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## The Preempting of Equal Protection for Immigrants?

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# The Preempting of Equal Protection for Immigrants?

Jenny-Brooke Condon\*

## *Abstract*

*Recent debates about immigration have focused overwhelmingly on unauthorized migration and the respective roles of the federal and state governments in enforcing immigration law. But that emphasis in law and theory has obscured a critical civil rights question of our time: what measure of equality is due to those with the opportunity to abide by the rules of entry, who are now lawfully present within the United States?*

*Although the United States Supreme Court recognized decades ago that lawfully present migrants are a discrete and insular minority entitled to heightened judicial protection under the Equal Protection Clause of the Fourteenth Amendment, in recent years, a body of little-analyzed federal and state court decisions has eroded that longstanding precedent, elevating deference to the federal government's power to set immigration policy over a previously established constitutional commitment to immigrants' equal treatment by the states. This Article critically explores this development and argues that although federalism may legitimately serve as a lens through which to gauge arbitrary discrimination, federalism principles should not stealthily serve as a preemption-like doctrine beneath the surface in equal*

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*protection cases. To reign in federalism’s potentially disruptive impact on immigrants’ rights, this Article argues that courts should consider federalism principles only as an interpretative tool in equal protection cases involving migrants and recommit to immigrants’ long settled right to equal treatment by the states.*

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*I. Introduction*

For most migrants, the path of legal entry into the United States represents a golden door of opportunity.<sup>1</sup> But legal entry does not guarantee equal treatment. Louisiana, for example, bars lawfully present migrants with valid visas from taking the bar exam<sup>2</sup> and excludes lawfully present noncitizens classified as non-immigrants<sup>3</sup> from working as licensed nurses.<sup>4</sup> In Tennessee, certain lawfully present migrants are ineligible for drivers' licenses.<sup>5</sup> Meanwhile, Connecticut, Colorado, Maine, and Washington, among other states, deny lawful permanent residents equivalent state-funded healthcare benefits provided to citizens.<sup>6</sup> Courts have sanctioned this dissimilar treatment in the face of equal protection challenges, in spite of the United States

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1. See ROGER DANIELS, *GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882*, at 3 (2004) (describing the “golden doorway of admission to the United States” and various efforts to narrow it).

2. See *LeClerc v. Webb*, 419 F.3d 405, 410–21 (5th Cir. 2005) (denying an equal protection challenge to a Louisiana Supreme Court rule that restricted bar admission to citizens and lawful permanent residents).

3. Under immigration law, nonimmigrants are persons “admitted to the United States only for the duration of their status, and on the express condition they have ‘no intention of abandoning’ their countries of origin and do not intend to seek permanent residence in the United States.” *Id.* at 418–19. But, while “nonimmigrants must indicate an intent not to remain permanently in the United States” as a condition of their visa, they may lawfully express a simultaneous “intent to remain permanently (when they apply for LPR status).” *Dandamudi v. Tisch*, 686 F.3d 66, 77–78 (2d. Cir. 2012) (describing this dual intent doctrine).

4. See *Van Staden v. St. Martin*, 664 F.3d 56, 57–61 (5th Cir. 2011) (rejecting an equal protection challenge to Louisiana law that restricted nursing licenses to citizens and lawful permanent residents).

5. See *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 535 (2007) (upholding a Tennessee law excluding lawfully present migrants with temporary status from obtaining drivers' licenses). A number of states, however, have recently expanded access to drivers' licenses to migrants regardless of their immigration status. See *State Laws Providing Access to Driver's Licenses or Cards, Regardless of Immigration Status*, NAT'L IMMIGR. L. CTR. (Mar. 2016), <https://www.nilc.org/wp-content/uploads/2015/11/drivers-license-access-table.pdf> (last visited Mar. 23, 2016) (summarizing states' laws that permit drivers licenses to be obtained by immigrants) (on file with the Washington and Lee Law Review).

6. See *infra* Part III (discussing the cases that examined this issue).

Supreme Court's holding more than forty years ago in *Graham v. Richardson*<sup>7</sup> that migrants who are lawfully present in the United States are a discrete and insular minority entitled to heightened judicial protection under the Fourteenth Amendment. For the migrants recently denied an equal share of their state's resources and economic opportunities, the Fourteenth Amendment's guarantee of equal treatment has proven hollow; the courts that have upheld laws imposing unequal burdens on lawfully present migrants have done so under deferential rational basis scrutiny.<sup>8</sup>

This disconnect between *Graham's* promise of equality and the discrimination experienced by lawfully present noncitizens has escaped the critical analysis it deserves. In recent years, both the United States Supreme Court's jurisprudence addressed to immigrants' treatment by the states<sup>9</sup> and an extensive scholarly literature have focused heavily on immigration federalism; that is, the extent to which the states and federal government share power to regulate migrants in ways traditionally unacknowledged.<sup>10</sup> This emphasis in law and theory on the structural relationship between federal and state power to regulate immigrants has overshadowed an essential dialogue regarding immigrants' rights.<sup>11</sup> More specifically, it has obscured

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7. 403 U.S. 365, 371 (1971).

8. See, e.g., *LeClerc v. Webb*, 419 F.3d 405, 420 (5th Cir. 2005) (“[R]ational basis review must be the appropriate standard for evaluating state law classifications affecting nonimmigrant aliens.”); *Soskin v. Reinertson*, 353 F.3d 1242, 1255 (10th Cir. 2004) (upholding Colorado’s alienage-based denial of healthcare benefits to lawful permanent residents under a deferential rational basis scrutiny).

9. 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, 593–94 (2011) (same).

10. See generally Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601 (2013); Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703 (2013); Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577 (2012); Adam B. Cox, *Immigration Law’s Organizing Principles*, 157 U. PA. L. REV. 341 (2008); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 796 (2008).

11. See Huntington, *supra* note 10, at 838 (acknowledging that “[a] focus on federalism in the immigration context should not displace concern for individual

the fact that for lawfully present migrants, a group formally entitled to protection as a suspect class<sup>12</sup> and long assumed to enjoy community membership similar to citizens, class-based discrimination persists with the sanction of deferential courts. In recent years, a body of little-analyzed federal and state court precedent has eroded *Graham*, elevating deference to the federal government's power to set immigration policy over a previously established constitutional commitment to immigrants' equal treatment by the states.<sup>13</sup>

This Article critiques this development, which if left unchanged, will effectively preempt equal protection for immigrants.<sup>14</sup> It argues for fulfillment of *Graham's* essential

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rights” and that the difficult and important question regarding the status of judicial review when states regulate immigrants requires “greater debate and exploration”). Other scholars have critiqued the dwindling focus in law and theory on immigrant rights. *See, e.g.*, Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 611–12 (2012) (“Despite the fact that immigration and immigration enforcement directly and indirectly raise civil rights concerns, the legal analysis and the public discourse often ignores, or at least obscures, the direct civil rights impacts of U.S. immigration law and its enforcement.”); 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) (discussing *Arizona v. United States*, 132 S. Ct. 2492 (2012), and noting that in earlier eras, the Supreme Court “might have concerned itself more closely with the questions of individual rights” raised by challengers and critics of the law than “structural questions”); Raquel Aldana, *On Rights, Federal Citizenship, and the “Alien,”* 46 WASHBURN L.J. 263, 290 (2007) (“[I]mmigrant advocates must grapple with an increasingly limited number of viable legal strategies to challenge anti-alienage measures in the courts.”).

12. *See Graham v. Richardson*, 403 U.S. 365, 371 (1971) (applying strict scrutiny and overturning state laws that denied lawfully present migrants public benefits).

13. *See infra* Part III (examining this body of cases in detail).

14. Only a few commentators have challenged congressional power to sanction state discrimination on the basis of alienage status, and they have done so with varied depths of treatment. *See, e.g.*, Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL'Y 1, 45 (2013) (arguing that the Civil Rights Act of 1870's policy of ensuring immigrants' equality should be given effect in any immigration preemption analysis, but noting that, in contrast, “[f]ederal disfavor or disability does not authorize state discrimination”). In a critique of provisions of the Immigration Reform and Control Act of 1986 (IRCA) that “permitted federal and state governments to

mandate that states treat lawfully present immigrants equally, irrespective of the vagaries of federal immigration policy. In taking aim at the recent rise of federalism concerns in equal protection doctrine involving alienage status,<sup>15</sup> this Article ultimately seeks to answer a broader normative question that both the Supreme Court and commentators alike, both before and after *Graham*, have never resolved: What role, if any, should federalism—specifically, the supremacy of federal immigration policy—play in determining states’ equal protection obligations to lawfully present noncitizens?

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exclude certain aliens from welfare and other benefits,” Gilbert Paul Carrasco argued that Congress could not immunize the states from the requirements of equal protection, which he described as “inverse preemption.” See Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 617–18 (1994) (“[T]he primacy granted federal statutes by the Supremacy Clause, while authorizing Congress to occupy a field and preclude state legislation on specific subjects, does not permit the licensing of state action that violates the Constitution.”). Not long after its enactment, Michael Wishnie examined the 1996 Welfare Reform Act—which, similar to IRCA, sanctions states’ alienage-based denials of public benefits. 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) (analyzing the Act through the lens of whether Congress has the power to delegate its immigration lawmaking authority to the states); see also *infra* Part I.B (critically discussing Wishnie’s argument). Some might suggest that this Article’s description of federalism’s role as “preempting equal protection” is a poor fit because, unlike preemption, the influence of congressional policy on equal protection doctrine in the cases described would sanction state measures, not invalidate them. But this Article’s description aims to instead capture the ways in which the supremacy of federal law, just like in traditional preemption, nullifies another source of law, here: equal protection under the Fourteenth Amendment.

15. This Article’s critique concerns the equal protection rights of lawfully present migrants, who under Supreme Court precedent are entitled to protection as a suspect class. It does not make additional claims regarding the rights of undocumented migrants. The United States Supreme Court in *Plyler v. Doe*, 457 U.S. 202 (1982) held that undocumented migrants are not a suspect class entitled to the same equal protection scrutiny or solicitude as lawful immigrants, even as it then went on to strike down Texas’s exclusion of undocumented children from a free public education under an intermediate scrutiny. The normative question of whether a state’s equal protection obligations ought to be modulated when a regulation affects undocumented immigrants is beyond the scope of this Article.

The answer matters, for it will determine the extent to which equality under the Constitution is contingent upon congressional policy, and invariably majoritarian politics. For migrants, who are categorically excluded from the political process, much is at stake: employment and professional opportunities, healthcare benefits, drivers' licenses, and a sense of membership and belonging in their communities.<sup>16</sup>

To be sure, federalism has long figured importantly in equal protection doctrine involving immigrants.<sup>17</sup> In fact, the Supreme Court has reinforced the principle that the federal government has exclusive responsibility for the regulation of immigration, as much through its equal protection jurisprudence as it has through preemption decisions.<sup>18</sup> The Court presumes that the federal government acts reasonably when it draws distinctions between noncitizens and citizens because of the federal government's plenary authority over immigration matters grounded in its exclusive foreign affairs power.<sup>19</sup> Conversely, states lack authority to regulate immigration, and the Court has closely scrutinized state laws to smoke out improper motives for alienage-based distinctions in order to ensure equal treatment.<sup>20</sup>

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16. See *infra* Part IV (examining the body of state and federal court decisions addressing these issues).

17. See *infra* Part III (examining the role of federalism in Supreme Court's alienage jurisprudence).

18. See *Mathews v. Diaz*, 426 U.S. 67, 84–85 (1976) (distinguishing *Graham*'s equal protection analysis for state laws from federal ones, noting 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”); *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (reasoning that “[t]he States enjoy no power with respect to the classification of aliens. This power is committed to the political branches of the Federal Government.” (internal citations and quotation marks omitted)); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (striking down a California law that restricted fishing licenses to noncitizens as a violation of equal protection after an extended discussion of exclusive federal authority to regulate immigrants and the conditions of their entry).

19. See *Mathews*, 426 U.S. at 85 (“[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.”).

20. *Graham v. Richardson*, 403 U.S. 365, 376 (1971); see also *Plyler*, 457

Although this interplay between federalism and equality has long existed in the equal protection jurisprudence involving immigrants, in the recent cases critiqued in this Article, federal immigration policy has played a more disruptive role, transforming equal protection doctrine involving state alienage classifications into a preemption-like inquiry that privileges congressional policy choices.<sup>21</sup> The preempting of equal protection in this context also alters the form of constitutional review. That is, in many of the recent cases upholding state alienage classifications, courts have incorporated legal considerations into their equal protection analysis that are more readily associated with preemption doctrine.

For example, courts assessing equal protection challenges by immigrants have considered whether state restrictions mirror federal objectives, correspond to an identifiable congressional policy, and operate “harmoniously within the federal program.”<sup>22</sup>

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U.S. at 216 n.14 (explaining the “treatment of certain classifications as suspect” and noting that “[s]ome classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective”).

21. Some have argued, however, that the Court’s earlier equal protection decisions in this area were, in fact, preemption cases masquerading as equal protection decisions. See Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1060–65 (1979) (“Conceptualizing constitutional doctrine regarding alienage-based classifications in terms of the supremacy rather than the equal protection clause explains . . . the Court’s differential treatment of state and federal lines drawn on the basis of alienage, which would otherwise be an anomaly in equal protection doctrine.”); David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?* 31 STAN. L. REV. 1069, 1070 (1979) (arguing that the Court’s decisions involving alienage classifications in the 1970s followed “an unarticulated theory of preemption,” premised upon the notion that the states may not interfere with federal regulation of immigrants by altering, for those whom the federal government has admitted, “the terms of immigration with new burdens”). In *Toll v. Moreno*, 458 U.S. 1, 11 n.16 (1982), a case challenging a state-alienage classification, the Court noted this commentary, sidestepped the equal protection question altogether, and decided the case on the basis of preemption.

22. See, e.g., *Guaman v. Velez*, 421 N.J. Super. 239, 266–67 (App. Div. 2011) (denying a preliminary injunction in equal protection challenge to alienage-based denial of state-funded healthcare benefits, reasoning, in part, that the law “mirrors federal objectives, corresponds to an identifiable congressional policy, and operates harmoniously within the federal program”

These considerations naturally shift the focus of equal protection inquiry from the justification for states' discrimination, to whether Congress objects or is supportive of the states' treatment.<sup>23</sup>

Further, by eschewing the heightened judicial skepticism mandated by *Graham* and its progeny in state alienage cases, and, in its place, reviewing discriminatory laws with a deference formerly reserved for the federal government's immigration regulations, courts are collapsing what has long existed as a dichotomous equal protection framework in cases involving alienage status.<sup>24</sup> Unlike other areas of equal protection scrutiny where the Fifth and Fourteenth Amendments have been deemed coextensive, since 1975, federal and state laws that classify on the basis of alienage status have been treated differently for equal protection purposes.<sup>25</sup> Federal laws receive deferential rational basis review because of the federal government's plenary

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(internal citations and quotation marks omitted)), *aff'd*, 221 N.J. 213 (2015) (per curiam); *Cid v. S.D. Dep't of Social Servs.*, 598 N.W.2d 887, 892 (S.D. 1999) (resolving an equal protection claim by reasoning that South Dakota had not "adopted any rule or legislation that is in conflict with national policies regarding alienage, or that places any burdens, other than those contemplated in the federal law, on those subject to its provisions").

23. This recent emphasis on federalism over rights may be emblematic of broader tendency in immigration law and discourse. As Kevin Johnson has observed, immigration debates are "often couched in . . . federalism-styled arguments," obscuring that "the core of the public debate over immigration enforcement concerns the rights of people and how they will be treated by government." Johnson, *supra* note 11, at 638.

24. See *Mathews v. Diaz*, 426 U.S. 67, 86–87 (1976) ("[T]he Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization."); see also *Rodriguez v. United States*, 169 F.3d 1342, 1347 (11th Cir. 1999) (noting a different "relationship between aliens and the States rather than between aliens and the Federal Government"); *City of Chi. v. Shalala*, 189 F.3d 598, 605 (7th Cir. 1999) ("[T]he deference owed to Congress in matters of aliens' status within its borders does not apply to state classification of aliens"), *cert. denied*, 529 U.S. 1036 (2000).

25. See Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 *FORDHAM L. REV.* 155, 158 (2014) (noting that in spite of the settled principle of congruence requiring that equal protection be interpreted the same way when applied to federal and state action, alienage discrimination is "one bastion" where "noncongruence still remains, sometimes unnoticed, within equal protection doctrine").

authority over immigration matters,<sup>26</sup> while courts have traditionally treated state laws employing the same or similar distinctions as suspect classifications that must meet the demands of strict scrutiny.<sup>27</sup>

But recently, this non-congruence is disappearing from equal protection doctrine in the realm of immigrants' rights as courts synchronize their analysis of federal and state alienage classifications—a largely under-theorized development.<sup>28</sup> Last year, divided panels of the First and the Ninth Circuits<sup>29</sup> followed

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26. *Mathews*, 426 U.S. at 86–87.

27. *Graham v. Richardson*, 403 U.S. 365, 367 (1971).

28. Indeed, recent accounts of equal protection doctrine involving immigrants assume an ongoing—and some argue incoherent—non-congruence. *See Soucek, supra* note 25, at 159 (arguing that not only has the Court applied more heightened scrutiny to state cases than federal cases, but also that the nature of that scrutiny has varied); Cox, *supra* note 10, at 352 (arguing that “[c]ourts have struggled for decades to develop a coherent approach to evaluating alienage rules” and have “for the most part . . . failed: in some cases courts have suggested that alienage classifications are suspect and trigger heightened scrutiny, but in other cases courts have suggested that some alienage restrictions are due great judicial deference”). Clare Huntington has noted that growing recognition of “immigration federalism”—that is, acceptance of some measure of shared power between federal and state governments with respect to the regulation of immigrants—likely means an end to non-congruent equal protection in the immigration context, but acknowledges that what that means for individual rights has not yet been explored. *See Huntington, supra* note 10, 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.”). Earlier scholarship argued that the congruence principle in equal protection doctrine established in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) warrants strict scrutiny of “federal alienage classifications in the same manner as state classifications in the realm of alienage law and fundamental rights.” Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After Adarand Constructors, Inc. v. Peña*, 76 OR. L. REV. 425, 452 (1997). But this scholarship never contemplated what is currently occurring in the doctrine: a collapsing of the different tiers of scrutiny toward a relaxed and unified standard for both federal and state alienage classifications. *Id.*

29. *See Bruns v. Mayhew*, 750 F.3d 61, 70 (1st Cir. 2014) (“[W]e therefore conclude that if Maine can be said to have ‘discriminated’ at all, it only did so on the basis of federal Medicaid eligibility, a benign classification subject to mere rational basis review.”); *Korab v. Fink*, 748 F.3d 875, 887 (9th Cir. 2014) (finding rational basis review applies when the state was “merely following the

a 2004 decision by the Tenth Circuit<sup>30</sup> and upheld state denials of public benefits to noncitizens after applying rational basis review. The state courts are split: some have followed the federal courts or adopted similar approaches,<sup>31</sup> while others have adhered to *Graham* and struck down denials of public benefits to immigrants as violations of equal protection after applying strict scrutiny.<sup>32</sup>

In addressing this developing, though not inevitable, collapse of the dichotomized approach to equal protection involving state and federal legislation classifying on the basis of alienage status, this Article seeks to clarify the appropriate role that federalism should play in equal protection doctrine<sup>33</sup>—as an interpretive tool to gauge presumptively acceptable justifications for distinguishing on the basis of migrants’ immigration status or as a lens through which to identify arbitrary governmental discrimination, but not as a preemption-like doctrine that makes the validity of state laws contingent upon congressional policy choices.<sup>34</sup>

Part II establishes *Graham*’s theory of equality for immigrants and its disconnect with the recent lower court developments. Part III theorizes the ways in which federalism concerns might matter to states’ equal protection obligations to lawfully present immigrants and examines the influence of these various accounts on the Supreme Court’s equal protection jurisprudence. Here, the Article shows that in contrast to the recent trend, in previous periods, the Supreme Court emphasized the structural concerns of federalism to reinforce, rather than constrict, immigrants’ rights to equal treatment by the states. Part IV describes the recent erosion of the divergent standards applicable to federal and state cases involving immigration

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federal direction set forth by Congress under the Welfare Reform Act”).

30. *Soskin v. Reinertson*, 353 F.3d 1242 (10th Cir. 2004).

31. *Hong Pham v. Starkowski*, 16 A.3d 635, 661 (Conn. 2011); *Guaman v. Velez*, 74 A.3d 931, 951 (N.J. App. Div. 2013), *aff’d*, 221 N.J. 213 (2015) (per curiam).

32. *Finch v. Commonwealth Health Ins. Connector Auth.* (*Finch I*), 946 N.E.2d 1262, 1280 (Mass. 2011); *Finch v. Commonwealth Health Ins. Connector Auth.* (*Finch II*), 959 N.E.2d 970, 973 (Mass. 2012); *Aliessa v. Novello*, 754 N.E.2d 1085, 1096–98 (N.Y. 2001); *Ehrlich v. Perez*, 908 A.2d 1220 (Md. 2006).

33. *See infra* Part V.B. (proposing this approach in detail).

34. *Id.*

status, the role of federalism in this development, and the effect: the supplanting of norms protective of individual rights with those focused on constitutional structure. Part V identifies federalism's place in equal protection analysis involving migrants, defines its potentially disruptive impact, and offers a prescription.

## II. *The Disconnect: A Suspect Classification with Deference*

### A. *Graham's Theory of Equality*

In *Graham v. Richardson*, the Supreme Court declared for the first time that alienage is a suspect classification, such that state laws distinguishing between lawfully present migrants and citizens are presumptively discriminatory and must meet the requirements of strict scrutiny.<sup>35</sup> The case involved the legality of a Pennsylvania law that denied public assistance to legal residents and an Arizona law that denied federally subsidized benefits to legal residents who had not lived within the United States for fifteen years.<sup>36</sup> Applying strict scrutiny, the Court struck down both laws as violations of equal protection, reasoning that a state's fiscal interests and desire to preserve limited welfare benefits for its own citizens did not justify this invidious distinction between residents.<sup>37</sup>

Although *Graham* is not one of the Court's more celebrated equal protection decisions, Harold Koh has described it as an "equal protection landmark" for good reason.<sup>38</sup> It invoked *United States v. Carolene Products Co.*<sup>39</sup> for the first time to declare that "discreteness and insularity" entitled a minority group to special constitutional protection.<sup>40</sup>

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35. *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

36. *Id.* at 366–68.

