LABORATORIES OF BIGOTRY? DEVOLUTION OF THE IMMIGRATION POWER, EQUAL PROTECTION, AND FEDERALISM

MICHAEL J. WISHNIE*

In this Article, Professor Michael Wishnie addresses the current pressing problem of denial of benefits to legal immigrants under the 1996 Welfare Reform Act in the context of a deeper inquiry into the very heart of immigration law: From where does the federal government derive the power to regulate its borders? Can Congress devolve this power to the states? Looking deeply into jurisprudence and textual sources, as well as history, he ascertains that this authority always has been exclusively federal and that to permit devolution would be to contradict the entire notion of sovereignty. Thus, Professor Wishnie concludes that any devolution of authority over immigration to the states, such as that contained in the 1996 welfare reforms, may not receive the judicial deference traditionally granted to federal immigration law. Instead, any state exercise in the immigration arena, even pursuant to Congress's explicit approval, must be evaluated under thirty years of precedent subjecting state discrimination against permanent resident aliens to heightened scrutiny.

INTRODUCTION

"The Constitution requires a distinction between what is truly national and what is truly local."[1] Safeguarding that which is "truly local" from congressional interference has been a significant concern of the Supreme Court for the past decade,[2] as well as the subject of a

* Assistant Professor of Clinical Law, New York University. B.A., 1987, J.D., 1993, Yale University. I am grateful for the comments and suggestions of Jack Chin, Sarah Cleveland, Christopher Eisgruber, Helen Hershkoff, Sylvia Law, Christopher Meade, Nancy Morawetz, and Philip Weiser. I also would like to thank Jessica Radke, Jennifer Simon, and Nirej Sekhon for able research assistance. I gratefully acknowledge the financial support of the Filomen D'Agostino and Max E. Greenberg Research Fund at the New York University School of Law.

1 United States v. Morrison, 529 U.S. 598 (2000) (invalidating civil remedy provision of Violence Against Women Act as unauthorized either by Commerce Clause or by Section 5 of Fourteenth Amendment).

2 See id. at 598 (invalidating portions of Violence Against Women Act as beyond scope of congressional authority under Commerce Clause or Section 5 of Fourteenth Amendment); Printz v. United States, 521 U.S. 898 (1997) (invalidating portions of Brady Handgun Violence Prevention Act on ground that Congress may not "commandeer" state executive officials); City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating portions of Religious Freedom Restoration Act as beyond scope of congressional authority under Section 5 of Fourteenth Amendment); United States v. Lopez, 514 U.S. 549 (1995) (invalidating Gun-Free School Zones Act as beyond scope of congressional authority under Commerce Clause); New York v. United States, 505 U.S. 144 (1992) (invalidating provision

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substantial literature.[3] Attention to the constitutional allocation of power also has prompted the Court to resolve claims of individual right by reference to constitutional architecture in several other recent and prominent cases.[4] But the Court has not had much occasion to evaluate what government powers, if any, are exclusively national.

In this Article, I consider whether the federal power to regulate immigration, a power not specifically enumerated in the Constitution but universally recognized for over a century,[5] is among those that are exclusively national and incapable of devolution to the states. My question is prompted by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Act or PRA),[6] of which legal immigrants and their families were a principal target.[7] The 1996

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of Low-Level Radioactive Waste Policy Amendments Act on grounds that Congress may not "commandeer" state legislatures); see also Bd. of Trs. v. Garratt, No. 99-1240, 2001 WL 173556 (U.S. Feb. 21, 2001) (holding that Congress has not validly abrogated state sovereign immunity as to private disability discrimination suits for money damages); Kimel v. Bd. of Regents, 528 U.S. 62 (2000) (same, as to age discrimination suits in federal courts); Alden v. Maine, 527 U.S. 706 (1999) (same, as to private suit in state courts under Fair Labor Standards Act); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (same, as to trademark suits in federal courts); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (same, as to patent suits in federal courts); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (same, as to suit by Native American tribe in federal court under Indian Gaming Regulatory Act).

[3] To cite but one thoughtful assessment of judicial intervention to protect state interests, see Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215 (2000).

[4] In addition to cases cited supra note 2, see, for example, Saenz v. Roe, 526 U.S. 489 (1999) (invalidating state durational residency requirement as condition of eligibility for public benefits as violative of right to travel protected by Privileges and Immunities Clause); Romer v. Evans, 517 U.S. 620 (1996) (invalidating state referendum repealing laws prohibiting discrimination based on sexual orientation and barring enactment of similar laws in future). Laurence Tribe has termed such judicial decisionmaking reasoning from "structural inference." Laurence H. Tribe, *Saenz* Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?, 113 Harv. L. Rev. 110, 110 n.3 (1999).

[5] See, e.g., Fong Yue Ting v. United States, 149 U.S. 698, 724, 730 (1892) (upholding congressional act excluding Chinese immigrants); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1891) (same, as to deportation of "morally suspect" persons); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889) (same, as to exclusion of Chinese laborers).

[6] Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Act or PRA), Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 8, 42 U.S.C.). Title IV of the Welfare Act is entitled "Restricting Welfare and Public Benefits for Aliens." Id. §§ 400-451, 110 Stat. at 2260-76.

