NEWSWEEK (Jun. 26, 2016), http://www.newsweek.com/2016/07/08/britain-brexit-wounds-european-nationalism-475101.html.

3. 118 U.S. 356, 369 (1886). *Yick Wo* involved a claim of racial discrimination by non-citizens. *Id.* Although it did not address the standards for assessing alienage-based discrimination, it nevertheless established the fundamental principle that non-citizens are entitled to protection under the Equal Protection Clause of the Fourteenth Amendment. *Id.*

4. *See infra* Part II (addressing the multiple levels of scrutiny that govern the Supreme Court's equal protection jurisprudence addressed to immigrant rights).

5. *See infra* Part II.

against non-citizens is an amalgam of super-deference,[6] suspect class treatment,[7] and intermediate scrutiny,[8] depending upon whether immigrants are present in the United States lawfully or not,[9] and whether a state or federal classification is at issue.[10] No other area of equal protection law modulates scrutiny in this way, with inevitably complex, if not inconsistent, results.

For example, the law immunizes decisions by the federal government to single out immigrants for unequal economic burdens, yet strikes down state laws premised upon the same considerations under strict judicial scrutiny.[11] The Court has cited the federal government's exclusive authority over immigration matters rooted in its foreign affairs power as the justification for treating federal authority in this area as a plenary power warranting supreme judicial deference.[12] But it is not clear that the federal government's regulation of immigrants

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6. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 305–06 (1993) (applying deferential rational basis scrutiny to Immigration and Nationalization Service (INS) policy of detaining non-citizen juveniles who lack close relatives or legal guardians); Fiallo v. Bell, 430 U.S. 787, 791–92 (1977) (applying deferential review of gender-based immigration law); Mathews v. Diaz, 426 U.S. 67, 81–82, 84–85 (1975) (upholding a federal law denying lawful permanent residents Medicare for five years under rational basis review, reasoning that "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization").

7. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371 (1971) (applying strict scrutiny to Arizona and Pennsylvania laws that denied welfare benefits to lawfully present immigrants after concluding that immigrants are a discrete and insular minority under *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)).

8. Intermediate scrutiny applies at least when state laws deprive undocumented immigrant children of free public school education. *See* Plyler v. Doe, 457 U.S. 202, 230 (1982) (invalidating a Texas law because it did not further "some substantial state interest").

9. *Id.* at 223 ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'").

10. *See Mathews*, 426 U.S. at 81–82; *Graham*, 403 U.S. at 371.

11. *See Mathews*, 426 U.S. at 73–74, 80. In *Mathews*, the district court concluded that the Medicare statute's alienage-based denial of healthcare benefits violated equal protection because it could not be justified based upon a "desire to preserve the fiscal integrity of the program, or to treat some aliens as more deserving than others." *Id.* at 73–74. This was essentially the holding of *Graham v. Richardson*, which the Court decided five years earlier. 403 U.S. at 371. But in *Mathews*, the Supreme Court rejected the district court's reasoning and held that *Graham* did not apply to federal immigration regulations, reasoning that "[t]he fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.'" 426 U.S. at 80.

12. *Mathews*, 426 U.S. at 81.

necessarily or always implicates foreign affairs,[13] or that the federal immigration power is an inherent sovereign power unreviewable by the courts.[14]

Indeed, the historically influential account of an exclusive federal power over immigration matters has been widely contested by scholars and states alike.[15] As Christina Rodriguez and others have argued, state and local governments have a significant role in the regulation of immigrants, whether by delegation from the federal government, cooperation with federal agencies, or through exercise of state and local police power.[16] But scholars and the courts have not seriously addressed

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13. *See* David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 145 (2013) (noting that "generations of immigrant advocates" have "excoriated" the foreign affairs rationale as a justification for the plenary power doctrine); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 57 (noting that the plenary power doctrine "has been assailed over the years by many academics and defended, I think, by none" in spite of its persistent authority). For example, Gerald Neuman has argued that "the correlation between the substance of immigration policy and the [foreign affairs] factors that have been invoked to justify extreme judicial deference is very weak." Gerald L. Neuman, *The Lost Century of American Immigration Law*, 93 COLUM. L. REV. 1833, 1898 (1993).

14. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 5 (2002) (tracing the roots of the plenary power over foreign affairs rationale and challenging its validity).

15. For a discussion of recent scholarship on immigration federalism, see *infra* Section III.B. A number of states have challenged the notion that the states are powerless to regulate immigration. For example, in 2010 Arizona enacted the Support Our Law Enforcement and Safe Neighborhoods Act, known as S.B. 1070, which expressly aimed to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." Arizona v. United States, 132 S. Ct. 2492, 2495 (2012) (quoting the note following ARIZ. REV. STAT. ANN. § 11–1051 (West 2012) (establishing an official state policy of "attrition through enforcement")). Other states, including Utah, Georgia, Indiana, Alabama, and South Carolina passed similar laws. *See SB 1070 Four Years Later, Lessons Learned*, NAT'L IMMIGR. L. CTR. (Apr. 23, 2014), https://www.nilc.org/issues/immigration-enforcement/sb-1070-lessons-learned/. These laws faced similar legal challenges.

16. *See, e.g.*, Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 609 (2008) (contending immigration control is carried out by "a de facto multi-sovereign regime"); *see also* Adam B. Cox & Eric E. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1285–88 (2012) (describing the numerous ways that the federal government delegates decisions about the admission and regulation of immigrants to state and local authorities); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 792 (2008) (arguing that immigration law is marked by a mix of federal and significant state and local involvement); Schuck, *supra* note 13, at 57 (challenging federal exclusivity in immigration lawmaking).

immigration federalism's implications for equal protection scrutiny.[17]

Moreover, the dichotomous approach to state and federal equal protection obligations is anomalous within broader equality jurisprudence; outside the immigration context, the Court has held that the equal protection guarantees of the Fifth and Fourteenth Amendments must apply the same standards and scrutiny to state and federal laws classifying on the basis of suspect characteristics.[18] In passing reference in *Adarand Constructors, Inc. v. Pena*, a case involving a racial classification, the Court exempted immigration laws from this constitutional mandate, but did so without analysis.[19] The Court's decision in *Plyler* added to this complexity. In *Plyler*, the Court struck down a Texas statute denying undocumented children access to free public school education under a more robust equal protection scrutiny than rational basis review,[20] but it simultaneously made clear that persons unlawfully in the United States do not warrant the same heightened judicial solicitude as their lawfully present counterparts.[21] The Court failed to reconcile, however, how the very same characteristics justifying the Court's treatment of lawfully present immigrants as a suspect class—their political powerlessness and the country's history of discrimination against immigrants—apply equally

17. Clare Huntington, however, has acknowledged such implications. *See* Huntington, *supra* note 16, at 838 ("The sharing of immigration authority among levels of government arguably calls for the unification of this standard, although it is not necessarily clear what such unification would look like.").

18. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226–27 (1995) (holding "that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny," a principle that Justice O'Connor referred to as "congruence"); *see also* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (stating that where "the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government").

19. 515 U.S. at 217–18 (setting forth the principle of congruence and noting that the Court did "not understand a few contrary suggestions appearing in cases in which [it] found special deference to the political branches of the Federal Government to be appropriate, e.g., *Hampton v. Mow Sun Wong*, [426 U.S. 88, 100, 101–102, 101 n. 21 (1976)] (federal power over immigration), to detract from this general rule" (first alteration in original)).

20. Plyler v. Doe, 457 U.S. 202, 217 (1976).

21. *Id.* at 219 n.19. Indeed, the Court affirmed that unlawful status might well justify state burdens and restrictions imposed uniquely upon migrants. *Id.* (emphasizing that "entry into this class, by virtue of entry into this country, is the product of voluntary action," and that unlawful entry is "itself a crime").

to undocumented persons.[22]

Immigration law scholars have long debated the Court's ambivalence about immigrants' constitutional rights and its use of preemption as a substitute for rights-based doctrines.[23] But few have grappled holistically with the tensions and exceptionalism within equal protection doctrine for non-citizens or offered a normative vision of what the guarantee of equal protection means for immigrants and how the judiciary should evaluate alleged transgressions of it.[24] Constitutional law scholars have also largely failed to address immigrants' constitutional rights within broader criticism and dialogue

22. As the district court reasoned in *Mathews*, "the danger of unjustifiable discrimination against aliens in the enactment of welfare programs is so great, in view of their complete lack of representation in the political process[,] . . . federal statute[s] should be tested under the same pledge of equal protection as a state statute." Mathews v. Diaz, 426 U.S. 67, 73 (1975) (citing Diaz v. Weinberger, 361 F. Supp. 1, 9 (S.D. Fla. 1973)); *see also* Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1545 (2015) (describing the lack of a coherent theory for determining when a group lacks political power so as to qualify for recognition as a discrete and insular minority warranting heightened judicial solicitude).

23. *See, e.g.*, Raquel Aldana, *On Rights, Federal Citizenship, and the "Alien"*, 46 WASHBURN L.J. 263, 290–91 (2007) (critiquing limited rights-based avenues for challenging anti-immigrant measures); Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 369–70 (2013) (critiquing the Court's recent focus in immigrants' rights cases on structural questions rather than individual rights); Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51, 87–88 (1985) (rejecting preemption as an adequate substitute for enforcement of immigrants' equal protection rights); Gerald L. Neuman, *Aliens As Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1430–31 (1995) (same); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1060–65 (1979) (arguing that "the Court's differential treatment of state and federal lines drawn on the basis of alienage" are better conceptualized as Supremacy Clause decisions rather than equal protection cases); David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1081 (1979) (same).

24. The notable exception is Hiroshi Motomura. In his book, AMERICANS IN WAITING, Motomura argues that traditional ways of thinking about immigrants' rights reflect models of inevitable, unequal justice. HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 86, 166 (2006) (describing the limitations of traditional accounts of immigration as contract or immigration as affiliation). He conceptualizes immigration as transition and proposes a framework whereby immigrants' right to equal treatment grows as their connections and ties to the United States deepen, rendering them more similar to citizens. *See id.* In another work, Motomura sets forth a framework for assessing the rights of undocumented migrants drawn from several themes in *Plyler v. Doe*, discussed *infra*, notes 212–14 and accompanying text. *See also* HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 10–13 (2014).

about equal protection's future,[25] discounting the potential of this area of equal protection law as a battleground for some of the most pressing civil rights issues of our time[26] and the importance of strong and consistent equal protection backstops to anti-immigrant laws and bigotry.[27] This risks accepting as inevitable doctrinal anomalies such as plenary power deference born during a late-nineteenth century period of racist and nativist thinking.[28]

Perhaps ironically, the lack of attention to this dimension of equal protection law may be partly explained by scholars' perception of the immigrants' rights cases as *sui generis*—the notion that equality means something different when it comes to non-citizens and requires different rules of judicial inquiry.[29] But the persistence of immigration exceptionalism does not obviate the need to reevaluate the long-untested assumptions underlying it and to question whether judicial scrutiny involving immigrants must necessarily stand apart from the rest of equal protection doctrine.

Blind acceptance of equal protection exceptionalism also misses contemporary opportunities to clarify the equal protection limits on the

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25. *See* Cleveland, *supra* note 14, at 12 (noting that "alien" cases, among others, "often have been ignored by mainstream constitutional law scholars as late-nineteenth-century anomalies of American constitutional jurisprudence," even though "the doctrines developed during this period . . . continue to be the controlling constitutional authority"). For a discussion on the contemporary critiques of equal protection doctrine, see *infra* Section III.A. Few scholars have examined whether the equal protection law applicable to immigrants repeats some of the very same problems in broader equal protection doctrine or presents unique challenges.

26. *See* Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 611–12 (2012) (arguing that law and political discourse insufficiently acknowledge immigration law and enforcement as a civil rights issue).

27. *See* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 497–98 (2001) (emphasizing the importance of constitutional restraints on state alienage discrimination given the likelihood that "episodic American nativism" returns with economic downturns); *see also* Alan Kraut, *Nativism, an American Perennial*, CTR. FOR MIGRATION STUD. (Feb. 8, 2016), http://cmsny.org/publications/kraut-nativism ("Suspicion, even hostility, to newcomers, has been a dimension of American culture and is expressed most vociferously in times of crisis, especially economic downturn.").

28. Cleveland, *supra* note 14, at 14 (noting that the inherent powers theory of the foreign affairs power originates "in a peculiarly unattractive, late-nineteenth-century nationalist and racist view of American society and federal power"); *see id.* at 99–106 (describing how racist and nativist impulses infected debates about immigration, and ultimately policy, during this period).

29. The Court, after all, has long held that the federal government has plenary power over immigration matters and that this power compels near-judicial abstention when immigrants press claims to equal treatment by the federal government. *See infra* Part II.A.

government's immigration and citizenship power. For example, in *Morales-Santana v. Lynch*,[30] an equal protection case before the Supreme Court in the 2016–2017 term, the Court considered whether Congress may discriminate based upon gender when it imposes more onerous rules upon citizen fathers for extending citizenship to foreign-born, non-marital children than it does upon citizen mothers.[31] In similar cases, the Court has purported to apply conventional intermediate scrutiny when assessing the Immigration and Nationality Act's gender-based rules for extending derivative citizenship.[32] But plenary power deference has nevertheless lurked in the background. It has impacted Justices' willingness to provide a remedy in the event of an equal protection violation and diluted the intermediate scrutiny the Court professed to apply.[33] This deference occurred even as the Court suggested that the plenary power doctrine should play no role in resolving the legality of laws implicating the rights of citizen parents and would-be citizen children, as opposed to the admission or removal of immigrants.[34] A decision in *Morales-Santana* this term that accepts the government's invitation to invoke plenary power review,[35] or defers to the federal immigration power in less transparent ways,[36] will solidify the equal protection exceptionalism described in this Article. On the other hand, a ruling striking down the discriminatory law could help pave the way for integration of immigrants' claims with the rest of equality doctrine.

This Article examines the exceptionalism that defines the Supreme Court's equal protection jurisprudence involving immigrants and argues that the Court should abandon its reliance upon fixed, categorical determinants of equality: namely, the lawfulness of

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30. 804 F.3d 520 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016). (This Article was published just after the Supreme Court decided *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017).)

31. *See id.*

32. *See* Nguyen v. I.N.S., 533 U.S. 53 (2001). See also *infra* Section II.A.3 for discussion of *Nguyen*.

33. *See Nguyen*, 533 U.S. at 71–72.

34. *See* discussion *infra* Section II.A.3.

35. The federal government has not ceded any ground on the force of plenary power deference, even when the challenged unequal treatment concerns citizenship. In prior cases, and in its most recent certiorari petition, the Government has urged the Court to apply rational basis review, citing the federal government's plenary authority over immigration and naturalization. *See* Brief for Petitioner at *2, *9, Morales-Santana v. Lynch, No. 15-1191 (U.S. Aug. 19, 2016), 2016 WL 4436132.

36. The Court may decline to apply rational basis but, nevertheless, incorporate plenary power deference in other ways, either through a toothless heightened scrutiny or through a refusal to recognize a remedy for the discriminatory allocation of the right to extend citizenship to children. *See infra* Section II.A.3.

immigration status and whether a federal or state law is at issue. It argues that this approach does not sufficiently account for the continuum of authority and motivations when governments regulate migrants. Nor does a rigid categorical focus on whether migrants are lawfully present in the United States alone answer whether their unequal treatment is constitutionally justified. It argues that a more functional approach to judicial review focused on the anti-caste norms at the heart of Equal Protection[37] should replace an otherwise exceptional and conflict-riddled approach to tiered scrutiny.

Part II explains the costs of treating equal protection law for immigrants as a doctrine outside of mainstream equality. Part III describes the reasons for the Court's exceptional approach to immigrants' equality. It explores how a splintered focus on the federal government's plenary power over immigration matters, immigrants' political powerlessness, and how the lawfulness of immigration status has produced a complex and inconsistent doctrine. Part IV assesses how this exceptionalism is problematic and undermines equality. Part V sets forth a proposal for functional review of immigrants' claims.

II. MAINSTREAMING IMMIGRANTS' EQUALITY

Equal protection exceptionalism in the realm of immigrant rights has largely gone unaddressed within contemporary critiques of equal protection law and the doctrine's future. This is a mistake, likely driven by misguided assumptions regarding the intractability of plenary power deference or the inevitability of an exceptional equal protection doctrine for migrants. Immigrants' cases do not compel exceptional treatment within equal protection review and, in fact, present many of the same challenges vexing the rest of constitutional equality doctrine.

As many scholars have demonstrated, contemporary equal protection doctrine is fraught with challenges. Scholars have declared the tiered approach to equal protection scrutiny destined for collapse under the burdens of its own complexity and contradiction.[38] Indeed, some have questioned whether rational basis review still means what it purports to, as the Court repeatedly affords heightened judicial consideration to groups otherwise outside the once-determinative

37. *See* Plyler v. Doe, 457 U.S. 202, 213 (1982) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.").