37. *Id.* at 374–75.

38. Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 *HAMLIN L. REV.* 51, 59 (1985).

39. 304 U.S. 144, 152–53 n.4 (1938).

40. Koh, *supra* note 38, at 59 (quoting Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 *COLUM. L. REV.* 1087, 1087 n.4 (1982)). This was the first and only time the Court recognized a group as a suspect class because it was

Under the *Carolene Products* rubric, recognition of a group as a suspect class expresses how disfavored and minority status renders that group powerless to vindicate their interests through the political process.<sup>41</sup> *Graham*, however, did not engage in any discussion of immigrants' vulnerability or history of discrimination. Perhaps considering immigrants' categorical exclusion from voting as self-evident political powerlessness,<sup>42</sup> the Court described "aliens as a class" as a "prime example" of a group for which "heightened judicial solicitude is appropriate."<sup>43</sup>

That unanimous holding is particularly compelling—and perhaps surprising—given that it came during a period when the Court otherwise endeavored to contain the scope of its equal

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both "discrete" and "insular" under *Carolene Products*. League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 541 (2007) (Gilman, J., dissenting) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290, n.28 (1978)). Indeed, as the Court itself has noted, although it has never held that "discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious," "these elements have been relied upon in recognizing a suspect class in only one group of cases, those involving aliens." Regents of the Univ. of Cal., 438 U.S. at 290 n.28 (citing *Graham v. Richardson*, 403 U.S. 365, 372 (1971)).

41. See *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) (stating "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'" (quotations and citation marks omitted) (citing *Graham*, 403 U.S. at 367)); see also Darren Lenard Hutchinson, "Not Without Political Power": *Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 984–91 (2014) (critiquing the equal protection doctrine's process-oriented approach to evaluating political powerlessness of suspect classes).

42. Daniel Kanstroom has argued that, in spite of their inability to vote, non-citizens participate in the polity in ways that are essential to the "politico-legal legitimacy" of constitutional democracy, including through litigation. See Daniel Kanstroom, "Alien" Litigation as *Polity-Participation: The Positive Power of a "Voteless Class of Litigants"*, 21 WM. & MARY BILL RTS. J. 399, 400, 439 (2012) ("While exclusion from voting, intimidation-by-deportation, and even a certain moral marginalization have surely limited noncitizens' ability to leverage political power, alternative pathways have often been found to achieve voice and politico-legal influence, and to develop and sustain new conceptions of justice itself.").

43. The Court reasoned 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 371–72 (citing *Carolene Prods. Co.*, 304 U.S. at 152–53 n.4).

protection doctrine,<sup>44</sup> and in a case in which the Court could have easily rested upon its separate preemption holding.<sup>45</sup> Moreover, unlike earlier cases,<sup>46</sup> *Graham*'s equality analysis was devoid of structural concerns; that is, the decision did not depend, or seek to bolster itself, upon the federal government's exclusivity over immigration matters.<sup>47</sup> Instead, underlying *Graham*'s conception of alienage as a suspect status is a strong normative vision of lawfully present noncitizens as "respected, responsible and participating member[s]" of society,<sup>48</sup> who deserve equal treatment.

To be sure, *Graham* was not explicit about this normative view; it did not even articulate with any precision its justification for treating alienage as a suspect classification.<sup>49</sup> Nevertheless, in explaining why Arizona's and Pennsylvania's laws did not meet the demands of strict scrutiny, the Court emphasized that lawfully present immigrants are similarly situated to citizens *vis a vis* state governments, and thus entitled to similar treatment.<sup>50</sup>

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44. See Koh, *supra* note 38, at 59–60 (noting that at the time, the Court was "refusing to name new suspect classifications, or to create new 'fundamental rights'"). Koh further notes that looking back at *Graham* as the Justices saw it in 1971, it appears an unlikely candidate as an equal protection landmark. The parties addressed equal protection as the fourth of four arguments challenging the statutes' validity and devoted only five pages of their brief to the argument. *Id.* at 58.

45. *Graham*, 403 U.S. at 379–80 (describing the basis for the Court's separate preemption holding); see Koh, *supra* note 38, at 59–60 (describing Justice Blackmun's success "in bringing state classifications that discriminate against resident aliens under judicial scrutiny without provoking a dissent" as surprising).

46. See *infra* Part II.A–B (discussing *Truax v. Raich*, 239 U.S. 33 (1915) and *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948)).

47. Indeed, *Graham*'s justification for applying strict scrutiny to the state alienage cases, and for concluding that Pennsylvania's and Arizona's anti-immigrant measures did not survive that scrutiny, never relied upon federal supremacy in immigration matters. *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

48. Koh, *supra* note 38, at 98–99 (quoting Kenneth Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977)).

49. See Soucek, *supra* note 25, at 174 (stating that the Court did not provide much explanation for the classification).

50. See *Graham*, 403 U.S. at 376 (noting that the state laws at issue

The Court noted that, like citizens, lawful permanent residents contribute financially to the state through both work and taxes, may have longstanding connections to the state, and share burdens of community membership similar to citizens, such as being called into the armed services.<sup>51</sup> The Court therefore reasoned that excluding this group of immigrants from a fair share of state resources on account of their alienage is “particularly inappropriate and unreasonable.”<sup>52</sup>

It is this aspect of *Graham*—declaring the inherent inequality of a system where migrants shoulder the responsibilities of community membership, but not the benefits of equal treatment—which, in spite of its uncertain basis for treating alienage as a suspect status, makes it unmistakably an equality decision.<sup>53</sup> It provides the most significant window into the court’s normative visions of migrants as equal community members, and a likely explanation for why it unanimously chose not to resolve the case exclusively on preemption grounds.

### B. *Graham’s Limitations and Longevity*

In decisions subsequent to *Graham*, the Court offered a variety of explanations for its recognition of alienage as a suspect classification. The Court alternately emphasized immigrants’ similarity to citizens,<sup>54</sup> their political powerlessness,<sup>55</sup> the historic

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affected “two classes of needy persons, indistinguishable except with respect to whether they are or are not citizens of this country”).

51. *Id.*

52. *Id.*

53. In a later case, *Toll v. Moreno*, Justice Blackmun, *Graham’s* author, explained that the Court’s decision recognizing alienage as a suspect status was partly based upon its acknowledgment that distinctions drawn on the basis of alienage-status are likely to reflect historic “antipathy” toward immigrants. 458 U.S. 1, 22 (1982) (Blackmun, J., concurring).

54. For example, in *In re Griffiths*, the Court noted the similarity of “resident aliens” to citizens in justifying strict scrutiny. *See* 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”).

55. In *Foley v. Connelie*, the Court explained *Graham’s* designation of alienage as a suspect classification on grounds of noncitizen’s political powerlessness, noting that *Graham’s* “heightened judicial solitude . . . [was]

prejudice visited upon them as a group because of characteristics beyond their control,<sup>56</sup> and even structural concerns about state conflicts with federal immigration policy.<sup>57</sup> Although the lower courts have selectively relied upon these explanations to reach divergent results in cases involving lawfully present non-immigrants,<sup>58</sup> the Supreme Court's various explanations should

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deemed necessary since aliens—pending their eligibility for citizenship—have no direct voice in the political processes.” 435 U.S. 291, 294 (1978) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938)).

56. See *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) (citing *Graham* and noting that “[s]ome classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective” and that “[c]lassifications treated as suspect tend to be irrelevant to any proper legislative goal”).

57. In *Foley v. Connelie*, the Court suggested an additional justification beyond immigrants' political powerlessness. 435 U.S. at 295. The Court stated that the state laws at issue in *Graham* and its progeny warranted close judicial scrutiny because “they took position[s] seemingly inconsistent with the congressional determination to admit the alien to permanent residence.” In spite of *Foley's* description, there is, however, little evidence that federalism concerns factored into *Graham's* equal protection holding at all. In making this observation, *Foley* cites *Graham's* separate preemption holding. *Id.* (citing *Graham v. Richardson*, 403 U.S. 365, 377–78 (1971)).

58. In particular, divergent views regarding the significance of the Court citing lawful permanent residents' “similarity” to citizens in *Graham* has resulted in a circuit split as to whether strict scrutiny applies to lawfully present nonimmigrants, including individuals with student and visitor visas. Compare *Van Staden v. St. Martin*, 664 F.3d 56, 59 (5th Cir. 2011) (concluding that Louisiana's denial of nursing licenses to nonimmigrants as a class did not warrant strict scrutiny under *Graham* because unlike lawful permanent residents, nonimmigrants are not similarly situated to citizens), *LeClerc v. Webb*, 419 F.3d 405, 418, 421 (5th Cir. 2005) (applying rational basis review to a Louisiana law that rendered lawfully present nonimmigrants ineligible to take the Louisiana Bar Exam after concluding that nonimmigrants, unlike lawful permanent residents, are not “similarly situated to citizens in their economic, social, and civic (as opposed to political) conditions”), and *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 533, 536 (6th Cir. 2007) (agreeing with *LeClerc* that lawful permanent residents are similar to citizens in that “they pay taxes, support the economy, serve in the armed forces, and are entitled to reside permanently in the United States” but that nonimmigrants are not, such that a Tennessee law making lawfully present nonimmigrants ineligible for drivers' licenses should be reviewed under rational basis scrutiny), with *Dandamudi v. Tisch*, 686 F.3d 66, 72, 75 (2d. Cir. 2012) (applying strict scrutiny and striking down a New York licensing statute that excluded lawfully present nonimmigrants from the pharmacy profession after rejecting the Fifth

at most suggest that there are multiple good reasons for designating alienage as a suspect classification.<sup>59</sup>

In fact, in spite of its ambiguity, the Supreme Court has never retreated from *Graham*'s recognition that lawfully present migrants are entitled to equal treatment by the states when they distribute state resources and benefits or regulate economic activity. Indeed, in the years after *Graham*, the Court has continued to closely scrutinize state laws singling out immigrants for special burdens and economic disadvantages,<sup>60</sup> even while recognizing two significant limitations upon its equal protection holding.

### *I. The Political Function Exception*

Only two years after *Graham*, the Court recognized that strict scrutiny might not always apply to state alienage classifications. In 1973 in *Sugarman v. Dougall*,<sup>61</sup> the Court recognized that states could constitutionally deny noncitizens access to certain state democratic political institutions because noncitizens, who cannot vote, have no legitimate claim to equal

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and Sixth Circuits' view that under *Graham* the similarities between citizens and aliens "articulate[d] a test for determining when state discrimination against any one subclass of lawful immigrants is subject to strict scrutiny" and concluding that, in any event, nonimmigrants are similar to citizens).

59. *Plyler*, 457 U.S. at 216 n.14 (citing "[s]everal formulations" that explain the Court's "treatment of certain classifications as 'suspect'" including the historic prejudice visited upon vulnerable groups, that classifications treated as suspect tend to be irrelevant to any proper legislative goal, and certain group's political powerlessness).

60. See *In re Griffiths*, 413 U.S. 717, 718–22 (1993) (invalidating a Connecticut statute restricting the bar exam to citizens); *Bernal v. Fainter*, 467 U.S. 216, 227–28 (1984) (invalidating a Texas statute requiring that notaries public be U.S. citizens); *Nyquist v. Mauclet*, 432 U.S. 1, 7–12 (1977) (invalidating a statute barring certain resident non-citizens from state financial assistance for higher education); *Exam. Bd. Eng'rs, Architects & Surveyors v. De Otero*, 426 U.S. 572, 602 (1975) (striking state laws preventing resident non-citizens from obtaining engineering licenses); *Sugarman v. Dougall*, 413 U.S. 634, 646 (1973) (invalidating a New York statute barring employment of non-citizens in the state's classified competitive civil service).

61. 413 U.S. 634, 647–49 (1973).

participation in this arena.<sup>62</sup> *Sugarman* articulated what later became known as the political function exception—a doctrine that led the Court in a series of cases in the late 1970s and early 80s to uphold under rational basis review a variety of state laws excluding noncitizens from public employment.<sup>63</sup>

Significantly, in recognizing this exception to *Graham*, *Sugarman* also signaled the end to Court’s separation of federalism concerns from equal protection analysis involving state alienage restrictions. The Court’s justification for modulating its equal protection scrutiny in cases involving state political functions rested heavily on federalism concerns, albeit not respect for the federal immigration power, but rather, states’ Tenth Amendment power to regulate elections and define their political community.<sup>64</sup>

The *Sugarman* Court described this state power broadly to include “not only” the selection of voter qualifications, but also decisions about eligibility for “state elective or important nonelective executive, legislative, and judicial positions.”<sup>65</sup> The Court reasoned that officers who formulate, execute, or review public policy “perform functions that go to the heart of representative government.”<sup>66</sup> Accordingly, when states exclude

62. *Foley v. Connelie*, 435 U.S. 291, 296 (1978) (citing *Sugarman*, 413 U.S. at 647–49).

63. Although *Sugarman* gave life to the political function exception, in resolving that particular case, the Court struck down a provision of a New York law that conditioned eligibility for permanent state civil service positions on citizenship. *Sugarman*, 413 U.S. at 646. The Court reasoned that the blanket ban on employment of noncitizens had “little, if any relation” to a state interest in preserving its political institutions. *Id.* at 646–47.

64. *See Sugarman*, 413 U.S. at 647

Just as the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections, (e)ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen. Such power inheres in the State by virtue of its obligation, already noted above, “to preserve the basic conception of a political community.”

(internal quotation marks and citations omitted).

65. *Id.*

66. *Id.* According to the Court, a state has the prerogative to exclude noncitizens “from participation in its democratic political institutions” on

noncitizens from such functions and the Court is therefore presented “with matters resting firmly within a State’s constitutional prerogatives,” *Sugarman* suggested the Court’s scrutiny would “not be so demanding.”<sup>67</sup>

Not long after, the Court confronted a slew of equal protection challenges to state laws excluding immigrants from public employment. The Court upheld most of the laws under a deferential rational basis scrutiny.<sup>68</sup> For example, it upheld laws excluding lawful permanent residents from employment as state troopers in *Foley v. Connelie*,<sup>69</sup> public school teachers in *Ambach v. Norwich*,<sup>70</sup> and probation officers in *Cabell v. Chavez-Salido*.<sup>71</sup> In each case, the Court was sharply divided.<sup>72</sup> Although the dissenting justices did not dispute that alienage status could justify the exclusion of noncitizens from voting and related political functions, they criticized the majority’s acceptance of a wide range of public employment involving non-discretionary decision-making as actually serving such functions. For example, in his dissent in *Foley*, Justice Stevens criticized the Court’s political function cases as sanctioning discrimination that perpetuated political patronage that necessarily and historically excluded noncitizens.<sup>73</sup>

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account of its historic and constitutional “responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders.” *Id.* at 648.

67. *Id.*

68. *See, e.g.*, *Cabell v. Chavez-Salido*, 454 U.S. 432, 444 (1982) (upholding a citizenship requirement for probation officers); *Ambach v. Norwich*, 441 U.S. 68, 80 (1979) (upholding a citizenship requirement for public school teachers); *Foley v. Connelie*, 435 U.S. 291, 299–300 (1978) (upholding a citizenship requirement for police officers).

69. 435 U.S. 291, 296 (1978).

70. 441 U.S. 68, 73–74 (1979) (affirming “the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government”).

71. 454 U.S. 432, 439 (1982).

72. In *Foley*, the decision was 6–3, and in *Ambach* and *Cabell*, the Court divided 5–4.

73. *See Foley*, 435 U.S. at 308–09 (Stevens, J., dissenting) (“The widespread exclusion of aliens from such positions today may well be nothing more than a vestige of the historical relationship between nonvoting aliens and a system of

Debate about the political function cases and their impact on *Graham's* theory of equality continued years later, even as the Court moved away from equal protection as the primary means of analyzing state alienage classifications. Chief Justice Rehnquist, dissenting as a then-Associate Justice in *Toll v. Moreno*,<sup>74</sup> for example, later questioned whether immigrants' political powerlessness was a "legitimate reason for treating aliens as a 'suspect class,'" given that the Court had also relied upon this very characteristic to justify state restrictions excluding noncitizens from state political functions.<sup>75</sup> He contended that this dualism reflected the Court's growing discomfort with alienage as a suspect classification,<sup>76</sup> a proposition sharply disputed by *Graham's* author, Justice Blackmun, in response.<sup>77</sup> Justice Blackmun noted the multiple reasons for treating alienage as a suspect status and rejected the notion that the political function cases are incompatible with that recognition.<sup>78</sup>

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distributing the spoils of victory to the party faithful.”).

74. 458 U.S. 1 (1982).

75. *Id.* at 41 (Rehnquist, J., dissenting); see also cases cited *supra* note 68 (upholding various citizenship requirements).

76. See *Toll v. Moreno*, 458 U.S. 1, 42 n.12 (1982) (“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.”).

77. Justice Blackmun responded that *Graham* recognized that lawfully present noncitizens are similarly situated to citizens “for most legislative purposes,” such that distinctions drawn on the basis of alienage-status are likely to reflect historic “antipathy” toward immigrants. *Id.* at 22 (Blackmun, J., concurring). He reasoned that the political function exception did not undermine these fundamental principles because noncitizens’ political powerlessness only heightened the need for judicial protection given migrants’ inability to respond to such antipathy through the political process. *Id.* at 23. He further noted that the reason for a discrete and insular minority’s exclusion from political power has never been significant; “instead, the fact of powerlessness is crucial, for in combination with prejudice it is the minority group’s inability to assert its political interests that ‘curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.’” *Id.* (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938)).

78. *Id.* at 19–22 (“[T]he Court always has recognized that aliens may be denied use of the mechanisms of self-government, and all of the alienage cases have been decided against the backdrop of that principle.”).

He reasoned that “[i]f this dual aspect of alienage doctrine is unique, it is because aliens constitute a unique class.”<sup>79</sup>

The political function cases can fairly be criticized on their own terms. To be sure, it is difficult to reconcile the Court’s various conclusions as to whether particular public employees “perform functions that go to the heart of representative government”<sup>80</sup>—for instance, that a probation officer is more essential to a state’s political community than a lawyer.<sup>81</sup> But the exception itself does not undermine *Graham*’s theory of immigrants’ rights. In fact, it reinforces it.<sup>82</sup>

As Justice Blackmun explained in his opinion in *Toll*, that the Constitution permits the exclusion of noncitizens “from participating in the process of self-government makes particularly profound the need for searching judicial review of classifications grounded on alienage” status.<sup>83</sup> Indeed, migrants’ political powerlessness “overcomes the usual presumption that even improvident decisions affecting minorities will eventually be rectified by the democratic

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79. *Toll*, 458 U.S. at 22.

80. *Id.* According to the Court, recognizing a state’s prerogative to exclude noncitizens “from participation in its democratic political institutions” simply acknowledges the state’s historic and constitutional “responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders.” *Id.* at 648.

81. *Compare* *Cabell v. Chavez-Salido*, 454 U.S. 432, 444 (1982) (upholding a citizenship requirement for probation officers), *with In re Griffiths*, 413 U.S. 717, 726–27 (1973) (applying strict scrutiny and striking down under the Equal Protection Clause a Connecticut law barring lawful permanent residents from taking the bar exam), *and Sugarman v. Dougall*, 413 U.S. 634, 646 (1973) (invalidating a New York statute barring employment of non-citizens in the state’s classified competitive civil service). *See also* *Ambach v. Norwick*, 441 U.S. 68, 81 (1979) (Blackmun, J., dissenting) (describing inconsistent outcomes in political function cases).

82. *See Toll v. Moreno*, 458 U.S. 1, 22 (1982) (Blackmun, J., concurring) (reasoning that the Court’s political function decisions “pointedly have declined to retreat from the position that restrictions on lawfully resident aliens that primarily affect economic interests are subject to heightened judicial scrutiny,” “reflect[ing] the Court’s proper judgment that the alienage cases are not irreconcilable or inconsistent with one another”).

83. *See id.* at 23 (reasoning that “the fact of powerlessness is crucial, for in combination with prejudice it is the minority group’s inability to assert its political interests that curtails the operation of those political processes ordinarily to be relied upon to protect minorities”) (internal quotations and citation omitted).

process.”<sup>84</sup> As Daniel Kanstroom has stated, “[t]he problem for noncitizens is deeper than minority status[.]. They do not get out-voted; they cannot vote at all.”<sup>85</sup> While this relationship does not undermine the rationale for either doctrinal thread, commentators<sup>86</sup> and jurists alike,<sup>87</sup> nevertheless, have pointed—unconvincingly—to this exceptionalism as evidence that *Graham*’s theory of equality is untenable.

The political function doctrine, however, is not a case of the exception swallowing the rule. Rather, two distinct and reconcilable rules inform the doctrine. Courts permit discrimination against non-citizens in the context of state laws relating to political participation because of states’ sovereign authority to determine membership in their political community. Outside of that realm, however, citizenship most often is irrelevant to other state legislative purposes.

## 2. *The Equal Protection Dichotomy*

The second major qualification of *Graham* came only a few years later in *Mathews v. Diaz*,<sup>88</sup> when the Court held that *Graham*’s recognition of alienage as a suspect classification did

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84. *Id.*

85. Kanstroom, *supra* note 42, at 436.

86. *See* Cox, *supra* note 10, at 352 (charging that the Court’s alienage doctrine is incoherent because “in some cases courts have suggested that alienage classifications are suspect and trigger heightened scrutiny, but in other cases courts have suggested that some alienage restrictions are due great judicial deference”).

87. *See, e.g.*, *Sugarman v. Dougall*, 413 U.S. 634, 649, 658 (1973) (Rehnquist, J., dissenting) (questioning *Graham* and criticizing the *Sugarman* majority’s reliance upon *Graham*’s reasoning that migrants and citizens are “indistinguishable for purposes of equal protection analysis”); *Toll*, 458 U.S. at 41 (Rehnquist, J. dissenting) (“If the exclusion of aliens from the political processes is legitimate, as it clearly is, there is reason to doubt whether political powerlessness is any longer a legitimate reason for treating aliens as a ‘suspect class’ deserving of ‘heightened judicial solicitude.’”); *Korab v. Fink*, 748 F.3d 875, 889 (9th Cir. 2014) (Bybee, J., concurring) (“A review of the history of alienage jurisprudence, with a particular review of *Graham* . . . suggests that it is time to rethink the doctrine.”).