[7] The Congressional Budget Office estimated that approximately $23.7 billion of the $53.4 billion in total federal savings from the PRA over its first six years—a staggering forty-four percent—would derive from Title IV's anti-immigrant provisions. Cong. Budget Office, Federal Budgetary Implications of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, at 3 tbl.2 (1996); see also Charles Wheeler, The New Alien Restrictions on Public Benefits: The Full Impact Remains Uncertain, 73 Interpreter Releases 1245, 1248 & n.35 (1996) (citing Letter from Congressional Budget Office to Senator

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Welfare Act facially authorizes, but does not require, states to deny a range of public benefits to permanent resident aliens,[8] an invitation that some states already have accepted[9] and that others surely will.[10]

This federal authorization of state-imposed anti-immigrant discrimination exposes longstanding wrinkles in equal protection doctrine, federalism, and immigration law. Under *Graham v.*

Pete Domenici, Chairman, Senate Budget Committee (Aug. 1, 1996)); Michael E. Fix & Karen Tumlin, Urban Inst., Welfare Reform and the Devolution of Immigrant Policy 5 & n.14 (1997), http://newfederalism.urban.org/html/anf_15.htm. Congressional restoration of Supplemental Security Income (SSI) benefits for some legal immigrants in the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, reduced the estimated federal savings by approximately $11.4 billion. Fix & Tumlin, supra, at 5.

[8] The specific anti-immigrant provisions of the 1996 Welfare Act are discussed infra notes 106-10 and accompanying text.

[9] Louisiana was the first state in the nation to do so. See Declaration of Emergency, 23 La. Reg. 24, 25 (1997) (terminating Medicaid for legal permanent residents effective January 1, 1997). Subsequently, Alabama terminated Temporary Assistance to Needy Families (TANF) to permanent residents and Wyoming terminated Medicaid to permanent residents. Ala. Admin. Code r. 660-2-2-.17 (1998) (terminating eligibility of noncitizens as of December 21, 1996 except for those required to be eligible by PRA); Code of Wyo. R. 049-183-002, § 8(b) (Weil's, Lexis through 2000 revision) (restricting Medicaid eligibility of noncitizens to those required to be eligible by PRA or eligible for SSI); see also Wendy Zimmermann & Karen C. Tumlin, Patchwork Policies: State Assistance for Immigrants Under Welfare Reform 60 tbl.5 (Urban Inst., Occasional Paper No. 24, 1999) (showing which states have denied assistance to immigrants), http://newfederalism.urban.org/pdf/occ24.pdf.

In addition, several states have enacted more onerous eligibility requirements for legal immigrants than for citizens. See, e.g., Conn. Gen. Stat. Ann. § 17b-116(e) (West Supp. 2000) (six-month residency requirement for immigrants); Wash. Rev. Code Ann. § 74.08A.100 (West Supp. 2001) (twelve-month residency requirement for immigrants only); Md. Regs. Code tit. 07, § 07.03.03.07(B)(4) (2000) (legal immigrants newly arrived in Maryland receive no state TANF benefits for twelve months if moved from outside country or from state without state-substitute TANF benefits); see also Zimmermann & Tumlin, supra, at 28 (discussing various other state restrictions). Others have chosen to condition immigrant eligibility for benefits on the applicant's willingness to pursue naturalization. See, e.g., Conn. Gen. Stat. Ann. § 17b-116(e) (naturalization requirement for general assistance); N.J. Stat. Ann. § 44:10-48(a) (West Supp. 2000) (naturalization requirement for TANF and General Assistance programs); see also Zimmermann & Tumlin, supra, at 28-29 (discussing effect of naturalization requirements). In addition, Indiana now imposes a shorter time limit for receipt of benefits on legal immigrants than on citizens. Compare Ind. Code Ann. § 12-14-2-5.1(a) (West 2000) (two year AFDC eligibility generally), and id. § 12-15 (two year Medicaid eligibility), with id. § 12-14-2.5-2 (one year AFDC eligibility for permanent residents), and id. § 12-15-2-7, 12-15-2.5-2 (one year Medicaid eligibility for permanent residents).

Finally, some states created programs to substitute for lost federal benefits but then limited these state-substitute programs only to certain permanent residents, or imposed eligibility restrictions on these state-substitute programs that do not apply to citizens in the continuing federal programs. See, e.g., N.Y. Soc. Serv. Law § 95(10)(b)(v) (McKinney Supp. 2001) (requiring immigrants eligible to naturalize to do so as condition of receipt of state food stamp replacement program); Zimmermann & Tumlin, supra at 29-30.

[10] See infra notes 25-26, 127-29 and accompanying text.

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Richardson[11] and its progeny, *state* anti-immigrant discrimination generally has been subject to strict scrutiny (and therefore invalidated),[12] but under *Mathews v. Diaz*[13] and its progeny, identical *federal* discrimination generally has been subject only to rational basis review (and therefore upheld).[14] The rationale for the divergent standards is that, at the federal level, equal protection norms must be balanced against the deference traditionally accorded to exercises of the federal immigration power, in light of the foreign affairs implications of immigration lawmaking. The states possess no similar immigration power, however, and therefore state or local anti-immigrant discrimination is scrutinized solely in light of equal protection principles.[15]

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,[16] and with it the substantial immunity from ordinary judicial scrutiny that long has accompanied exercises of the federal immigration power.[17] Although this devolution is not explicit, I argue that it 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.[18]

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11 403 U.S. 365 (1971) (subjecting state welfare rules distinguishing between citizens and legal permanent residents to strict scrutiny).