38. *See supra* note 13; *infra* note 49.

stratum of suspect classifications.[39] Others have condemned the subversion of strict scrutiny from a doctrine aimed at eradicating racial animus and hostility to a legal approach highly solicitous of whites' experience of race-conscious measures designed to remediate the effects of structural racism.[40] Scholars have also critically deconstructed other elements of conventional equal protection analysis, including the notion of groups' political powerlessness as a justification for strict scrutiny[41] and the consideration of whether groups are similarly situated,[42] resulting in similarly harsh conclusions about the doctrine's coherence.

Within these broader discussions of contemporary equal protection doctrine and its future, however, non-citizens' claims have been insufficiently explored. This is curious for multiple reasons.

First, the immigrants' rights cases may help expose whether tiered scrutiny is too blunt an instrument to accurately capture the nuances of group status and discrimination. Scholars' efforts to identify a

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39. *See* Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 581 (2014) ("The Court has repeatedly shown itself willing to apply meaningful scrutiny to groups (and sometimes rights) that are not among those it has selected for formal heightened scrutiny review."). *But see* Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 416 (2016) (arguing that rational basis review is sufficient, and even desirable, for non-suspect classifications, and that balancing in such cases becomes inevitable).

40. In particular, Ian Haney-López and Reva Siegal have presented devastating critiques of the equal protection doctrine's transformation from a jurisprudence aimed at rooting out racial animus and prejudice to one fixated on the perception of white injury and colorblindness. Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1781 (2012) (critiquing the Court's requirement of intent when it "evaluates claims of discrimination against non-Whites" and "how it regards affirmative action designed to ameliorate racial inequality, where colorblindness reigns"); Reva B. Siegel, Foreword, *Equality Divided*, 127 HARV. L. REV. 1, 38 (2013) ("Judicial interpretation responsive to the aggrievement of white citizens threatened to divide equal protection law into two bodies of doctrine: one body of law governing minority complaints that was deferential to democratic actors, and another body of law responsive to majority complaints that closely scrutinized democratic decisionmaking."); *see also* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 487–88 (2004) (arguing that "the suspect classification label has made it more, rather than less, difficult for government to remedy the effects of hostility toward racial minorities in employment, voting, and other arenas"); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 172 (2016) ("[S]trict scrutiny rarely benefits people of color because modern racial discrimination does not rely on overt racial classifications to do its dirty work.").

41. *See* Stephanopoulos, *supra* note 22, at 1542 (critiquing the absence of a coherent theory for determining when a group lacks political power so as to qualify for heightened scrutiny).

42. Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 598 (2011) (arguing that the Supreme Court historically viewed the concept of similarly situated not "as a separate, threshold requirement, but rather as one and the same as the equal protection merits inquiry").

consistent and principled approach to discrimination should necessarily take on, rather than elide, these challenges.

Second, the treatment of immigrants presents one of the most pressing civil rights questions of our time, complicated both by new migration patterns in the states and new ways of thinking about the balance of power between federal and local authorities to regulate immigrants. The question of what equality means for immigrants should not be sidelined as a boutique corner of equal protection jurisprudence subject to exceptional rules, but rather could pave the way for a more dynamic, modern equality jurisprudence.

Perhaps ironically, the perception of immigrants' claims as exceptional likely explains the considerable absence of non-citizens' treatment within broader critiques of equal protection doctrine. Scholars may be influenced by the notion that government treatment of non-citizens raises unique equality questions, implicates different long-settled rules, or is simply an incoherent mess.

The Supreme Court's recognition of lawful immigrants as a discrete and insular minority in 1971 might also explain the often noticeable absence of immigrants from broader discussions of equality doctrine. Having reached the rarified pinnacle of suspect status during a formative period of equal protection doctrine, observers may presume that non-citizens are not a beleaguered group in the fight for formal recognition of their right to equality. That, coupled with the fact that the Supreme Court has not handed down many significant equal protection cases involving non-citizens' rights since *Plyler* in 1982,[43] and has instead addressed laws targeting immigrants largely through preemption,[44] may suggest to many that contests over equal protection will be left to other vulnerable groups. These assumptions are wrong.

The Court did not neatly resolve the doctrine governing immigrants' equality in *Graham* or *Plyler*. Nor are immigrants' claims to equal treatment so dissimilar from other groups that they warrant anomalous treatment outside of the norms applicable in conventional equal protection doctrine. Indeed, the siloing of non-citizens' equal protection doctrine from conversations taking place regarding the remainder of

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43. I exclude *Nguyen* and related cases from this point in that they were brought by citizen parents.

44. *See* Arizona v. United States, 132 S. Ct. 2492, 2497 (2012) (examining whether federal law preempted an Arizona statute); Chamber of Commerce v. Whiting, 563 U.S. 582, 594–600 (2011) (same); Toll v. Moreno, 458 U.S. 1, 9–10 (1982) (sidestepping equal protection challenge to strike down on preemption grounds a Maryland law limiting tuition assistance to certain lawfully present immigrants), *superseded by statute*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

equality jurisprudence deprives broader equal protection debates of insights from the immigration context that are just as valuable and applicable when assessing the constitutional demands of equality for other vulnerable groups.[45]

Those insights include that strict scrutiny can stymie judicial recognition of inequality, as much as it can serve to protect vulnerable groups. For undocumented immigrants, outside the context of *Plyler*, the difficulty of clearing the hurdle of heightened scrutiny prevents meaningful judicial engagement with their claims to equal treatment.[46] Scholars have noted a different, but similar, effect of strict scrutiny as a double-edged sword when criticizing its asymmetric use to both strike down racially pernicious laws as well as race-conscious measures designed to remediate racial subjugation.[47] To be sure, these problems are driven by different political and doctrinal failings.[48] But given equal protection's multiple dualisms, evident and perhaps overlapping across various group claims, equal protection exceptionalism warrants space within the broader conversation of constitutional equality.

III. EXCEPTIONALLY UNEQUAL

Equal protection doctrine involving immigrants reflects consummate line-drawing.[49] Three primary, and often clashing, considerations have led to this highly variegated approach to equality:

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45. Compare MOTOMURA, AMERICANS IN WAITING, *supra* note 24, at 166 (noting that "America has rescinded much of its equal treatment of lawful immigrants based on the expectation of full membership") with sources cited *supra* note 40.

46. *See generally* Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601 (2013) (noting the ways in which preemption has substituted for the lack of a meaningful equal protection doctrine for undocumented immigrants).

47. *See* Haney-López, *supra* note 40; Siegel, *supra* note 40, at 3–4; Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CAL. L. REV. 735, 750–54 (2002) (addressing the tension between symmetrical and asymmetrical approaches to the review of discriminatory laws).

48. *See* Siegel, *supra* note 40.

49. This line-drawing exposes what Linda Bosniak has argued are conflicting theories of immigrants as equal, rights-holding members of society versus outsiders lacking meritorious claims for equivalent treatment. *See, e.g.*, Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 956 [hereinafter Bosniak, *Exclusions and Membership*] (describing how the law has extended undocumented migrants "a dual legal identity," treating them as "both outsiders and members, regulated objects of immigration control and subjects of membership in limited but important respects"); Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1089 (1994) [hereinafter Bosniak, *Membership, Equality, and the Difference That Alienage Makes*] (arguing that "American alienage law is driven by deep uncertainty and conflict over the proper scope of the government's authority to regulate membership").

(1) federal plenary power over immigration matters;[50] (2) immigrants' political powerlessness;[51] and (3) the principle that the lawfulness of immigration status is relevant to whether the Constitution tolerates unequal treatment.[52]

The Court has exalted immigrants as a suspect class entitled to the utmost judicial solicitude given that immigrants as a class cannot vote and have historically experienced discrimination and racial hostility throughout our nation's history.[53] But the Court has deemphasized lawful immigrants' vulnerable status when the government invokes the federal immigration power,[54] and has also sanctioned the notion that undocumented migrants can be treated as outsiders, even when they are inside the United States, and whether or not they have deep ties here and contribute meaningfully to American society.[55] The section below examines the norms and assumptions fueling this exceptional approach to equal protection.

A. Plenary Power

The most significant line drawn by the Court in its equal protection jurisprudence addressed to immigrants is the immunity afforded federal laws distinguishing on the basis of non-citizenship status.[56] The Supreme Court's 1889 decision in *Chae Chan Ping v. United States*[57]—commonly known as the *Chinese Exclusion Case*—originated the now entrenched and much criticized plenary power doctrine, which has

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50. *See* decisions and explanations cited *supra* note 6.

51. *See* Foley v. Connelie, 435 U.S. 291, 294 (1978) (stating that lawfully present immigrants warrant "heightened judicial solitude" because "aliens—pending their eligibility for citizenship—have no direct voice in the political processes").

52. *See* Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982) (confirming that undocumented migrants cannot be considered a suspect class because they are present in violation of the law through voluntary conduct).

53. *See id.* at 216 n.14 ("[C]ertain groups, indeed largely the same groups, have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process'" (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)) (citing Graham v. Richardson, 403 U.S. 365, 372 (1971))).

54. *Compare Graham*, 403 U.S. at 372 (emphasizing in the context of state alienage restrictions the similarity of lawful permanent residents to citizens with respect to their contributions and responsibility of community membership), *with* Mathews v. Diaz, 426 U.S. 67, 81 (1976) (stating that such distinctions between lawfully present migrants and citizens are not invidious when federal immigration power is at stake).

55. *See Plyler*, 457 U.S. at 220 (noting that undocumented status may justify unequal treatment and emphasizing voluntary entry into the class of undocumented immigrants and that unauthorized entry is a crime).

56. *See* cases and discussion *infra* notes 65–97.

57. 130 U.S. 581, 603 (1889).

largely insulated from judicial review a host of rights-based claims by immigrants.[58]

In the *Chinese Exclusion Case*, the Court invoked Congress's plenary power over immigration matters to reject a Chinese immigrant's claim that the government violated his rights by failing to credit a reentry certificate issued to him for the purpose of returning to the United States after a trip to China.[59] The Court upheld Congress's exclusion of Chinese immigrants from the United States based exclusively upon their race, suggesting that immigrants' constitutional rights do not impose limits upon the federal immigration power.[60] The Court reasoned that when the federal government exercises its sovereign power to further the nation's "protection and security"—even when the country is not at war—its determinations "are necessarily conclusive" upon the judiciary.[61]

In the century-plus since that decision, the Court has recommitted itself to this feeble judicial role in delineating immigrants' rights.[62]

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58. The Court explained the need for deference to the federal government based upon its sovereign power in matters of foreign affairs. *Id.* at 603–04 ("Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power."). For scholarly critiques of the plenary power doctrine, see sources cited *supra* note 13. Sarah Cleveland cites the *Chinese Exclusion Case* as an example of the Court's inherent sovereign powers doctrine, which she defines as marked by three elements: "an extra-constitutional source of authority deriving from international law, relative lack of constitutional constraint, and limited judicial review." Cleveland, *supra* note 14, at 5.

59. *Chae Chan Ping*, 130 U.S. at 589.

60. *Id.* at 606; *see also* MOTOMURA, AMERICANS IN WAITING, *supra* note 24, at 29 (noting that although the *Chinese Exclusion Case* "emphasized national sovereignty coupled with national security and self-preservation[,] . . . these themes were only a thin veil for the Court's more basic premise[:] . . . Anglo-Saxon racial superiority at a time of expanding American empire in the Caribbean and the Pacific").

61. *Chae Chan Ping*, 130 U.S. at 606 (reasoning that if "the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed").

62. The plenary power doctrine has effectively exempted laws regulating non-citizens from a range of rights-based constitutional doctrines and norms in a variety of anomalous ways, creating the long-criticized canon of immigration exceptionalism. *See, e.g.*, Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 59 (2015) (noting that courts' willingness to immunize "the substantive immigration judgments of Congress" from "fundamental conceptions of constitutional review epitomizes what immigration law professors have characterized as 'immigration exceptionalism'"); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 257–58 (noting that the doctrine has been applied consistently in constitutional challenges related to substantive rights and Fifth Amendment due process, and that it has also at times been extended to cover actions of the Immigration and Naturalization Service).

Although the *Chinese Exclusion Case* did not raise discrimination claims under the Fifth Amendment,[63] its plenary power analysis has had lasting effects on modern equal protection doctrine involving non-citizens.[64]

1. *Mathews v. Diaz*

In the equal protection context, the Court has reviewed the federal government's regulation of immigrants with a deference largely unknown in other areas of modern law addressing the rights of minority groups.[65] In 1976, in *Mathews v. Diaz*, the Court invoked plenary power principles to justify its application of rational basis review to Congress's decision to treat citizens and lawful permanent residents differently for purposes of healthcare benefits.[66] The Court held that Congress did not violate equal protection by conditioning non-citizens' eligibility for supplemental Medicare insurance benefits on possession of permanent

63. *See* MOTOMURA, AMERICANS IN WAITING, *supra* note 24, at 28 (noting that it was not "at all surprising" for an era that brought us *Plessy v. Ferguson*, 163 U.S. 537 (1896), "that *Chae Chan Ping* did not allege racial, ethnic, or nationality discrimination").

64. *See* Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 930–31 (1995) (analyzing impact of plenary power doctrine on a range of constitutional rights, including equal protection); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 607–08 (1990) (same); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 21–22 (1984) (describing how "classical immigration law has essentially neutralized" equal protection). *But see* Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange But Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 257–58 (2000) (suggesting that many of the notorious immigration decisions that failed to recognize rights for non-citizens were not out of step with the Court's other precedents at the time they were decided and "could have come out the same way even if they involved the rights of citizens under domestic constitutional law").

65. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 81–82 (1976) (reasoning that "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization"); Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 284 (describing the review utilized in *Mathews* as an "astonishingly lenient version of the rational basis test").

66. 426 U.S. at 69, 83 (1976). Many scholars have characterized *Mathews* as an extension of the plenary power doctrine. *See, e.g.*, T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 865 (1989) (citing *Mathews* as an example of the Court reaffirming and extending the plenary power doctrine "in the Constitution's second hundred years"); Rosberg, *supra* note 65, at 317, 334 (criticizing *Mathews*' reliance upon a plenary power rationale to support deferential review).

residence status for five years.[67] The Court reasoned that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[68]

Courts often cite *Mathews* as a precedent establishing deference to federal immigration lawmaking in light of the federal government's foreign affairs power.[69] Hiroshi Motomura, however, has questioned whether *Mathews* has been correctly understood.[70] He contends that the Court was less influenced by plenary power deference and more influenced by the idea that immigrants' right to be treated fairly grows as their ties to the United States deepen and they become more similar to citizens—what Motomura deems "immigration as affiliation."[71] Under this account, the Court deemed it acceptable to deny healthcare benefits to non-citizens until they possessed permanent resident status for five years because at that point they more closely resembled citizens.[72] There is some reason to think that this affiliation-focused reasoning influenced the Court.[73] Nevertheless, the impact of the plenary power tradition in *Mathews* cannot be easily dismissed.[74]

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67. *Mathews*, 426 U.S. at 79–80.

68. *Id.*

69. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 225 (1982) (citing *Mathews*, 426 U.S. at 81, and reasoning that "[t]he obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion" into the field of immigration lawmaking); Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 348 (2005) (same).

70. *See* MOTOMURA, AMERICANS IN WAITING, *supra* note 24, at 84–85.

71. Motomura contends that "rather than rejecting out of hand the argument that the rule was unconstitutional," *Mathews* instead "took a constitutional challenge to an alienage law seriously, in contrast to immigration law decisions that rely on plenary power." *Id.* at 84–85 (quoting *Mathews*, 426 U.S. at 80).

72. *Id.*

73. *See id.* ("Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence." (quoting *Mathews*, 426 U.S. at 80)).

74. However, the Court's decision in *Graham v. Richardson*, only five years earlier, striking down alienage-based restrictions in state public benefits schemes suggests some limits to the affiliation rationale as a normative justification for *Mathews*. 403 U.S. 365, 371–72 (1971). In *Graham*, the Court cited lawful permanent residents' similarity to citizens with respect to their contributions and burdens of community membership as a justification for *striking down* state laws that denied them welfare benefits on equal terms as citizens. *Id.* at 376. Specifically, in rejecting the State's purported justification for the dissimilar treatment, the Court reasoned:

The Court's deference under rational basis review went beyond the familiar conclusion that, in the absence of irrationality, legislative classifications enjoy a presumption of validity.[75] Rather, the Court invoked the justifications for judicial forbearance in the context of political questions,[76] to suggest the Court's deference would border on judicial abstention.[77] Indeed, the Court noted that congressional policy related to immigrants is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[78]

Moreover, the Court invoked expansive plenary power language not only to describe precedents in the areas of traditional immigration law involving admission and deportation but also to connect those precedents to the question of whether immigrants should share equally

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> "Aliens like citizens pay taxes and may be called into the armed forces. Unlike the short-term residents in Shapiro, aliens may live within a state for many years, work in the state and contribute to the economic growth of the state." There can be no 'special public interest' in tax revenues to which aliens have contributed on an equal basis with the residents of the State.