88. 426 U.S. 67 (1975).

not apply to laws enacted by Congress.<sup>89</sup> The Court declined to view federal laws distinguishing between citizens and noncitizens as presumptively invidious, given Congress's "broad power over naturalization and immigration."<sup>90</sup> In light of the federal government's responsibility for the regulation of migrants, rooted in its authority over foreign affairs, the Court declined to encroach upon congressional decisions regarding whether and when the nature of an immigrant's relationship with the United States might warrant an equal share of public resources.<sup>91</sup>

In language that engendered—and has since long been cited in preserving—an "equal protection dichotomy" in cases involving alienage status, the Court identified the divergent outcome in *Graham* as consistent, and actually supportive, of the Court's decision in *Mathews*.<sup>92</sup> The Court reasoned that *Graham*'s equal protection analysis "involved significantly different considerations because it concern[ed] the relationship between aliens and the States rather than between aliens and the Federal Government."<sup>93</sup> According to the Court, "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."<sup>94</sup>

Unlike *Graham*, *Mathews*' equal protection analysis turned upon structural concerns. The Court disclaimed a meaningful judicial role in checking the political branches' decisions related to immigration policy, reciting the familiar contours of the plenary power doctrine: that "[t]he reasons that preclude judicial

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89. *See id.* at 84–85 (distinguishing *Graham* and applying rational basis review to a federal Medicare restriction based on alienage status after 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").

90. *Id.* at 79–80.

91. *Id.* The Court declared it "unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence." *Id.* at 83.

92. *Id.* at 84–85.

93. *Id.*

94. *Id.* at 85.

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.”<sup>95</sup>

At the time, scholars criticized *Mathews* for accepting that Congress’s alienage-based restriction on benefits challenged in the case actually constituted an immigration regulation.<sup>96</sup> In the decades that followed, however, courts and commentators have generally accepted the dichotomy between the equal protection obligations of the state and federal governments with respect to migrants as a justifiable distinction based upon their respective powers.<sup>97</sup> In fact, the divergent standards have comfortably existed as an anomaly within equal protection doctrine more broadly, which, outside the context of alienage status, requires congruence between the equal protection requirements applicable to federal and state governments through the Fifth and Fourteenth Amendments.<sup>98</sup> Indeed, in *Adarand Constructors, Inc.*

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95. *Id.* at 81–82.

96. See Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1066 (1994) (discussing criticism); see also Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 334 (1997) (arguing that the restriction on Medicare benefits in *Mathews v. Diaz*, “was not in any obvious way concerned with immigration”); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT’L L. 862, 869 (1989) (arguing that “the courts have wrongly assumed that every federal regulation based on alienage is necessarily sustainable as an exercise of the immigration power”).

97. See Bosniak, *supra* note 96, at 1105 (noting that “[o]ver time . . . the distinction between the two cases has come to be treated as largely self-evident” and commentators have accepted “the contrast as the inevitable result of the division of labor between the states and the federal government”); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1439 (1995) (“Congressional discrimination receives deference because it is presumed to reflect the weighing of factors that the states are neither likely nor constitutionally competent to assess.”).

98. Specifically, *Adarand Constructors v. Pena* confirmed that the guarantees of equal protection mean the same thing under the Fifth and Fourteenth Amendments—what Justice O’Conner called, in the context of race-based classifications, “congruence.” See 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”). In *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), the Court earlier stated that because “the Constitution prohibits the states from maintaining

*v. Peña*,<sup>99</sup> the case in which the Court clarified this principle of “congruence,” Justice O’Conner referenced the special deference to federal immigration regulations as an appropriate exception to the general rule of congruence.<sup>100</sup>

In the end, *Graham* survived two significant limitations upon its holding.<sup>101</sup> One might expect its requirement of strict scrutiny to be insulated from shifts in federal immigration policy, particularly in light of its characterization of alienage as a “prime example” of *Carolene Products* vulnerability,<sup>102</sup> and the Court’s discussion of state equal protection obligations to lawfully present immigrants separate and apart from federalism and supremacy concerns. As the following discussion demonstrates, however, within a recent body of federal and state court decisions that has not been the case. The following section explores this disconnect and offers some initial explanations for it.

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racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”

99. 515 U.S. 200, 217–18 (1995).

100. Indeed, the Court has expressly accepted non-congruence in the alienage cases. *See id.* (“We do not understand a few contrary suggestions appearing in cases in which we found special deference to the political branches of the Federal Government to detract from this general rule.” (citing *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 101–02 n.21 (1976) (discussing federal power over immigration))). Moreover, even after *Mathews*, the Court continued to cite *Graham* as an example of a suspect classification requiring heightened judicial scrutiny. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982) (citing *Graham*’s requirement of strict scrutiny); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978) (citing *Graham* when discussing suspect classifications).

101. As Linda Bosniak has noted, in subsequent cases “the Court has reaffirmed the equality analysis” and its vision of aliens as the proper “subjects of equality.” *See Bosniak, supra* note 96, at 1056, 1107 (citing *In re Griffiths*, 413 U.S. 717, 729 (1973)) (holding that Connecticut’s wholesale ban of resident non-citizens from admission to the bar violates the Equal Protection Clause); *Sugarman v. Dougall*, 413 U.S. 634, 646 (1973) (striking down a New York law that allowed only citizens to hold permanent positions in the competitive class of the state civil service).

102. *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938)).

*B. Federalism on the Rise*

In spite of *Graham*, recently before the lower courts, equal protection jurisprudence addressed to alienage status has focused less on rights and more on constitutional structure, operating much like preemption doctrine in that the validity of state laws is largely determined not by the state's justification, but rather by congressional policy choices. State classifications that treat lawfully present immigrants differently from citizens on the basis of alienage status are likely to be upheld if a state's restriction is consistent with federal immigration law or if Congress purports to "sanction" the state's action.<sup>103</sup> Conversely, courts have cited conflicts with federal immigration policy in striking down state alienage classification on equal protection grounds.<sup>104</sup>

Though this trend has wider reach, the prime example of federalism's recent impact in equal protection doctrine involving lawfully present immigrants is the line of cases interpreting the 1996 welfare reform act, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).<sup>105</sup> Several courts have viewed PRWORA's authorization for states to deny state-funded public benefits to immigrants as dispositive of the equal protection inquiry.<sup>106</sup> As a result, these decisions have

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103. See cases cited *supra* note 87 (providing examples where courts found that the challenged law was consistent with federal immigration law or that Congress sanctioned the state's action).

104. See, e.g., *Dandamudi v. Tisch*, 686 F.3d 66, 69 (2d Cir. 2012) (applying strict scrutiny to a New York licensing statute that excluded lawful nonimmigrants from the pharmacy profession because the regulatory scheme "seeks to prohibit some legally admitted aliens from doing the very thing the federal government indicated they could do when they came to the United States—work").

105. Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA or Welfare Reform Act of 1996), Pub. L. No. 104-193, 110 Stat. 2105 (1996).

106. See, e.g., *Soskin v. Reinertson*, 353 F.3d 1242, 1255 (10th Cir. 2004) (upholding Colorado's alienage-based denial of healthcare benefits to lawful permanent residents based upon PRWORA); *Korab v. Fink*, 748 F.3d 875, 887 (9th Cir. 2014) (upholding Hawaii's limitation of public benefits available to resident immigrants because of PRWORA); *Bruns v. Mayhew*, 750 F.3d 61, 72 (1st Cir. 2014) (upholding Maine's alienage-based denial of public benefits because of PRWORA).

upheld alienage-based restrictions in state public benefits schemes under a rational basis scrutiny historically reserved for the federal government's immigration regulations.<sup>107</sup>

For example, in 2004, in *Soskin v. Reinertson*,<sup>108</sup> a divided panel of the U.S. Court of Appeals for the Tenth Circuit upheld a Colorado law denying healthcare benefits to lawful permanent residents on equal terms as citizens. It did so under rational basis scrutiny, reasoning that *Graham* did not dictate the result in light of the “specific Congressional authorization for the state’s action, the PRWORA.”<sup>109</sup> In 2014, the First<sup>110</sup> and Ninth Circuits<sup>111</sup> cited *Soskin* and upheld similar laws limiting public benefits to immigrants based upon alienage status, after applying rational basis scrutiny.

Although the circuit courts reasoned that *Graham*'s vitality was not in question because it did not, according to the courts, address the impact of congressional action purporting to sanction states' differential treatment of lawfully present noncitizens<sup>112</sup>—this qualification actually minimizes—and misconstrues—a significant piece of *Graham*'s reasoning. Specifically, in *Graham*, the Supreme Court expressly rejected the argument that Congress could authorize alienage-based discrimination by the states, after Arizona argued that its imposition of an alienage-based durational residency requirement for welfare benefits was authorized by the Social Security Act of 1935.<sup>113</sup> The

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107. Cases discussed *infra* Part IV.

108. See 353 F.3d at 1255 (citing PRWORA and reasoning that if “a state determines that the burden” or providing state-funded benefits “is too high and decides against optional coverage, it is addressing the Congressional concern (not just a parochial state concern) that individual aliens not burden the public benefits system” (internal quotation marks and citation omitted)).

109. *Id.* at 1251.

110. *Bruns v. Mayhew*, 750 F.3d 61, 61 (1st Cir. 2014).

111. *Korab*, 748 F.3d at 875.

112. See *Bruns*, 750 F.3d at 66 (stating “the alienage-based distinction in this case does not originate purely from state legislation, unlike the restrictions struck down in *Graham*”); *Korab*, 748 F.3d at 882 (viewing Hawaii's post-PRWORA denial of healthcare benefits as presenting a hybrid case between *Graham*'s and *Mathews*'s “pristine examples of the bookends on the power to impose alien classifications”).

113. See *Graham v. Richardson*, 403 U.S. 365, 382 (1971) (refusing to construe the federal statutes cited by Arizona and Pennsylvania as

Court reasoned that “[a]lthough the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization, Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.”<sup>114</sup>

The convergence in equal protection scrutiny applicable to state and federal laws that has developed in spite of this reasoning thus exposes a potential crack in *Graham*’s foundation. Indeed, Judge Jay Bybee’s concurring opinion in the 2014 Ninth Circuit case, *Korab v. Fink*,<sup>115</sup> spotlights what he portrayed as a major fissure.

In addressing an equal protection challenge to Hawaii’s PRWORA-sanctioned denial of health care benefits to lawfully present state residents, Judge Bybee opined that courts should employ “preemption analysis instead of equal protection analysis in alienage cases,”<sup>116</sup> reincarnating earlier scholarly debates regarding which form of constitutional review should resolve challenges to state laws classifying on the basis of alienage status.<sup>117</sup> Citing the political function cases, the equal protection

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“authoriz[ing] discriminatory treatment of aliens at the option of the States” which would present “serious constitutional questions”).

114. *Id.* (citing *Shapiro v. Thompson*, 394 U.S. 618, 638–41 (1969)).

115. *See* 797 F.3d 572, 584 (9th Cir. 2014) (Bybee, J., concurring) (writing “separately to explain why the law of alienage remains so unclear and how we might better approach it”).

116. *See id.* at 585 (“The equal protection principle announced in *Graham* has proven unsustainable.”). Declaring equal protection doctrine involving alienage discrimination a “conundrum,” Judge Bybee charged that *Graham*’s theory of alien rights was “unsupportable” from the start given the Supreme Court’s unwillingness to impose the same equal protection obligations upon the Federal Government in accordance with *Bolling v. Sharpe*, 347 U.S. 497 (1954) (stating that it would be “unthinkable” if the equal protection obligations of the Federal Government under the Fifth Amendment were not coextensive with the equal protection obligations of the States). *Id.* at 888.

117. *See* Neuman, *supra* note 97, at 1430–31 (rejecting the argument that equal protection doctrine concerning immigrants is unduly complex and should “be abandoned and replaced by a federal preemption analysis”); Koh, *supra* note 38, at 87 (noting that recent commentators had “hailed federal preemption as the unseen solution to the ‘glaring doctrinal anomaly’ in the Court’s alienage jurisprudence” and “that preemption and equal protection have been described as ‘vying for predominance in the field of alienage’”).

dichotomy, and the more deferential scrutiny applicable to classifications based upon migrants' undocumented status, Judge Bybee opined that the *Graham* doctrine was unworkable because it has been "riddled with exceptions and caveats that make consistent judicial review of alienage classifications difficult."<sup>118</sup>

On the one hand, Judge Bybee's call to abandon equal protection analysis in favor of preemption is remarkable, given that the case involved a state's differential treatment of lawfully present residents and citizens in a state public benefits scheme—a classic *Graham* fact pattern, notwithstanding the added consideration of PRWORA. Even more so, Judge Bybee posed his dramatic proposition—doing away with equal protection analysis for lawfully present migrants—without demonstrating any actual incoherence in the alienage doctrine, beyond describing the existence of *Graham*'s exceptions.<sup>119</sup> This is an odd argument given that exceptions, in fact, can bring coherence to a rule that does not apply in every case. On the other hand, Judge Bybee's concurrence might be less a provocative entreaty to substitute preemption as the response to immigrant claims of unequal treatment and instead simply a candid description of what, in many instances, is already occurring—a variant of preemption posing as equal protection analysis.<sup>120</sup>

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118. *Korab v. Fink*, 797 F.3d 572, 585 (9th Cir. 2014) (Bybee, J., concurring).

119. For example, Judge Bybee posits that "[f]rom the outset, the *Graham* rule, simpliciter, was unsupportable" because it could never apply to the federal government, while *Bolling v. Sharpe*, 347 U.S. at 500, established that the federal and state equal protection obligations must be the same. See *Korab*, 797 F.3d at 589–90. But *Graham*'s rule was specifically addressed to migrants' right to equal treatment by the states regarding public resources and economic opportunities. The Court did not profess to create a rule that also applied to the federal government's immigration regulations, which are authorized, in part, by the federal government's exclusive authority to manage foreign affairs. The Court has concluded that congruence simply is not compelled when it comes to powers possessed exclusively by the federal government, but not the states. See *Adarand Constructors v. Peña*, 515 U.S. 200, 217–18 (1995) ("We do not understand a few contrary suggestions appearing in cases in which we found special deference to the political branches of the Federal Government to detract from this general rule." (citing *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 101–102 n.21 (1976) (federal power over immigration))).

120. See Heeren, *supra* note 11, at 374 ("Although courts are willing to enforce the federal government's power to preempt state immigration law and to deeply probe the rationality of immigration decisions, they are less likely to

Part III analyzes this recent influence of federalism in the new equal protection jurisprudence embodied by *Soskin*, and the decisions that have followed it, and demonstrates why Judge Bybee is wrong: federalism can play a meaningful role in equal protection doctrine involving alienage status without hollowing out the Fourteenth Amendment's anti-discrimination norms altogether in favor of the Supremacy Clause. That *Graham* might not apply in every alienage case is not a fatal flaw.

This disconnect between *Graham*'s promise of equality and the disruptive impact of federalism on recent equal protection jurisprudence in the realm of immigrants' rights has not received the critical attention it deserves. Scholarship has questioned the basis for distinguishing between federal immigration regulations and state "alienage" classifications, given the overlapping nature of laws regulating migrants' entry and exit, and their lives once present in the United States.<sup>121</sup> One commentator has analyzed how preemption and skepticism of agency decision-making have substituted for rights-based analysis, following a shift away from

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concede what was once a given—that immigrants are largely entitled to equal treatment.”).

121. Adam Cox describes immigration rules as selection rules governing who may enter or exit the country or “how we choose immigrants” and immigration regulation laws—referred to as “alienage” law when it comes to the states—or “how we treat those immigrants whom we have chosen.” Cox, *supra* note 10, at 370. Linda Bosniak describes the two domains as one of membership and personhood, or regulation “inside” immigration law, and regulation “outside.” Bosniak, *supra* note 96 at 1058. As Hiroshi Motomura has noted, these categories 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.” Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT’L L. 201, 202 (1994) [hereinafter *Immigration and Alienage*]. Vice versa, Motomura argues that “‘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.” *Id.* at 203. As Adam Cox has argued, “The process of selecting immigrants is deeply and irrevocably intertwined with the process of regulating their daily lives.” Cox, *supra* note 10, at 393. For her part, Clare Huntington argues that “it makes more sense to think about immigration law and alienage law as part of a continuum of immigration regulation.” Huntington, *supra* note 10, at 826.

equal protection when courts assess laws regulating migrants.<sup>122</sup> Other scholars have viewed PRWORA's "authorization" to the states to decide for themselves whether or not to provide state-funded benefits to immigrants as an unlawful attempt by Congress to devolve immigration authority to state governments.<sup>123</sup> Absent from the literature, however, is a critical account of the blurring line in equal protection doctrine between federal and state laws classifying on the basis of alienage status and whether *Graham's* promise of equality has been realized, or subordinated to interloping federalism concerns.

Michael Wishnie's argument that Congress is powerless to alter states' Fourteenth Amendment obligations by sharing its immigration power with the states provides an important starting place for this much-needed conversation. Following PRWORA's adoption, he argued that Congress could not insulate the states from the requirements of equal protection because the federal power to regulate immigration is "exclusively national" and incapable "of devolution to the states."<sup>124</sup> Wishnie reasoned that to expand the deference afforded to the federal government to state regulations affecting immigrants would "erode the antidiscrimination and anticaste principles that are at the heart of our Constitution."<sup>125</sup>

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122. See Heeren, *supra* note 11, at 372 (noting that "when immigrants make communitarian claims for equal treatment—a share in the privileges and benefits of citizenship—their claims are increasingly rejected"). Heeren has argued that a narrowing of equal protection doctrine as a general matter has made it "more difficult for noncitizens to prevail on individual rights claims" and has forced advocates to find "alternative theories" in federalism and administrative law outside "the arena of individual rights." *Id.* at 207–08.

123. See Wishnie, *supra* note 14, at 496 ("The Welfare Act's authorization of state discrimination against immigrants was an attempt by Congress to devolve some of the exclusively federal immigration power to the states..."); Huntington, *supra* note 10, at 839 ("Under the PRWORA, the federal government delegates its authority to determine eligibility for federal benefits to states and localities."); see also Victor C. Romero, *Devolution and Discrimination*, 58 N.Y.U. ANN. SURV. AM. L. 377, 386 (2002) (describing outcomes of immigration devolution as a "mixed bag" with regard to class based discrimination where devolution could open the door for state innovation regarding rights, including for same-sex couples).

124. Wishnie, *supra* note 14, at 494.

125. Wishnie, *supra* note 14, at 494, 553.

Wishnie's conclusion that PRWORA did not alter states' Fourteenth Amendment obligations to lawfully present migrants is convincing, but his primary inquiry, whether Congress can delegate immigration lawmaking authority to the states, does not fully explain PRWORA's impact or the recent convergence in equal protection jurisprudence involving federal and state alienage classifications.

Specifically, in the years since Wishnie's article, the courts that have sanctioned state denials of welfare benefits to immigrants under rational basis scrutiny have not considered the states to be exercising a delegated immigration power. Rather, PRWORA has served a different legitimizing function. In a variety of ways, explained in more detail in Part III, courts have viewed federal policy much in the way they would in a preemption case: so long as Congress does not object to the states' alienage-based denials of benefits, such measures are deemed valid and complementary to congressional policy.<sup>126</sup>

Moreover, the uniform rule doctrine, which many courts have relied upon to justify applying rational basis review to state denials of public benefits to migrants, is not really a delegation doctrine, but a supremacy one. That is, when courts accept that Congress has created a uniform immigration rule for states to follow, they are really concluding that Congress has set immigration policy, which the Supremacy Clause requires states to follow; they are not ruling that Congress has shared (or devolved) immigration rulemaking power so that the states may set their own immigration law.<sup>127</sup> But courts have muddied this doctrinal distinction by concluding that PRWORA established a uniform rule for states to follow in circumstances where Congress did not mandate particular state action and instead recognized states' discretion with respect to state-funded healthcare benefits.<sup>128</sup> This analysis is, in my view, a flawed application of

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126. *Infra* Part III.

127. *See infra* notes 199–207 (discussing *Plyler*).

128. *See, e.g.*, *Korab v. Fink*, 797 F.3d 572, 581 (9th Cir. 2015).

Considering the Welfare Reform Act as a whole, it establishes a uniform federal structure for providing welfare benefits to distinct classes of aliens. The entire benefit scheme flows from these classifications, and a state's limited discretion to implement a plan for a specified category of aliens does not defeat or undermine

the uniform rule doctrine, and delegation does not therefore explain, nor justify, the courts' conclusions.

In addition, Wishnie acknowledged that the devolution that is the focus of his argument was “not explicit” in PRWORA but “should be presumed because, under any other construction of the Welfare Act, the current rash of anti-immigrant state welfare rules are obviously invalid under *Graham*'s settled rule that state welfare discrimination against legal immigrants is unconstitutional.”<sup>129</sup> But that framing fails to account for how federalism principles more broadly, even without delegation, could similarly and illegitimately undermine *Graham*. That is, delegation is not the only means by which courts might affect a rollback of *Graham*. Whereas Wishnie's article took aim at the reasons why delegation could not insulate states from the requirements of equal protection (given his argument that the federal government cannot devolve the immigration power to the states), this Article argues Congress cannot through its own policy choices sanction state discrimination against immigrants.

Moreover, while the shift in equal protection examined in this Article has largely occurred in a particular set of cases interpreting PRWORA,<sup>130</sup> its import goes beyond the construction of a single statute. First, the preempting of equal protection described in these cases reinforces an already existing tendency in the Supreme Court's equal protection jurisprudence—*Graham* notwithstanding—to emphasize the structural concerns of federalism in equal protection cases involving alienage-status.<sup>131</sup>

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uniformity. In arguing to the contrary, the dissent ignores that “a state's exercise of discretion can also effectuate national policy.” (quoting *Soskin v. Reinertson*, 353 F.3d 1242, 1257, 1255 (10th Cir. 2004)).