12 See Bernal v. Fainter, 467 U.S. 216 (1984) (invalidating state citizenship requirement for appointment as notary public); Nyquist v. Mauclet, 432 U.S. 1 (1977) (same, as to state financial aid for postsecondary education); Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) (same, as to civil engineering license); In re Griffiths, 413 U.S. 717 (1973) (same, as to admission to bar); Sugarman v. Dougall, 413 U.S. 634 (1973) (same, as to state civil service employment). The exception to the rule of strict scrutiny for state anti-immigrant discrimination is a state's citizenship requirement for jobs involving policymaking or exercises of significant discretion, which is scrutinized only for a rational basis. See, e.g., Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (deputy probation officers); Ambach v. Norwick, 441 U.S. 68 (1979) (elementary and secondary school teachers); Foley v. Connelie, 435 U.S. 291 (1978) (state troopers).

13 426 U.S. 67, 82 (1976) (holding federal welfare rules distinguishing between citizens and legal permanent residents subject to rational basis review in equal protection challenge).

14 But see Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (holding citizenship requirement in federal civil service subject to rationality review, and invalidating requirement).

15 See *Mathews*, 426 U.S. at 84-87 (explaining different equal protection analysis applicable to state and federal anti-immigrant discrimination in light of "exclusive federal power" over immigration).

16 See PRA § 400(7), 8 U.S.C. § 1601(7) (Supp. V 1999); infra notes 100-05 and accompanying text.

17 See infra notes 43-53 and accompanying text.

18 See infra notes 54-85 and accompanying text.

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The 1996 Welfare Act's provisions authorizing states to discriminate against immigrants are likely to be the second provisions of that statute to be reviewed by the Supreme Court.[19] I argue that a close examination of the sources and scope of the federal immigration power yields the conclusion that the immigration power is an exclusively federal one that Congress may not devolve by statute to the states.[20] Thus, the welfare rules enacted by states are not entitled to judicial deference as immigration laws and should be evaluated under thirty years of precedent subjecting state anti-immigrant discrimination to heightened scrutiny.[21] This is not to say that states lack power to enact welfare rules; they do, certainly, pursuant to their traditional spending and police powers.[22] But if a state's enactment of anti-immigrant welfare rules is *not* an act of immigration lawmaking, then these measures are entitled to no special immunity from ordinary equality principles.

Analysis of the constitutional implications of Congress's attempt to devolve the federal immigration power by statute is illuminating for several reasons. First, a number of states already have accepted the federal invitation to discriminate[23] (although none has discriminated as severely as the federal law permits).[24] Moreover, there will come a

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19 The Court already has invalidated provisions of the 1996 Welfare Act regarding durational residency requirements. Saenz v. Roe, 526 U.S. 489 (1999) (holding that state and federal durational residency requirements violate right to travel). Unfortunately for the nation's approximately eleven million permanent resident aliens, see Immigration & Naturalization Serv., U.S. Dep't of Justice, State Population Estimates: Legal Permanent Residents and Aliens Eligible to Apply for Naturalization (1996), http://www.ins.usdoj.gov/graphics/aboutins/statistics/lprest.htm, and millions of other legal immigrants, the *Saenz* Court implied that the right to travel is secured by the Privileges and Immunities Clauses, which protect only the "privileges and immunities *of citizens*," U.S. Const. art. IV, § 2 (emphasis added); U.S. Const. amend. XIV, § 1 (same, except reads "privileges or immunities"). For an account that grounds the constitutional right to travel in the Commerce Clause rather than the citizens-only Privileges and Immunities Clause, see Stephen Loffredo, "If You Ain't Got the Do, Re, Mi": The Commerce Clause and State Residency Restrictions on Welfare, 11 Yale L. & Pol'y Rev. 147 (1993).

20 See infra Part III.

21 See cases cited supra notes 11-12.

22 See Martha F. Davis, Brutal Need: Lawyers and the Welfare Movement, 1960-1973, at 6 (1993) ("States adopted 400 new public welfare laws between 1917 and 1920 alone, creating a relatively modern and rational welfare system from the patchwork of philanthropic local initiative of the nineteenth century."); see also infra notes 342-43 and accompanying text.

23 See infra notes 115-24 (describing state legislative initiatives).

24 Only four states, Alabama, Louisiana, Pennsylvania, and Wyoming, have tried to terminate the eligibility of legal immigrants for TANF or Medicaid; no state yet has sought to deny legal immigrants eligibility for both programs. See supra note 9 (citing statutes); infra note 116 (same).

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time when state budgets are not so flush,[25] and when episodic American nativism returns.[26] Then, more states will try to balance their budgets on the backs of indigent immigrants. Judicial assessment of these equal protection, immigration, and federalism questions will determine directly the eligibility of millions of indigent persons and their families for life-sustaining public benefits.[27]

Second, analysis of these questions is important for understanding the nature of the federal immigration power. For the most part, immigration law in this country began in the late nineteenth century, when the Supreme Court discerned an unenumerated federal constitutional power to regulate immigration.[28] Since then, although few courts or commentators have questioned the existence of such a federal power, there has been little analysis of its precise constitutional source.[29] Because the Welfare Act attempts to devolve this unenumerated federal power to the states,[30] and with it the extraordi-