Id. (quoting Leger v. Sailer, 321 F. Supp. 250, 253 (1970)). In emphasizing lawful permanent residents' affiliation with their respective states, the Court held "that a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause." *Id.* If lawfully present immigrants' wanting affiliation played a prominent role in *Mathews*, it seems odd that the Court would emphasize this group's similarity with citizens with respect to shared burdens and contributions of community membership when it struck down a similar alienage-based rule enacted by states only five years earlier.

75. *See* Chemerinsky, *supra* note 39, at 402 (stating that under rational basis review, a law "will be upheld unless the challenger proves that the law does not serve any conceivable legitimate purpose, or that it is not a reasonable way to attain the intended end").

76. *See* THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 54–55 (1992) (examining plenary power deference in the immigration context as a subset of the political question doctrine); *Mathews*, 426 U.S. at 82 (reasoning that the principles informing the political question doctrine also "dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization").

77. *Mathews*, 426 U.S. at 81. The Court reasoned that:

> Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.

Id.; *see also* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 157, 158 (2002) (contending that Justice Stevens argued "by analogy to the political question doctrine [without] invok[ing] it fully," thereby crafting a rule of institutional deference instead of deeming all immigration matters nonjusticiable).

78. *Mathews*, 426 U.S. at 81 n.17 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952)).

in public resources once lawfully present within the United States. The Court cited the political branches' "need for flexibility in policy choices," even in that second category of regulation, "rather than the rigidity often characteristic of constitutional adjudication."[79]

Central to the Court's adoption of this circumscribed judicial role was its easy conclusion that the Medicare restriction was, in fact, an exercise of the federal immigration power—a premise scholars contest, noting the law's tenuous connection to migration.[80] Lawfully present immigrants' access to resources once living within the United States, conventionally described as alienage law, had previously received more exacting judicial scrutiny, at least in the context of state regulation.[81]

The *Mathews* Court, however, never seriously questioned whether this same reasoning should apply to federal decisions allocating public resources.[82] Instead, the Court cited *Harisiades v. Shaughnessy*, a deportation case rejecting immigrants' First Amendment claims under a plenary power rationale,[83] for the principle that "*any policy toward aliens* is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."[84] *Mathews* thus doubled-down on the unbounded idea that federal laws addressed to immigrants—no matter their aim—implicate the federal government's sovereign authority in foreign relations, and are thus largely immunized from judicial scrutiny.

2. *Fiallo v. Bell*

The Court confirmed this expansive role of the plenary power doctrine in immigrants' equal protection cases a year later in *Fiallo v. Bell*.[85] There, the Court upheld a law treating unwed citizens and lawful permanent resident fathers differently from mothers with

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79. *Id.* at 81.

80. *Id.* at 79–80; Rosberg, *supra* note 65, at 334 (arguing that the restriction on Medicare benefits in *Mathews*, "was not in any obvious way concerned with immigration"); Aleinikoff, *supra* note 66, at 869 (arguing that "the courts have wrongly assumed that every federal regulation based on alienage is necessarily sustainable as an exercise of the immigration power").

81. *See* Aleinikoff, *supra* note 66, at 869; Rosberg, *supra* note 65, at 334.

82. The Court discussed whether immigrants of differing statuses possess the same claim to share in the nation's resources as citizens, but never analyzed or explained why the distribution of benefits in this way was related to congressional authority over matters of immigration and foreign relations. *Mathews*, 426 U.S. at 81.

83. 342 U.S. 580, 588–89, 592, 596 (1952).

84. *Mathews*, 426 U.S. at 81 n.17 (emphasis added) (quoting *Harisiades*, 342 U.S. at 588–89).

85. 430 U.S. 787, 792 (1977).

respect to their ability to confer immigration status on offspring born out of wedlock.[86] In doing so, the Court refused to examine whether Congress relied upon an impermissible gender-based classification in enacting the immigration measure.[87]

Fiallo appears a more predictable case for application of plenary power deference than *Mathews* because it involved the admission of non-citizens as immigrants—a seemingly straightforward exercise of federal immigration power.[88] Several features of *Fiallo*, however, complicate that description and called for a more rigorous assessment of equal protection's requirements.[89]

First, the petitioner in *Fiallo* challenged a facially discriminatory gender-based classification,[90] a form of discrimination the Court had struck down in other cases only a few years earlier under a more searching judicial review.[91] Additionally, the discrimination challenged in *Fiallo* related to the rights of citizen parents who claimed an equal right to reunify with non-marital children, not the interests of non-

86. *Id.* at 791, 797, 800.

87. *Id.* at 809–10 (Marshall, J., dissenting).

88. *See* Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) ("The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" (quoting Boutilier v. I.N.S., 387 U.S. 118, 123 (1967)); Ting v. United States, 149 U.S. 698, 704–05 (1893); Ekiu v. United States, 142 U.S. 651, 660 (1892); Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581 (1889). Scholars have long noted that contrary to the Court's line drawing, the difference between immigration regulations governing admission and removal of non-citizens on the one hand, and laws regulating immigrants' lives once living in the United States on the other is, in reality, rather blurry. *See infra* Section II.C.

89. ALEINIKOFF, *supra* note 79 at 159 (noting that the plaintiffs in *Fiallo* argued that the case involved "'double-barreled discrimination' (sex and illegitimacy)[, which] rendered the statute plainly unconstitutional under prevailing law").

90. The Court noted that 8 U.S.C. § 1101(b)(1)(D) defined "child" for purposes of preferential immigration status as "an unmarried person under 21 years of age who is a legitimate or legitimated child, a stepchild, an adopted child, or an illegitimate child seeking preference by virtue of his relationship with his natural mother." *Fiallo*, 430 U.S. at 788. The Court acknowledged that that definition did "not extend to" a child born of wedlock "seeking preference by virtue of his relationship with his natural father." *Id.* at 789. Moreover, 8 U.S.C. § 1101(b)(2) defined qualifying "parent" for purposes of the Act "solely on the basis of the person's relationship with a 'child'," thereby excluding natural fathers from the definition, as well. *Id.*

91. *See* Reed v. Reed, 404 U.S. 71, 76–77 (1971) (striking down under heightened scrutiny an Idaho statute dictating that men must be preferred to women when deciding between persons equally qualified to administer estates); Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (striking down under heightened scrutiny a federal law that regulated benefits available to members of the uniformed services differently based upon gender).

citizens seeking immigration status.[92] Additionally, *Fiallo* affected the interests of children born out of wedlock.[93] In the decade preceding *Fiallo*, the Court had recognized that this group warrants heightened judicial protection, arguably raising the stakes for more rigorous judicial scrutiny.[94]

Notwithstanding these factors, the Court again refused to second-guess Congress's decisions in the immigration context, affirming that immigration policy questions are "entrusted exclusively to the political branches" and that the Court has no "authority to substitute [its] political judgment for that of the Congress."[95] Indeed, the Court deemed it insignificant that citizens and lawful immigrant parents claimed unconstitutional treatment in *Fiallo*;[96] in its view, such treatment was outside the traditional equal protection doctrine because it was tied up in Congress's decisions regarding whom to admit to the United States.[97]

Motomura contrasts *Fiallo*, which he acknowledges "was much more deferential to the federal government" in the context of an "immigration admission statute," with *Mathews*, which he regards as reflecting nuanced concerns with Congress's ability to classify

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92. *Fiallo*, 430 U.S. at 790 (noting appellants were three "unwed natural fathers"); Rosberg, *supra* note 65, at 318 ("[T]he injury alleged was not to the prospective immigrants whose position was affected by the provision[,]" but rather to citizens and resident alien parents unable "to bring relatives to the United States from overseas.").

93. *Fiallo*, 430 U.S. at 791, 797.

94. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68, 71–72 (1968) (holding that restricting recovery under Louisiana's wrongful death statute to marital children violates equal protection); Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73, 76 (1968) (denying a biological mother recovery under wrongful death statute for the death of a non-marital child violates equal protection); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 165 (1972) (restricting Louisiana's workmen compensation statute to dependent marital children violates equal protection).

95. *Fiallo*, 430 U.S. at 798. *Fiallo* is an example of plenary power deference at its apex; the Court expressly "underscor[ed] the limited scope of judicial inquiry into immigration legislation." *Id.* at 792; *see* Rosberg, *supra* note 65, at 276 (describing *Fiallo* as "a reminder of the potency" of the plenary power rationale).

96. *Fiallo*, 430 U.S. at 794 (noting that the Court had "resolved similar challenges to immigration legislation based on other constitutional rights of citizens" and rejected the notion "that more searching judicial scrutiny is required" for immigration regulations when the rights of citizens are implicated (citing Kleindienst v. Mandel, 408 U.S. 753, 755, 769–70 (1972) (rejecting United States citizens' First Amendment challenge to the Attorney General's denial of a visa to a non-citizen professor who was a proponent of "the economic, international, and governmental doctrines of world communism" where the citizens claimed the visa denial infringed their First Amendment right to communicate with the professor))).

97. *Id.* at 792 ("'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909))).

immigrants in accordance with their varying degrees of affiliation.[98] Taken together, however, *Fiallo* and *Mathews* suggest a nearly impenetrable immunity for the federal government whenever it classifies pursuant to its immigration and naturalization power. Whether admission rules or domestic benefit laws are being challenged, and whether citizen or non-citizen claims are presented, the Court has been unwilling to second-guess the federal government's line drawing, purportedly carried out pursuant to its immigration and naturalization power. As the next section demonstrates, the intractability of plenary power deference has extended to another area of law involving the rights of citizens: parents seeking to confer citizenship on their foreign-born offspring.

3. The Derivative Citizenship Cases

The Court has twice upheld facially discriminatory, gender-based derivative citizenship laws challenged on equal protection grounds, albeit without resorting to *Fiallo*'s transparent plenary power deference. The inability to reconcile these cases with broader equal protection jurisprudence involving gender reveals, however, further equal protection exceptionalism.

4. Citizenship Outside of Plenary Power

In *Miller v. Albright*,[99] the Court first upheld a provision of the Immigration and Nationality Act (INA) that required U.S. citizen fathers to overcome gender-specific "legitimation" hurdles to extend derivative citizenship to non-marital children born abroad.[100] The Filipino daughter of a former U.S. serviceman filed suit, claiming that the parental verification requirement violated equal protection because it used parents' gender to discriminate between two classes of foreign-born non-martial children: those with U.S. citizen fathers and a non-citizen mother and those with a U.S. citizen mother and a non-citizen father.[101] The petitioner's father confirmed his relationship with his daughter through a judicial process, but he did so after her twenty-first

98. MOTOMURA, AMERICANS IN WAITING, *supra* note 24, at 84.

99. 523 U.S. 420 (1998).

100. *Id.* at 444–45; 8 U.S.C. § 1409(a)(4) (2012) (requiring U.S. citizen fathers to extend derivative citizenship on foreign-born children through legitimation, a declaration of paternity under oath by the father, or a court order of paternity), *invalidated by* Morales-Santana v. Lynch, 804 F.3d 520 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016).

101. *Miller*, 523 U.S. at 424. The latter group was not subject to the more onerous parental verification requirements. *Id.*

birthday, thus barring her from derivative citizenship under the INA.[102]

In upholding the denial of citizenship, the Court issued a fractured opinion that lacked consensus on how the guarantees of equal protection apply to the INA's discriminatory rules on derivative citizenship.[103] Nevertheless, a range of perspectives surfaced in *Miller* regarding the scope of equal protection limitations on Congress's immigration and naturalization power.

First, Justice Stevens, writing for the Court, acknowledged that "[d]eference to the political branches dictates 'a narrow standard of review . . . in the area of immigration and naturalization.'"[104] But he also suggested that this same deference should not apply when the case concerns whether a person is a citizen, contrasting the recognition of citizenship with the conferral of immigration status sought in *Fiallo*.[105] Without deciding which level of scrutiny applied, Justice Stevens concluded that even under the "heightened scrutiny that normally governs gender discrimination claims," the restriction was "substantially related to important governmental objectives."[106]

Cabining plenary power deference in this way, however, only fosters further equal protection contradictions. Under this approach, citizen parents have no constitutional right to equal treatment when they petition for their non-marital, foreign-born children to join them in the United States, but the Court will more closely scrutinize discriminatory rules affecting when such parents may confer citizenship to those children. For the beneficiary in each case, the status sought—citizenship versus a family-based immigration preference—undoubtedly carries different interests. But for the parent-litigants, it is hard to reconcile the different approaches when the gender-based classification

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102. *Id.* at 425–26.

103. *See id.* at 424 (distinguishing *Fiallo* on grounds that the case did not concern a non-citizen "challenging the denial of an application for special status" but rather that it involved a challenge to the "Government's refusal to register [Miller] as a citizen"). Justice Stevens's opinion for the Court finding the INA provision constitutional was joined by Justice Rehnquist, but the four other justices who concurred in the judgment did so for different reasons. *Id.* at 423.

104. *Id.* at 434 n.11 (quoting Mathews v. Diaz, 426 U.S. 67, 82 (1976)).

105. *Id.* at 429 (reasoning that the Court need not decide whether *Fiallo* dictated the outcome because that decision "involved the claims of several aliens to a special immigration preference," and not a claim to citizenship).

106. *Id.* at 434 n.11.

and the separation from children is equivalent in both instances.[107]

Concurring in *Miller*'s judgment, Justice O'Connor, joined by Justice Kennedy, shared Justice Stevens' willingness to put aside questions concerning plenary power's role in order to scrutinize the gender-based classification but considered *Miller* the wrong vehicle for addressing such claims.[108] In her view, the non-citizen child filing suit could not adequately assert the real interests at stake: the citizen-father's right to confer derivative citizenship on the same terms as citizen mothers.[109]

Other members of the Court, however, were unwilling to put aside plenary power deference and address the equal protection question on its merits. Justice Scalia, joined by Justice Thomas, concurred in the judgment of the Court, but only based upon the separate conclusion that the Court had no power to remedy the alleged discrimination by conferring citizenship upon foreign-born children outside the rules "prescribed by Congress."[110] In Justice Scalia's view, even severing a provision of the statute that the Court deemed to violate equal protection—thereby making the petitioner eligible for citizenship—

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107. In both *Fiallo* and *Miller*, the alleged equal protection violation concerned the rights of citizen parents and raised the prospect of whether gender-based policies should undermine the constitutional interest in family unity. In Moore *v. City of East Cleveland*, the Supreme Court recognized individuals' important interest in family unity and "freedom of personal choice in matters of marriage and family life." 431 U.S. 494, 499 (1977) (plurality opinion) (striking down a housing ordinance that limited occupancy to members of a single family under heightened scrutiny). Scholars have criticized the failure to recognize the interests protected in *Moore* in the immigration setting, even when the rights of citizens are at stake. *See* Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725, 777–78 (1996) (arguing that the constitutional interest in family unity, particularly for citizens petitioning for non-citizen family members, should not be overlooked on account of plenary power deference); *see also* Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701, 710 (2005) (noting lack of doctrinal support for "a constitutional right to family unity").

108. *Miller*, 523 U.S. at 445–46 (O'Connor, J., concurring).

109. *Id.* Justice O'Connor believed that the Court should refrain from considering "petitioner's gender discrimination claim" because although the petitioner was "clearly injured by the fact that she has been denied citizenship, the discriminatory impact of the provision falls on petitioner's father, Charlie Miller," who was no longer a party to the suit. *Id.* (emphasis omitted).

110. *Id.* at 453 (Scalia, J., concurring). Justice Scalia reasoned that "it makes no difference whether or not § 1409(a) passes 'heightened scrutiny' or any other test Members of the Court might choose to apply." *Id.* at 452–53. In his view, the Court "could not, consistent with the limited judicial power in this area, remedy [an equal protection] infirmity [in the citizenship law] by declaring petitioner to be a citizen or ordering the State Department to approve her application for citizenship." *Id.* at 455 (noting that the government's sovereign authority over immigration and citizenship is "largely immune from judicial control" (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977))).

would be "incompatible with the plenary power of Congress."[111] Plenary power doctrine's role in this area of equal protection law thus remained unresolved after *Miller*.

5. Unacknowledged Deference

The Court soon revisited the same derivative citizenship law three years later in *Nguyen v. INS*,[112] which stands out among the Court's equal protection decisions for its unspoken plenary power deference. In *Nguyen*, the Court applied intermediate scrutiny and upheld different gender-based "legitimatization" rules required for fathers and mothers to extend citizenship to non-marital, foreign-born children.[113] The Court reasoned that such rules served two "important" governmental interests[114]: "assuring that a biological parent-child relationship exists"[115] and ensuring parents and children have an "opportunity or potential to develop . . . a relationship . . . consist[ing] of the real, everyday ties that provide a connection between child and citizen parent[,] and, in turn, the United States."[116] Even though the Court professed to apply the conventional equal protection scrutiny that would apply to any gender-based classification, in reality, the Court's review was less exacting: it did not require the government to show an "exceedingly persuasive justification" for the gender differentiation, a requirement of earlier precedent.[117] The Court also relaxed its assessment of the fit between that justification and the gender-based classification.[118]

This rollback in the Court's approach to gender-based laws provoked a withering dissent from Justice O'Connor.[119] She accused the majority of applying intermediate scrutiny in name only, criticized the

111. *Id.* at 457.