129. Wishnie, *supra* note 14, at 496.

130. See, e.g., *Soskin v. Reinertson*, 353 F.3d 1242, 1255 (10th Cir. 2004) (applying rational basis scrutiny to Colorado's PRWORA-based alien eligibility restrictions); *Korab v. Fink*, 748 F.3d 875, 877 (9th Cir. 2014) (upholding Hawaii's PRWORA-based health benefits law for classes of nonimmigrant aliens); *Bruns v. Mayhew*, 750 F.3d 61, 63 (1st Cir. 2014) (upholding Maine's termination of medical assistance benefits post-PRWORA).

131. See, e.g., *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (“State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.”); *Foley v. Connelie*, 435 U.S. 291, 295 (noting

While that emphasis has historically worked to reinforce immigrants' rights, the latest iteration of this tendency before the lower courts demonstrates how *Graham's* promise of constitutionally protected equality is vulnerable when federalism concerns dictate equal protection analysis, allowing the inevitable political variability of federal immigration policy to largely determine immigrants' right to equal treatment by the states. In other words, the federalism problem for noncitizens' equal protection rights that PRWORA helps to expose may also extend beyond that statute's attempt to immunize state denials of welfare benefits.

Indeed, expansive deference to federalism concerns and congressional policy is evident outside the PRWORA context in cases involving lawfully present immigrants' equal access to professional licenses, drivers' licenses, and other employment opportunities.<sup>132</sup> These cases cannot be theorized based upon the delegation theory that is the focus of Wishnie's insightful critique<sup>133</sup> because the anti-immigrant measures in those instances were not enacted pursuant to a purportedly authorizing federal statute. There are thus important reasons to better understand these doctrinal developments and potential impact beyond PRWORA and the delegation theory that that statute necessarily invites. To do so, federalism's existing and potential role in equality analysis must be established.

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that the states "took position[s] seemingly inconsistent with the congressional determination to admit the alien to permanent residence").

132. See, e.g., *Van Staden v. St. Martin*, 664 F.3d 56, 61–62 (5th Cir. 2011) (upholding under rational basis review a Louisiana statute that denied lawful nonimmigrants the ability to apply for nursing licenses); *LeClerc v. Webb*, 419 F.3d 405, 431 (5th Cir. 2005) (upholding under rational basis review a Louisiana rule that rendered lawfully present nonimmigrants ineligible to take the Louisiana Bar Exam); *Dandamudi v. Tisch*, 686 F.3d 66, 81 (2d Cir. 2012) (applying strict scrutiny to strike down a New York licensing statute that excluded lawfully present nonimmigrants from the pharmacy profession).

133. See Wishnie, *supra* note 14, at 496 (explaining that Congress devolved "some of the exclusively federal immigration power to the states").

*III. Federalism's Historic Role in the State Alienage Cases*

The Supreme Court's jurisprudence addressed to state laws classifying on the basis of alienage status has been pendular—swinging between two constitutional doctrines, preemption and equal protection. Recently, the Court has evaluated the legality of state laws targeting immigrants largely through the Supremacy Clause.<sup>134</sup> But for a time, equal protection was the Supreme Court's preferred means of resolving challenges to state laws imposing alienage-based burdens on states' immigrant residents.<sup>135</sup> But even in these cases, the Court has often justified the result based upon the federal government's exclusive authority to regulate immigration to the United States and the conditions of immigrants' authorization to remain here.<sup>136</sup>

The multiple explanations and normative goals that might account for the Court's reliance upon federalism principles in these equal protection cases are identified and critiqued below. This catalogue and criticism provides a foundation for this Article's ultimate claim: that federalism can play a legitimate role in equal protection doctrine involving alienage status when it serves as a lens through which to gauge arbitrary discrimination, whether state or federal, but federalism should not stealthily serve as a preemption-like doctrine beneath the surface in equal protection cases.<sup>137</sup> When the validity of state laws

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134. See *Toll v. Moreno*, 458 U.S. 1, 9–10 (1982) (declining to decide whether a Maryland law excluding nonimmigrants from public tuition benefits violated equal protection, and instead striking down the law on preemption grounds); *Arizona v. United States*, 132 S. Ct. 2492, 2495 (2012) (striking down three Arizona immigration enforcement measures under the Supremacy Clause); *Whiting v. Chamber of Commerce*, 131 S. Ct. 1968, 1970 (2011) (analyzing validity of Arizona business licensing law that addressed unauthorized employment of noncitizen workers under preemption).

135. See Heeren, *supra* note 11, at 398 (“The Burger Court struck down an extraordinary amount of state legislation on equal protection grounds. In at least two of these cases, the plaintiffs also raised preemption . . .”). The Court first focused on equal protection as a means of regulating state alienage classifications in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Truax v. Raich*, 239 U.S. 33 (1915).

136. Cases cited *infra* notes 138–174.

137. This potentially disruptive impact of federalism and supremacy principles on migrants' equal protection claims before the states contrasts with typical sovereignty-based federalism objections which Heather Gerken notes

disadvantaging immigrants turns on congressional policy choices, the Fourteenth Amendment's antidiscrimination norms are forfeited to majoritarian politics.

### A. *Ultra Vires State Action*

Long before *Graham*, courts considered federalism principles in equal protection cases involving alienage status as a means of ferreting out arbitrary state motivations. Under this approach, state action imposing burdens uniquely upon immigrants for purposes of immigration control is treated as presumptively unjustified and discriminatory because the state lacks power to regulate immigration in the first place.<sup>138</sup> The Court's 1915 decision in *Truax v. Raich*<sup>139</sup> exemplifies this approach.

In *Truax*, the Court struck down an Arizona law that required businesses with more than five employees to maintain 80% of the positions for qualified electors and "native-born citizens," reasoning that denying noncitizens the right to work solely because of their alienage status undermined "the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."<sup>140</sup> But although the Court decided *Truax* on the basis of equal protection, federalism concerns figured prominently in the Court's reasoning.<sup>141</sup>

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often reflect concerns that "local power is a threat to minority rights" and that "state decisions that fly in the face of deeply held national norms will be insulated from reversal." Heather K. Gerken, Foreword, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 9, 46 (2010).

138. Bryan Soucek, in an article analyzing the role of federalism in equal protection jurisprudence addressed to marriage equality (and the alienage cases by comparison), proposes that federalism be factored into equal protection analysis under a similar "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. Soucek, *supra* note 25, at 167–71.

139. 239 U.S. 33 (1915).

140. *Id.* at 41.

141. *Id.* at 42. In spite of its holding as to private employment, *Truax* suggested that states could nevertheless preserve public resources for citizens at the expense of noncitizens. *See id.* at 40 (noting that the "discrimination . . . involved" was particularly unjustified because it "imposed upon the conduct of ordinary private enterprise"). *Graham* later disavowed this

Even without mentioning the Supremacy Clause, the Court's reasoning sounded in preemption doctrine.<sup>142</sup> The Court reasoned that the "legitimate interests of the State . . . cannot be so broadly conceived as to bring them into hostility to exclusive Federal power," over immigration control, namely the decision "to admit or exclude aliens."<sup>143</sup> That authority, the Court noted, "is vested solely in the Federal Government."<sup>144</sup> The Court characterized the denial of the opportunity to earn a livelihood as "tantamount to the assertion of the right to deny [immigrants] entrance and abode" such that Arizona's law would conflict with federal law.<sup>145</sup> Specifically, "those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality."<sup>146</sup>

One might fairly read the federalism analysis in *Truax* as an unstated alternative ground for striking down the law under the Supremacy Clause.<sup>147</sup> But even if *Truax* contains an embedded

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aspect of *Truax*, noting that the Court's subsequent decision in *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), discussed *infra*, rejected this special public-interest doctrine. See *Graham v. Richardson*, 403 U.S. 365, 374 (1971) (concluding "a State's desire to preserve limited welfare benefits for its own citizens" failed to justify the states' denial of benefits to legal residents).

142. Although *Truax* was decided on equal protection grounds, in 2012 the Supreme Court cited it in *Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012), a preemption case. There, the Court invalidated several provisions of an Arizona law which sought to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." *Id.* at 2497 (quoting ARIZ. REV. STAT. ANN. § 11-1051 (2012)).

143. *Truax*, 239 U.S. at 42.

144. *Id.*

145. *Id.*

146. See *id.* (reasoning that "in ordinary cases [immigrants] cannot live where they cannot work").

147. Given the Court's emphatic description of the equal protection violation and the promise of equality under the Fourteenth Amendment, *Truax* cannot be dismissed solely as a preemption decision masquerading under an equal protection label. For example, the Court reasoned

that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. If this could be refused solely upon the ground of race or nationality, the

preemption holding, it is clear that the Court considered the state's wanting authority to regulate immigration as relevant to its equal protection obligations.

For example, the Court rejected the state's purported interest in limiting the employment of non-citizens because only the federal government may determine the standards under which migrants may lawfully work.<sup>148</sup> The Court reasoned that the state's power "to make reasonable classifications in legislating to promote the health, safety, morals and welfare" did not empower it "to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood."<sup>149</sup> The Court held that Arizona had acted beyond its police power authority to reach the subjects of immigration lawmaking and thus could not justify its action under the Equal Protection Clause.<sup>150</sup>

*Truax* predates many of the Court's landmark decisions establishing the contours of modern equal protection doctrine, including *United States v. Carolene Products*.<sup>151</sup> But elements of this ultra vires approach persisted in the Court's later alienage cases. For example, in 1977, in *Nyquist v. Mauclet*,<sup>152</sup> the Court approached federalism concerns in a similar manner, striking down on equal protection grounds a New York statute that made citizenship an eligibility requirement for state tuition assistance. There, the Court rejected New York's claim that it could exclude legal residents from access to financial aid to incentivize noncitizens to naturalize.<sup>153</sup> The Court concluded that New York did not present a "permissible" state purpose because

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prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.

*Id.* at 41.

148. *See id.* at 43 (reasoning that the Court must consider whether "underlying the classification is the authority to deal with that at which the legislation is aimed").

149. *Id.* at 41.

150. *See id.* at 42–43 ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government.").

151. 304 U.S. 144, 152–53 n.4 (1938).

152. 432 U.S. 1 (1977).

153. *See id.* at 10 ("Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere.").

immigration control and the authority to regulate naturalization “is entrusted exclusively to the Federal Government, and a State has no power to interfere.”<sup>154</sup>

This ultra vires approach considers federalism as a “legal tool” to discern improper government motives and unjust treatment; it does not serve as a means of negotiating the relationship between the federal government and the states at the expense immigrants’ rights.<sup>155</sup> In this sense, it operates much like the Court’s recognition of suspect classifications and application of strict scrutiny,<sup>156</sup> but with attention to the entity alleged to have discriminated. That is, instead of focusing on the qualities of the recipient of discrimination that renders a government classification suspect, it focuses on the characteristics of the government discriminating to discern whether its regulation of subjects beyond its reach reveals an invidious purpose.

Moreover, the ultra vires approach ensures that structural concerns do not supplant rights in equal protection doctrine involving alienage status because it has the advantage of working in only one direction. Concluding that the government has no authority to regulate a specific area such that its action is ultra vires serves as a good proxy for whether or not the state has classified in an improper manner, but the reverse is not necessarily true. If a state has sufficient *power* to act with respect to a given subject—or acts consistently with the Federal Government—should not resolve the equal protection inquiry, which must still, of course determine whether the state’s chosen classification is justified by a sufficient state interest.<sup>157</sup>

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154. *Id.*

155. See Neuman, *supra* note 97, at 1434 (“The substantive constitutional command of equal protection should not be confused with the standards of review or other judicial ‘tests’ employed to police government compliance with that command.”). Gerald Neuman has criticized scholars who claim that the dichotomized approach to equal protection in alienage cases is illogical and unworkable because of the different standards. He notes that “[t]his argument erroneously treats ‘suspectness’ as an objective description of reality rather than a legal tool.” *Id.* at 1435.

156. *Id.*

157. See, e.g., *Barannikova v. Greenwich*, 643 A.2d 251, 261–62 (Conn. 1994) (“The fact that a state may act within a given realm provided it does not conflict with federal legislation, does not also imply that when so acting it may make

The growing influence of immigration federalism—which, contests the notion of an exclusive federal power over immigration matters, and accepts some room for state regulation<sup>158</sup>—complicates the simplicity of this approach to discerning federalism’s role in equal protection doctrine. If one accepts that state and federal governments share more power than previously acknowledged to regulate migrants, determining what is ultra vires is not so simple.

### *B. Rights-Enhancing Immigration Policy*

A rights-enhancing theory of federal immigration authority provides another potential explanation for how federalism concerns might matter in equal protection doctrine involving alienage status. Under this account, migrants’ claim to equal treatment by the states is derivative of, or enhanced by, the status conferred upon them by the federal government. This explanation emphasizes the Federal Government’s exclusive and plenary authority over immigration matters and suggests that that sovereign’s decision to admit migrants into the country under federal law carries with it certain guarantees, namely, that the persons admitted will receive equal treatment by the states.

This account is evident in the Court’s 1948 decision in *Takahashi v. Fish & Game Commission*,<sup>159</sup> decided more than three decades after *Truax*. In *Takahashi*, the Court struck down a California law restricting fishing licenses to lawfully present migrants “ineligible for citizenship.”<sup>160</sup> *Takahashi* addressed a specific question left open by *Truax*: whether a state might possess a special public interest in preserving certain state resources—there, licenses to fish in coastal waters—for citizens

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invidious distinctions without regard to the constitutional equal protection guarantee.”).

158. See Elias, *supra* note 10, at 705–06 (“This ‘new immigration federalism’ is and will be grounded in immigrant-inclusionary rulemaking, which has the potential to complement (as well as occasionally contradict) federal efforts at comprehensive immigration reform.”).

159. 334 U.S. 410 (1948).

160. *Id.* at 417.

at the expense of noncitizens.<sup>161</sup> Although the Court acknowledged that California's alienage restriction raised important questions of both "federal-state relationships and of constitutionally protected individual equality and liberty,"<sup>162</sup> it opted for an equal protection rationale as the ground for invalidating the state measure, even as its decision once again focused heavily on federal exclusivity over immigration matters.<sup>163</sup> It noted:

The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.<sup>164</sup>

The Court tethered this discussion to its equal protection analysis partly through an ultra vires analysis of state regulation. The Court reasoned that federal exclusivity over immigration matters "emphasize[d] the tenuousness of the state's claim that it has power to single out and ban its lawful alien inhabitants."<sup>165</sup>

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161. *Id.*

162. *Id.* at 414–15.

163. *Id.* at 419. The Court later exhibited an openness, in spite of Takahashi's equal protection holding, to recast it as a preemption decision. In *Toll v. Moreno*, 458 U.S. 1 (1982), the Court acknowledged "the actual basis for invalidation of the California statute was apparently the Equal Protection Clause of the Constitution." *Id.* at 11 n.16. But it noted "pre-emption played a significant role in the Court's analysis," citing the work of two commentators who claimed that "many of the Court's decisions concerning alienage classifications, such as *Takahashi*, are better explained in pre-emption than in equal protection terms." *Id.* (citing Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1060–65 (1979); Levi, *supra* note 21).

164. *Takahashi*, 334 U.S. at 419 (citation omitted).

165. *Id.* at 420. The Court also rejected the notion that the state could coopt

But *Takahashi* also relied upon a separate, rights-enhancing theory of federal immigration power to justify its equal protection holding. The Court suggested that the Federal Government's decision to grant lawfully present immigrants the right to enter and live in the country effectively triggers migrants' claim to equal treatment by the states.<sup>166</sup> Citing *Truax*, the Court explained that in that case Arizona's attempt to suppress the employment of noncitizens was invalid because "having been lawfully admitted into the country under federal law," the plaintiff "had a federal privilege to enter and abide in any State in the Union and thereafter under the Fourteenth Amendment to enjoy the equal protection of the laws of the state in which he abided."<sup>167</sup>

The rights-enhancing theory of federalism treats congressional policy as a gatekeeper to Fourteenth Amendment rights, allowing Congress to decide who has claims to such rights.<sup>168</sup> But long before *Takahashi*, as well as after, the Court has interpreted the Fourteenth Amendment as applying to "all persons" within the United States, regardless of their immigration status.<sup>169</sup> In other contexts, the Court has also

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federal classifications and put them to use for its own purposes. *Id.* The Court reasoned that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits" whereas Congress has "broad and wholly distinguishable powers over immigration and naturalization." *Id.*

166. *Id.* at 415–16 (citing *Truax v. Raich*, 239 U.S. 33 (1915)).

167. *Id.* (quotation omitted).

168. For similar reasons, scholars have noted the inadequacy of preemption as a substitute for equal protection analysis: It removes migrants' fair treatment from the concerns of constitutional equality to the domain of policymaking. See Koh, *supra* note 38, at 97 (explaining the inadequacies of preemption as a substitute for equal protection in cases involving discrimination against noncitizens); Bosniak, *supra* note 96, at 255 (suggesting that federalism and the Supremacy Clause concern "institutional process" or "who decides" and not who are the "the rightful subjects of equality").

169. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (recognizing that noncitizens are "persons" within the meaning of the Fourteenth Amendment); *Plyler v. Doe*, 457 U.S. 202, 210 (1987) (rejecting the state's argument "that undocumented aliens, because of their immigration status, are not 'persons within the jurisdiction' of the State of Texas, and that they therefore have no right to the equal protection of Texas law").

turned back congressional attempts to dictate Fourteenth Amendment rights.<sup>170</sup>

That said, a federalism theory recognizing that Congress may enhance migrants' claims to equal treatment under the Constitution complements the Court's view of legislative power under Section 5 of the Fourteenth Amendment as a one-way ratchet: Congress is empowered to enforce the Fourteenth Amendment to achieve its remedial purposes, but cannot act to restrict its reach.<sup>171</sup> The ratchet theory, however, is not a perfect analogy for this potential role of federalism in equal protection cases involving alienage-status. When the federal government grants or restricts immigrants' license to enter or remain within the country, it is not enforcing the Fourteenth Amendment, nor even the slightest bit interested in remedying the inequality and institutionalized racism that led to the Amendment's enactment. Rather, when the Executive exercises its plenary immigration authority in this way, the federal government is making policy choices based upon such variables as economic conditions, political concerns, and foreign affairs.

A rights-enhancing view of federal immigration authority thus invites the result that the economic and political vagaries of federal immigration policy will dictate the scope of state equal protection obligation.<sup>172</sup> And in many instances, federal immigration policy often does not enhance the standing of migrants under the Fourteenth Amendment. As others have

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170. *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997) (striking down the Religious Freedom Restoration Act of 1993 as exceeding Congress's enforcement power under Section 5 of Fourteenth Amendment, stating that "[i]f Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means'" (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803))).

171. *See Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (stating that § 5 of the Fourteenth Amendment is a "positive grant of legislative power" for Congress to pass legislation that "secure[s] the guarantees of the Fourteenth Amendment"); *see also Guttentag*, *supra* note 14, at 45 (arguing that immigration preemption doctrine should take full account of federal policy grounded in the Civil Rights Act of 1870 that immigrants receive equal treatment).

172. Indeed, many of the lower courts that have upheld alienage-based cuts to public benefits and professional opportunities have held just that. *Infra* Part III.

noted, the assumption that the federal government is more protective of immigrant rights than the states over-simplifies the complex nature of federal immigration regulation and, in many instances, is simply inaccurate.<sup>173</sup> A theory that injects federalism into equal protection analysis involving state treatment of immigrants in this way could therefore invite doctrinal inconsistency and confusion.

For example, if a rights-enhancing theory of federal immigration law explains the result in *Graham*, it makes the Court's decision in *Mathews*, five years later, much harder to reconcile. If state measures imposing burdens upon immigrants are closely scrutinized because they effectively deny "entrance and abode," as *Takahashi* put it,<sup>174</sup> and therefore conflict with the federal government's decision to admit such immigrants to permanent residence under an equality of legal privileges, then Congress's decision to deny lawful permanent residents federal Medicare benefits would seem similarly inconsistent with its own decision to grant certain migrants permanent residence. Perhaps *Mathews* merely solidifies that within the Court's sweeping deference to the federal government's immigration regulations the Court will not second-guess even inconsistent policy choices.

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173. See Gerken, *supra* note 137, at 46 (citing traditional nationalist perspective in federalism scholarship that "local power is a threat to minority rights"). Other scholars have contested the assumption that the federal government is more protective of immigrants than the states. See, e.g., Rodríguez, *supra* note 10, at 570–71 (criticizing scholarly debates about immigration federalism as "currently framed" because they "largely have focused on whether the national government or the states will be better at protecting or advancing immigrants' interests"). But see Johnson, *supra* note 11, at 618–19 (describing the "long history of state and local laws that discriminate against immigrants" and arguing that, while "civil rights concerns [do not] disappear from the field just because the federal government is regulating immigration, . . . the potential civil rights deprivations at the state and local levels are likely to be greater because of the fact that nativist and racist sentiments are more likely to prevail").

174. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 416 (1948) (quoting *Truax v. Raich*, 239 U.S. 33, 42 (1915)).

*C. Congressional Imprimatur for State Discrimination*

It is clear as a matter of preemption doctrine that courts do not cloak state laws which adopt federal immigration classifications as their own with a presumption of legitimacy, based upon imputed congressional endorsement of the regulation.<sup>175</sup> On the contrary, under the Supremacy Clause, the Court considers whether Congress intended to occupy the field of regulation or whether a seemingly harmonious state law might, nevertheless, frustrate Congress's purpose.<sup>176</sup> In the equal protection context, however, the Court has not been as clear about the extent to which federal immigration policy—particularly with respect to undocumented migrants—might provide an imprimatur of legitimacy to state laws that discriminate against noncitizens.

On the one hand, in *Plyler v. Doe*,<sup>177</sup> the Court invalidated under equal protection a Texas law that denied free public school education to undocumented children, in part by reasoning that the plaintiffs' presence in the United States in violation of federal law did not justify the state's discrimination. But on the other hand, the Court noted that migrants' unlawful presence is constitutionally relevant to the scope of their equal protection rights.<sup>178</sup> Specifically, the Court rejected Texas's position that

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175. See *Arizona v. United States*, 132 S. Ct. 2492, 2502–03 (2012) (striking down under the Supremacy Clause an Arizona law that created an alien registration requirement, even where Arizona argued that “the provision had the same aim as federal law and adopts its substantive standards”). The Court reasoned that the provision's purported harmony with congressional immigration policy did not save it from preemption given the “basic premise of field preemption—States may not enter, in any respect, an area the Federal Government has reserved for itself.” *Id.* at 2502.