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[25] The National Association of State Budget Officers reports that in fiscal year 2000, all fifty states had a budget surplus, and thirty-six states had a surplus in excess of five percent of their spending. Nat'l Ass'n of State Budget Officers, The Fiscal Survey of States: December 2000, at 11 tbl.9 (2000), http://www.nasbo.org/topical/fall2000fiscalsurvey.pdf; see Robert Pear, States Gather Big Surpluses, Benefit of a Strong Economy, N.Y. Times, Jan. 5, 2000, at A12. But see David Firestone, Slowing Economy Forces Governors to Trim Budgets, N.Y. Times, Feb. 8, 2001, at A1 ("With a swiftness that has taken many governors by surprise, the slowing economy has sharply reduced state tax revenues in the last few weeks, forcing a growing number of states around the South and Midwest to cut their budgets for the first time in a decade."). In addition to trends in the national and regional economies, states soon will be forced to address the consequences of time limits on federal welfare programs. The implementation of federal time limits in 2001 will place additional pressure on state welfare budgets. See Raymond Hernandez, U.S. Welfare Limit May Put Thousands in Albany's Care, N.Y. Times, Mar. 21, 2000, at A1 (noting "prospect that New York taxpayers will have to pick up tens of millions of dollars in welfare costs once the federal time limits take hold" in late 2001); Somini Sengupta, State's Poorest Facing Loss of U.S. Aid, N.Y. Times, Feb. 10, 2001, at B1 (noting that nearly one-third of New York welfare recipients are expected to lose benefits at end of 2001 because of federal time limits).

[26] See, e.g., John Higham, Strangers in the Land: Patterns of American Nativism, 1860-1925, at 14-18, 68-72 (4th ed. 1994) (tracing various episodes of nativism throughout American history and showing economy to be at least one factor in its emergence); Ronald Takaki, Strangers from a Different Shore: A History of Asian Americans 11-14, 331-35 (1989) (depicting experiences of Asians in America and setting forth history of racism).

[27] Zimmermann & Tumlin, supra note 9, at 58 tbl.3 (estimating that 4.7 million noncitizens lived in poverty in United States in 1996).

[28] Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 603-04 (1889); see also Louis Henkin, The Constitution and United States Sovereignty: A Century of *Chinese Exclusion* and Its Progeny, 100 Harv. L. Rev. 853, 853-54 (1987).

[29] Stephen H. Legomsky, Immigration Law and the Principle of Plenary Congressional Power, 1984 Sup. Ct. Rev. 255, 307.

[30] See PRA § 400(7), 8 U.S.C. § 1601(7) (Supp. V 1999); see also infra notes 100-05 and accompanying text.

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nary judicial deference that attends its exercise,[31] the statute will compel the Court to determine whether the immigration power is an exclusively federal, nondevolvable power, reserved by the architecture and animating principles of the Constitution to Congress and the President.

Third, examining the origins and sources of the federal immigration power sheds light on important federalism questions, including the capacity of the states to engage in immigration lawmaking and other foreign affairs-related activities. In an era of widespread globalization, state and local governments seek increasingly to participate directly in international trade activities, and sometimes to influence the course of foreign affairs by their procurement or investment practices.[32] These activities have prompted a vigorous political and legal debate,[33] as well as a campaign to have the Supreme Court revisit its

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[31] For over a century, the Supreme Court's immigration law jurisprudence has accepted federal discrimination not tolerated elsewhere in the law. See Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."); see also Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999) (holding that INS generally does not violate First Amendment when it engages in selective enforcement of immigration laws based on disfavored speech or associational activities of noncitizens); Fiallo v. Bell, 430 U.S. 787 (1977) (upholding federal immigration discrimination based on gender). The "plenary power doctrine," holding immigration lawmaking largely immune from judicial scrutiny, has been criticized savagely. See, e.g., Gabriel J. Chin, Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration, 46 UCLA L. Rev. 1 (1998) (condemning plenary power doctrine as product of nineteenth-century judicial commitment to racial separation); Henkin, supra note 28, at 863 ("Chinese Exclusion—its very name is an embarrassment—must go."); Legomsky, supra note 29, at 255-60 (arguing that Court has been oddly deferential in area of immigration); Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 Yale L.J. 545, 549 (1990) (arguing that plenary power doctrine has distorted immigration jurisprudence and forced courts to incorporate basic constitutional norms through statutory interpretation).

[32] For example, at least nineteen cities and two states have passed laws restricting public procurement from companies that do business in Burma (Myanmar). Cf. Crosby v. Nat'l Foreign Trade Council, 120 S. Ct. 2288, 2293 & n.5 (2000) (holding state and local "Burma laws" preempted by federal statute); see also id. at 2301-02 (discussing state and local sanctions passed against South Africa in 1980s).

[33] See, e.g., Curtis A. Bradley, The Treaty Power and American Federalism, 97 Mich. L. Rev. 390 (1998) (criticizing treaty power exceptionalism as plenary power vis-à-vis states); Jack L. Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 83 Va. L. Rev. 1617 (1997) (rejecting historical, structural, and normative justifications for federal common law of foreign relations); Peter Spiro, Foreign Relations Federalism, 70 U. Colo. L. Rev. 1223 (1999) (describing obsolescence of foreign relations exclusivity). But see Louis Henkin, Foreign Affairs and the U.S. Constitution 13 (2d ed. 1996) (defending federal supremacy in foreign affairs); Martin S. Flaherty, Are We to Be a Nation? Federal Power vs. "States Rights" in Foreign Affairs, 70 U. Colo. L. Rev. 1277 (1999) (advocating renewed justification for federal foreign affairs authority over states).