112. 533 U.S. 53 (2001). This time a citizen parent brought the equal protection challenge such that standing was no longer a barrier for Justices O'Connor and Kennedy to weigh in on the substantive equal protection question. *Id.* at 58 (noting "the father is before the Court in this case" and standing is not an issue).

113. *Id.* at 59, 62 (noting a father has three options: "legitimation[,] a declaration of paternity under oath by the father[,] or a court order of paternity[,]" but all must be undertaken before the child's eighteenth birthday).

114. *Id.* at 60.

115. *Id.* at 62. The Court reasoned that mothers and fathers are not similarly situated with respect to proof of parenthood. *Id.* at 63. Given that "proof of motherhood . . . is inherent in birth itself," the Court found it "unremarkable that Congress did not" impose the same proofs of parenthood upon mothers as fathers. *Id.* at 64.

116. *Id.* at 64–65.

117. *Id.* at 74 (O'Connor, J., dissenting) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

118. *Id.* at 78.

119. *Id.* at 74–97.

Court for hypothesizing government justifications that did not actually motivate the classification, and characterized the Court's analysis as perpetuating the very gender-based stereotypes that heightened scrutiny seeks to eliminate.[120]

On its surface, *Nguyen* appears to at least recognize constitutional limits on the federal government's immigration and naturalization power,[121] but plenary power deference's impact is still apparent.[122] Deference to the political branches did not dictate which form of scrutiny to apply,[123] but the Court nevertheless acknowledged a potentially diminished role in remedying inequality in this area because of the federal government's plenary immigration authority. Echoing Justice Scalia's remedy-focused plenary power concerns from *Miller*,[124] the Court noted that "the wide deference afforded to Congress in the exercise of its immigration and naturalization power . . . would have to be considered" if the Court determined that gender-based differences in the derivative citizenship statute "did not withstand conventional equal protection scrutiny," thus requiring a remedy.[125]

Although *Nguyen* is largely known—and criticized—as a gender

120. *Id.*

121. The Court professed to apply the same equal protection principles that it would apply in conventional equal protection cases that do not implicate the federal government's power to set immigration and naturalization policy. *Id.* at 60 (majority opinion).

122. *See, e.g.*, Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 343 (2002) ("*Nguyen* is remarkable among cases involving constitutional challenges to immigration measures for not taking the plenary power route, all the more so by not taking the opportunity to reaffirm those cases that did.").

123. The Court opted not to consider "whether some lesser degree of scrutiny" should apply "because the statute implicates Congress' immigration and naturalization power." *Nguyen*, 533 U.S. at 61.

124. *See* Miller v. Albright, 523 U.S. 420, 454–55 (1998) (Scalia, J., concurring) ("Even if we were to agree that the difference in treatment between illegitimate children of citizen-fathers and citizen-mothers is unconstitutional, we could not, consistent with the limited judicial power in this area, remedy that constitutional infirmity by declaring petitioner to be a citizen or ordering the State Department to approve her application for citizenship.").

125. *Nguyen*, 533 U.S. at 72–73.

discrimination decision,[126] there is good reason to think that *Nguyen*'s less-than-skeptical heightened scrutiny reflected the Court's discomfort with remedying discrimination enacted pursuant to the federal immigration and naturalization power.[127] Two considerations make this reading of *Nguyen* particularly plausible.

First, similar concerns have appealed to the Court in explicit plenary power decisions. Gerald Rosberg has noted, for example, that fears about judicial competency to construct rules impacting immigration policy likely produced the extremely deferential review in *Fiallo*.[128] Rosberg contends that the Court was concerned that "the invalidation of any one rule" in the immigration and naturalization context "could have ramifications throughout the entire system."[129] He argued that the Court likely feared that "[t]oo much judicial scrutiny could bring down the entire system of intricate and interconnected rules."[130] A similar fear appeared in *Mathews v. Diaz*, where the Court addressed lawful residents' access to healthcare benefits.[131] There, the Court cited the more than 440,000 Cuban refugees admitted to the United States in the ten-year period prior to the Court's 1975 decision and noted its hesitancy to establish a "rule of constitutional law that would inhibit the flexibility of the political branches of government to

126. Scholars have criticized *Nguyen* for refusing to apply principles of gender equality developed in earlier jurisprudence to cases involving parentage, where antiquated notions of gender are most likely to emerge. *See* David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1002 (2002) (criticizing *Nguyen* for failing to question "the underlying propriety" of considering "biological difference[s] between the parents"); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2259 (2002) (noting that *Nguyen* reflects a "continued difference between race and sex distinctions in equality jurisprudence" and questioning whether there is "much doubt that the Court would have overturned a law making one's citizenship turn in any way on the race of one's American (or non-American) parent").

127. Justice O'Connor arguably recognized plenary power's potentially immunizing impact in *Nguyen*. She thus sought to cabin it, repeating Justice Stevens' contention from *Miller* that *Fiallo* was "readily distinguish[able]" because the sex-based classification imposed upon citizen and permanent resident parents in that case determined the availability of an immigration benefit for non-citizens, whereas *Nguyen* concerned putative citizens. *Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting). Justice O'Connor suggested that plenary power deference should not play a similar role when the question concerns "whether an individual is a citizen in the first place." *Id.* Peter Spiro has suggested that the *Nguyen* Court undertook analytical "gymnastics" in order "to find the discriminatory naturalization measure consistent with ordinary equal protection constraints." *See* Spiro, *supra* note 122, at 343.

128. *See* Rosberg, *supra* note 65, at 325–27.

129. *Id.* at 325.

130. *Id.*

131. 426 U.S. 67 (1976).

respond to changing world conditions."[132] Following this history, the Court's statement in *Nguyen* that plenary power deference "would have to be considered" if the Court found an equal protection violation[133] reveals lingering doubts about judicial intervention in cases involving the federal government's immigration and citizenship power and may help explain the Court's less than rigorous review.

Second, the impact of unstated plenary power concerns seems particularly likely when one considers the Court's lack of experience in this area; for more than a century before, it had largely recused itself from meaningfully evaluating limits upon the federal immigration power when the interests of non-citizens were at issue. Even while purporting that the same deference does not apply to cases involving putative citizens, the Court lacked a record of judicial intervention to draw upon in the decision.

To be sure, there are strong arguments that the Court's reliance upon stereotyped and ingrained concepts of gender—particularly in the context of parental roles—helped produce *Nguyen*'s diluted form of intermediate scrutiny that Justice O'Connor excoriated.[134] But *Nguyen*'s challenge to gender-based inequality arose in the shadow of the political branches' immigration and naturalization powers, and plenary power considerations also played a role in the Court's unacknowledged deference.

Because the Court was not transparent about its deference, however, it never considered whether the federal government's foreign affairs power undergirding the century-old plenary power doctrine warranted endorsement in this context or whether citizen-parents' right to confer citizenship to children on equal terms as members of the opposite gender arises far outside of such matters.

6. Loosening Plenary Power's Grip

Plenary power considerations once again clashed with equal protection principles in the Court's 2016–2017 term, when the Court again assessed gender-based rules for derivative citizenship in *Morales-Santana*.[135] Unlike the parental acknowledgement requirements at issue in *Miller* and *Nguyen*, *Morales-Santana* involved the separate requirement that citizen parents establish physical presence in the

132. *Id.* at 81.
133. Nguyen v. I.N.S., 533 U.S. 53, 73 (2001).
134. *See supra* notes 113–19 and accompanying text.
135. 804 F.3d 520 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016).

United States before the child's birth.[136]

Last year, the U.S. Court of Appeals for the Second Circuit held that the statute unconstitutionally discriminated on the basis of gender in erecting disparate hurdles for unwed fathers to confer citizenship to foreign-born children.[137] The court rejected the Government's argument that rational basis review should apply because the statute was enacted pursuant to Congress's plenary authority to regulate immigration and citizenship.[138] Applying intermediate scrutiny, the Court held that Congress did not have an exceedingly persuasive justification for its disparate treatment, rejecting the argument that the law furthered the government's asserted goals of ensuring adequate ties between foreign-born children and the United States and reducing statelessness.[139] The Court concluded that impermissible gender stereotypes regarding mothers' likelihood of raising and caring for children born out of wedlock accounted for Congress's differential treatment.[140]

In 2008 the U.S. Court of Appeals for the Ninth Circuit reached the opposite result in *United States v. Flores-Villar*.[141] There, the court applied intermediate scrutiny and upheld the gender-based residency requirements in the derivate citizenship law.[142] The court reasoned that the government's interests—encouraging parental relationships and avoiding statelessness—which justified the "legitimation" requirements upheld in *Nguyen*, also supported the different physical presence requirements applicable to mothers and fathers.[143]

Even while purporting to apply intermediate scrutiny, the Ninth Circuit's opinion was inflected with plenary power deference. Specifically, in acknowledging that the fit between the significantly

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136. *Id.* at 523 (citing Immigration and Nationality Act of 1952, ch. 1, § 309(a), (c), 66 Stat. 238, 238–239 (codified at 8 U.S.C. § 1409(a), (c) (1952))). Under the statute, citizen mothers have to establish that they have lived continuously in the United States for any single year prior to the child's birth (including even the first year of the mother's life), whereas citizen fathers must establish that they have lived continuously in the United States for ten years, five of which must occur after the father's fourteenth birthday. *Id.* This same physical residency requirement was not at issue in *Miller*, where the citizen father met the requirement. *See* Miller v. Albright, 523 U.S. 420, 430 (1998); *see also* 8 U.S.C. § 1401(a)(7) (West 2012).

137. *Morales-Santana*, 804 F.3d at 523–24.

138. *Id.* at 529.

139. *Id.* at 534–35, 535 n.17.

140. *Id.* at 534.

141. 536 F.3d 990, 996 n.2 (9th Cir. 2008), *aff'd by an equally divided court*, 564 U.S. 210 (2011).

142. *Id.* at 996.

143. *Id.* (reasoning that the goal of ensuring an opportunity for a parental relationship, ties to the United States, and avoiding stateless children was "no less important, and the particular means no less substantially related to those objectives").

longer and age-specific residency requirements applicable to fathers did not have a "perfect" fit with the government objectives of "[a]voiding statelessness and assuring a link between an unwed citizen father, and this country," the Court, nevertheless, found the fit "sufficiently persuasive in light of the virtually plenary power that Congress has to legislate in the area of immigration and citizenship."[144]

The Supreme Court appears poised to resolve the conflict among the courts of appeals by finally striking down the discriminatory citizenship laws this term, which Justice Ginsburg noted in her dissent in *Miller* "is one of the few provisions remaining in the United States Code that uses sex as a criterion in delineating citizens' rights."[145] One might surmise that the Court is eager to do so given that it granted certiorari in *Flores-Villar* in the absence of circuit disagreement on this issue. There, the Supreme Court affirmed the Ninth Circuit's decision in 2011 in a *per curiam* opinion issued by an equally divided Court, with Justice Kagan recusing herself from the decision.[146]

Although there is no disagreement among the circuits regarding the level of scrutiny that should apply to derivative citizenship laws based upon gender,[147] the plenary power doctrine could well influence the result in two ways. First, the government has not given up on the possibility that the most robust and transparent form of plenary power deference should apply in cases involving citizenship. The government argues that the Second Circuit erred by applying heightened scrutiny to the derivative citizenship law, noting that "[t]he power to confer citizenship is just as subject to the plenary authority of Congress as the power to admit or exclude aliens; indeed, it is an aspect of the same

144. *Id.* at 996–97 (citing *Fiallo* as standing for the principle "that congressional power is at its height with respect to immigration and citizenship, and that 'legislative distinctions in the immigration area need not be as "carefully tuned to alternative considerations" as those in the domestic area'" (internal citations omitted) (quoting *Fiallo v. Bell*, 430 U.S. 787, 791–93, 799 n.8 (1977))).

145. Miller v. Albright, 523 U.S. 420, 461, 463 (1998) (Ginsburg, J., dissenting) (describing women's historic "inability to transmit their United States citizenship to children born abroad [as] one among many gender-based distinctions drawn in our immigration and nationality laws").

146. *Flores-Villar*, 564 U.S. at 210 ("Justice Kagan took no part in the consideration or decision of this case.").

147. Morales-Santana v. Lynch, 804 F.3d 520, 530 (2d Cir. 2005) (applying intermediate scrutiny), *cert. granted*, 136 S. Ct. 2545 (2016); *Flores-Villar*, 536 F.3d at 996 n.2 (assuming that intermediate scrutiny applied in spite of the government's "forceful" *Fiallo*-based argument that Congress's broad power with respect to citizenship and immigration matters warranted rational basis review, but noting the law would survive no matter the scrutiny applied).

power."[148] In fact, the government urged the Court to apply the same extremely deferential rational basis review as it did in *Fiallo*.[149]

If the Court is troubled by the law's gender-based discrimination, but wary of inserting itself into matters determining citizenship, it could fall back on plenary power deference as a justification for relaxed scrutiny, thereby avoiding the need to fashion a remedy.[150] But even if the Court reviews the physical presence requirement under heightened scrutiny, plenary power deference may still influence the outcome. The second question before the Court is whether, assuming the disparate physical presence requirement for mothers and fathers violates equal protection, the lower court had authority to remedy that violation by "conferring U.S. citizenship on [the] respondent, in the absence of any express statutory authority to do so."[151]

The government contends that ordering such relief would necessarily embroil the Court in immigration and citizenship policy.[152] It claims that the Second Circuit's remedy—equalizing the physical presence requirements applicable to U.S. citizen mothers and fathers—would have "the effect of granting U.S. citizenship (from birth) to an untold number of individuals who did not satisfy the statutory criteria set by Congress and who grew up with no expectation that they were citizens of the United States."[153] Invoking similar concerns about judicial overreaching into executive policymaking that influenced *Fiallo* and *Mathews*, the government claims the Court would be welcoming persons into the national community who were not contemplated as

148. Respondent's Petition for Rehearing En Banc at 4, *Morales-Santana*, 804 F.3d 520 (No. 11-1252).

149. *Id.* at 5 (noting that *Fiallo* also addressed the claims of U.S. citizens, "who *unsuccessfully* argued that rational basis review should not apply because the statutory provision at issue implicated 'constitutional interests of U.S. citizens and permanent residents'" (emphasis added) (quoting *Fiallo*, 430 U.S. at 794)).

150. Spiro, *supra* note 122, at 343 (noting that in *Nguyen*, a ruling based upon plenary power "would have afforded the Court an easy out").

151. Brief for Petitioner at *I, Lynch v. Morales-Santana, No. 15-1191 (U.S. Aug. 19, 2016), 2016 WL 4436132.

152. *Id.* at *12.

153. *Id.* at *49–50.

citizens, sending ripples throughout the system.[154] Plenary power considerations could thus have a considerable impact on *Morales-Santana*, even if the form of judicial review is not in serious dispute.

Morales-Santana presents an important opportunity for the Court to reign in immigration exceptionalism. The antidiscrimination principles and equality concerns that have led the Court to reject gender-based restrictions on citizen rights in other regulatory domains[155] are no less significant when the matter concerns a parent's right to extend citizenship to a child.[156] Even accepting for the sake of argument that the principles underlying the plenary power doctrine have value in some contexts,[157] it is not clear why those considerations should necessarily override citizens' constitutional interest in gender-

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154. Indeed, the government contends that deciding who can obtain membership in the nation's community cannot be decided by the Court because that decision-making is exclusively the role of the federal government. *Id.* at *50 ("An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare." (quoting United States v. Ginsberg, 243 U.S. 472, 474 (1917))). The challenger, Morales-Santana, rejects the premise that remedying gender-based treatment in the derivative citizenship law would invite judicial overreaching by recognizing "untold" numbers of putative non-citizens. Brief for Respondent, at *24, *Morales-Santana*, No. 15-1191 (U.S. May 23, 2016), 2016 WL 2984951 (arguing that the government's "petition offers no evidence that the number of affected persons is significant" and fails to "explain how recognizing such a group of U.S. citizens will affect any governmental interests").

155. *See* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (examining the role of anti-differentiation and anti-subordination theories in the Court's gender equality decisions).

156. *See* Miller v. Albright, 523 U.S. 420, 461, 463 (1998) (Ginsburg, J., dissenting) (explaining that gender-based stereotypes have driven women's historic "inability to transmit their United States citizenship to children born abroad").