176. See generally Lauren Gilbert, *Immigrant Laws, Obstacle Preemption and the Lost Legacy of McCulloch*, 33 BERKELEY J. EMP. & LAB. L. 153, 159 (2012) (describing the various forms of federal preemption).

177. 457 U.S. 202, 226 (1982).

178. *Id.* at 219, 224–26. Here, the Court's analysis reads very much like a preemption decision and cites *De Canas v. Bica*, 424 U.S. 351 (1976), in which the Court upheld a California restriction on the employment of noncitizens as consistent with the Supremacy Clause. *Plyler*, 457 U.S. at 225–26. The Court stated:

As we recognized in *De Canas v. Bica*, the States do have some

Congress had provided an “imprimatur” of legitimacy to the state’s discrimination because, in contrast to the legally present migrants in *Takahashi*, Congress had not admitted the undocumented children “on an equality of legal privileges with all citizens under non-discriminatory laws.”<sup>179</sup> Yet, the Court accepted that congressional policy might modulate a state’s equal protection obligations, stating that in any equal protection challenge involving “the treatment of aliens, . . . courts must be attentive to congressional policy,” for “the exercise of congressional power might well affect the State’s prerogatives to afford differential treatment to a particular class of aliens.”<sup>180</sup>

Although the Court did not provide much guidance on when congressional policy might bolster a state’s authority to discriminate against noncitizens, *Plyler* suggests that the policy in question must be directly related to the discriminatory state classification employed. There, the Court rejected Texas’s position, noting an absence of federal law and policy “concerning the State’s authority to deprive [undocumented] children of an education.”<sup>181</sup>

Yet, even the Court’s limited endorsement of this theory of federalism’s role in equal protection doctrine is ambivalent. While accepting that congressional policy “might well affect the State’s

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authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal. In *De Canas*, the State’s program reflected Congress’ intention to bar from employment all aliens except those possessing a grant of permission to work in this country. In contrast, there is no indication that the disability imposed by § 21.031 corresponds to any identifiable congressional policy. The State does not claim that the conservation of state educational resources was ever a congressional concern in restricting immigration. More importantly, the classification reflected in § 21.031 does not operate harmoniously within the federal program.

*Id.* (quotation omitted).

179. *Id.* at 224 (quoting *Takahashi*, 334 U.S. at 420). The Court reasoned that congressional “disapproval of the presence of these children within the United States, and the evasion of the federal regulatory program that is the mark of undocumented status” did not provide Texas with “authority for its decision to impose upon them special disabilities.” *Id.*

180. *Id.*

181. *Id.* at 224–25.

prerogatives to afford differential treatment,”<sup>182</sup> the Court simultaneously walked back slightly from that statement, acknowledging that “[i]f the constitutional guarantee of equal protection was available only to those upon whom Congress affirmatively granted its benefit, the State’s argument would be virtually unanswerable.”<sup>183</sup> The Court reasoned that the “Equal Protection Clause operates of its own force to protect anyone ‘within [the State’s] jurisdiction’ from the State’s arbitrary action.”<sup>184</sup>

To be sure, the disconnect between the Court’s holding and its statement regarding the “relevance” to equal protection analysis of a migrant’s status under federal immigration law was partly driven by its exceptional facts. Dissenting in *Plyler*, Chief Justice Burger accused the Court of treating plaintiffs as a quasi-suspect class given their status as children and their interest in education as a quasi-fundamental right.<sup>185</sup> *Plyler*, nevertheless, provides a doctrinal opening for the inverse of a rights-enhancing theory of federal immigration policy to take shape.<sup>186</sup>

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182. *Id.* at 224.

183. *Id.* at 225 n.21.

184. *Id.*

185. *See id.* at 244 (Burger, C.J., dissenting) (criticizing the Court for “patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis” to “spin[ ] out a theory custom-tailored to the facts of these cases”).

186. The dissent in *Plyler* endorses *Takahashi’s* rights-enhancing view of federalism, including its inevitable inverse. *See Plyler v. Doe*, 457 U.S. 202, 246 n.7 (1982) (Burger, J., dissenting)

[S]tate discrimination against legally resident aliens conflicts with and alters “the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states” . . . [but] the same cannot be said when Congress has decreed that certain aliens should not be admitted to the United States at all.

(quoting *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948)).

Whether a state’s equal protection obligations ought to be modulated when a regulation affects undocumented immigrants—or, put another way, when is undocumented status constitutionally relevant to equal protection rights and to what degree—is beyond the scope of this Article. But, of course, the issue bears upon the rights of lawfully present immigrants, particularly if one accepts, as many courts recently have, that federalism matters to state equal protection

*D. Dissimilarly Situated by Immigration Policy*

Federal immigration policy might also impact equal protection analysis of state alienage classifications, if courts view migrants' status under federal law as relevant to whether they are similarly situated to their citizen counterparts. *Graham* emphasized that legal residents are similarly situated to citizens for most state legislative purposes,<sup>187</sup> citing their shared right to work, obligation to pay taxes, and eligibility to be drafted,<sup>188</sup> but without crediting these attributes of group membership—which result from federal policy choices—directly to federalism concerns. Nevertheless, in emphasizing attributes derivative to a migrants' status under federal law, *Graham* effectively obliged *Plyler* to hold that undocumented migrants' different status under federal law was not a “constitutional irrelevancy.”<sup>189</sup>

In the end, to focus on whether migrants are similarly situated to citizens may really be asking something more fundamental: as Linda Bosniak has put it, when does citizenship matter?<sup>190</sup> Is it only when the federal government regulates entry

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obligations based upon a rights-enhancing view of federal immigration policy. See *infra* Part III.D (addressing Fifth and Sixth Circuit decisions upholding state laws imposing burdens upon lawfully present nonimmigrants based upon the theory that unlike lawful permanent residents Congress has not admitted nonimmigrants to the United States under an equality of legal privileges). *Plyler* is one example where undocumented immigrants' unauthorized presence in the United States was not determinative of this group's equal protection rights. But it has not provided a strong basis to protect undocumented migrants from state discrimination in other contexts. 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.”).

187. See *Toll v. Moreno*, 458 U.S. 1, 22 (1982) (Blackmun, J., concurring) (reasoning that *Graham* recognized that lawfully present noncitizens are similarly situated to citizens “for most legislative purposes,” such that distinctions drawn on the basis of alienage-status are likely to reflect historic “antipathy” toward immigrants).

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

189. See *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (declining to recognize undocumented immigrants as a suspect class).

190. See Bosniak, *supra* note 96, at 1148 (stating that courts will continue to be called upon to determine the “significance of the status of alienage—

and exit to the United States and who can vote and participate in state political functions? Or can it matter when the states enact measures disadvantaging immigrants with respect to state resources and economic opportunities?

### *E. Preemption Instead*

Federalism principles play the most decisive role in equal protection cases involving immigrants when courts opt not to address alleged equal protection violations at all and instead invalidate laws on the basis of the Supremacy Clause. Since *Plyler*, the Supreme Court has often utilized preemption to evaluate state restrictions based upon alienage.<sup>191</sup> As Kerry Abrams has argued, the preemption focus is not surprising, at least in the case of undocumented migrants, as it “substitutes for the lack of an equal protection doctrine that adequately protects” that group from discrimination.<sup>192</sup> But the Court has sometimes opted for preemption, even when the legislation at issue concerned lawfully present migrants.

For example, in *Toll v. Moreno*,<sup>193</sup> decided later in the same term as *Plyler*, the Supreme Court declined to address an equal protection question involving a University of Maryland policy that denied in-state tuition to lawfully present non-immigrant G-4 visa holders, even though citizens and lawful permanent

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including undocumented alienage—for the allocation of rights and benefits in our society”).

191. See *Toll*, 458 U.S. at 13 (striking down a University of Maryland policy that denied in-state tuition to lawfully present nonimmigrants as preempted by federal law); *De Canas v. Bica*, 424 U.S. 351, 356–57 (1976) (upholding a California law prohibiting employers from hiring undocumented workers as valid under the Supremacy Clause); *Arizona v. United States*, 132 S. Ct. 2492, 2497–98 (2012) (striking down on preemption grounds three sections of an Arizona statute addressed to immigration enforcement); see also Heeren, *supra* note 11, at 369–70 (suggesting that in earlier eras, the Court was more likely to closely address “questions of individual rights” than “structural questions” presented by state laws regulating migrants and noting that in *Plyler*, the “Court never addressed the preemption issue; it resolved the case on equal protection grounds”).

192. Abrams, *supra*, note 10, at 601.

193. 458 U.S. 1 (1982).

residents could obtain in-state tuition so long as they were domiciled in the State.<sup>194</sup> The district court held that the policy violated equal protection and, in the alternative, was preempted by federal law.<sup>195</sup> But the Supreme Court sidestepped the equal protection issue altogether, affirming the lower court's decision exclusively on the basis of the Supremacy Clause.<sup>196</sup> The concurring and dissenting opinions provide some clues as to why.

Chief Justice Rehnquist in dissent questioned *Graham's* continuing vitality in light of the political function exception, which he viewed as calling *Graham's* central premise into doubt. That dissent provoked a spirited response from Justice Blackmun, *Graham's* author.<sup>197</sup> Given that friction, and the fact that *Plyler* struck down a state law disadvantaging undocumented immigrants, the Court was likely hesitant to expand *Graham* beyond the class of lawful permanent residents to those who, though lawfully present in the United States, constituted non-immigrant visitors.<sup>198</sup>

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194. *Id.* at 3. G-4 visas applied “to nonimmigrant aliens who are officers or employees of certain international organizations, and to members of their immediate families.” *Id.* at 4.

195. *Id.* at 9.

196. *Id.* at 9–10. As to the Supremacy Clause, the Court concluded that Congress preempted Maryland's policy of denying in-state tuition to G-4 visa holders on the basis of their immigration status because it specifically permitted that class of nonimmigrants to establish domicile in the United States and provided them with preferential tax treatment. *Id.* at 14. According to the Court, Maryland's denial of in-state tuition thus amounted to “an ancillary burden not contemplated by Congress in admitting these aliens to the United States,” *id.* at 14 (quotation omitted), and frustrated the federal policy of inducing such international organizations “to locate significant operations in the United States” through preferential treatment. *Id.* at 16.

197. *Supra* note 74 and accompanying text; *see also* Bosniak, *supra* note 96, at 1107 n.257 (noting that in bypassing the equal protection question in *Toll*, the Supreme Court did not explain why supremacy was its preferred mode of analysis).

198. *See* Bosniak, *supra* note 96, at 1107 n.257 (noting “the likely explanation for the resort to preemption doctrine in *Toll v. Moreno* [is] the fact that the state wasn't discriminating against permanent residents, and the Court wasn't sure it wanted to extend strict scrutiny to categories of nonimmigrant aliens, including resident nonimmigrants” (quoting Letter from Gerald L. Neuman, Professor, Columbia Law School, to Author (Oct. 15, 1994) (on file with author))). *Graham* did not necessarily foreclose extension of suspect class status to this group; it spoke of “alienage” as a suspect class, and other decisions like

Before the lower courts, the Supremacy Clause has played an additional role in equal protection cases, particularly those involving PRWORA. Specifically, courts have recognized what some have referred to as the “uniform rule” doctrine,<sup>199</sup> whereby state regulations targeting migrants receive the deference applicable to the Federal Government’s immigration classifications if Congress has specifically directed “the States to implement national immigration objectives” in a uniform manner.<sup>200</sup> Courts reason that, because “the Constitution empowers Congress to ‘establish [a] uniform Rule of Naturalization,’” state action that follows a uniform immigration rule mandated by the federal government should also be considered with similar deference.<sup>201</sup>

This doctrine originates from language in *Plyler*, addressing exclusive federal authority over immigration matters and state responsibility to respect the supremacy of federal immigration law.<sup>202</sup> In an influential footnote, the Court first noted that the federal government may constitutionally employ alienage classifications to distinguish between individuals because such distinctions “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.”<sup>203</sup> Noting that “[n]o State may independently exercise a like power,” the Court, citing *De Canas v. Bica*,<sup>204</sup> a preemption

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*Takahashi*, which struck down discriminatory state laws involved classifications against nonimmigrants like the G-4 visa holders in *Toll*. But the question of whether suspect classification status under *Graham* applies to nonimmigrants was unsettled at the time of *Toll* and remains so today, with the Circuit Courts of Appeals split on this issue. See *infra* Part IV.D (analyzing these federal decisions).

199. See generally, e.g., *Korab v. Fink*, 748 F.3d 875 (9th Cir. 2014) (citing *Plyler*’s uniform rule language).

200. *Aliessa ex rel Fayad v. Novello*, 754 N.E.2d 1085, 1098 (N.Y. 2001) (“If the rule were uniform, each State would carry out the same policy under the mandate of Congress—the only body with authority to set immigration policy.”).

201. *Id.* (quoting U.S. CONST. art. I, § 8, cl. 4; *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982)).

202. *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982).

203. *Id.*

204. 424 U.S. 351 (1976).

case, then clarified, however, that states do not act *independently* when they follow the mandates of the federal government pursuant to the Supremacy Clause. The Court explained that “if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction.”<sup>205</sup>

What the Court had in mind when it articulated this principle is not entirely clear. It certainly did not spell out the effect on states’ equal protection obligations of “uniform rules” prescribed by the federal government. Nor did the Court clarify whether following “the federal direction” would include states opting, on their own accord, to follow the federal government’s lead, or whether it only referred to states following specific directives from the federal government. In the end, *Plyler* simply may have been articulating a principle of supremacy, under which it follows that states do not violate equal protection because they are constrained to follow federal immigration directives.<sup>206</sup> Several lower courts, however, have expanded *Plyler*’s footnote beyond that simple meaning, upholding state laws adopting federal immigration classifications as their own under deferential rational basis review, without first concluding that Congress mandated a specific rule for the states to follow in a uniform manner.<sup>207</sup>

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205. *Plyler*, 457 U.S. at 219 n.19.

206. See generally *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976) (striking down federal Civil Service Commission alienage-based employment restriction targeting lawful permanent residents but noting the result would be different if the exclusion “were expressly mandated by the Congress or the President”); *In re Adoption of a Child by L. C.*, 425 A.2d 686, 693 (N.J. 1981) (rejecting equal protection challenge to state law regulating birth certificates of foreign born adoptees after reasoning that “a state may deny benefits to aliens if the discrimination against aliens is rationally related to the state’s constitutional obligation to avoid conflicts with federal law and imposes no burdens on aliens not anticipated by Congress”).

207. See, e.g., *Soskin v. Reinertson*, 353 F.3d 1242, 1255 (10th Cir. 2004) (rejecting the view that the “federal government’s imprimatur for” state alienage discrimination “cannot reduce the level of scrutiny to which the state’s choice is subjected under the Equal Protection Clause” while acknowledging that Congress in PRWORA did not enact a uniform federal immigration policy and direct the states to follow it); *Korab v. Fink*, 748 F.3d 875, 884 (9th Cir.

*IV. The Collapse of the Equal Protection Dichotomy?*

Although the Supreme Court has never revisited *Graham*, in recent years, a number of decisions by the state courts and three federal circuit courts have eroded the distinction between federal laws classifying on the basis of alienage status and those wrought by the states.<sup>208</sup> And they have done so based upon a variety of rationales, most of which privilege structural concerns about the preeminence of federal immigration policy at the expense of immigrants' rights.<sup>209</sup>

The below discussion explores the breakdown in the equal protection dichotomy that has long governed cases involving alienage status and the role of federalism concerns in that result. This discussion examines the post-PRWORA public benefits cases, as well as the federal circuit court split regarding the level of equal protection scrutiny applicable to laws barring temporary workers from professional licenses and employment opportunities.

In the public benefit cases, PRWORA has driven these results. That law, enacted by Congress in 1996, made most noncitizens ineligible for means-tested federal benefits, such as Medicaid.<sup>210</sup> Specifically, Congress deemed most lawful

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2014) (recognizing that PRWORA allows states “discretion to implement a plan for a specified category of aliens” but concluding that this “does not defeat or undermine uniformity” because “a state’s exercise of discretion can also effectuate national policy”).

208. See generally *Soskin*, 353 F.3d 1242 (applying rational basis review to state denial of healthcare benefits); *Bruns v. Mayhew*, 750 F.3d 61 (1st Cir. 2014) (same); *Korab v. Fink*, 748 F.3d 875 (9th Cir. 2014) (same).

209. See generally *Soskin*, 353 F.3d at 1250–54; *Bruns*, 750 F.3d at 69–70; *Korab*, 797 F.3d at 581.

210. See 8 U.S.C. § 1641(b) (2012) (limiting the term “qualified alien”). Congress deemed persons lawfully admitted for permanent residence and other specified groups, such as asylees and refugees, to be “qualified aliens.” All persons not considered to be “qualified aliens,” such as undocumented immigrants, were deemed “unqualified” and thus ineligible for most federal benefits. *Id.* § 1611(a). Congress then parsed immigrants’ eligibility for federal means-tested benefits even further, dividing “qualified aliens” into two additional subgroups: those lawfully residing in the United States before August 22, 1996, some of whom could receive federal benefits, and those who arrived lawfully in the United States after that date, for whom federal benefits would be unavailable for at least five years. *Id.* § 1613(a).

permanent residents ineligible for federal food stamps and Medicaid until they have possessed that status for at least five years.<sup>211</sup> In doing so, Congress identified two federal interests sought to be furthered by PRWORA—promoting self-sufficiency among aliens in accordance with “national immigration policy” and reducing “the incentive for illegal immigration provided by the availability of public benefits.”<sup>212</sup> PRWORA did not, however, direct a particular state practice with respect to state-funded benefits.

On the contrary, Congress expressly allowed the states to decide for themselves whether to direct their own monies for that purpose and yet tried to insulate the states from the requirements of equal protection, and apparently *Graham*, should they choose to follow the federal government’s lead and deny immigrants an equal share of state resources.<sup>213</sup> In § 1601(7) of PRWORA, a provision with dubious legitimacy in so far as its attempt to legislate the outcome of an equal protection analysis,<sup>214</sup> Congress provided: “a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.”<sup>215</sup>

Even without finding § 1601(7) dispositive, courts have relied upon PRWORA to shape a new equal protection jurisprudence in the lower courts sanctioning state discrimination against immigrants in the realm of public benefit access. Some courts have viewed PRWORA’s sanctioning of state denials of benefits as dispositive of the legality of state law under the Fourteenth Amendment.<sup>216</sup> Other courts have attributed to federal law the

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211. *Id.*

212. *Id.* § 1601(5)–(6).

213. *Id.* § 1622(a).

214. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (concluding it is exclusively for the Court, and not Congress, “to determine what constitutes a constitutional violation”).

215. 8 U.S.C. § 1601(7) (2012).

216. As the Ninth Circuit put it in *Korab v. Fink*, 797 F.3d 572 (9th Cir. 2014): “Even assuming arguendo that Hawaii’s discretionary decision not to provide optional coverage for COFA Residents constitutes alienage-based

inequality experienced by immigrants, even with respect to state resources, absolving states of any responsibility for funding half of citizens' federally-subsidized benefits, while not providing equivalent funding to immigrants.<sup>217</sup> And still others have viewed state legislation targeting immigrants for denial of healthcare benefits as classifications crafted in accordance with the monetary incentives of following the federal government's discriminatory lead, and therefore based upon characteristics other than alienage status.<sup>218</sup>

The below summary examines the various roles that federalism has played in this recent equal protection jurisprudence. It exposes and critiques the sometimes unacknowledged power of federalism concerns to trump immigrants' rights to equal protection before the states.

#### *A. Congressionally Authorized Discrimination*

In cases arising under the Supremacy Clause, courts focus upon congressional intent because "the purpose of Congress is the ultimate touchstone in every preemption case."<sup>219</sup> That is, courts must consider whether Congress intended to occupy a field of regulation, the reach and meaning of its statutes, and whether its intent would be frustrated by state laws addressed to the same topic.<sup>220</sup> The same is typically not true when evaluating the

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discrimination, that decision, which is indisputably authorized by the Welfare Reform Act, is subject to rational-basis review. The posture of Korab's constitutional challenge—essentially a complaint about state spending—coupled with the legitimacy of the federal statutory framework, leads to this conclusion." *Id.* at 582.

217. See generally *Plyler v. Doe*, 457 U.S. 202 (1948); see also *Soskin v. Reinertson*, 353 F.3d 1242, 1255–56 (10th Cir. 2004) (stating "the discrimination is Congress's doing").

218. See *Bruns v. Mayhew*, 750 F.3d 61, 71 (1st Cir. 2014) (concluding that "the state drew no distinctions on the basis of alienage" when it opted to participate in Medicaid and provide half of the program's funding, without affording equivalent state resources to lawful permanent residents).

219. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, (1996)).

220. See generally *Arizona v. United States*, 132 S. Ct. 2492 (2012) (analyzing congressional intent under doctrines of express, field, and conflict preemption and invalidating portions of Arizona law addressed to immigration

validity of state laws regulating migrants under the Equal Protection Clause. Indeed, the Supreme Court has stated, including in *Graham*, that Congress cannot insulate the states from the requirements of equal protection.<sup>221</sup> And in *Plyler*, the Supreme Court recognized that congressional choices are not dispositive of states' equal protection obligations even with respect to the rights of undocumented immigrants.<sup>222</sup> Nevertheless, after PRWORA, a number of courts grappling with the "the effect of Congressional authorization of state discrimination against aliens," have viewed the effect of PRWORA as effectively altering states' Fourteenth Amendment obligations to legal permanent residents.

Specifically, in *Soskin*, the Tenth Circuit deemed PRWORA as dispositive of the constitutional inquiry,<sup>223</sup> in contravention of *Graham's* recognition that Congress may not authorize a state's discrimination or immunize the state from the requirements of

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enforcement); Gilbert, *supra* note 176, at 159 (describing the various forms of federal preemption and the role of congressional intent).