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landmark opinion on the topic.[34] The federal immigration power long has been understood as closely related to the foreign affairs and foreign commerce powers.[35] Thus, evaluating the 1996 congressional effort to include states in immigration lawmaking may contain useful lessons for the broader debate on the role of the states in foreign affairs.

This Article proceeds in four parts. Part I reviews the jurisprudence of state and federal anti-immigrant discrimination law, the federal provisions enacted in 1996, and the range of post-1996 state enactments. In Part II, I examine previous analytic approaches to federally authorized, state-imposed discrimination against immigrants and identify shortcomings in each. I propose in Part III that the constitutional immigration power is an exclusively federal power that may not be devolved by statute to the states. I analyze the case law concerning immigration federalism and then examine the textual and nontextual sources for the federal immigration power, as previously identified by the Supreme Court and commentators. I demonstrate that each constituent source of the immigration power is exclusively federal and may not be devolved to the states. I also suggest that there are sound policy reasons for the view that the federal immigration power is nondevolvable. I conclude that Congress's 1996 effort to devolve its federal immigration power is constitutionally impermissible, and that the post-1996 anti-immigrant state welfare laws, like their pre-1996 kin, must be subject to heightened scrutiny. In Part IV, I identify and attempt to rebut potential objections to the nondevolvability theory.

I
THE JURISPRUDENCE OF ALIENAGE DISCRIMINATION, THE PRA, AND POST-1996 STATE WELFARE PROVISIONS

Congress enacted the PRA against a legal backdrop that included three overlapping doctrinal traditions: those relating to immigration lawmaking generally, constitutional antidiscrimination principles, and federal preemption of state and local regulation of noncitizens. In the PRA's legislative history, Congress cited to this jurisprudence in de-

[34] The landmark decision is Zschernig v. Miller, 389 U.S. 429 (1968) (holding that dormant foreign affairs preemption bars application of state escheat statute requiring inquiry into East German system of government, as statute impermissibly involves state in foreign affairs). The Supreme Court declined to revisit *Zschernig* when recently offered the opportunity. See *Crosby*, 120 S. Ct. at 2294 n.8 (invalidating Massachusetts "Burma law" as preempted by federal Burma statute, but declining to rule on First Circuit's application of *Zschernig* dormant foreign affairs preemption doctrine to invalidate same state law).

[35] See infra notes 205-09 and accompanying text.

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tail,[36] as it attempted to devolve its federal immigration power and thereby evade the constitutional prohibition on state anti-immigrant discrimination. Before turning to an analysis of the constitutional questions raised by the PRA, however, one must understand the constitutional decisions that Congress sought to skirt and those that it tried to embrace, the legislative choices reflected in the text of the PRA itself, and the post-PRA state enactments that now will place these questions before the judiciary.

A. Doctrinal Traditions

Several principles have emerged from a century of judicial decisions regarding federalism, equal protection for immigrants, and immigration law. The first is the "plenary power doctrine," which holds broadly that exercises of the federal immigration power are bound up in foreign affairs and national security and therefore are largely immune from searching judicial review.[37] The second is that the Constitution grants the states no like power.[38] A third is that noncitizens are "persons" protected by the equal protection clause of the Fourteenth Amendment.[39]

Two important consequences flow from these principles. First, immigrants may bring equal protection challenges to *federal* laws singling out immigrants, but in light of the plenary power doctrine, courts will scrutinize federal laws only for a "rational basis."[40] Courts therefore rarely invalidate a federal law as unconstitutionally discriminating against immigrants.[41] Second, legal immigrants may invoke the Fourteenth Amendment's Equal Protection Clause against discriminatory state measures, and the plenary power doctrine does not shield *states* from more searching scrutiny.[42] To the contrary, permanent res-

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36 See infra notes 100-05 and accompanying text.

37 See infra notes 45-52 and accompanying text.

38 See infra notes 89-96 and accompanying text.

39 See infra notes 54-85 and accompanying text.

40 Mathews v. Diaz, 426 U.S. 67, 81-84 (1976) (subjecting residency requirement in federal Medicare program that discriminates against legal immigrants to rational basis review).

41 Id. at 67 (upholding five-year residency requirement for permanent resident aliens in federal Medicare program); City of Chicago v. Shalala, 189 F.3d 598 (7th Cir. 1999) (affirming citizenship requirements in 1996 Welfare Reform Act), cert. denied, 120 S. Ct. 1530 (2000); Rodriguez v. United States, 169 F.3d 1342 (11th Cir. 1999) (same, as to Food Stamps programs under 1996 Welfare Reform Program); Kiev v. Glickman, 991 F. Supp. 1090, 1095-97 (D. Minn. 1998) (same); Abreu v. Callahan, 971 F. Supp. 799, 807-11 (S.D.N.Y. 1997) (same, as to Food Stamps and SSI); Cid v. S.D. Dep't of Soc. Servs., 598 N.W.2d 887, 891-93 (S.D. 1999) (same, as to TANF). But see Hampton v. Mow Sun Wong, 426 U.S. 88, 100-05 (1976) (invalidating federal Civil Service Commission regulation prohibiting employment of permanent residents).

42 See infra notes 73-77 and accompanying text.

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ident aliens (and perhaps other legal immigrants) are a "'discrete and insular minority,'"[43] historically subjected to discrimination, and, as nonvoters, unable to protect themselves in normal democratic processes.[44] Courts therefore have scrutinized closely state discrimination against legal immigrants and frequently invalidated it.