157. The idea of an exclusive and plenary foreign affairs power that is largely immune from judicial review developed in the Supreme Court's decision in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936), where the Court concluded "that federal authority over foreign relations operated independently of the Constitution and was inherent in the United States' existence as a sovereign, independent nation." Cleveland, *supra* note 14, at 3. But as Cleveland notes, the "theory that the national government may enjoy inherent, extraconstitutional sovereign powers" had roots in earlier decisions, including the 1889 *Chinese Exclusion Case*. *Id.* at 5. Cleveland notes that theory has been challenged by a number of foreign affairs scholars who "have criticized the *Curtiss-Wright* doctrine as a twentieth-century anomaly and have urged that the foreign affairs power be brought back into the fold of mainstream constitutional jurisprudence." *Id.* at 6 (first citing Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1104–07 (1999); then citing Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 816, 861–70 (1997); and then citing Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1659–60 (1997)).

neutral treatment within the United States.

As scores of scholars have noted, there are many reasons to question and reject the plenary power doctrine's abiding influence, including its exaggeration of foreign affairs rationales to immunize tenuously related immigration regulations[158] and its unwarranted call for wholesale institutional deference.[159] Scholars have thus long advocated abandonment of the doctrine,[160] while others have presaged—albeit, perhaps, prematurely—its impending demise.[161]

I share the view that the Court should reexamine and reject the plenary power deference that is responsible for so much of equal protection doctrine's aberrational approach to non-citizens. Nevertheless, even without the Court abandoning the plenary power doctrine completely, affirming citizen parents' claims for equal and gender-neutral treatment in *Morales-Santana* would not in any obvious way undermine the historical justifications cited for plenary power

158. Legomsky, *supra* note 62, at 262 ("[I]t ignores reality to hold that every provision concerned with immigration, as applied to every fact situation it might encompass, is so intimately rooted in foreign policy that the usual scope of judicial review would hamper the effective conduct of foreign relations."); Mathew J. Lindsay, *Disaggregating "Immigration Law"*, 68 FLA. L. REV. 179, 261, 265 (2016) (arguing "that the Supreme Court should abandon the long-standing presumption that the regulation of noncitizens comprises a discrete, constitutionally privileged domain of distinctly political subject matter that is inextricably linked to foreign affairs and national security").

159. ALEINIKOFF, *supra* note 77, at 152, 174–75 (examining multiple explanations for the plenary power doctrine's institutional deference and arguing "that such deference is, today, misplaced"); Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 862 (1987) ("Nothing in our Constitution, its theory, or history warrants exempting any exercise of governmental power from constitutional restraint. No such exemption is required or even warranted by the fact that the power to control immigration is unenumerated, inherent in sovereignty, and extraconstitutional.").

160. *See* Motomura, *supra* note 64, at 607–08; Schuck, *supra* note 64, at 21–24; *see also* Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1 (urging elimination of the plenary power doctrine); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (arguing that the Court should abandon the plenary power doctrine).

161. *See* Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289 (2000) (expressing skepticism of plenary power doctrine's demise); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002) (identifying trends toward the abandonment of the plenary power doctrine).

deference.[162]

Indeed, besides making the summary claim that all exercises of the citizenship power are bound up with foreign relations, the Government did not show how requiring equivalent treatment of mothers and fathers with respect to derivative citizenship would intrude upon the federal government's authority in foreign relations, frustrate its ability to communicate as a sovereign in one voice, nor implicate national security concerns.[163] The government, nevertheless, claims in *Morales-Santana* that "the power to grant or deny citizenship to individuals born abroad is just as subject to the plenary authority of Congress as the power to admit or exclude aliens[;]" it claims, in fact, that is simply "a different aspect of the same overarching sovereign power."[164] The Court's questioning during oral argument suggested, however, that it is likely to decline the invitation to apply such sweeping deference and will instead utilize the conventional intermediate scrutiny applicable to gender-based classifications.[165] But because several Justices appeared concerned about how to fashion a remedy in *Morales-Santana*,[166] plenary power may still play a role in the decision.

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162. Lindsay, *supra* note 158, at 188 (noting "that the Court continues to reason from the premise that certain laws and enforcement actions bearing on noncitizens occupy a logically self-evident, legally discrete category of immigration laws that are part and parcel of foreign affairs and national security . . . even though the social and political judgments that historically appeared to justify it would strike most contemporary policy makers and judges as both anachronistic and patently racist").

163. Cleveland, *supra* note 14, at 157 (describing the Court's development of an "absolutist view of power over aliens under international law to hold that the authority to determine who could enter or remain was both dedicated to the political branches and unlimited by other constitutional constraints" and noting that "[t]he foreign affairs and national security implications of immigration were a primary justification for the Court's abdication of ordinary constitutional analysis in this area").

164. Brief for Respondent in Opposition at *17, Lynch v. Morales-Santana, No. 15-1191 (U.S. May 23, 2016), 2016 WL 2984951. The government argues that deciding which persons born abroad should be granted U.S. citizenship involves a complex weighing of competing considerations and is "an aspect of the power to exclude aliens from the Nation." *Id.* at *14–15. That power, according to the government, is "vitally and intricately interwoven with the conduct of foreign relations," and the courts are not "well-positioned to second-guess Congress's complex judgments" in this area. *Id.* at *15–16.

165. Indeed, during oral argument, none of the Justices asked about the applicable scrutiny, seeming to agree that intermediate scrutiny would apply. Oral Argument, *Morales-Santana*, No. 15-1191 (Nov. 9, 2016), https://www.oyez.org/cases/2016/15-1191

166. *See id.*; Amy Howe, *Argument Analysis: Searching for a Remedy for Constitutional Violation on Citizenship*, SCOTUSBLOG (Nov. 9, 2016, 2:37 PM), http://www.scotusblog.com/2016/11/argument-analysis-searching-for-a-remedy-for-constitutional-violation-on-citizenship/.

The sweeping deference evident in all of the equal protection cases involving the federal government's immigration and naturalization power is just one piece of the *Chinese Exclusion Case*'s broader legacy of immigration exceptionalism, which Peter Spiro has described as a "rights-subverting constitutional anomaly."[167] In other words, though equal protection doctrine addressed to non-citizens' equality is exceptional as compared to mainstream equal protection jurisprudence for citizens, because of the plenary power doctrine's broader impact, it is just par for the course when it comes to other constitutional rights and doctrines.[168] Nevertheless, equal protection exceptionalism warrants examination outside of the broader phenomena of immigration exceptionalism because the doctrine's uniqueness is not defined solely by the plenary power anomaly. Indeed, as the next section demonstrates, the Court's view of its competency to make constitutional rules affecting immigrants has not consistently pointed toward judicial deference.

B. Political Powerlessness

The deference afforded to the federal government when it distinguishes between citizens and immigrants is even more extraordinary considering that the Supreme Court invoked strict scrutiny to strike down laws similar to the ones upheld in *Mathews* only five years earlier.[169] The primary difference was the government responsible for the legislation.

In *Graham v. Richardson*, the Court held that lawful immigrants "as a class are a prime example of a 'discrete and insular minority'" entitled to heighted judicial solicitude.[170] Indeed, immigrants were the very first group for which the Court invoked footnote four of *United States v. Carolene Prods. Co.*[171] to grant such special constitutional

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167. *See* Spiro, *supra* note 122, at 341.

168. *See, e.g.*, ALEINIKOFF, *supra* note 77, at 152 ("describ[ing] and critiqu[ing] justifications . . . for the nonapplication of constitutional norms to immigration and naturalization regulations and minimal scrutiny of federal policies that discriminate on the basis of alienage"); Legomsky, *supra* note 62, at 258 (noting that plenary power deference cuts "across a wide spectrum of individual rights" and "has been applied with greatest consistency to challenges based on constitutional provisions that protect substantive rights").

169. *See* Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

170. *Id.* The Court reasoned that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Id.* at 372 (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

171. 304 U.S. at 152 n.4.

protection.[172] *Graham* was not explicit about why alienage constitutes a suspect classification,[173] but its reliance upon *Carolene Products* provides some guidance. Footnote four famously cited groups' history of "prejudice" and often corresponding political powerlessness as the triggers for a "more searching judicial inquiry."[174] The Court need not have looked further than its own precedent, however, from the *Chinese Exclusion Case*,[175] to subsequent decisions like *Fong Yue Ting v. United*

172. The Court described "aliens as a class" as a "prime example" of a group for which "heightened judicial solicitude is appropriate." *Graham*, 403 U.S. at 372 (citing *Carolene Prods. Co.*, 304 U.S. at 152 n.4). In *Mathews v. Diaz*, the Court distinguished this aspect of *Graham*, noting that the reasons for treating lawfully present migrants as a suspect class—at least with respect to state regulations—must yield to the federal government's plenary authority over immigration matters. 426 U.S. 67, 84–85 (1976) (reasoning that equal protection analysis "involves significantly different considerations" when "it concerns the relationship between aliens and the States rather than between aliens and the Federal Government").

173. The extent of the Court's reasoning was that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *See Graham*, 403 U.S. at 372 (citing *Carolene Prods. Co.*, 304 U.S. at 152 n.4).

174. *Carolene Prods. Co.*, 304 U.S. at 152 n.4 (suggesting that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry"). In subsequent decisions, the Court explained its justification for treating immigrants as a suspect class based upon a multitude of rationales. For example, Justice Blackmun, who authored *Graham*, stated a decade later in his concurrence in *Toll v. Moreno* that the historic "antipathy" directed at immigrants as a class played a role. *See* 458 U.S. 1, 20–21 (1982) (Blackmun, J., concurring) (stating that antipathy may be inferred, and thus strict scrutiny warranted, by disparate treatment of "persons who historically have been disabled by the prejudice of the majority"), (superseded by statute as stated in Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968 (2011)). The Court has also cited the similarity of lawful permanent residents to citizens with respect to shared contributions and burdens of community membership. *See In re* Griffiths, 413 U.S. 717, 722 (1973) (reasoning that "[r]esident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society," such that "[i]t is appropriate that a State bear a heavy burden when it deprives them of employment opportunities"). Finally, the Court has cited non-citizens' political powerlessness given their inability to vote. Foley v. Connelie, 435 U.S. 291, 294 (1978) (noting that *Graham*'s "'heightened judicial solitude' . . . [was] deemed necessary since aliens—pending their eligibility for citizenship—have no direct voice in the political processes" (quoting *Graham*, 403 U.S. at 372)).

175. Chae Chan Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581 (1889).

States,[176] and others, to find historical evidence of discrimination against non-citizens.[177] Immigrants' inability to vote renders them particularly vulnerable to such discrimination and marginalization because they are unable to defend themselves or remedy such treatment through the political process.[178]

After concluding in *Graham* that lawful immigrants are a suspect class, the Court applied strict scrutiny and struck down Pennsylvania and Arizona laws denying healthcare benefits to legal residents.[179] The Court reasoned that a state's fiscal interests and desire to preserve limited welfare benefits for its own citizens did not justify such an invidious distinction between state residents.[180]

Not long after *Graham*, however, the Court's alienage jurisprudence proved to be strict in theory but not always fatal in practice.[181] Two

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176. 149 U.S. 698, 726 (1893). The Geary Act extended the ban on Chinese Immigration for another ten years, required Chinese laborers to carry a residency card, and required Chinese immigrants to prove their residency through the testimony of a white witness. *Id.* at 718, 727–28. As Sarah Cleveland has noted, not only did the law specifically "underscore[] the inferior status of the Chinese," but the Solicitor General's brief defending the law before the Court "was riddled with nativist sentiment and hostility toward the Chinese litigants." Cleveland, *supra* note 14, at 139, 141. The brief stated that "[l]ike past 'hordes of barbarians,' the 'Mongolians [were] practically incapable of assimilation with our people. They [came] as a foreign element, and they remain[ed] as such.'" *Id.* at 141 (quoting Brief for Respondents at 18, 55, *Fong Yue Ting*, 149 U.S. 698 (1893) (No. 1345)). It further argued that "the most insidious and dangerous enemies to the State . . . are not the armed foes who invade our territory, but those alien races who are incapable of assimilation, and come among us to debase our labor and poison the health and morals of the communities in which they locate." *Id.* at 141–42.

177. *See Chae Chan Ping*, 130 U.S. at 606 (deferring to legislative conclusions that "the presence of foreigners of a different race in this country, who will not assimilate with us, [will] be dangerous to its peace and security"); *see also* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 11 (1998) (arguing that "race-based laws upheld under the plenary power doctrine had the same purpose and effect as domestic racial discrimination, namely, promoting white supremacy").

178. *See* Daniel Kanstroom, *"Alien" Litigation As Polity-Participation: The Positive Power of a "Voteless Class of Litigants"*, 21 WM. & MARY BILL RTS. J. 399, 405–06 (2012) (noting that voting "is the one act of civic engagement that is almost universally denied to non-citizens" based on the most basic rationale that "voting is a sine qua non of democratic membership, and that citizenship is the legal proxy for such membership").

179. Graham v. Richardson, 403 U.S. 365, 374–75 (1971).

180. *Id.*

181. Gerald Gunther famously described the Court's strict scrutiny jurisprudence as "'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). The alienage cases stand out within this jurisprudence as an instance where the Court's recognition of a group as a suspect class has not meant consistent application of strict scrutiny and invalidation of laws as a consequence.

years after *Graham*, the Court recognized in *Sugarman v. Dougall*,[182] that strict scrutiny need not be applied when states limit non-citizens from participation in political "functions that go to the heart of representative government," which the Court soon interpreted to include a wide-range of public employment.[183]

The underlying theory for this line of decisions was states' broad power under the Tenth Amendment to determine voter qualifications and set the eligibility rules for "state elective or important nonelective executive, legislative, and judicial positions."[184] In short, under the Court's political function doctrine, non-citizens who cannot vote have no legitimate claim to equal participation in a state's political community.[185]

Citing the gulf between the Court's response to state and federal regulations discriminating on the basis of immigration status and the "political function" carve-out to *Graham*, critics have contended that equal protection doctrine addressed to immigrants is not only exceptional, it is incoherent.[186] That criticism cites the dualism of treating the history of prejudice against immigrants and their inability as a class to vindicate their interests through the political process as justifications for strict scrutiny in one context,[187] while overlooking those factors entirely when the regulation concerns the federal

182. 413 U.S. 634, 646–49 (1973). *Sugarman* suggested that rational basis review might apply when the Court considered states' exclusion of citizens from institutions reflecting core political functions, but the Court struck down the particular New York law presented in that case, which conditioned eligibility for permanent state civil service positions on citizenship. *Id.* at 646–47 (reasoning that a blanket ban on civil service employment of non-citizens had "little if any relation" to a state interest in preserving its political institutions).

183. For example, it upheld under rational basis review laws excluding lawful permanent residents from employment as state troopers in *Foley v. Connelie*, 435 U.S. 291 (1978), public school teachers in *Ambach v. Norwich*, 441 U.S. 68, 80 (1979), and probation officers in *Cabell v. Chavez-Salido*. 454 U.S. 432, 442 (1982).

184. *Sugarman*, 413 U.S. at 647.

185. *Id.*

186. Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 352 (2008) (arguing that "[c]ourts have struggled for decades to develop a coherent approach to evaluating alienage rules" and have "for the most part . . . failed"); *see also* Korab v. Fink, 797 F.3d 572, 584 (9th Cir. 2014) (Bybee, J., concurring) (describing alienage jurisprudence as "unsettled" and marked by a "morass of conflicting approaches").

187. *See* Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) ("[C]ertain groups, indeed largely the same groups, have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" (quoting Graham v. Richardson, 403 U.S. 365, 367 (1971))).

government.[188]

Former Chief Justice Rehnquist contended, in fact, that the political function exception exposes another tension in the doctrine. Dissenting as an Associate Justice in *Toll v. Moreno*,[189] he questioned how immigrants' political powerlessness could be a "legitimate reason for treating aliens as a 'suspect class'" in one context, and yet also serve as the very same characteristic justifying relaxed scrutiny when states exclude non-citizens from state political functions.[190]

C. The Lawfulness of Immigration Status

Equal protection doctrine also draws a line between laws regulating lawful and undocumented immigrants.[191] The Court, however, has also recognized exceptions to that seemingly fixed line, as evidenced by the Court's landmark decision in *Plyler v. Doe*.[192]

In *Plyler*, the Court invalidated a Texas law that denied free public school education to undocumented children under heightened scrutiny.[193] With a rather fleeting analysis, the Court concluded that migrants who are present in the United States in violation of federal immigration law are not a suspect class like their lawfully present

188. In *Mathews v. Diaz*, the Court did not address whether immigrants' political powerlessness might expose them to unfair legislative outcomes or class-based antipathy when the federal government regulates immigrants. 426 U.S. 67, 85 (1976). Instead, the Court suggested that all legislative line-drawing by the federal government in the area of immigration is presumptively reasonable and nearly unreviewable because of its plenary authority to regulate migration. *See id.* ("[A] division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business.").

189. Toll v. Moreno, 458 U.S. 1, 25 (1982) (Rehnquist, J., dissenting), *superseded by statute*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

190. *Id.* at 41 n.12 ("If the Court has eschewed strict scrutiny in the 'political process' cases, it may be because the Court is becoming uncomfortable with the categorization of aliens as a suspect class."). Justice Blackmun, *Graham*'s author, in turn, contended that the political function exceptions did not undermine lawful immigrants' status as a suspect class; it heightened their need for judicial protection given their inability to respond to discrimination through the political process. *Id.* at 23 (Blackmun, J., concurring).