221. Specifically, in *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court concluded that a congressional statute that purported to authorize state laws imposing durational residency requirements for welfare benefits was irrelevant to whether state laws adopting such restrictions violated equal protection. Reasoning that it was not the congressional enactment, "but only the state requirements which pose the constitutional question," the Court concluded that "Congress may not authorize the States to violate the Equal Protection Clause." *Id.* at 641. Two years later, the Court reaffirmed that principle in *Graham v. Richardson*, 403 U.S. 365 (1971), rejecting Arizona's argument that its durational residency requirement for immigrants was constitutional because it was "actually authorized by federal law." *Id.* at 380. The Court noted that even if the federal statute were "read so as to authorize discriminatory treatment of aliens at the option of the States . . . serious constitutional questions [would be] presented." *Id.* at 381–82. The Court explained that although the Federal Government has broad power with respect to immigration, "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." *Id.* (citing *Shapiro*, 394 U.S. at 641).

222. *Plyler*, 457 U.S. at 224 (quoting *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948)). The Court reasoned that congressional "disapproval of the presence of these children within the United States, and the evasion of the federal regulatory program that is the mark of undocumented status" did not provide Texas with "authority for its decision to impose upon them special disabilities." *Id.*

223. *Id.* at 1254–55.

equal protection.<sup>224</sup> Indeed, the Tenth Circuit described that statement in *Graham* as a “tautological” proposition.<sup>225</sup> In the court’s view, the question was “not whether Congress can authorize such a constitutional violation,” but rather “what constitutes such a violation when Congress has (clearly) expressed its will regarding a matter relating to aliens.”<sup>226</sup> The Tenth Circuit concluded that Congress’s invitation to the states in PRWORA to deny benefits to lawful residents reflected an expression of congressional will regarding “national policy.”<sup>227</sup> The Court explained that when a state determines that the burden of providing benefits to lawful residence “is too high,” such that it opts to deny such coverage, “it is addressing the congressional concern (not just a parochial state concern) that ‘individual aliens not burden the public benefits system.’”<sup>228</sup> The First and Ninth Circuits followed *Soskin*’s lead and adopted this reasoning as well.<sup>229</sup>

These decisions reflect a congressional imprimatur theory of state alienage discrimination. But there are important reasons why Congress cannot immunize state discrimination against a suspect class in this way through its own immigration policy decisions—that is, who may enter and remain within the United States. It would suggest that Congress can serve as the gatekeeper to constitutional rights, determining the beneficiaries

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224. See *Graham v. Richardson*, 403 U.S. 365, 382 (1971) (“Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.” (citing *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969))); see also *Saenz v. Roe*, 526 U.S. 489, 508 (1999) (“Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation.”).

225. *Soskin v. Reinertson*, 353 F.3d 1242, 1255 (10th Cir. 2004).

226. *Id.*

227. *Id.*

228. *Id.*

229. See generally *Bruns v. Mayhew*, 750 F.3d 61 (2014); see also *Korab v. Fink*, 748 F.3d 875, 887 (9th Cir. 2014) (concluding that Congress in PRWORA “has (clearly) expressed its will regarding a matter relating to aliens,” such that Hawaii did not violate equal protection by “merely following the federal direction set forth by Congress under the Welfare Reform Act” (quoting *Soskin*, 353 F.3d at 1254)).

of such rights, all subject to change should new political leaders change course.

Under preemption doctrine, the law deemed supreme depends upon what law is in force on the day of a court's decision. But the Constitution "removes certain norms from the realm of ordinary politics."<sup>230</sup> The Fourteenth Amendment aimed to check majoritarian power for the benefit of vulnerable groups and its norm of equal treatment therefore transcends the indeterminacy of politics.<sup>231</sup>

### *B. Structured Discrimination: "Aliens Only" Programs*

In evaluating whether state alienage classifications violate equal protection guarantees, a number of courts have also focused on whether the state has allocated public resources to citizens and aliens through separately named, funded, and structured programs. Under this approach, states do not run afoul of equal protection if they provide resources to citizen and immigrants through separate programs (some of which may be jointly funded by the federal government) and then simply terminate the "alien-only" program.

For example, in *Doe v. Commissioner of Transitional Assistance*,<sup>232</sup> the Massachusetts Supreme Judicial Court held that a six-month durational residency requirement for a state supplemental benefit program imposed upon immigrants ineligible for federal Transitional Aid to Families with Dependent Children (TAFDC) did not violate equal protection. In the Court's view, the imposition of a durational residency requirement uniquely upon immigrants did not unconstitutionally distinguish between citizens and immigrants because "the Massachusetts

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230. See David R. Dow, *The Equal Protection Clause and the Legislative Redistricting Cases—Some Notes Concerning the Standing of White Plaintiffs*, 81 MINN. L. REV. 1123, 1134–35 (1997) (describing equal protection guarantees as "constraints on the political majority's political power").

231. *Id.* at 1134.

232. 773 N.E.2d 404, 410 (Mass. 2002) (applying rational basis review to Massachusetts's alienage-based denial of public benefits).

Legislature was not required to establish the supplemental program” and only immigrants were eligible for it.<sup>233</sup>

The court rejected the plaintiffs’ contention that the State had treated immigrants and citizens differently by partly financing the jointly funded TAFDC program but not providing similar benefits to immigrants on the same terms.<sup>234</sup> It reasoned that citizens were “eligible to receive benefits from a different” federal program “on conditions less restrictive than those imposed on qualified aliens” due to federal policies and thus this factor was irrelevant to whether the state had enacted a discriminatory classification targeting immigrants.<sup>235</sup> The court applied rational basis review to the state’s durational residency requirement, noting that the state’s choice to provide a separate “aliens-only” program evidenced a “clearly noninvidious intent,” namely, “mitigating the harm to qualified alien families” occasioned by the Welfare Reform Act.<sup>236</sup>

The Connecticut Supreme Court employed similar reasoning in *Hong Pham v. Starkowski*,<sup>237</sup> holding that the elimination of a state-funded medical assistance program for immigrants ineligible for Federal Medicaid did not “discriminate on the basis of alienage” where the eliminated “aliens only” program did “not benefit citizens as opposed to aliens.”<sup>238</sup> The court rejected the plaintiffs’ argument that the state’s decision to participate in the Federal Medicaid program and to thereby allocate state resources to fund 50% of that program for citizens without allocating equivalent funding to immigrants constituted differential treatment for purposes of equal protection.<sup>239</sup> The court reasoned that the state’s treatment of immigrants under an exclusively state-funded program was not comparable to “the state’s

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233. *Id.* at 411–15.

234. *Id.* at 414–15.

235. *Id.*

236. *Id.*

237. 16 A.3d 635 (Conn. 2011).

238. *See id.* at 645–48 (“When a state establishes an assistance program that benefits only aliens, the elimination of that program does not violate the Equal Protection Clause simply because the state is taking a benefit away from aliens.”).

239. *Id.* at 639–41.

treatment of individuals within the separate federal Medicaid program, which is governed and funded substantially by a different government.”<sup>240</sup>

The court distinguished *Graham* and the state court decisions that have followed it post-PRWORA on grounds that the programs at issue involved discrimination “within a single, state funded and state controlled program” providing benefits to aliens and citizens alike.<sup>241</sup> The court held that Connecticut therefore did not discriminate on the basis of alienage and declined to reach what level of scrutiny should apply to such classifications “authorized by the federal government.”<sup>242</sup>

Similarly, in *Bruns v. Mayhew*,<sup>243</sup> the First Circuit rejected the plaintiffs’ equal protection challenge to the state’s termination of their state-funded medical assistance on grounds that the plaintiffs were not similarly situated to any other recipients of state funding, even though Maine administered a single state medical assistance program, MaineCare, that distributed both Federal Medicaid and exclusively state-funded benefits to lawful permanent residents ineligible for that federal program.<sup>244</sup> The state’s joint administration of the two programs under the same umbrella program and the state’s funding of half of citizens’ federal Medicaid benefits did not alter the court’s view that the state’s repeal of the “aliens only” portion of that program did not deprive lawful immigrants “of a benefit that it continued to provide to citizens.”<sup>245</sup>

The Court of Appeals for the Ninth Circuit in *Pimentel v. Dreyfus*,<sup>246</sup> applied similar reasoning, although the federal program at issue, unlike those in *Doe*, *Hong Pham*, and *Bruns*,

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240. *See id.* at 655 (reasoning that programs solely sponsored by the state are not comparable to programs with joint federal and state funding).

241. *Id.*

242. *Id.* at 645, 655.

243. *See Bruns v. Mayhew*, 750 F.3d 61, 70 (1st Cir. 2014) (reasoning that when Maine repealed the state program it did not continue to give citizens benefits that non-citizens no longer received).

244. *Id.* at 69–70.

245. *See id.* (reasoning that, though the programs are under the same “umbrella,” they are distinct because one is jointly funded by the federal government and the state, and the other program is exclusively state-funded).

246. 670 F.3d 1096, 1108 (9th Cir. 2012).

was not jointly funded by the state and federal government. Specifically, the court held that Washington's termination of an exclusively state-funded food assistance program for immigrants who were ineligible for federal food stamp benefits did not violate equal protection.<sup>247</sup> Citing the different funding sources, and federal control over the eligibility criteria for the federal benefits, the court reasoned that the affected immigrants were not similarly situated to citizens eligible for federal Supplemental Nutrition Assistance Program (SNAP) benefits.<sup>248</sup>

In so holding, the court rejected the plaintiffs' argument that the state's expenditure of 50% of the administrative costs for the federally funded SNAP program without providing equivalent resources to immigrants constituted an impermissible classification on the basis of alienage.<sup>249</sup> Indeed, the court opined that Washington's "alien's only" benefits program might present a case of reverse alienage discrimination, because the only relevant alienage classification at issue actually benefited immigrants; the state provided "no similar state program for citizens."<sup>250</sup> The court concluded that when a state repeals a law designed to level

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247. *See id.* at 1109–10 ("When Washington terminated FAP, the state denied the plaintiff class benefits that it did not and still does not grant to citizens and other aliens. Thus, the difficulty with Pimentel's claim is that she offers no similarly situated individuals as a foundation for her equal protection claim.").

248. *See id.* at 1107 ("Since the recipients under the different programs are therefore not similarly situated, Pimentel may not compare former FAP recipients to current SNAP recipients to allege an equal protection violation.").

249. *Id.* at 1108. Other federal courts have likewise ruled that state administration of federal welfare programs does not alter the deferential scrutiny applicable to PRWORA's alienage eligibility restrictions for federal benefits. *See Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001) (explaining that state administration of a program providing pre-natal Medicaid benefits did not alter the rational basis review applicable to federal alienage restrictions); *accord Aleman v. Glickman*, 217 F.3d 1191, 1197 (9th Cir. 2000) (same as to Food Stamps); *City of Chi. (Alvarez) v. Shalala*, 189 F.3d 598, 600–05 (7th Cir. 1999) (same as to SSI and food stamps); *Rodriguez v. United States*, 169 F.3d 1342, 1346–51 (11th Cir. 1999) (same).

250. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1107 (9th Cir. 2012) (quoting *Adarand Constrs. 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.")).

the playing field occasioned by Congress's discrimination against aliens "it does not necessarily engage in discrimination."<sup>251</sup>

The Ninth Circuit at least recognized the theoretical problem of resolving equal protection disputes by an overly formal analysis of benefit programs' structure.<sup>252</sup> The court noted, "Washington could not evade strict scrutiny simply by first authorizing one state-funded program for citizens and certain aliens and another for a subclass of aliens, and then canceling the latter."<sup>253</sup> But in the case of federal SNAP benefits, however, the court viewed the comparison between federal food stamp benefits and state-funded food assistance as "faulty" because, irrespective of the fact that the state administered the federally funded SNAP benefits in the same program as the separately funded aliens-only program, "the two programs are, in reality, two separately administered programs funded by two distinct sovereigns."<sup>254</sup> For that reason, the court concluded that recipients of the terminated aliens-only state program were not similarly situated to citizens eligible for the SNAP program.<sup>255</sup>

These varied decisions turning back equal protection challenges to states' unequal allocation of state resources to legal residents and citizens illustrate courts' tendency to view such issues with a formalism that insufficiently probes state responsibility for immigrants' unequal treatment, and instead disproportionately credits congressional immigration prerogatives with the resulting inequality.

To be sure, no theory or principle of federalism supports ratcheting down the scrutiny applicable to a suspect class merely because it is less convenient or more expensive for the states to provide equal treatment due to factors beyond that sovereign's control. As the Massachusetts Supreme Judicial Court has stated, that federal policy choices makes discrimination against

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251. *Id.* (quoting *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 483 (1982) ("To be sure, the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.")).

252. *Id.* at 1006–07.

253. *Id.* at 1106.

254. *Id.* at 1107.

255. *Id.* at 1106–10.

noncitizens more cost-effective for the state should make no difference.<sup>256</sup>

The claim that federal immigration policy renders immigrants dissimilarly situated from citizens in this context is also inconsistent with *Graham's* theory of equality. For example, one might argue that citizens and aliens are not similarly situated *vis a vis* the states in light of their status under federal law, which makes citizens eligible for federal Medicaid matching funds without the same restrictions it imposes upon lawful permanent residents. But *Graham* treated citizens and lawful permanent residents similarly situated based upon their shared contributions and burdens of community membership,<sup>257</sup> not a comparative economic assessment of what it would cost to treat them equally.<sup>258</sup>

### C. Alienage Classifications Recast

Relatedly, courts have treated alienage-based restrictions on public benefits as classifications based upon characteristics other than alienage status.<sup>259</sup> For example, in addition to upholding Connecticut's denial of state-funded healthcare benefits to immigrants on grounds that the elimination of an "aliens only" benefit program did not constitute alienage discrimination, the

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256. See *Finch v. Commonwealth Health Ins. Connector Auth. (Finch I)*, 946 N.E.2d 1262, 1280 (Mass. 2011) (stating "that the Federal government (on national origin grounds) is unwilling to [finance] Commonwealth Care does not render the Commonwealth obligated to classify eligibility on the basis of national origin—it merely makes such a classification economically attractive to the State that is left carrying the entire burden").

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

258. See *Korab v. Fink*, 797 F.3d 572, 583 (9th Cir. 2014) (concluding that Hawaii did not engage in alienage discrimination where the plaintiff had not "even alleged that the state expenditures for health insurance for aliens within the discretionary category created by Congress are less than the state expenditures for health insurance for others"). *But see id.* at 599–600 (Clifton, J., dissenting) (criticizing majority for requiring equal protection claimants to "demonstrate that the state [spends] less funds [per capita] than it [spends] on the rest of the population" as inconsistent with "bedrock equal protection doctrine" which does not excuse disparate treatment because it is "more expensive" to provide equivalent benefits to similarly situated groups of state residents).

259. *Hong Pham v. Starkowski*, 16 A.3d 635, 662–63 (Haw. 2011).

*Hong Pham* court also reasoned that Connecticut's denial of healthcare funding to immigrants was at most a classification "based on an individual's eligibility for federal Medicaid" matching funds, and not alienage status.<sup>260</sup>

The First Circuit in *Bruns v. Mayhew*<sup>261</sup> adopted similar reasoning, refusing to view Maine's denial of state-funded medical assistance to lawful permanent residents ineligible for federal Medicaid as alienage discrimination.<sup>262</sup> The court reasoned that "if Maine can be said to have 'discriminated' at all" by continuing to participate in the Federal Medicaid program, "it only did so on the basis of federal Medicaid eligibility, a benign classification subject to mere rational basis review."<sup>263</sup>

This analysis inadequately accounts for the state's role in immigrants' unequal treatment. To be sure, the federal government is responsible for the exclusion of immigrants from the Federal Medicaid program.<sup>264</sup> Under the Supreme Court's precedents, the federal government's authority over immigration matters justifies that unequal treatment.<sup>265</sup> But the same

260. See *id.* at 659 (reasoning that "[w]hen the state participates in federal Medicaid, it chooses to provide some state funding to assist [eligible] individuals . . . and not to provide funding to [ineligible] individuals" and immigrants are "not the only group of individuals ineligible for federal Medicaid").

261. 750 F.3d 61 (1st Cir. 2014).

262. *Id.* at 69–70.

263. *Id.* (citing *Hong Pham*, 16 A.3d at 659); cf. *Soskin v. Reinertson*, 353 F.3d 1242, 1255–56 (10th Cir. 2004).

264. *Soskin* employed similar reasoning. See 353 F.3d at 1255–56 ("A state's exercise of the option to include fewer aliens in its aliens-only program, then, should not be treated as discrimination against aliens as compared to citizens. That aspect of the discrimination is Congress's doing—by creating one program for citizens and a separate one for aliens.").

265. See *Mathews v. Diaz*, 426 U.S. 67, 85 (1975) ("[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."); *Plyler v. Doe*, 457 U.S. 202, 225 (1982) ("Although it is a routine and normally legitimate part of the business of the Federal Government to classify on the basis of alien status, and to take into account the character of the relationship between the alien and this country, only rarely are such matters relevant to legislation by a State." (quotation omitted)).

justification does not apply to the states. And thus it is hard to see why—at least on the courts’ articulated theory—a state deserves a pass from its equal protections obligations where it opts into a discriminatory scheme on its own accord (albeit with significant financial incentives to do so), is complicit in unequal treatment, but does not possess the same authority for treating migrants dissimilarly as the federal government.<sup>266</sup> In a state like Connecticut, for example, the government chose to extend \$1.9 billion of funds from state tax coffers into the Federal Government’s discriminatory scheme, without extending resident immigrants equal resources for healthcare benefits.<sup>267</sup> Indeed, the courts’ characterization of the classification as “eligibility for federal matching funds” conflates the fiscal benefits to the states of singling out immigrants for termination of welfare benefits with the threshold question of whether the state has drawn an alienage-based classification by funding benefits for citizens but not migrants.

Courts’ willingness to view states’ discriminatory spending on healthcare benefits as benign classifications based upon the availability of federal matching funds is probably best explained by judges’ unstated intuition that it seems unreasonable to hold the federal government to one standard, but then expect fairer treatment from the states with respect to the same kind of public benefits.<sup>268</sup> But that intuition is in direct opposition to the longstanding rationale of the equal protection dichotomy. This strand of the new equal protection jurisprudence involving alienage status thus exposes a burgeoning break down of what once appeared to be well-settled doctrinal silos of federal and state alienage classifications.

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Under each of these approaches, the supplanting of Fourteenth Amendment antidiscrimination norms with a

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266. *Supra* note 265.

267. *Hong Pham v. Starkowski*, 16 A.3d 635, 644–45 (Haw. 2011).

268. The Ninth Circuit followed this rationale in *Korab v. Fink*, which reasoned that “[t]he logical corollary to the national policy that Congress set out in the Welfare Reform Act is that, where the federal program is constitutional, as it is here, states cannot be forced to replace the federal funding Congress has removed.” 797 F.3d 572, 582 (9th Cir. 2014).

doctrine disproportionately focused on congressional policy undermines *Graham's* promise of equal treatment by the states. Or, more simply, it signals a preempting of equal protection for immigrants.

A number of courts, however, have rejected these approaches and, post-PRWORA, followed *Graham's* mandate to apply strict scrutiny to state alienage classifications.<sup>269</sup> Significantly, courts have invalidated state laws both denying immigrants access to exclusively state-funded programs that previously benefitted noncitizens and citizens alike,<sup>270</sup> and laws eliminating exclusively state-funded “aliens-only” programs where the state continued to partly fund federal benefits for citizens.<sup>271</sup>

For example, in *Aliessa v. Novello*,<sup>272</sup> in holding that New York's termination of state-funded medical benefits to lawfully present immigrants based upon their immigration status violated the equal protection guarantees of the New York and federal constitutions, the New York Court of Appeals rejected the state's claim that New York's decision to terminate certain legal residents from the program implemented federal immigration policy and should thus “be evaluated under the less stringent ‘rational basis’ standard.” The court recognized that if Congress specifically directed “the States to implement national immigration objectives” in a uniform manner, a state alienage classification might be properly considered under rational basis review because “the Constitution empowers Congress to ‘establish [a] uniform Rule of Naturalization.’”<sup>273</sup> But in the court's view,

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269. See *Finch v. Commonwealth Health Ins. Connector Auth. (Finch II)*, 959 N.E.2d 970, 981 (Mass. 2012) (stating that the Commonwealth may not “lean on Federal policy as a crutch to absolve it of examining whether its own invidious discrimination is truly necessary”); *Finch v. Commonwealth Health Ins. Connector Auth. (Finch I)*, 946 N.E.2d 1262, 1280 (Mass. 2011) (applying strict scrutiny to the state's benefits program).

270. See *Aliessa v. Novello*, 754 N.E.2d 1085, 1098 (N.Y. 2001) (striking down New York's alienage-based allocation of exclusively state-funded healthcare benefits).

271. See *Ehrlich v. Perez*, 908 A.2d 1220, 1227 (Md. 2006) (striking down Maryland's termination of exclusively state-funded health care benefits for immigrants ineligible for federal benefits, while continuing to jointly fund federal benefits for citizens).

272. 754 N.E.2d 1085 (N.Y. 2001).

273. *Id.* at 1096 (quoting U.S. CONST. art. I, § 8, cl. 4 and *Plyler v. Doe*, 457

PRWORA did not constitute a uniform rule of federal immigration policy because it authorized states to choose for themselves whether to provide state-funded benefits to immigrants, thereby inviting “potentially wide variation” in state practice.<sup>274</sup>

In *Ehrlich v. Perez*<sup>275</sup> and *Finch v. Commonwealth Health Ins. Connector Auth.*,<sup>276</sup> the highest courts of Maryland and Massachusetts concluded that the respective states violated equal protection where they allocated resources to fund federal Medicaid benefits for citizens and lawful residents who satisfied PRWORA’s five year bar but terminated state healthcare benefits for certain legal residents ineligible for federal Medicaid by virtue of their immigration status. The courts found equal protection violations where the differential treatment challenged by the plaintiffs consisted of the states financing part of federally subsidized benefits for citizens while eliminating a supplemental, exclusively state-funded “aliens only” program.<sup>277</sup> Both decisions thus eschewed a formalistic analysis of the states’ equal

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U.S. 202, 219 n.19 (1982)).