1. Plenary Power Principles

The accepted definition of immigration law is the regulation of the admission and expulsion of noncitizens, or in classic terms, regulation of "entrance and abode."[45] With few exceptions, the federal government did not regulate "entrance and abode" by noncitizens in this country until after the Civil War.[46]

Despite the Reconstruction Congress's concern for the treatment of noncitizens in some arenas,[47] it was not long before Congress adopted restrictionist legislation, particularly targeting Chinese immigrants and residents.[48] In response to challenges to these late nine-

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[43] Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (quoting United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)).

[44] Toll v. Moreno, 458 U.S. 1, 19-24 (1982) (Blackmun, J., concurring); *Graham*, 403 U.S. at 371-72; Harold H. Koh, Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens, 8 Hamline L. Rev. 51, 99-100 (1985) (supporting equal protection approach over preemption approach to aliens' rights); Gerald Rosberg, The Protection of Aliens from Discriminatory Treatment by the National Government, 1977 Sup. Ct. Rev. 275, 293-316 (defending application of strict scrutiny to government anti-immigrant discrimination); see also Developments in the Law—Immigration Policy and the Rights of Aliens, 96 Harv. L. Rev. 1286, 1299-1302 (1983) (surveying theory and jurisprudence of immigration policies).

[45] E.g., Legomsky, supra note 29, at 256; Motomura, supra note 31, at 547.

[46] T. Alexander Aleinikoff, David A. Martin & Hiroshi Motomura, Immigration and Citizenship: Process and Policy 154-55 (4th ed. 1998). Gerald Neuman has suggested that the pre-Civil War divide between Northern and Southern states regarding slavery prevented the development of any federal policy regarding border regulation. See Gerald L. Neuman, The Lost Century of American Immigration Law (1776-1875), 93 Colum. L. Rev. 1833, 1889 (1993); see also Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law 51 (1996) ("The uncoupling of migration from slavery as a result of the Civil War made federal regulation possible.").

[47] See, e.g., Plyler v. Doe, 457 U.S. 202, 214 (1982) (reviewing congressional debates on Fourteenth Amendment and determining that "Congress . . . sought expressly to ensure that the equal protection of the laws was provided to the alien population"); see also Voting Rights Act of 1870, ch. 114, §§ 16, 18, 16 Stat. 140, 144 (1870) (reenacting § 1 of Civil Rights Act of 1866 and extending its prohibition on discrimination in contracting to cover noncitizens); Duane v. Geico, 37 F.3d 1036, 1040-42 (4th Cir. 1994) (discussing legislative history of same, and holding that 42 U.S.C. § 1981 (1994), modern successor to contracting portion of § 1 of Civil Rights Act of 1866, prohibits alienage discrimination in private contracting).

[48] See, e.g., Act of May 6, 1882, ch. 126, 22 Stat. 58 (suspending immigration from China for ten years). See generally Lucy Salyer, Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law (1995) (examining experience of Chinese immigrants under nineteenth century immigration laws).

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teenth-century laws, the Supreme Court declared that Congress and the Executive Branch possessed a "plenary immigration power," and that exercises of this power largely were immune from judicial oversight.[49] Since then, the Court's rationale for judicial deference to exercises of the plenary immigration power has focused on the exigencies of the conduct of foreign affairs and on a concern that the judiciary not limit the ability of the Executive and Congress to safeguard national security.[50]

The plenary power doctrine has suffered withering criticism as a shameful and racist relic,[51] and a majority of Justices on the current Supreme Court appear to be uneasy with its extreme scope.[52] Never-

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[49] In a series of early decisions, the Court held that aliens in "exclusion" proceedings at the nation's borders could invoke neither the procedural nor the substantive elements of the Due Process Clause. Even aliens physically present in the country but placed in "deportation" proceedings could not invoke substantive due process. See Fong Yue Ting v. United States, 149 U.S. 698, 724, 730 (1893) (rejecting substantive challenge to deportation statute); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (rejecting procedural challenge to exclusion statute, for "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law"); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) (rejecting substantive challenge to exclusion statute). The Court did conclude that persons already present in the United States could bring due process challenges to the procedures employed in deporting them. Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 100 (1903).

[50] For example, the Court stated in Harisiades v. Shaughnessy, 342 U.S. 580 (1952), that

> any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Id. at 588-89 (footnote omitted). For similar statements, see Landon v. Plasencia, 459 U.S. 21, 34 (1982); Kleindienst v. Mandel, 408 U.S. 753, 765-67 (1972).

[51] See articles cited supra note 31; see also Mary Sarah Bilder, The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce, 61 Mo. L. Rev. 743, 749 (1996) ("[T]he Court's nineteenth-century opinions on immigration under the Commerce Clause reveal the shadows of slaves and indentured servants.").