191. *See generally* MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 24.

192. 457 U.S. at 226.

193. *Id.* at 223–224.

counterparts who receive heightened protection under *Graham*.[194] Declining undocumented immigrants suspect class treatment did not, however, end the inquiry. The Court noted that the suspect class designation and the recognition of fundamental rights, which had helped to forge a new equal protection jurisprudence in the height of the Court's modern equality jurisprudence,[195] were inadequate to give meaning to the antidiscrimination norms and anti-caste principles fundamental to the Fourteenth Amendment, which were squarely presented in *Plyler*.[196]

Specifically, for a majority of the justices in *Plyler*, the law's imposition of "a lifetime hardship" and "stigma of illiteracy" on children "not accountable for their disabling status"—many of whom may never be deported from the United States—implicated antidiscrimination and anti-caste concerns at the heart of the Fourteenth Amendment.[197] The Court concluded that the conventional binary tools of suspect status and super-deference insufficiently accounted for these concerns and thus proved inadequate.[198]

Accordingly, the Court applied a form of scrutiny more searching

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194. *Id.* at 219 n.19, 220, 223 ("Undocumented aliens cannot be treated as a suspect class, because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'"). The crux of the Court's reasoning on this point—which was relegated to footnote nineteen of the opinion—appeared to rest on the notion that undocumented migrants are voluntary members of that class, bolstered by the federal government's plenary immigration authority grounded in its foreign affairs power. *See id.* at 219 n.19. The Court stated:

> Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a 'constitutional irrelevancy'. With respect to the actions of the Federal Government, alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation.

Id.

195. Chemerinsky, *supra* note 39, at 5 (describing key precedents of the era).

196. 457 U.S. at 223 (noting that "more is involved in these cases than the abstract question whether [Texas's law] discriminates against a suspect class, or whether education is a fundamental right").

197. *Id.* In explaining its scrutiny, the Court noted the relevance of both the "costs to the Nation and to the innocent children," *id.* at 222, of precluding non-citizen children from living "within the structure of our civic institutions." *Id.* at 223. The Court noted that this would "foreclose any realistic possibility" that the children could later "contribute in even the smallest way to the progress of our Nation." *Id.*

198. *Id.* at 230.

than typical rational basis review,[199] reasoning that to survive, Texas's law must further some substantial goal of the State.[200] The Court concluded that none of Texas's various justifications for denying undocumented children a public education met that standard.[201]

The Court has never since been called upon to revisit *Plyler* or extend its reasoning to other groups of undocumented migrants. In the decades since, *Plyler* has been lionized as the pinnacle of equal protection's full potential to protect undocumented immigrants,[202] and criticized by others as the epitome of judicial activism.[203]

Although *Plyler* provides an important model for a more functional approach to equal protection, it also established that migrants' unlawful presence is constitutionally relevant to the scope of their equal

199. Although the Court did not identify or name the scrutiny employed, scholars have widely understood it to reflect a form of heightened scrutiny. *See* MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 24, at 7 (describing *Plyler* as invoking a scrutiny somewhere between rational basis review and strict scrutiny); Eyer, *supra* note 39, at 576 (describing *Plyler* among a category of "meaningful review" cases outside of traditional rational basis review); Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature Rights and Classes*, 99 U. ILL. L. REV. 1209, 1211–15 (1999) (citing *Plyler* as an example of an "evolving third strand of equal protection doctrine" that operates outside the suspect class and fundamental right paradigm).

200. *Plyler*, 457 U.S. at 224.

201. *Id.* at 224–27. Specifically, the Court rejected the notion that the children's presence in violation of federal law authorized Texas's discrimination and that the desire to preserve state fiscal resources could alone justify the means chosen to achieve that interest. *Id.*

202. *See* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1734 (2010) ("So far, history has shown *Plyler* to be a high-water mark, and not a decision that prompted a new era in equal protection for unauthorized migrants generally."). *But see* Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, *supra* note 49, at 1121 ("*Plyler* may be said to express a powerfully egalitarian vision of the Constitution, and as much as it has served to protect the interests of an exceptionally marginalized class of people in our society, the decision itself is far more equivocal in its vision of undocumented aliens than these characterizations would suggest.").

203. *See, e.g.*, Michael J. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections on, and Beyond,* Plyler v. Doe, 44 U. PITT. L. REV. 329, 339–40 (1983) (arguing that *Plyler* changed the rules of equal protection doctrine).

protection rights.[204] After *Plyler*, lower courts have continued to review both federal and state laws addressed to undocumented migrants under deferential rational basis review.[205] Indeed, as others have noted, the lack of a meaningful equal protection framework to address the claims of undocumented migrants has forced any dialogue regarding states' treatment of immigrants to take place under the sphere of structurally-framed legal challenges based upon preemption.[206]

III. EXCEPTIONALISM'S PROBLEMS

A. Categorical Confusion

As the above discussion demonstrates, equal protection doctrine in the realm of immigrant rights is laden with competing interpretive tools aimed at a mix of judicial goals based upon often unexamined assumptions. The effect is a doctrine hampered by its own rigidity,

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204. 457 U.S. at 219. Indeed, in several parts of its analysis, the Court noted that the status of being in the United States in violation of federal law may provide a justification for alienage-based discrimination. *See id.* ("Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct."); *id.* at 220 ("Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action."); *id.* at 223 ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'"). Linda Bosniak contrasted the opinion's treatment of "innocent" undocumented children with the Court's description of their parents' "wrongdoing," concluding that "[t]he Court's stern portrayal of the adult undocumented alien presents a different picture of *Plyler* than the one to which most of us are accustomed." Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, *supra* note 49, at 1120–23 ("In this *Plyler*, the alien's status in the immigration domain is not at all irrelevant to her rights beyond the border; instead, an alien's immigration status may rightfully structure her treatment inside the national community so long as that status was acquired through purposeful action.").

205. *See, e.g.*, League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523 (6th Cir. 2007) (upholding Tennessee's denial of drivers' licenses to lawfully present non-immigrants under rational basis review); Doe v. Dep't. of Pub. Safety, 147 F. Supp. 2d 1369 (N.D. Ga. 2002) (applying rational basis review and holding that the denial of drivers' licenses to undocumented immigrants did not violate equal protection). *But see* Ariz. Dream Act Coal. v. Brewer, 757 F.3d 1053 (9th Cir. 2015) (striking down under rational basis review Arizona's denial of drivers' licenses to persons granted Deferred Action for Childhood Arrivals).

206. *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492, 2497–98 (2012) (examining whether federal law preempted an Arizona immigration enforcement measure); Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1977 (2011) (same); *see also* Abrams, *supra* note 46 (noting that preemption "substitutes for the lack of an equal protection doctrine that adequately protects" undocumented immigrants from discrimination); Heeren, *supra* note 23; Aldana, *supra* note 23.

unable to account for the textured reality of immigrants' status and experiences within the United States, nor the amalgam of state and federal authority and motivations to regulate migrants. As set forth below, this equal protection exceptionalism is problematic and undermines equality. The Court's current approach does not sufficiently address, nor appropriately balance, the various interests that come to bear when the state regulates immigrants, nor further the anti-caste principles underlying equal protection.[207]

For example, plenary power deference purports to exercise judicial restraint in order to respect the federal government's inherent sovereign authority to regulate immigrants and foreign affairs.[208] But the entrenchment of the doctrine prevents the Court from ever seriously assessing whether and when matters involving immigrants actually implicate those concerns.[209] Indeed, the foreign policy justification for plenary power's deference automatically subsumes questions of

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207. Other scholars have taken aim at tiered review more broadly, without specifically accounting for the equal protection exceptionalism involving immigrants. For the best account of what is wrong with the Court's tiered equality analysis and for a proposal to restructure equal protection scrutiny, see Goldberg, *supra* note 40, at 489. Others have similarly cited flaws in the Court's approach to equal protection scrutiny. *See, e.g.*, JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 74 (2001) (arguing that the Supreme Court's multi-tiered approach to equal protection scrutiny "has become highly rarefied to the point where it threatens to collapse of its own complexity"); G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 3 (2005) ("Recently, several commentators suggested that the Court's established scrutiny levels typology . . . is on the verge of degeneration."); Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 740 (2014) (noting "emerging consensus that suspect classification analysis and the tiers-of-scrutiny framework are broken, in need of repair if not complete abandonment"); Leslie F. Goldstein, *Between the Tiers: The New[est] Equal Protection and* Bush v. Gore, 4 U. PA. J. CONST. L. 372, 372 (2002).

208. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952) ("Any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.").

209. *See Spiro*, *supra* note 122, at 349–50 (contending that plenary power doctrine was the product of the international context during which it first arose: a period marked by great instability and risk, which raised the need for the "speed, secrecy, and singular responsibility" that "unitary decision making" by the Executive brought to bear). *But see* FRANCK, *supra* note 76, at 55 (arguing that the Court's plenary power cases rest on an "essentially unexamined assumption that the national security and an effective foreign policy are advanced by giving the political branches unreviewable discretion over aliens' residency rights in the United States"). Indeed, the Court has often repeated the principle that decisions affecting immigrants implicate foreign affairs without any fresh analysis of that proposition. *See, e.g.*, Negusie v. Holder, 555 U.S. 511, 517 (2009) ("Judicial deference in the immigration context is of special importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" (quoting INS v. Abudu, 485 U.S. 94, 110 (1988))).

immigrant treatment in the United States within foreign policy decision-making without reasoned analysis.[210] Doing so also ignores the nativist and racialized context in which deference to the plenary power doctrine was born.[211] The plenary power juggernaut thus prevents the Court from ever engaging in this discussion.

On the other hand, the Court has stated that strict judicial scrutiny endeavors to root out "deep-seated prejudice" and to ensure that politically powerless groups chronically targeted by such prejudice do not experience caste-based subjugation.[212] But by drawing a line exclusively around lawfully present immigrants to unearth such prejudice, the Court's approach stymies a more robust equal protection framework for other non-citizens vulnerable to class-based antipathy and likewise politically powerless to remediate it.

Indeed, siphoning suspect class treatment for a subset of immigrants prevents courts from assessing how all migrants experience discrimination within the country and discourages consideration of whether and when undocumented migrants may be similar to lawful immigrants and thus similarly entitled (under the Court's own theories)

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210. *See* Legomsky, *supra* note 62, at 262–63 ("The Court's blanket technique of mechanically labeling immigration decisions as so ensconced in foreign policy that constitutional review is improper has precluded consideration of whether foreign affairs were actually affected."); Rubenstein, *supra* note 13, at 145 (noting that "generations of immigrant advocates" have "excoriated" the foreign affairs rationale as a justification for the plenary power doctrine); Schuck, *supra* note 13, at 57 (noting that the plenary power doctrine "has been assailed over the years by many academics and defended, I think, by none" in spite of its persistent authority); Neuman, *supra* note 13, at 1898.

211. Cleveland, *supra* note 14, at 263–65 ("The racist and nationalist views of the day go far in explaining the substantive outcomes reached in the inherent powers decisions, such as the Court's willingness to restrict the constitutional protections of Indian, immigrant, and territorial groups, and to legitimate sweeping national power.").

212. Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982). In *Plyler* the Court cited several explanations for its treatment of classifications as "suspect." *Id.* The Court explained:

> Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. Finally, certain groups, indeed largely the same groups, have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish.

Id. (internal citations omitted) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

to heightened judicial protection.[213] For example, *Graham* emphasized characteristics shared by lawful immigrants and citizens—including that both pay taxes and may live and work in a state for many years—when concluding that disparate treatment between the two groups was particularly unreasonable.[214] But many of the factors cited by *Graham* also describe many undocumented immigrants. Many have lived in the United States for long periods, many pay taxes,[215] and many feel a deep sense of connection and identification with the country.[216] A rigid, approach to equal protection for immigrants, largely driven by scrutiny, does not allow for a more nuanced consideration of whether and when, based upon such factors, undocumented immigrants warrant similar treatment as citizens or lawfully present immigrants.

Moreover, migrants as a class are often collectively perceived by society-at-large as a monolithic group[217] and may even suffer from the same forms of state discrimination and assumptions about their wanting membership, loyalty to the United States, and rights to share

213. See Leisy J. Abrego, *Legal Consciousness of Undocumented Latinos: Fear and Stigma As Barriers to Claims-Making for First- and 1.5-Generation Immigrants*, 45 L. & SOC'Y REV. 337, 337 (2011) (reporting results of "ethno-graphic observations and in-depth interviews" that showed "although all undocumented immigrants are legally banned, their identities, sense of belonging, and interpretation of their status vary" based most significantly upon life-stage at time of migration).

214. Graham v. Richardson, 403 U.S. 365, 376 (1971).

215. *See* Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security with Billions*, N.Y. TIMES (Apr. 5, 2005), http://www.nytimes.com/2005/04/05/business/illegal-immigrants-are-bolstering-social-security-with-billions.html (noting that the U.S. Social Security Administration contends that three quarters of undocumented immigrants pay payroll taxes, contributing six to seven billion dollars to Social Security benefits, from which they are excluded). Additionally, undocumented persons also pay real estate taxes because they either own homes or real estate taxes are incorporated into rents. *See* Randy Capps & Michael Fix, *Undocumented Immigrants: Myths and Reality*, AM. IMMIGR. LAW. ASS'N (Oct. 25, 2005), http://ailadownloads.org/advo/UrbanInstitute-UndocumentedImmgrantsMythsAndReality.pdf (stating that undocumented persons also pay the "same sales and other consumption taxes as everyone else," which funds the "majority of state and local costs of schooling and other services").

216. *See* Abrego, *supra* note 213, at 337 (noting variation in undocumented persons' connections to the United States and sense of belonging).

217. *See* Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115, 1121–22 (2009) (describing how immigrants with legal status and citizenship are often still perceived as immigrants because of their racial or ethnic group and "are still treated as non-citizens or second-class citizens because of discrimination").

equally in state resources and opportunities.[218] But under the Court's approach, only laws targeting lawful immigrants are subject to heightened scrutiny and likely invalidation, and only when state laws are at issue.[219] This ignores that discrimination against undocumented persons may be part of the same anti-immigrant animus that impacts their lawfully present counterparts.

Indeed, the recognition of lawful permanent residents as the sole immigrants protected as a suspect class suppresses the development of more rigorous constitutional protection for other immigrants outside that circle of special protection. As others have noted, the designation of suspect classes can thwart the recognition of other groups from reaching that pinnacle of vulnerable group protection.[220]

Moreover, the Court's justification for why certain factors, such as discrimination historically visited upon immigrants and their political powerlessness, should warrant strict scrutiny in the context of state regulation, but yield entirely when federal law is at issue, is not convincing. If such characteristics are important enough to warrant heightened protection in one setting, can they really be wholly irrelevant, enough to elicit super-deference, in another?[221] *Plyler*'s more nuanced approach to equal protection review offers promise, but it also recommits to the conventional rigid framework when, in the Court's

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218. *See* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 295–96 (2002) (describing how immigration enforcement activities and hate crimes directed at Arab and Muslims after September 11th treated all members of those religious and ethnic groups, or perceived members, as threats to national security); Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1259, 1268 (2008) [hereinafter Johnson, *Devastating Initiatives*] (describing how inability to vote renders both undocumented and lawful immigrants vulnerable to discrimination by majority groups, particularly in citizen initiative or referenda processes).

219. *See supra* Section II.B.

220. Kenji Yoshino has argued that the "canon has closed" for recognition of groups entitled to suspect class status, with the Court having every incentive to resist "diluting the meaning" of strict scrutiny by expanding the categories of individuals entitled to heightened protection. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 757, 762 (2011); *see also* Pollvogt, *supra* note 207, at 740 (summarizing chief "critiques of suspect classification analysis" as not "protect[ing] groups that it should protect, and that it is internally inconsistent as well as inconsistently applied").

221. This may be a function (or fall-out) of tiered scrutiny more generally. *See* Goldberg, *supra* note 40, at 488 ("[A]n analysis originally conceived to ferret out governmental reliance on arbitrary or biased assumptions regarding individual traits may point to intractable structural contradictions within suspect classification analysis regarding the purpose of, and triggers for, skeptical scrutiny.").

view, less is "at stake."[222] Indeed, *Plyler* internalizes the doctrine's broader contradictions, stating that undocumented immigrants cannot be considered a "suspect class" and reaffirming the deference owed the federal government's immigration regulations on account of its foreign affairs power.[223] *Plyler* thus strongly indicates that the ruling itself was exceptional, a message apparently necessary for Justice Brennan to secure Justice Powell's critical fifth vote.[224]

Plyler nevertheless carves a valuable analytical path that provides some of the building blocks for a more meaningful assessment of immigrants' claims to equality. By focusing on the underlying state and individual interests at play—rather than the legal tool used to assess those interests—the Court was able to meaningfully engage with the Fourteenth Amendment's fundamental concerns: eliminating the subjugation of classes and eradicating a caste-based social order, while still taking seriously a state's interest in considering the character of migrants' connections to the state when determining the extent of their claim to an equal share of state resources.[225] Few reasons exist for squandering this more reasoned approach to immigrants' equality from broader application.[226]

Indeed, as Hiroshi Motomura has argued, three of *Plyler*'s core themes suggest, contrary to conventional wisdom, that its analysis was not highly customized to the facts of that case.[227] Motomura notes that *Plyler*'s view of the children's unlawful status as nuanced and not dispositive of their claims to equal treatment is a principle applicable to

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222. Plyler v. Doe, 457 U.S. 202, 223 (1982). *Plyler* sanctions equal protection exceptionalism for immigrants, even while it dismisses the framework as too "abstract" to resolve the important considerations before it. *Id.*

223. *Id.* at 219 n.19; *see also* Bosniak, *Exclusion and Membership*, *supra* note 49, at 983–84 (describing the ways that *Plyler* is less solicitous of immigrant equality than otherwise conventionally acknowledged).