274. See *id.* at 1098 (“If the rule were uniform, each State would carry out the same policy under the mandate of Congress—the only body with authority to set immigration policy.”). Unlike the other recent cases in which courts have upheld state laws excluding legal residents from public benefits programs, the program at issue in *Aliessa* provided exclusively state-funded coverage to both citizens and aliens alike who did not qualify for Federal Medicaid. *Id.* at 1092. As a result, the differential treatment challenged by the plaintiffs could not be dismissed as the result of a separate, federally directed program, and New York’s classification ran directly afoul of *Graham*. Cf. *Krhapunskiy v. Doar*, 909 N.E.2d 70, 76–77 (N.Y. 2009) (concluding New York’s failure to provide state funding to ameliorate the effects of PRWORA did not violate the requirement of equal protection). While *Aliessa* might, therefore, be dismissed as the most straightforward application of *Graham* post-PRWORA, other state courts have not cabined its reasoning to exclusively state-funded benefit programs. *Ehrlich*, 908 A.2d at 1227.

275. 908 A. 2d 1220, 1243–44 (Md. 2006).

276. *Finch II*, 959 N.E.2d 970, 973 (Mass. 2012); *Finch I*, 946 N.E.2d 1262, 1280 (Mass. 2011).

277. See *Ehrlich*, 908 A.2d at 1227 (“Although the Maryland State Medicaid program, along with federal funds, provides the same medical services as available under the Welfare Innovation Act to both citizens and residents, . . . this new provision is limited to those aliens for whom federal Medicaid eligibility was eliminated by the Welfare Reform Act.”).

protection obligations and instead focused on the state's decision to partially fund benefits for citizens through federal programs while eliminating funding for lawful permanent residents through separate state programs and appropriations.

#### *D. Lawfully Present Without Equality*

Another fault-line where federalism considerations are casting a long shadow in equal protection jurisprudence involves the rights of lawfully present non-immigrants to equal treatment by the states. While there is currently consensus among three federal courts of appeals that rational basis review should apply to state laws denying public benefits to lawful permanent residents after PRWORA, the circuits are split as to whether *Graham* mandates strict scrutiny when states enact laws limiting nonimmigrants'<sup>278</sup> access to employment opportunities, drivers' licenses, and professional licenses.<sup>279</sup> In spite of the divergent outcomes, like the PRWORA cases, here too, federalism concerns have dominated the equal protection discussion.

Specifically, the Second Circuit and Fifth Circuit disagree about whether strict scrutiny under *Graham* applies to laws that discriminate against temporary, but lawfully present, non-immigrants.<sup>280</sup> In *LeClerc v. Webb*,<sup>281</sup> the Fifth Circuit upheld

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278. Immigration law classifies migrants as immigrants (those admitted for permanent residence) and nonimmigrants who "are admitted to the United States only for the duration of their status" and must state "they have 'no intention of abandoning' their countries of origin and do not intend to seek permanent residence in the United States." *LeClerc v. Webb*, 419 F.3d 405, 418–19 (5th Cir. 2005).

279. Compare *id.* at 420 (applying rational basis review to uphold Louisiana law barring nonimmigrants from taking the bar exam), and *LULAC v. Bredesen*, 500 F.3d 523, 535–36 (6th Cir. 2007) (applying rational basis review to Tennessee law barring nonimmigrants from obtaining driver licenses), with *Dandamudi v. Tisch*, 686 F.3d 66, 75 (2d Cir. 2012) (rejecting "the rationale of the Fifth and Sixth Circuits" and applying strict scrutiny to Connecticut law excluding nonimmigrants from being pharmacists).

280. *Supra* note 279.

281. See 419 F.3d at 417–18 (distinguishing lawful permanent residents from nonimmigrants, stating that unlike the former, nonimmigrants are not "legally entrenched within American society" given their short term permission to remain and need not be recognized as a discrete and insular minority).

a Louisiana Supreme Court rule rendering lawfully present graduates of foreign law schools—many here on temporary worker and student visas—ineligible to take the Louisiana Bar exam in the face of an equal protection challenge. The court held that rational basis review applied to Louisiana’s citizenship eligibility requirement for the bar exam because *Graham* and a later Supreme Court decision, *In re Griffiths*,<sup>282</sup> were not controlling.<sup>283</sup> *In re Griffiths* applied *Graham* and held that Connecticut’s exclusion of lawful permanent residents from bar admissions violated the requirements of equal protection.<sup>284</sup> Departing from those precedents, the Fifth Circuit reasoned that the Constitution imposes different equal protection obligations upon the states with respect to lawful permanent residents and temporary, but also lawfully present, foreign residents.<sup>285</sup>

The court reasoned that the U. S. Supreme Court has never strictly scrutinized a state alienage classification other than those disadvantaging lawful permanent residents.<sup>286</sup> And in the Fifth Circuit’s view, the Court in *Griffiths* emphasized that lawful permanent residents “share essential benefits and burdens of citizenship in a way that aliens with lesser legal status do not.”<sup>287</sup> It noted that, in addressing equal protection challenges to state laws burdening other classes of immigrants, including non-immigrant aliens or undocumented immigrants, “the Court has either foregone Equal Protection analysis”

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282. See 413 U.S. 717, 726–27 (1973) (applying strict scrutiny and striking down under the Equal Protection Clause a Connecticut law barring lawful permanent residents from taking the bar exam).

283. See *LeClerc v. Webb*, 419 F.3d 405, 418–19 (5th Cir. 2005) (reasoning that *In re Griffiths*’ rationale was limited to resident aliens, and did not apply to nonimmigrants).

284. *In re Griffiths*, 413 U.S. at 726–27.

285. See *LaClerc*, 419 F.3d at 410 (noting that “the level of constitutional protection afforded nonimmigrant aliens is different from that possessed by permanent resident aliens”).

286. See *id.* at 415–16 (stating that “the Supreme Court has reviewed with strict scrutiny only state laws affecting permanent resident aliens” and has held that “not all limitations on aliens are suspect” (quoting *Foley v. Connelie*, 435 U.S. 291, 294 (1978))).

287. *Id.* at 415.

altogether, as in *Toll v. Moreno*,<sup>288</sup> and *De Canas v. Bica*,<sup>289</sup> which both addressed state alienage laws solely under the Supremacy Clause, or applied “a modified rational basis review,” as in *Plyler v. Doe*.<sup>290</sup>

Federalism, specifically a rights-enhancing theory of federal immigration policy, was central to the Fifth Circuit’s reasoning.<sup>291</sup> The court noted that the Supreme Court’s “fundamental rationale” for applying strict scrutiny to state laws affecting lawful permanent residents was a structural one: that the states “took position[s] seemingly inconsistent with the congressional determination to admit the alien to permanent residence.”<sup>292</sup> The court suggested that the same conflict with federal immigration policy is not at stake when states regulate non-immigrants, who do not benefit from the same rights-enhancing offer of permanent residence.<sup>293</sup>

*LeClerc* further reasoned that the Supreme Court applied strict scrutiny to state laws classifying on the basis of alienage status in part based upon permanent residents’ political powerlessness and similarity to citizens.<sup>294</sup> In the court’s view, nonimmigrants lack this same peculiar position that juxtaposes vulnerability with rights and responsibilities.<sup>295</sup> The Fifth Circuit

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288. See 458 U.S. 1, 9–10 (1982) (invalidating a University of Maryland policy denying in-state tuition to nonimmigrants on Supremacy Clause grounds, after declining to consider the plaintiffs’ Equal Protection claims).

289. See 424 U.S. 351, 356–57 (1976) (upholding a California law prohibiting employment of undocumented workers on Supremacy Clause grounds).

290. See *LeClerc v. Webb*, 419 F.3d 405, 416 (5th Cir. 2005) (noting that in *Plyler v. Doe*, 457 U.S. 202, 224 (1982), the Court concluded that the “the immigration status of the affected class of aliens precluded use of either intermediate or strict scrutiny review”).

291. *Id.* at 423–25.

292. *Id.* (quoting *Foley v. Connelie*, 435 U.S. 291, 295 (1978)).

293. *Id.*

294. *Id.* at 417–18.

295. See *id.* (reasoning that because of their temporary status, nonimmigrant aliens lack a similar connection to American society, as evidenced by the requirement that they stipulate before entry that they do not intend to abandon their native citizenship). Moreover, the court found that as a class nonimmigrants are not discrete or insular because wide variation exists among nonimmigrants’ admission status. *Id.* at 417. In his dissent, Judge Stewart took issue with this reasoning, contending that the Court’s decisions in *Graham* and

reaffirmed its holding in *LeClerc* six years later in *Van Staden v. St. Martin*,<sup>296</sup> applying rational basis review and upholding a Louisiana statute that made lawfully present non-immigrants ineligible to work as licensed practical nurses.<sup>297</sup>

In *LULAC v. Bredsen*<sup>298</sup> the Sixth Circuit closely followed the Fifth Circuit's approach in a case challenging Tennessee's denial of drivers' licenses to lawfully present non-citizens.<sup>299</sup> The court applied rational basis review, citing the Fifth Circuit's reasoning that *Graham* does not apply beyond the class of lawful permanent residents and that temporary, nonpermanent residents are dissimilar from citizens in constitutionally significant ways.<sup>300</sup>

In addition, the court cited the Fifth Circuit's federalism justification for cabining *Graham* and its progeny to lawful permanent residents, noting that when states discriminate against LPRs they are taking a position "seemingly inconsistent with the congressional determination to admit the alien to permanent residence."<sup>301</sup> But the Sixth Circuit added an additional structural justification for applying a more deferential

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its progeny apply to all lawfully present "aliens" as a class and strict scrutiny did not turn on "aliens' ability to serve in the Armed Forces or pay taxes." *Id.* at 428–29.

296. 664 F.3d 56 (2011).

297. *See id.* at 61 (accepting as a rational justification for the law that it "seeks to protect Louisiana residents from LPN's who may have previously left the jurisdiction to avoid the Board's disciplinary controls on the profession").

298. 500 F.3d 523 (2007).

299. *See id.* at 523–33 (agreeing with the Fifth Circuit's distinction between permanent resident aliens who are "legally entrenched in society" and nonimmigrant aliens who are admitted to the United States for a durational period).

300. *Id.* at 533. As in *LeClerc*, *LULAC* included a strong dissent. Circuit Judge Ronald Lee Gilman criticized the majority for failing to acknowledge the extensive criticism of the *LeClerc* opinion, including dissents from both the initial appellate decision and the narrow 8–7 decision declining en banc review. *LULAC*, 500 F.3d at 539–42 (Gilman, J., dissenting). He further chided the majority for treating the absence of Supreme Court precedent extending *Graham* to nonimmigrants as a reason to read that decision's clear holding declaring aliens a suspect class in a narrow manner. *Id.* at 542–43.

301. *Id.* at 533 (majority opinion) (quoting *LeClerc v. Webb*, 419 F.3d 405, 417 (5th Cir. 2005) (citation omitted)).

scrutiny to laws discriminating on the basis of nonimmigrant status: In the court's view, Tennessee's law not only was consistent with federal law, it actually "mirrors it."<sup>302</sup> The court explained that the challenged law "merely serves to deny state-issued proof of identification to any alien whose presence the federal government has refrained from permanently authorizing, so as to avoid the appearance that the State of Tennessee is vouching for his or her identity."<sup>303</sup> In fact, the court characterized the state's classification as "directly derivative of aliens' status under immigration law."<sup>304</sup> The court was candid that federalism concerns were significant to its reasoning, noting, in response to the dissent, that its "more deferential approach to Tennessee's legislative judgment" was "born of due respect for principles of federalism and comity."<sup>305</sup>

The Second Circuit, also emphasizing principles of federalism, reached the opposite result in *Dandamudi v. Tisch*.<sup>306</sup> There, the court deemed *Graham* controlling and applied strict scrutiny to invalidate a New York law that made lawful permanent resident status or citizenship a requirement to work as a pharmacist within that state, thereby excluding lawfully

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302. *Id.*

303. *Id.*

304. *See id.* at 534 (describing how the state law was the "mirror image" of federal law).

305. *Id.* at 534 n.8. In another case involving lawfully present immigrants' access to drivers' licenses, *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (2014), the Ninth Circuit avoided deciding what level of scrutiny applies to state classifications targeting recipients of work authorization pursuant to President Obama's Deferred Action for Childhood Arrivals (DACA) program, agreeing with the lower court that Arizona's decision to deny DACA recipients drivers' licenses was "likely to fail even rational basis review." *Id.* at 1065. The Ninth Circuit, however characterized the Supreme Court precedent as not limiting strict scrutiny to lawful permanent residents. Rather, the court noted that "the Supreme Court has consistently required the application of strict scrutiny to state action that discriminates against noncitizens *authorized to be present* in the United States." *Id.* at 1065 n.4 (citing *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Graham v. Richardson*, 403 U.S. 365 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948)).

306. *See Dandamudi v. Tisch*, 686 F.3d 66, 78 (2012) ("We see no reason to create an exception to the Supreme Court's precedent that would result in such illogical results that clearly contradict the federal government's determination as to which individuals have a legal right to be here.").

present non-immigrants like the plaintiff.<sup>307</sup> The court declined to view *Graham* and its progeny as limited to lawful permanent residents, reasoning that the Supreme Court affirmed a “general principle that alienage is a suspect classification.”<sup>308</sup>

Once again, federalism concerns influenced the court’s equal protection reasoning.<sup>309</sup> Specifically, the court reasoned that the state regulatory scheme sought “to prohibit some legally admitted aliens from doing the very thing the federal government indicated they could do when they came to the United States—work.”<sup>310</sup> Citing *Takahashi*, the court further reasoned that New York had not only treated two groups of similarly situated residents differently, but had effectively “drive[n] from the state nonimmigrants who have federal permission to enter the United States to work.”<sup>311</sup>

In sum, all of the courts that have evaluated non-immigrants’ right to equal protection under the Fourteenth Amendment have focused on federalism concerns, but with divergent results. The Fifth and Sixth Circuits have viewed federal immigration policy broadly, ascribing to Congress a policy of providing nonimmigrants with a lesser status with fewer rights than lawful permanent residents.<sup>312</sup> In contrast, the Second Circuit focused

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307. See *id.* at 70, 74 (finding no “existing basis for distinguishing *Graham*’s requirement” that state statutes distinguishing on the basis of alienage status “are strictly scrutinized”).

308. See *id.* at 74–75 (reasoning “that the Court has never held that lawfully admitted aliens are outside of *Graham*’s protection” nor “distinguished between classes of legal resident aliens”).

309. See *id.* at 77 n.14 (“Certainly the federal government, which bears the constitutional responsibility of regulating immigration, has much broader latitude to distinguish among subclasses of aliens. But this latitude does not give states carte blanche to do the same.”).

310. *Id.* at 69, 77. The Second Circuit separately concluded that New York’s law was preempted under the Supremacy Clause, but was “constrained” to decide the case on equal protection grounds because of the noncitizen plaintiffs’ standing limitations with respect to preemption challenges. *Dandamudi*, 686 F.3d at 81 (citing the NAFTA Implementation Act).

311. See *Dandamudi*, 686 F.3d at 81 (“The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work.” (quoting *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 416 (1948))).

312. See *LULAC v. Bredesen*, 500 F.3d 523, 533 (6th Cir. 2007) (applying

on a narrower aspect of federal immigration policy—Congress’s decision to permit nonimmigrants to work in the United States.<sup>313</sup> The courts’ conflicting, perhaps even instrumental, use of congressional policy choices to justify divergent outcomes underlines the need for a coherent theory of federalism’s role in assessing migrants’ equal protection rights.

### *V. Recalibrating Federalism’s Proper Role in Discerning Migrants’ Equal Protection Rights*

#### *A. Federalism’s Place*

The respective roles of the federal and state governments in regulating migrants is a separate constitutional and normative question from what equality is due migrants once the nation opens its doors and those with access to the opportunity follow the rules of entry. In many instances, the courts have conflated the two<sup>314</sup> and, in the process, undermined the antidiscrimination norms at the heart of equal protection. One reason for this development is the lack of a clear conceptual framework for how federalism considerations may play a legitimate role in discerning the constitutionality of state law distinguishing between citizens and lawfully present noncitizens. As a result, in alienage cases, federalism considerations often have a disruptive effect on the antidiscrimination norms of the Fourteenth

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rational basis where state law was not in conflict with federal law but instead “mirrored” it); *LeClerc v. Webb*, 419 F.3d 405, 421 (5th Cir. 2005) (rational basis justified in part by deference to “legislative policy decisions”).

313. *Dandamudi v. Tisch*, 686 F.3d 66, 77 (2012).

314. Judge Clifton, dissenting in *Korab v. Fink*, criticized the Ninth Circuit majority for its “confusion as to whether” it was addressing “an equal protection or a preemption case.” 797 F.3d 572, 605 n.7 (9th Cir. 2014) (Clifton, J., dissenting). He noted that the court’s equal protection analysis focused “not [on] whether Congress may authorize Hawaii to violate the Equal Protection Clause but rather ‘what constitutes such a violation when Congress has (clearly) expressed its will regarding a matter relating to aliens.’” *Id.* (quoting *Soskin v. Reinertson*, 353 F.3d 1242, 1254 (10th Cir. 2004)). Judge Clifton reasoned that “no equal protection doctrine . . . turns on whether ‘Congress has (clearly) expressed its will.’ That is instead the language of preemption analysis.” *Id.*

Amendment, transforming equal protection analysis into a preemption-like inquiry.<sup>315</sup>

Federalism's historic role in equal protection doctrine involving migrants examined in earlier sections of this Article helps to identify when federalism concerns can legitimately matter to the resolution of whether a sovereign has violated equal protection, and when federalism considerations are misplaced and work to displace a focus on equality. That analysis and this Article's related critique of the recent equal protection jurisprudence involving lawfully present migrants suggests that in three categories—which I collectively describe as interpretative uses of federalism—federalism considerations can work within equal protection analysis without substituting a concern about migrants' rights with an emphasis on constitutional structure.

First, federalism does not supplant equality norms when courts consider whether unique powers of the state and federal governments warrant a presumption that government regulation in that area is rational and not based upon improper motives. For example, the Court has modulated its equal protection scrutiny in cases involving state political functions because of states' Tenth Amendment power to regulate elections and define their political community.<sup>316</sup> Similarly, in *Mathews*, the Court disclaimed a meaningful judicial role in checking the political branches' decisions related to immigration policy on account of the federal government's exclusive role in regulating immigration.<sup>317</sup> In both

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315. *Supra* Part IV.

316. *See* *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)

Just as the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections, each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen. Such power inheres in the State by virtue of its obligation, already noted above, "to preserve the basic conception of a political community."

(quotations omitted).

317. *See* *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976)

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,

instances, this federalism-driven deference is the result of the same theory: where the Constitution commits exclusive authority to a particular sovereign, government regulations based upon that authority, so the theory goes, are unlikely to be based upon arbitrary and improper motives.<sup>318</sup> Courts implement the theory by modulating their equal protection scrutiny.

Citing these dual exceptions, commentators have criticized the Court's alienage jurisprudence as "incoherent,"<sup>319</sup> but without explaining why these exceptions are incompatible with one another or do not employ a consistent and sound theory of constitutional adjudication.<sup>320</sup> Putting aside whether the particular decisions in which the Court recognized these exceptions actually reflect regulation of a type for which the Court deemed deference warranted—i.e., whether *Mathews'* alienage-based restriction on Medicare benefits in fact regulated immigration<sup>321</sup> or whether states' exclusion of lawful permanent residents from jobs as public school teachers and parole officers really addressed functions essential to a state's political community<sup>322</sup>—both exceptions reflect a consistent use of federalism to help illuminate whether dissimilar treatment is justified. That is, the Court presumes that the government's

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such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.

318. See *Foley v. Connelie*, 435 U.S. 291, 295–96 (1978) (describing that the "practical consequence" of state's power under the Tenth Amendment to define their political community is judicial deference to legislative choices based upon that authority); *Mathews*, 426 U.S. at 80–82 (describing the need for deference to decisions made pursuant to federal government's authority over foreign affairs and immigration).

319. See *Cox*, *supra* note 10, at 352 (arguing that "[c]ourts have struggled for decades to develop a coherent approach to evaluating alienage rules" and have "for the most part . . . failed"); *Korab v. Fink*, 797 F.3d 572, 584 (Bybee, J., concurring) (describing alienage jurisprudence as "unsettled" and marked by a "morass of conflicting approaches").

320. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1093–94 (2003). Volokh suggests that one or two exceptions to a rule do not necessarily undermine its "overarching justification," particularly when a core principle can still be discerned for the rule and its exceptions. *Id.*

321. *Supra* note 96.

322. See *Foley*, 435 U.S. at 299–300 (Stevens, J., dissenting) (questioning the exclusion of migrants from many forms of public employment as actually serving the purpose of preserving states' political community).

reason for distinguishing between residents is legitimate because of the Constitution's structural commitment of a specific power to the respective government. And, in both instances, the Court then uses standards of review as a "legal tool" to help discern whether the government has complied with the Constitution's substantive command of equality.<sup>323</sup>

One may legitimately question whether modulating scrutiny functions accurately as a legal tool or whether courts erroneously have allowed too many government classifications with nuanced motivations within the sphere of judicial deference.<sup>324</sup> But those critiques do not mean that federalism is an improper consideration in equal protection jurisprudence altogether. Indeed, federalism's role in these instances works within equal protection analysis, not against it, because courts still require that discriminatory treatment be justified by a sufficient state interest. Courts' federalism-tinged scrutiny merely operates as shortcut to judicial acceptance of a sufficient state interest.

Relatedly, federalism considerations may also play an appropriate role in equal protection analysis when it helps reveal that the justification for a government regulation is arbitrary and improper because the state lacks authority to regulate the subject matter in the first place.<sup>325</sup> This *ultra vires* analysis, examined earlier in this Article,<sup>326</sup> is the inverse of the scrutiny-modulating deference described above: a government's lacking authority to regulate a subject matter is a pretty good indication that its regulation in that area may be based upon improper motives.<sup>327</sup>

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323. Neuman, *supra* note 99, at 1434–35. Gerald Neuman has challenged the scholarly criticism claiming that because "a classification cannot be suspect when the states employ it, yet non-suspect when the federal government employs it," the equal protection dichotomy is flawed. *Id.* at 1435. Neuman counters that "[t]his argument erroneously treats 'suspectness' as an objective description of reality rather than a legal tool." *Id.*

324. Criticism discussed *supra* note 96.

325. See *Truax v. Raich*, 239 U.S. 33, 43 (1915) (striking down alienage-based state labor restriction reasoning that courts must consider whether "underlying the classification is the authority to deal with that at which the legislation is aimed"); see also Soucek, *supra* note 25, at 167–71 (describing a similar role for federalism in equal protection doctrine as "interest constraining" federalism in comparative analysis of alienage and marriage equality cases).