[52] In Miller v. Albright, 523 U.S. 420 (1997), the Court considered a challenge to explicit gender discrimination in a naturalization statute. Significantly, five members of the Court—Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer—wrote or joined opinions that strongly suggested that, notwithstanding the plenary power doctrine, with the proper plaintiff, the gender discrimination at issue would be held unconstitutional. Id. at 445-52 (O'Connor, J., concurring); id. at 460 (Ginsburg, J., dissenting); id. at 471 (Breyer, J., dissenting). The Court now has an opportunity to deliver on *Miller*'s promise, as it is likely to resolve a post-*Miller* split among the Courts of Appeals. Compare United States v. Ahumada-Aguilar, 189 F.3d 1121 (9th Cir. 1999) (with proper plaintiff, invalidating statute at issue in *Miller*), petition for cert. filed, 68 U.S.L.W. 3741 (U.S. May 22, 2000) (No. 99-1872), with Nguyen v. INS, 208 F.3d 528, 535 (5th Cir. 2000) (declining to follow *Ahumada-Aguilar* and upholding same statute), cert. granted, 121 S. Ct. 29 (2000); see also T. Alexander Aleinikoff & Cornelia T.L. Pillard, Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision-Making in *Miller v. Albright*, 1998 Sup. Ct. Rev. 1, 3 ("*Miller* raises the prospect that the plenary power doctrine is as inappropriate in immigra-

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theless, I do not take aim at the plenary power doctrine, as that ground has been well covered.[53] Instead, I wish to consider whether, even assuming the appropriateness of some degree of judicial deference to immigration lawmaking, statutory devolution of the federal immigration power is possible, thereby transforming otherwise unconstitutional discrimination into a lawful state alienage classification.

2. *Equality Principles*

Anti-immigrant discrimination long has been at the heart of equal protection jurisprudence, and courts have developed a second line of cases holding that state and local governments may not disfavor legal permanent residents as immigrants.[54] One of the Supreme Court's earliest Fourteenth Amendment decisions, *Yick Wo v. Hopkins*,[55] considered the threshold question whether a noncitizen is a "person" constitutionally guaranteed "the equal protection of the laws," in a challenge to San Francisco's discriminatory denial of permits to all Chinese laundry operators.[56] The Court first explained that the provisions of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."[57] It went on to hold that San Francisco had engaged in impermissible discrimination based on "hostility to the race and nationality" of Chinese immigrants, in violation of the Fourteenth Amendment.[58]

Although *Yick Wo* settled the applicability of the Fourteenth Amendment to all "persons," regardless of immigration status, it did so in the context of a claim of race and nationality discrimination. More than half a century passed before the Court confronted an immigrant's claim of citizenship, or "alienage," discrimination. In

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tion and nationality law generally as the Justices in Miller suggest it is for *jus sanguinis* citizenship claims.").

53 See supra note 31.

54 See, e.g., Graham v. Richardson, 403 U.S. 365 (1971) (holding that anti-immigrant welfare discrimination violates equal protection); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (same, as to discrimination in granting of commercial fishing licenses); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that anti-immigrant laundry licensing scheme violates equal protection). For two thoughtful analyses of the Supreme Court's equal protection jurisprudence concerning immigrants, see Linda Bosniak, Membership, Equality, and the Difference that Alienage Makes, 69 N.Y.U. L. Rev. 1047 (1994); Koh, supra note 44.

55 118 U.S. 356 (1886).

56 Id.

57 Id. at 369.

58 Id. at 374.

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Takahashi v. Fish & Game Commission,[59] the Court invalidated a California statute denying commercial fishing licenses to immigrants who were "ineligible to citizenship"—a federal classification that at the time prevented Japanese immigrants, but few others, from naturalizing.[60] The discriminatory classification in the California statute, therefore, while no doubt a proxy for anti-Japanese race and nationality discrimination,[61] was in fact formally an *alienage* classification. The Court's resolution was plain: "The Fourteenth Amendment and the laws adopted under its authority . . . embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under nondiscriminatory laws."[62]

It was not until *Graham v. Richardson*[63] that the Court considered a challenge to state alienage discrimination that was not, at least obviously, a direct proxy for race or nationality discrimination. In *Graham*, the Court examined alienage restrictions in Arizona and Pennsylvania welfare statutes. Recognizing that alienage classifications implicated equal protection, Justice Blackmun wrote for a unanimous Court that state "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."[64] The *Graham* Court emphasized that permanent residents shouldered important civic obligations, such as payment of taxes and subjection to military conscription, on an equal basis with citizens.[65] In *Graham*, the Court then rejected the asserted

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59 334 U.S. 410 (1948).

60 Id. at 412 n.1.

61 Id. at 425 (Murphy, J., concurring); see also Michael J. Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1061 & n.194 (1979) (characterizing *Takahashi* as involving alienage discrimination that "at bottom" is race discrimination).

62 *Takahashi*, 334 U.S at 420. A separate strand of analysis in *Takahashi* also treated the California fishing statute as an impermissible state effort effectively to deny "entrance and abode" to immigrants lawfully admitted pursuant to an act of Congress. Id. at 418-20.

63 403 U.S. 365 (1971).

64 Id. at 371-72 (footnotes and citation omitted). The discrimination at issue in *Graham* is based on alienage, but it is conceivable that the Court could have characterized it as a form of discrimination against poor people. Under decisions that barely predate *Graham*, however, such an analysis would have led the Court to apply only rationality review. See James v. Valtierra, 402 U.S. 137, 141-43 (1971) (equal protection challenge to state constitutional amendment restricting construction of low-income housing subject to rationality review); Dandridge v. Williams, 397 U.S. 471, 486-87 (1970) (same, as to equal protection challenge to family cap in state AFDC statute). For a critical account of the Court's use of rationality review in evaluating classifications based on wealth, see Stephen Loffredo, Poverty, Democracy, and Constitutional Law, 141 U. Pa. L. Rev. 1277, 1305-67 (1993).