224. *See* MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 24, at 6 (noting that historical records reveal that Justice Brennan redrafted his *Plyler* opinion in order to assure Justice Powell that the decision would not be widely applicable and thereby secure his vote).

225. MOTOMURA, *supra* note 24, at 10–13; *Plyler*, 457 U.S. at 223 ("[M]ore is involved in these cases than the abstract question whether [Texas's law] discriminates against a suspect class, or whether education is a fundamental right.").

226. Pollvogt, *supra* note 207, at 743 (arguing that tiered review falls short of "prompting critical analysis of the dynamics of invidious discrimination" where "deferential rational basis review . . . affirmatively shuns reasoned analysis in the name of federalism and separation of powers").

227. MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 24, at 10–13. For example, Justice Burger's dissent in *Plyler* criticized the majority opinion for "spin[ning] out a theory custom-tailored to the facts of these cases." *Plyler*, 457 U.S. at 244 (Burger, J., dissenting).

undocumented immigrants beyond children.[228] He further posits that *Plyler's* second theme, which focused on the significance of state and local government's lacking authority to regulate migrants and immigration, should likewise be relevant to other anti-immigrant laws not concerning children and access to education.[229] Finally, Motomura cited *Plyler*'s concern with integration—evidenced by the Court's refusal to countenance the creation of a disadvantaged, uneducated, permanent caste of immigrants—to argue that migrants' ties to the United States are a principled basis for discerning the measure of equality due to unauthorized migrants under the Constitution.[230]

In determining the level of scrutiny to apply, the existing approach to immigrants' equal protection claims instead focuses on which government is responsible for the classification, political powerlessness (but only for lawfully permanent residents), and a rigid conceptualization of immigrants' status as either lawful or not. These factors are usually outcome determinative of the level of scrutiny that will apply, even though, as described in the next section, the authority to regulate immigrants does not typically take place at the federal or state level alone.[231] Immigration status is likewise fluid and nuanced, with undocumented immigrants sometimes sharing ties to the United States more akin to permanent residents[232] or living in so-called mixed-status families made up of lawful immigrants, citizens, and undocumented persons.[233] As Motomura has noted, individual migrants also often possess numerous statuses while in the United States, making their legal categorization at any given time a poor reflection of their full experience and connection to the country.[234] Immigrants as a class therefore cannot be neatly subdivided into equal protection tiers, and the doctrine does not adequately respond to varied experiences of immigrants subject to discrimination in the United States.

Equal protection exceptionalism is also shaped by its second-order effects, including the creep of plenary power deference beyond its originally intended domain. As I have explained elsewhere, in recent years, numerous lower courts have foregone the heightened judicial skepticism mandated by *Graham* and its progeny in state alienage cases in favor of reviewing discriminatory laws with a deference formerly reserved for the federal government's immigration

228. MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 24, at 10–13.
229. *Id.*
230. *Id.*
231. *See infra* Section III.B.
232. MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 24, at 10–13.
233. *Id.*
234. *Id.*

regulations.[235] This elevated deference to the federal government's power to set immigration policy over a previously established constitutional commitment to immigrants' equal treatment by the states has started to collapse the dichotomous equal protection framework.[236] This blurring of the line between the justifications for state and federal law regulating immigrants—and thus the bending of scrutiny toward a unitary standard[237]—only further confirms what scholars have long noted: the line between immigration and alienage law is illusory.[238]

But even more so, plenary power deference's creep into an equal protection arena normally marked by strict scrutiny is a testament to the doctrine's enduring potency and its resistance to compartmentalization. Indeed, its furtive impact on the derivative citizenship cases described above[239] suggests that plenary power may play a role even when the Court presents its scrutiny as conventional and plenary-power free, resulting in a *Nguyen*-like form of diluted judicial review.[240]

Finally, treating some forms of discrimination against immigrants under a more relaxed scrutiny (either because a federal immigration law is at issue or undocumented migrants are affected) can dilute the meaning of suspect class status for the lawfully present immigrants formally recognized as warranting strict judicial review.[241] As Richard

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235. There are good reasons to question whether the lower courts have eroded *Graham*'s mandate of strict scrutiny and informally collapsed the equal protection dichotomy. *See* Jenny-Brooke Condon, *The Preempting of Equal Protection for Immigrants?*, 73 WASH. & LEE L. REV. 77 (2016) (arguing that lower courts frequently cite federal immigration policy as a justification for relaxing scrutiny of state laws discriminating on the basis of immigration status).

236. *Id.* at 85.

237. In contrast, Brian Soucek argues that equal protection involving immigrants is "one bastion" where "noncongruence still remains." Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 FORDHAM L. REV. 155, 158 (2014). Analyzing the role of federalism in equal protection jurisprudence addressed to marriage equality (and the alienage cases by comparison), Soucek proposes that federalism be factored into equal protection analysis under an "interest constraining" approach, whereby the ability of the state or federal government to justify discrimination is limited by the relative strength or weakness of the particular sovereign's authority to regulate in a given area. *Id.* at 167–71.

238. *See infra* notes 255–61 and accompanying text.

239. *See supra* Section II.A.

240. *See* Nguyen v. I.N.S., 533 U.S. 53, 73 (2001) (sidestepping whether a lesser degree of scrutiny should apply because of Congress's immigration and naturalization power, but noting that plenary power concerns might come to bear should the Court declare the gender-based requirements of the derivative citizenship statute unconstitutional, necessitating a remedy for the statute's discriminatory denial of citizenship).

241. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1300 (2007).

Fallon has noted in his comprehensive critique of strict scrutiny, while intermediate scrutiny "leaves strict scrutiny formally unaltered in the contexts in which it applies, [it] complicates the architectural structure of constitutional doctrine and, by doing so, diminishes the significance that strict scrutiny once held."[242] Fallon argues that multiple forms of judicial review "demote[] strict scrutiny to the status of one test among others, of varying degrees of stringency, and thus diminishes the necessary significance of a decision either to apply strict scrutiny or not to apply it."[243]

This effect is amplified in the context of immigrants given the already illusory line between immigration laws and alienage laws, and because categorizing immigrants as subclasses emphasizes formal differences in their legal status, while ignoring their common bonds and collective experience of discrimination.[244] Given this, *Plyler* notwithstanding, the recognition of lawful immigrants as a suspect class in *Graham* may well have made it more difficult for other immigrants and all non-citizens impacted by federal laws to claim more robust protection.[245] At the very least, it has halted a more nuanced consideration of immigrants and equality.

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242. *Id.* (alteration in original).

243. *Id. But see* Chemerinsky, *supra* note 39, at 403 (arguing that "the rational basis test is not only constitutional but also desirable" because "[n]othing in the Constitution requires more exacting scrutiny than rational basis review and deference to the government is often appropriate").

244. Susannah Pollvogt has emphasized that animus and the "dynamics of impermissible discrimination are fluid and context-specific." Pollvogt, *supra* note 207, at 802. Recognizing that such dynamics "are not amenable to fixed categorization," she urges that discrimination be explored "through concrete, real evidence (rather than untethered judicial speculation) such that the reasons for any particular act of discrimination can be offered, examined, and assessed." *Id.* at 802–03. She thus urges "moving beyond suspect classifications." *Id.* at 803.

245. Nice, *supra* note 199, at 1211 (suggesting that the "rigidity" of the conventional two levels of scrutiny in equal protection cases has "hinder[ed] the Supreme Court both from enforcing the equal protection mandate and from adequately explaining its failure to do so" (alteration in original)). Nice contends that traditional tiered equal protection review has resulted in "formal stagnation hindering the doctrine's functional utility." *Id.* at 1215. For prominent critiques of strict scrutiny's failure to achieve its intended effect of routing out discrimination against minority groups, see Robinson, *supra* note 40, at 172–73 ("For at least the last thirty years, at least at the Supreme Court level, strict scrutiny has been the principal tool of civil rights retrenchment, protecting whites rather than blacks and Latinos.") and Siegel, *supra* note 40, at 3 (2013) (demonstrating how a "body of constitutional law that began in the aspiration to protect 'discrete and insular minorities' has been profoundly transformed by the conflict that enforcing equal protection provokes" (citations omitted)).

B. Scrutinizing Immigration Federalism

The current approach to equal protection for immigrants is also problematic because it fails to account for contemporary dimensions of, and unresolved controversies regarding, immigration federalism.[246] Immigration regulation often cannot be categorized as strictly federal or local in nature and often reflects an amalgam of interests and power.[247] It may include local exercise of delegated authority,[248] cooperative federalism,[249] or innate state police power authority to regulate immigrants in ways that influence immigration patterns and policy more broadly.[250]

Moreover, a number of scholars have rejected the notion that sub-federal governments are powerless to regulate and, in particular,

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246. *See, e.g.*, Huntington, *supra* note 16, at 792 (positing that the "constitutional mandate for federal exclusivity over pure immigration law is far more contestable than the traditional debate would suggest" and arguing "that immigration is more like areas of constitutional law that involve a mix of federal and state authority"); Schuck, *supra* note 13 (challenging federal exclusivity in immigration lawmaking and arguing for state involvement in visa policy).

247. *See* Rodríguez, *supra* note 16, at 609 (arguing that "management of today's immigration depends on the involvement of all levels of government. Contrary to the conventional wisdom, immigration control occurs through a de facto multi-sovereign regime").

248. *See* Cox & Posner, *supra* note 16, at 1287 (contesting immigration authority as an exclusive federal power and noting that "delegation is pervasive in American immigration law"). Cox and Posner contend: "The federal government rarely makes decisions on its own about which immigrants should be admitted" but rather

> delegates to agents outside the federal government tremendous power to select the "types" of migrants who are admitted—to make admissions decisions based on the nature of their labor-market skills, the level of their language proficiency, their likelihood of success in the United States, and so forth. Even more surprisingly, it also delegates significant power to these agents to control migrants once they arrive in the country and to decide whether they should be deported.

Id. (alteration in original).

249. *See* Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1111, 1115 (2013) (describing "federal initiatives to encourage cooperative state and local immigration policing," as well as the emergence of an "equilibrium" of immigration federalism). Kalhan contends that immigration federalism "contemplate[s] considerable state and local immigration policing under federal coordination and supervision, but also has afforded states and localities space to make voluntary choices about the extent to which they wish to undertake or limit their involvement in immigration policing." *Id.* (alteration in original).

250. *See* Rodríguez, *supra* note 16, at 581 (describing state and local police power functions that influence immigration patterns).

assimilate migrants into state and local communities.[251] Others, however, are less sanguine about a robust subfederal role for states and localities in regulating the lives of migrants.[252] In particular, Pratheepan Gulasekaram and S. Karthick Ramakrishnan have "cast doubt on the factual premise undergirding the necessity of the new immigration federalism."[253] Their empirical work suggests that the immigration federalism fueling restrictive state and local immigration laws is not an inevitable or salutary response "to regionally specific, immigration-induced policy concerns," but rather more often the product of "partisan opportunities and political entrepreneurship."[254]

The appropriate role of subfederal actors in immigration regulation also implicates foundational questions regarding the nature of regulation targeting immigrants. Commentators have long contested the perceived fixed line between what has traditionally been conceptualized and treated as federal immigration regulations (laws regulating entry and exit), as opposed to state alienage classifications (laws regulating the lives of migrants within the United States).[255] Given their overlapping spheres of regulation and their inevitable influence upon one another, the line between immigration law and

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251. *See, e.g.*, Abrams, *supra* note 46, at 601; Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 581–82 (2012); Cox, *supra* note 186, at 360, 382; Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 705–06 (2013) (describing immigration federalism's potential for "immigrant-inclusionary rulemaking"); Huntington, *supra* note 16, at 795–96; Rodríguez, *supra* note 16, at 615–17.

252. *See, e.g.*, Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2078–79 (2013) (expressing skepticism of "functionalist understanding[s] of local immigrant regulation"). Gulasekaram and Ramakrishnan argue that "dominant scholarly theories of immigration federalism must be rethought because these subfederal laws are neither functional responses to regional policy challenges nor isolated expressions of anti-immigrant fervor." *Id.* at 2081.

253. *Id.* at 2080.

254. *Id.* at 2080–81.

255. *See* Bosniak, *Exclusion and Membership*, *supra* note 49, at 1040–41 (describing traditional domains as one of membership and personhood, or regulation inside immigration law, and regulation outside); Cox, *supra* note 186, at 393 ("The process of selecting immigrants is deeply and irrevocably intertwined with the process of regulating their daily lives."); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 202–03 (1994) (noting that the conceptual categories of immigration and alienage law are often difficult to separate because of their "functional overlap," in that "'[a]lienage' rules may be surrogates for 'immigration' rules" where the "intended and/or actual effect of an alienage rule is to affect immigration patterns" and where "'immigration' rules may be surrogates for 'alienage' rules" where, for example, "the intended and actual effect of deportation grounds is to regulate the everyday lives of aliens in the United States no less than do rules governing their access to public benefits" (alteration in original)).

alienage law is now widely acknowledged as "elusive"[256] and part of "a continuum of immigration regulation."[257]

The categorical, rigid approach to equal protection scrutiny involving immigrants, however, overlooks this complexity, failing to answer whether equal protection doctrine should operate the same way as applied to restrictionist versus integrationist subfederal regulation of immigrants. Indeed, *Mathews* and *Fiallo* are based upon the premise that plenary federal authority over immigration matters is virtually immune from judicial oversight precisely because of the federal government's exclusive sovereign power over foreign affairs.[258] Conversely, the Court has cited that same plenary federal authority over immigration matters as a justification for closely scrutinizing state laws discriminating on the basis of immigration status—the theory being that states are likely to pursue improper motives when acting beyond the scope of permissible state power and arguably infringing upon an area of exclusive federal domain.[259]

If states do, in fact, possess authority to regulate migrants, either independently of the federal government or as a means of cooperative federalism, then deference to an exclusive federal immigration power loses force as a justifiable basis for modulating equal protection scrutiny.[260]

In the section that follows, this Article urges a new approach to equal protection review of immigrants' claims that better and more fully reflect the ways in which the state and federal governments jointly, independently, and sometimes in tension, regulate the lives of migrants.

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256. *See* Motomura, *supra* note 64, at 113–14 (describing the line between immigration and alienage law as "elusive" because of their functional overlap).

257. Huntington, *supra* note 16, at 826; *see also* Cox, *supra* note 186, at 360.

258. Fiallo v. Bell, 430 U.S. 787, 803 n.4 (1977) (noting that formulation of "[p]olicies pertaining to the entry of aliens and their right to remain here . . . is entrusted *exclusively* to Congress," a principle "about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government" (emphasis added) (quoting Galvan v. Press, 347 U.S. 522, 531 (1954))); Mathews v. Diaz, 426 U.S. 67, 84 (1976) (citing "*exclusive* federal power over the entrance and residence of aliens," and "that it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens" (emphasis added)).

259. *See* Condon, *supra* note 235, at 112–13 (describing decisions both before and after *Graham* where courts "considered federalism principles in equal protection cases involving alienage status as a means of ferreting out arbitrary state motivations").

260. *See* Huntington, *supra* note 16, at 838 (acknowledging that acceptance of some measure of shared power between federal and state governments with respect to the regulation of immigrants "arguably calls for the unification of this standard, although it is not necessarily clear what such unification would look like").

IV. AN ANTI-SUBORDINATION APPROACH TO IMMIGRANT EQUALITY

The problems with equal protection exceptionalism outlined above require a reimagined approach to assessing the equality due to non-citizens under the Constitution. Because the Court's current approach to immigrants' equal protection claims relies, to its detriment, upon the isolated concepts of plenary power, immigrants' political powerlessness, and their legal status to dictate judicial review, the doctrine overlooks more fundamental concerns at the heart of the Fourteenth Amendment: preventing the subjugation of classes and eliminating caste-based treatment.[261]

The approach to equal protection followed by several states when assessing equal protection guarantees under their state constitutions provides a useful model.[262] For example, the New Jersey Supreme Court has declined to follow the tiered approach to scrutiny that governs equal protection analysis under the Federal Constitution.[263] It instead employs a balancing test that considers "the nature of the affected right, the extent to which the government restriction intrudes upon it, and the public need for the restriction."[264] Other states, including Alabama,[265] Alaska, and Montana, similarly balance the importance of

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261. *See* Goldberg, *supra* note 40, at 528–31 (describing the central concern of the Equal Protection Clause as "preventing enforcement of class legislation" and recounting the Court's repeated commitment to this principle in its jurisprudence); *see also* Plyler v. Doe, 457 U.S. 202, 213 (1982) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."); *id.* at 216 n.14 ("Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish.").