326. *Supra* Part III.A.

327. *Id.* A variant of this approach was also at work in *Gebin v. Mineta*, 231

Like scrutiny-modulated deference, this use of federalism also serves as an interpretive tool because the focus remains on whether discriminatory treatment is justified, not the separate structural concerns of supremacy, institutional competence, and the respective powers of the federal and state governments.

It remains to be seen, however, the extent to which these interpretative uses of federalism in equal protection analysis remain doctrinally coherent in light of the growing influence of immigration federalism—a normative account of shared federal and state power to regulate migrants and immigration.<sup>328</sup> For example, if states do, in fact, possess authority to regulate migrants in ways traditionally thought to be the exclusive domain of federal immigration regulation—as many immigration federalism theorists have contended,<sup>329</sup>—the basis for unitary deference in equal protection doctrine to an exclusively federal immigration power may need to be rethought.<sup>330</sup>

But even in the absence of a reimagined equal protection framework that better accounts for immigration federalism—a project beyond this Article’s scope—the consideration of federalism principles in equal protection cases in the ways

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F. Supp. 2d 971 (C.D. Cal. 2002), where the district court refused to apply rational basis review to a provision of the Aviation and Transportation Security Act (ATSA), enacted two months after 9/11, that barred all noncitizens from employment as airport screeners, reasoning that a wholesale ban on noncitizens from the job of airport screeners “could have no implication in our relations with foreign powers, nor could it be justified as encouraging aliens to naturalize.” *Id.* at 976; see also Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1645–46 (2007) (discussing *Gebin* and concluding that “[t]he reasons behind the plenary power doctrine matter in determining whether a law falls within it”).

328. *Supra* note 10.

329. See, e.g., *supra* note 10 and accompanying text (citing immigration federalism scholarship); Elias, *supra* note 10, at 705–06 (“This ‘new immigration federalism’ is and will be grounded in immigrant-inclusionary rulemaking, which has the potential to complement (as well as occasionally contradict) federal efforts at comprehensive immigration reform.”).

330. Clare Huntington, for example, has noted that growing recognition of “immigration federalism”—that is, acceptance of some measure of shared power between federal and state governments with respect to the regulation of migrants—likely means an end to non-congruent equal protection in the immigration context, but acknowledges that what that means for individual rights has not yet been explored. See Huntington, *supra* note 11, at 838 (noting impact of immigration federalism on equal protection scrutiny requires “greater debate and exploration”).

described above, nevertheless, does not undermine constitutional equality norms. Federalism's seemingly contradictory role in these instances—modulating scrutiny of the federal government's regulations in one instance and the states' in the other—merely recognizes, as Justice Blackmun put it, that “aliens constitute a unique class”: alienage status is a constitutionally relevant basis for distinguishing between residents in some instances, and not others, and often only by a specific sovereign within each instance.<sup>331</sup>

Federalism concerns can also play a more direct role in equal protection analysis if the Supremacy Clause provides a compelling justification for states to distinguish between citizens and noncitizens. That is where Congress directs the states to implement a uniform federal immigration policy,<sup>332</sup> states might defend challenges to a state law by claiming that the state's conformance with federal law constitutes a compelling state interest. This approach is preferable to relaxing the strict scrutiny normally applicable to state alienage restrictions when states are purportedly following a uniform federal immigration policy—which is how the decisions upholding state alienage restrictions after PRWORA have addressed the issue.<sup>333</sup> Requiring the state to meet the demands of strict scrutiny, even if the Supremacy Clause helps to form a compelling state interest,<sup>334</sup> is preferable because it will encourage courts to delve

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331. *Toll v. Moreno*, 458 U.S. 1, 22 (1982) (Blackmun, J., concurring).

332. *See, e.g., Soskin v. Reinertson*, 353 F.3d 1242, 1255 (10th Cir. 2004) (reasoning that the “federal government's imprimatur” for state alienage discrimination may “reduce the level of scrutiny to which the state's choice is subjected under the Equal Protection Clause” while acknowledging that Congress in PRWORA did not enact a uniform federal immigration policy and direct the states to follow it).

333. *See generally, e.g., Bruns v. Mayhew*, 750 F.3d 61 (2014) (applying rational basis review because of PRWORA); *Korab v. Fink*, 748 F.3d 875, 887 (9th Cir. 2014) (applying rational basis review after concluding that Congress through PRWORA “has (clearly) expressed its will regarding a matter relating to aliens,” and Hawaii did not violate equal protection by “merely following the federal direction set forth by Congress” (quoting *Soskin*, 353 F.3d at 1254)).

334. For example, the New Jersey Supreme Court has viewed a state's interest in avoiding conflicts with federal immigration law as a sufficient justification for alienage-based classifications, but did so while reducing the scrutiny otherwise required by *Graham*. *In re Adoption of a Child by L. C.*, 425 A.2d 686, 693 (N.J. 1981) (rejecting equal protection challenge to state law regulating birth certificates of foreign-born adoptees because “a state may deny

more scrupulously into the question of whether the federal “directive” the states purportedly were forced to comply with is actually a mandate or whether the states instead have conveniently co-opted federal immigration policy for state purposes.<sup>335</sup>

Beyond its use as an interpretative tool, however, federalism has played another role in equal protection cases involving lawfully present migrants. In the new equal protection jurisprudence embodied by *Soskin* and the other recent decisions critiqued in this Article,<sup>336</sup> courts privilege congressional policy as effectively dispositive of whether states have unconstitutionally discriminated, even where Congress has not dictated a uniform rule for states to follow. Here, federalism has a disruptive effect on equality norms, rendering equal protection analysis more like preemption doctrine. Federalism’s impact in this final area is cause for concern, for it could effectively preempt equal protection for migrants.

### *B. Federalism’s Disruptive Effect*

Federalism has a disruptive effect on equal protection doctrine when courts treat federal law as diminishing migrants’ claim to equal protection before the states and congressional policy choices as a basis for viewing state classifications targeting migrants as laws drawn on the basis of non-invidious characteristics such as economic savings.<sup>337</sup> Deference to

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benefits to aliens if the discrimination [] is rationally related to the state’s [] obligation to avoid conflicts with federal law and imposes no burdens on aliens not anticipated by Congress”).

335. See, e.g., *Soskin*, 353 F.3d at 1255 (reducing the level of scrutiny applicable to Colorado alienage-based restriction on public benefits even after acknowledging that Congress in PRWORA did not enact a uniform federal immigration policy and direct the states to follow it).

336. *Supra* Part IV.

337. See *Hong Pham v. Starkowski*, 16 A.3d 635, 659 (Haw. 2011) (holding that Connecticut’s denial of healthcare funding to immigrants was at most a classification “based on an individual’s eligibility for federal Medicaid” matching funds, and not alienage status); *Bruns*, 750 F.3d at 69–70 (reasoning that “if Maine can be said to have discriminated at all” by continuing to participate in the Federal Medicaid program, “it only did so on the basis of federal Medicaid eligibility, a benign classification subject to mere rational basis review”

congressional policy is misplaced and disruptive to equal protection norms in these instances in at least three ways.

First, treating migrants' status under federal immigration law as largely determinant of their claim to equality before the states sanctions class-based discrimination in matters far removed from immigration policy, such as fiscally motivated decisions regarding whether to provide migrants state-funded benefits<sup>338</sup> or unproven assumptions about migrants' reliability and suitability as a class for certain professional licenses.<sup>339</sup> This expands the sweeping deference afforded to the federal government's immigration authority, which is grounded in its foreign affairs power, to run-of-the-mill domestic policy decisions that do not warrant similar deference.<sup>340</sup> Even worse, a state's actions may receive the same deference as the federal government where its reasons for singling out migrants may be the sort of invidious class-based distinctions targeted by *Graham*—discredited assumptions about migrants' inferior contributions to society and lesser claims to the benefits of community membership.<sup>341</sup>

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(quotation omitted)).

338. See *Finch v. Commonwealth Health Ins. Connector Auth.* (Finch I), 946 N.E.2d 1262, 1275–76 (Mass. 2011) (recognizing that PRWORA's alienage-based limitations on federal matching funds for public benefits made similar alienage-based cuts "economically attractive to the State that is left carrying the entire burden").

339. See *LeClerc v. Webb*, 419 F.3d 405, 430 (5th Cir. 2005) (Stewart, J. concurring in part, dissenting in part) (criticizing the majority's reliance upon unproven assumption that lawfully present migrants "pose a special threat to the integrity of the Louisiana bar because they could be unexpectedly deported or they could leave and go back to their home country, leaving litigants in the lurch"); *Dandamudi v. Tisch*, 686 F.3d 66, 79 (2d Cir. 2012) (rejecting similar assumptions about dangers of nonimmigrants' "transience" with respect to their suitability as pharmacy professionals).

340. See Neuman, *supra* note 97, at 1439–40 (arguing that preemption cannot replace equal protection analysis in cases involving migrants because it would "permit Congress to decide how broadly aliens should be made vulnerable to mistreatment by the states [and] extend the extraordinary deference [afforded] to federal immigration policy to the . . . decisions of states and local governments").

341. See *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (reasoning that "the justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens" because "[a]liens . . . pay taxes, . . . may be called into the armed forces," and "may live [and work] within a state for many years, . . . contribut[ing] to the economic

Second, privileging congressional policy in this way subjects equal protection rights to the indeterminacy of federal policy choices<sup>342</sup> when the Constitution intended to remove those “norms from the realm of ordinary politics.”<sup>343</sup> This is particularly true in the case of the Fourteenth Amendment, which was specifically intended as a restraint “on the political majority’s political power.”<sup>344</sup> Additionally, allowing states to immunize alienage-based classifications by reference to federal immigration policy sacrifices an important dialogue on migrants’ membership in state and local communities. Specifically, it insulates the states from having to respond to what Harold Koh has described as “the moral and philosophical claims that resident aliens make against their state governments” through equal protection challenges,<sup>345</sup> thereby avoiding an important dialogue regarding what equality for migrants really means and states’ obligations to their noncitizen residents.

Finally, and perhaps most obviously, federalism’s role in this category of equal protection cases is clearly inconsistent with *Graham*, which did not pin its equal protection holding upon the federal government’s exclusivity over immigration matters nor countenance a state’s attempt to frame alienage-based discrimination as non-invidious fiscal policy.<sup>346</sup> To be sure, federalism concerns may have played less of a role in *Graham*’s equal protection analysis because, unlike in some of the Court’s other alienage decisions,<sup>347</sup> *Graham* was also challenged under

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growth of the state”).

342. See *Neuman*, *supra* note 97, at 1439–40 (rejecting the notion that Congress should determine the states’ power to subject non-citizens to unequal treatment).

343. David R. Dow, *The Equal Protection Clause and the Legislative Redistricting Cases—Some Notes Concerning the Standing of White Plaintiffs*, 81 MINN. L. REV. 1123, 1134–35 (1997).

344. *Id.*

345. See Koh, *supra* note 38, at 99 (arguing that “equal protection . . . answers” these concerns “in a way that preemption reasoning does not”); see also Kanstroom, *supra* note 42, at 461 (stating “counterintuitively perhaps, the contribution of noncitizens to public discourse and to the polity is often most effectively accomplished through the legal system”).

346. See *Graham*, 403 U.S. at 374–75 (rejecting the claim that the desire to preserve “the fiscal integrity” of state welfare programs may be justified by “invidious distinctions between classes of its citizens” (citation omitted)).

347. See *id.* at 371 (discussing *Truax v. Raich*, 239 U.S. 33 (1915), and

the Supremacy Clause and included a separate holding finding the state laws preempted.<sup>348</sup> The Court was thus able to separate its concerns about federal and state relations from its concerns about equality.<sup>349</sup>

But the fact that the Court specifically considered equal protection to produce a forceful, landmark holding is exactly the point. During a formative period of equal protection jurisprudence, the Court unanimously decided to emphasize migrants' right to equality under the Constitution, when it could have simply made the case a preemption decision.<sup>350</sup> This choice not only had a doctrinal impact on cases involving state alienage restrictions in that they were decided on the basis of equal protection in the decade going forward, but it also carried important expressive significance regarding migrants' shared place in the community and status as persons deserving and entitled to equality.<sup>351</sup>

One might respond to the three criticisms noted above and contend that consideration of congressional intent in the equal protection context does not necessarily transform judicial review into a preemption case.<sup>352</sup> That is true to the extent that, as noted above, courts might treat a mandatory rule of federal immigration policy that Congress has directed the states to follow as a sufficient state interest justifying a state's alienage-based

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Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948)).

348. See *Graham v. Richardson*, 403 U.S. 365, 377–78 (1971) (“State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government.”).

349. See *Bosniak*, *supra* note 96, at 1107 (reasoning that *Graham* and its progeny’s equal protection analysis “obviously, depends not on institutional process concerns—concerns, that is, about who decides—but on substantive commitments to equality, and on a vision of aliens as the rightful subjects of equality”).

350. The Court, for example, chose this route in *Toll v. Moreno*. See 458 U.S. 1, 17 (1982) (applying the Supremacy Clause to invalidate Maryland’s exclusion of nonimmigrants from in-state tuition program and avoiding a decision on equal protection grounds).

351. See *generally* Koh, *supra* note 38; *Bosniak*, *supra* note 96, at 1107.

352. See *Korab v. Fink*, 797 F.3d 572, 583 n.9 (9th Cir. 2014) (criticizing the dissent for claiming that the majority’s “reference to Congress’s clearly expressed will demonstrates our ‘confusion as to whether this an equal protection or a preemption case’”).

classification.<sup>353</sup> But the problem is courts have looked to congressional policy as dispositive of state's equal protection obligations even where Congress has not directed the states to implement a uniform federal immigration policy.<sup>354</sup> And in these cases, courts never considered whether following a *non-mandatory* federal policy would provide a compelling state interest to withstand strict scrutiny. Rather, they merely extended the deference to the federal government's immigration laws to the states which opted to follow the federal government's lead.<sup>355</sup> In essence, states insulated themselves from the requirements of equal protection by merely referencing congressional policy choices as a justification for their own discriminatory conduct.

This again shifts the focus from the state's obligations under the Constitution to the content of congressional policy choices. It thereby subjugates rights within an unarticulated preemption-like doctrine. For each of these reasons, and to reaffirm lawfully present migrants' right to equality under the Constitution, equal protection jurisprudence in the realm of migrants' rights warrants a realignment.

### *C. Fulfilling Equality's Promise*

To resist what this Article describes as the preempting of equal protection for migrants requires two rather undramatic shifts in doctrine. First, courts must recommit to *Graham's* core principles. This should not be difficult given that the reasons for treating migrants as a discrete and insular minority—their

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353. See *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982) (recognizing that though states lack authority to regulate migrants “if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction”).

354. See, e.g., *Soskin v. Reinertson*, 353 F.3d 1242, 1255 (10th Cir. 2004) (rejecting the view that the “federal government's imprimatur for” state alienage discrimination “cannot reduce the level of scrutiny to which the state's choice is subjected under the Equal Protection Clause” while acknowledging that Congress in PRWORA did not enact a uniform federal immigration policy and direct the states to follow it); see also *supra* Part IV (discussing cases following *Soskin's* reasoning).

355. *Supra* Part IV.

political vulnerability, similarity to citizens with respect to most state legislative judgments, and long history on the receiving end of state-level discrimination<sup>356</sup>—have not changed over time. In fact, lawfully present migrants have only become further integrated into the economic life of the states and deepened their community ties since *Graham* was decided.<sup>357</sup> Lawfully present migrants thus remain similarly situated to their citizen counterparts in ways that the Supreme Court deemed constitutionally significant more than 40 years ago,<sup>358</sup> and which the Court emphasized in subsequent decisions.<sup>359</sup> Additionally, while lawfully present migrants' status as a group that is similar to citizens for most state legislative purposes has not changed, their vulnerability due to political powerlessness has only deepened. This is evident in part from the rash of alienage-based restrictions on public benefits that many states enacted during

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356. *Supra* Part II.A.

357. See *Strength in Diversity: The Economic and Political Power of Immigrants, Latinos, and Asians*, MIGRATION POLICY INST. (2015), <http://www.immigrationpolicy.org/just-facts/strength-diversity-economic-and-political-power-immigrants-latinos-and-asians> (last visited Feb. 7, 2016) (describing economic contributions of immigrants as a class, and in particular contributions of immigrant-owned businesses) (on file with the Washington and Lee Law Review); David Dyssegaard Kallick, FISCAL POLICY INSTITUTE, *Immigrants and the Economy* (2009), [http://www.fiscalpolicy.org/ImmigrantsIn25MetroAreas\\_20091130.pdf](http://www.fiscalpolicy.org/ImmigrantsIn25MetroAreas_20091130.pdf) (describing significant contributions of foreign born workers, regardless of immigration status, to a wide range of occupations and labor sectors).

358. See *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (citing migrants' political powerlessness and emphasizing that they share burdens of community membership similar to citizens); *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) (citing *Graham* and noting that “[s]ome classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective”).

359. 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”); *Foley v. Connelie*, 435 U.S. 291 (1978) (explaining *Graham*'s designation of alienage as a suspect classification on grounds of noncitizen's political powerlessness); *Toll v. Moreno*, 458 U.S. 1, 22 (1982) (Blackmun, J., concurring) (suggesting that alienage was recognized as a suspect status partly to acknowledge that distinctions drawn on the basis of alienage-status are likely to reflect historic “antipathy” toward this minority group).

the economic downturn after the 2008 financial crisis.<sup>360</sup> States facing daunting fiscal crises<sup>361</sup> reflexively sought to preserve public resources by terminating coverage for a group that lacked the ability to respond to such policies through the electoral process. In short, *Graham*'s basic rule is just as necessary and defensible today as it was when the Court unanimously decided it.

Second, courts must assess federalism's potentially disruptive impact on equality analysis and consider federalism principles only as an interpretative tool in cases involving migrants. Courts should not be blind to the fact that the federal power over immigration law and migrants' exclusion from the political process may impact the assessment of equal protection obligations in cases involving this "unique class."<sup>362</sup> But federalism should not cast so long a shadow that it transfigures equality analysis into a supremacy-like doctrine.

This call for a judicial recommitment to *Graham* devoid of federalism considerations may invite skepticism, specifically the charge that *Graham*'s exceptions have essentially swallowed its basic rule which cannot be salvaged.<sup>363</sup> But the existence of justified exceptions do not alone make otherwise defensible and necessary rules untenable or devoid of what Eugene Volokh has described as a "powerful attitude-shaping force."<sup>364</sup> Rather, as Volokh notes, the force of an original rule is particularly unlikely to be undone by the presence of exceptions where those

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360. See *supra* Part IV (analyzing the recent decisions challenging alienage-based restrictions).

361. See Gregory T. W. Rosenberg, *Alienating Aliens: Equal Protection Violations in the Structures of State Public-Benefit Schemes*, 16 U. PA. J. CONST. L. 1417, 1417–18 (2014) (citing cases challenging states' denial of public benefits "as a way of containing costs in light of budgetary pressures").

362. See *Toll*, 458 U.S. at 22 (Blackmun, J., concurring) (explaining that exceptions to *Graham* may be "unique . . . because aliens constitute a unique class"); see also *supra* Part V.A (describing when federalism considerations necessarily come into play when assessing state authority in equal protection cases involving migrants).

363. See *Korab v. Fink*, 797 F.3d 572, 589 (9th Cir. 2014) (Bybee, J., concurring) ("A review of the history of alienage jurisprudence, with a particular review of *Graham* . . . suggests that it is time to rethink the doctrine."); *id.* at 585 (characterizing *Graham* as "riddled with exceptions and caveats that make consistent judicial review of alienage classifications difficult").

364. Volokh, *supra* note 320, at 1093.

exceptions fit “within some exceptional supercategory—for instance, cases that have been traditionally recognized as being outside the main principle.”<sup>365</sup> The *Mathews* and political function exceptions represent one such instance.

The federal government’s power to regulate immigration and states’ power to define their political communities are simply “outside” of *Graham*’s main principle. That principle—that the states may not single out migrants for unfair economic burdens and exclusionary policies—helps ensure that states do not impose opportunistic policy choices upon this group simply because of their inability to protest their treatment through the political process.<sup>366</sup> It also helps smoke out what might otherwise exist as unspoken assumptions about migrants’ insufficient contributions to state resources and their lesser claim to community membership. Thus, the importance of, and justification for, such a rule is not undermined simply because it may also be true that the federal government receives great deference in its immigration policy decisions or that the states may exclude migrants from political functions and institutions.

Critics might still contend that even if doctrinally consistent, *Mathews* and the political function cases punctured such sizeable holes in *Graham*’s main theory that its lacks any remaining significance. That perspective is belied, however, by *Graham*’s importance in shaping the daily lives of migrants before the states in a multitude of substantive and meaningful ways. Indeed, *Graham* has a role to play in ensuring lawfully present migrants’ equal access to employment and professional opportunities, healthcare benefits, drivers’ licenses, and a sense of membership and belonging in communities.<sup>367</sup> Deference in exceptional areas of regulation affecting migrants does not dilute the significance of affirming lawfully present migrants’ right to equal treatment as workers, professionals, and people.

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365. *Id.* at 1094 n.207.

366. This principle has an ongoing role to play to ensure that, as *Plyler* put it, states are not permitted to “impos[e] special disabilities upon groups disfavored by virtue of circumstances beyond their control” thereby creating “the kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish.” *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

367. *See supra* Part IV (examining the body of state and federal court decisions addressing these issues).

*VI. Conclusion*

While immigration debates have recently focused overwhelmingly, and understandably, on unauthorized migration and the respective roles of the federal and state governments in crafting and enforcing immigration law, those important questions should not obscure a critical civil rights question of our time: how states must treat those migrants who are presented with the opportunity to abide by the rules of entry and now live within the United States. For good reason, the United States Supreme Court recognized decades ago that such migrants deserve equal treatment. It is now time to ensure that the federalism considerations that have preoccupied the courts in the intervening years do not undermine that promise.