262. *See* Randall S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 L. & INEQ. 239, 257–58 (1999) (describing state court interpretations of equal protection under state constitutions and noting that twelve states have employed approaches outside the federal approach of tiered scrutiny, including balancing tests); *see also* David J. Shannon, Note, *"No Pass, No Play": Equal Protection Analysis Under the Federal and State Constitutions*, 63 IND. L.J. 161, 174–75 (1987–88).

263. Right to Choose v. Byrne, 450 A.2d 925, 936 (N.J. 1982) (striking down statute denying Medicaid funding for abortions under the equal protection guarantees of the New Jersey Constitution); Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985) (noting its "independent analysis of rights under" the equal protection guarantees of the New Jersey Constitution and the Court's rejection of "two-tiered equal protection analysis").

264. *Greenberg*, 494 A.2d at 302 (citing text of Article 1, paragraph 1 of the New Jersey State Constitution in explaining the court's adoption of an alternative formulation from federal tiered scrutiny (citing N.J. CONST. art. 1, para. 1)).

265. Moore v. Mobile Infirmary Ass'n, 592. So. 2d 156, 170 (Ala. 1991) (finding that a statute limiting award of non-economic damages in medical malpractice cases violated the equal protection guarantees of the Alabama Constitution after "balancing the direct and palpable burden placed upon catastrophically injured victims of medical malpractice against the indirect and speculative benefit that may be conferred on society").

individual interests against the public benefit sought to be achieved by the state.[266]

Following a similar non-tiered approach to equal protection scrutiny when assessing immigrants' rights under the federal constitution would go a long way toward ameliorating some of the problems with exceptionalism identified in this Article. First, this functional approach would prevent the Court from cutting off a meaningful assessment of government interests once rational basis review is invoked. To be sure, eliminating tiered review is not the same as eliminating the plenary power doctrine entirely,[267] for which the merits of doing so are well documented.[268] But flattening the rigid tiered approach to equal protection scrutiny for immigrants may be a first step toward reassessing a long-criticized, but otherwise impenetrable, doctrine.[269]

Indeed, reflexive invocation of rational basis review suppresses judicial engagement with the underlying justifications for plenary power deference, the nature of the government interest at play, and the nuances of how federal and state governments independently, cooperatively, or through delegation regulate immigrants.[270] Opening up the bifurcated approach to federal and state regulation of immigrants to a more sliding-scale approach would encourage courts to interrogate the actual governmental interests at work in regulating immigrants, when an adequate governmental interest is lacking, and whether the means chosen are adequately related to achievement of those interests. Moreover, expansion of the doctrine beyond the fixed

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266. *See* Ronald K.L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095, 1126–29 (1985) (criticizing Montana's functional approach for being less deferential to economic regulations); Jeffrey, *supra* note 262, at 257 n.72 (first citing *Moore*, 592. So. 2d at 166; and then citing Robert L. Nelson, *Welcome to the "Last Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation*, 12 ALASKA L. REV. 1, 11–17 (1995) (discussing Alaska's sliding scale approach).

267. Indeed, as the discussion of the derivative citizenship cases demonstrates, *supra* Section II.A.3, plenary power considerations can impact equal protection analysis even when those considerations do not funnel the Court into the lowest tier of rational basis scrutiny.

268. *See* Schuck, *supra* note 13, at 57.

269. One might respond to this Article's proposal and contend that the tensions and exceptionalism that I have identified in the doctrine will simply perpetuate themselves under the new terms of functional review. While it is true that assessing equality outside of a tiered framework will not alone eliminate the underlying drivers of exceptionalism—plenary power deference and the principle that undocumented immigrants have diminished claims to equal treatment—the tiered framework amplifies the effect of each consideration making them outcome determinative. Under a functional approach, not only are courts more likely to assess the theories underlying those doctrines, but each would serve merely as one consideration to be balanced among several.

270. *See supra* Section III.B.

categories of plenary power super-deference or strict scrutiny would allow immigration federalism to be taken seriously.

More specifically, following the lead of the state supreme court balancing tests and assessing a "public need for the restriction"[271]—or as Suzanne Goldberg has argued in her seminal proposal for non-tiered equal protection scrutiny: "whether a plausible, non-arbitrary explanation exists for why the burdened group has been selected to bear the challenged burden in the context at issue"[272]—would prompt courts to consider the context of legislation in a way that tiered scrutiny overlooks. For example, under this approach, courts must consider whether Congress's purpose in classifying on the basis of alienage status bears a real connection to foreign affairs,[273] or is instead motivated by entirely different concerns, which historically have included nativist views and racial hostility toward immigrants.[274]

Conversely, this approach would recognize that alienage-conscious lawmaking by sub-federal governments aimed at integrating immigrants into communities for economic, public safety, and moral reasons is very different than local restrictions aimed at discouraging immigration flows to the state or making life so inhospitable that immigrants elect to "self-deport."[275] Without a functional approach to equal protection, such integrationist measures risk being struck down

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271. *See, e.g.*, Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985); *see also Moore*, 592. So. 2d at 170 (assessing "benefit that may be conferred on society").

272. Goldberg, *supra* note 40, at 533.

273. *See* Rosberg, *supra* note 65, at 334–36 (criticizing *Mathews v. Diaz*, 426 U.S. 67 (1975), for assuming restriction on access to public benefits was connected to immigration policy).

274. *See* Cleveland, *supra* note 14, at 14–15. The district court's decision in *Gebin v. Minetta* provides a rare example of a court refusing to defer to the federal government's decisions to classify on the basis of alienage status. 231 F. Supp. 2d. 971, 976 (C.D. Cal 2002) (holding that restriction on employment as TSA airport screeners was unconnected to immigration policymaking).

275. Indeed, the Supreme Court recognized in *Arizona v. United States*, the Court's most recent landmark preemption case, that the "stated purpose" of Arizona's immigration enforcement law was to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States" and to "establish an official state policy of 'attrition through enforcement." 132 S. Ct. 2492, 2497 (2012) (striking down Arizona statute addressed to immigration enforcement under the Supremacy Clause).

under strict scrutiny following *Graham*,[276] when the concepts of political powerlessness and history of discrimination visited upon immigrants would not justify subjecting such remedial efforts to strict scrutiny's fatal consequences. Focusing instead on the "public need" to integrate immigrants into state and local communities,[277] and whether that need justifies intrusion upon the interests of citizens,[278] would better account for the interests of immigrants and citizens alike when state and local governments enact laws aimed at integrating non-citizens into state and local communities.

In advocating a new approach to equal protection scrutiny for immigrants, the federal and state governments' roles in immigration regulation, immigrants' political powerlessness, and their legal status would still play a role in equal protection analysis. But the doctrine should assess each of these considerations from a holistic perspective, rather than through a splintered analysis whereby a single principle in isolation dictates the outcome.

Indeed, a more functional approach to equal protection allows for recognition that alienage status may be a relevant basis for classification in certain domains but not others, and that figuring out when a person's immigration status—whether lawful or not—matters as a constitutionally legitimate basis for distinction should not turn exclusively upon which government has treated citizens and non-citizens differently.[279] This approach adds necessary nuance into the rigid categorical focus on whether a federal or state law is at issue—which treats static federalism concerns as dispositive without regard to the

276. *See supra* notes 155–58 and accompanying text. While such a result might at first seem unlikely, the U.S. Court of Appeals for the Ninth Circuit has suggested that state efforts to level the playing field for immigrants—in that case to provide state-funded benefits to immigrants denied access to Medicaid under federal law because of their immigration status—might require application of strict scrutiny. *See* Pimentel v. Dreyfus, 670 F.3d 1096, 1107 (9th Cir. 2012). The court noted that Washington State provided "benefits exclusively to federally ineligible legal immigrants, while denying such benefits to citizens and federally eligible qualified aliens." *Id.* It reasoned that Washington's enactment of the program might therefore "have merited strict scrutiny by treating persons differently on the basis of alienage, since it was accompanied by no similar state program for citizens." *Id.* (quoting Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995) ("[R]ejecting the notion of 'benign classifications' and applying strict scrutiny to all racial classifications irrespective of the race of the burdened or benefitted group.")).

277. *See* MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 24, at 145–70 (explaining important role of subfederal lawmaking in integrating immigrants into local, state, and national communities); Rodríguez, *supra* note 16, at 617 (same).

278. *See, e.g.*, Moore v. Mobile Infirmary Ass'n, 592. So. 2d 156, 170 (Ala. 1991) (balancing the burden on those asserting equal protection violation with the restriction's benefit to society); Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985) (assessing nature of the affected interest and extent of the intrusion upon that interest).

279. *See* Plyler v. Doe, 457 U.S. 202, 223–24 (1982).

presence of discriminatory motives, immigrants' ties to the United States, and evolving notions of immigration federalism.

The more contextual analysis proposed here also deemphasizes the legality of immigration status as an outcome-determinative trigger of judicial scrutiny, allowing courts to follow *Plyler*'s more reasoned assessment of the ways in which legal status is not an accurate proxy for immigrants' interest in equal treatment. Scrutiny based upon the lawfulness of immigration status alone cannot accurately account for the strength of immigrants' ties to the United States,[280] their contributions to the community,[281] and the impact upon society at large when a class of immigrants is relegated to an inferior social status.[282]

Finally, a unitary standard allows courts to consider how all immigrants—and not just those with legal status—lack political power[283] and are particularly susceptible to prejudice.[284] Under the Court's current approach to assessing immigrants' equality, political powerlessness and the history of anti-immigrant discrimination only comes into play in one setting: when states discriminate on the basis of lawful immigration status.[285] Given that the Court has been unwilling to recognize undocumented immigrants as a class deserving strict scrutiny given their unlawful status,[286] immigrants' political powerlessness and the history of discrimination directed at them as a class effectively drops out of the analysis for all other immigrants. As noted above, this produces the unsatisfying result of a trait meaning something significant in one setting but disappearing from the analysis altogether in another. But more fundamentally, it means that courts' equal protection inquiries are not engaging with the long-existing reasons and systemic nature of discrimination against immigrants.

To be sure, courts may have sound reasons for interfering less frequently when the federal government classifies on the basis of unlawful immigration status than when it imposes unique burdens

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280. *See* MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 24, at 10–13 (noting that immigration status is nuanced and indeterminate of rights with undocumented immigrants sometimes sharing ties to the United States more akin to permanent residents and often possessing numerous statuses while in the United States).

281. *See* Eduardo Porter, *Here Illegally, Working Hard and Paying Taxes*, N.Y. TIMES (Jun. 19, 2006), http://www.nytimes.com/2006/06/19/business/19illegals.html (noting that many undocumented workers pay taxes).

282. *See Plyler*, 457 U.S. at 223–24 (noting both the "costs to the Nation and to the innocent children" of precluding non-citizen children from living "within the structure of our civic institutions," preventing them from ever later "contribut[ing] in even the smallest way to the progress of our Nation").

283. *See* Kanstroom, *supra* note 178, at 406.

284. *See* Johnson, *Devastating Initiatives*, *supra* note 218; *see also supra* Section II.B.

285. *See* Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

286. *See Plyler*, 457 U.S. at 219.

upon lawful permanent residents that are inapplicable to citizens. But that does not mean that undocumented immigrants' inability to protect themselves from the majoritarian political process or their likelihood of exploitation should be irrelevant when courts assess non-citizens' equal protection challenges. These factors should remind courts to be vigilant for signs of animus and overreaching when assessing group classifications.[287] A non-tiered approach to equal protection scrutiny allows courts to consider immigrants' vulnerability to unfair legislation either by assessing the legitimacy of the asserted "public need" or—under a separate prong, as advocated by Suzanne Goldberg—that explicitly interrogates the role of bias.[288] In the end, a non-tiered and unitary approach to equal protection scrutiny for immigrants provides more potential to meaningfully assess and balance the various government and individual interests at stake when the state regulates immigrants.

The obvious rejoinder to this Article's description of equal protection exceptionalism is that the doctrine is necessarily exceptional because it implicates federal powers inapplicable to citizens and addresses rights of undocumented persons with drastically different claims to fair treatment than citizens. Under this view, what this Article diagnoses as exceptionally flawed is instead a well-calibrated framework for assessing non-citizens' varied connections with the United States and the unique federalism concerns that are implicated when state or federal governments regulate immigrants. Indeed, some might say that immigration exceptionalism is inevitable and even desirable. This perspective, however, overlooks the internal contradictions in the doctrine and the benefits of a functional framework focused on the core purpose and meaning of equality,[289] rather than static legal tools of such a scrutiny that are supposed to, but do not always, serve those purposes.

Conversely, skeptics of a more functional approach to equal protection scrutiny, including advocates for immigrants' rights, may suggest that the proposal would be counterproductive and cede too much ground on immigrant equality by suggesting that *Graham*'s

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287. For example, under a traditional approach to equal protection scrutiny (in the absence of evidence of racial profiling), Arizona's laws aimed at encouraging non-citizens to self-deport would be subject to a rational basis review just like any other neutral law applicable to citizens granted full engagement in the political process. *See* Arizona v. United States, 132 S. Ct. 2492, 2497–98 (2012).

288. Goldberg, *supra* note 40, at 533 (identifying a third inquiry under her proposed equal protection framework that assesses "whether the classification reflects disapproval, dislike, or stereotyping of the class of persons burdened by the legislation").

289. *See* discussion of *Plyler supra* note 182 and accompanying text.

recognition of lawfully present immigrants as a suspect class should collapse into a more amorphous inquiry uncommitted to that landmark principle.[290] Two responses mitigate these concerns.

First, as I have noted elsewhere, there is already evidence of plenary power deference eroding *Graham*'s requirement of strict scrutiny and collapsing the dichotomized approach to equal protection scrutiny toward a unitary form of review.[291] Unfortunately, the doctrine has bent toward a single standard of plenary power deference, not close judicial scrutiny, whether state or federal laws are at issue.[292] Thus, to argue in favor of the Court recommitting to core antidiscrimination principles and anti-caste norms underlying the Equal Protection Clause instead of a fragmented, scrutiny-driven framework may actually resist an erosion of meaningful equal protection review for immigrants or a complete overturning of *Graham*.

Second, *Graham* recognized the need for strict scrutiny based upon immigrants' political powerlessness and the history of anti-immigrant discrimination. But it was also fundamentally concerned about the ways in which immigrants shared burdens and contributions of community membership similar to citizens but were singled out for unequal burdens.[293] Some scholars have cited this principle as the most significant and influential consideration in *Graham*.[294] Because the current approach to equal protection analysis for immigrants has relegated this reasoning to exclusive use within the echelon of strict scrutiny for lawful permanent residents, its potential application to other groups of non-citizens has been stymied. In contrast, a functional approach to equal protection review has the potential to assess these characteristics and interests for undocumented immigrants as well, with the potential for lasting and broader recognition of *Graham*'s foundational principles.

In addition, equal protection exceptionalism demonstrates how considerations like plenary power deference and the exclusivity of the federal immigration power can ossify the doctrine without exposing their underlying principles to fresh engagement and thinking. The result can be a reflexive resort to unchallenged assumptions even outside their intended context, such as whether the immigration and naturalization power precludes judicial second-guessing of even facially discriminatory rules for citizenship and the provision of equal

290. *See* Koh, *supra* note 23, at 58–60 (describing *Graham* as a landmark equal protection decision).
291. *See* Condon, *supra* note 235, at 81.
292. *Id.* at 86 n.28.
293. Graham v. Richardson, 403 U.S. 365, 376 (1971).
294. *See* Koh, *supra* note 23, at 59.

protection remedies.[295]

V. CONCLUSION

Equal protection doctrine addressed to immigrants' rights is exceptional, but not necessarily so. The view of immigrants as subject to separate rules and outside the mainstream of equality analysis has meant that few have questioned the tensions and anomalies within equal protection analysis for immigrants. This Article demonstrates that the legal tools employed by the Court pursuant to a framework of tiered scrutiny splinters the guarantee of equal protection for immigrants in ways that are not theoretically consistent nor always defensible. A unitary, non-tiered approach to equal protection provides a reasoned alternative with promise to fulfill equal protection's most basic purpose of rejecting class-based legislation and avoiding caste-based treatment.

295. These considerations are before the Court this term in *Morales-Santana v. Lynch*, 136 S. Ct. 2545 (2016) (mem.) (granting certiorari for Morales-Santana v. Lynch, 804 F.3d 520 (2d Cir. 2015)).