65 *Graham*, 403 U.S. at 376. In a separate holding that relied heavily on the federalism analysis in Truax v. Raich, 239 U.S. 33 (1915), see infra notes 90-95 and accompanying text,

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state interests in preserving scarce fiscal resources for citizens as insufficiently compelling to justify the alienage classifications.[66]

Only five years after *Graham*, the Supreme Court again considered a welfare provision that restricted benefits for permanent resident aliens, and again the Court rendered a unanimous decision. This time, however, the restriction appeared in the Medicare program, pursuant to a *federal* statute. In *Mathews v. Diaz*,[67] the Court concluded that that made all the difference. The *Mathews* Court began its analysis not, as it had in *Graham*, with a review of civil rights cases involving immigrants, but rather by treating the Medicare restriction as an element of federal *immigration* policy. Thus, the Court sounded the

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the Court also explained that the state statutes were preempted by the exclusive federal immigration power, in that state denial of welfare benefits "equate[s] with the assertion of a right, inconsistent with federal policy, to deny entrance and abode," *Graham*, 403 U.S. at 380. In a later opinion, Justice Blackmun examined *Graham*, elaborating that "disparate treatment accorded a class of 'similarly circumstanced' persons who historically have been disabled by the prejudice of the majority led the Court to conclude that alienage classifications 'in themselves supply a reason to infer antipathy'. . . and therefore demand close judicial scrutiny." Toll v. Moreno, 458 U.S. 1, 20-21 (1982) (Blackmun, J., concurring) (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979)).

66 *Graham*, 403 U.S. at 374-75 ("Since an alien as well as a citizen is a 'person' for equal protection purposes, a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases than it was in *Shapiro* [v. Thompson, 394 U.S. 618, 633 (1969)]."). Importantly, the aliens in *Graham* were permanent resident aliens, colloquially known as persons with "green cards" and sometimes referred to as "citizens in training." T. Alexander Aleinikoff, Citizens, Aliens, Membership and the Constitution, 7 Const. Comment. 9 (1990); Bosniak, supra note 54; David A. Martin, Due Process and Membership in the National Community: Political Asylum and Beyond, 44 U. Pitt. L. Rev. 165 (1983). So too were the plaintiffs in all but two of the subsequent Supreme Court decisions regarding local anti-immigrant discrimination. Bernal v. Fainter, 467 U.S. 216 (1984) (invalidating bar to permanent residents serving as notary public); Nyquist v. Mauclet, 432 U.S. 1 (1977) (invalidating state restriction on student aid to legal permanent residents); Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) (invalidating bar to permanent residents obtaining license as civil engineer); In re Griffiths, 413 U.S. 717 (1973) (invalidating state bar to permanent residents obtaining admission to bar); Sugarman v. Dougall, 413 U.S. 634 (1973) (invalidating state law barring permanent resident aliens from civil service jobs). But see Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (recognizing "political function" exception to *Graham* rule of strict scrutiny for certain categories of public employment and upholding state statute excluding permanent residents from employment as "peace officers"); Ambach v. Norwick, 441 U.S. 68 (1979) (same, as to state statute requiring permanent resident public school teachers to declare intent to become citizens); Foley v. Connelie, 435 U.S. 291 (1978) (same, as to state statute limiting membership in police force to citizens). The two cases of state or local anti-immigrant discrimination *not* involving permanent residents were Plyler v. Doe, 457 U.S. 202 (1982) (subjecting denial of public primary and secondary education to undocumented children to intermediate scrutiny and invalidating it), and *Toll*, 458 U.S. at 1 (holding that state denial of student financial aid to holders of G-4 visas violated Supremacy Clause). The Court, however, has not considered which level of scrutiny to apply to state discrimination against thousands of other legal immigrants, from student and employment visa holders to refugees and asylum seekers.

67 426 U.S. 67 (1976).

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classic themes of the plenary power doctrine: Regulation of immigration "may implicate our relations with foreign powers,"[68] and the judicial branch is ill-equipped to apply other than a "narrow standard of review of decisions made by the Congress or the President in the area of immigration."[69] Because the Medicare alienage restriction implicated immigration policy and therefore foreign affairs, the Court reasoned, the restriction would be upheld so long as the classification was not "wholly irrational."[70]

The *Mathews* Court recognized that the extreme judicial deference given to a discriminatory *federal* welfare provision was at odds with *Graham*'s recent application of close scrutiny to a discriminatory *state* welfare measure. Yet the *Mathews* Court explained that the equal protection analysis in the two cases "involves significantly different considerations,"[71] because the "Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization."[72]

The divergent standards of constitutional review for federal and state alienage classifications—and therefore the consistently different results of judicial review—have remained the law. For nearly thirty years, state alienage classifications have been subjected to strict scrutiny and generally invalidated,[73] whereas federal alienage classifications have been reviewed for rationality and generally upheld.[74] Although the Court did carve out exceptions to the strict scrutiny standard for certain state-level public employment classifications,[75] its

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[68] Id. at 81.

[69] Id. at 82.

[70] Id. at 83.

[71] Id. at 84.

[72] Id. at 86-87.

[73] See cases cited supra note 12. State courts also have applied strict scrutiny to state alienage classifications in welfare programs and invalidated them as violative of the Fourteenth Amendment. E.g., Barannikova v. Town of Greenwich, 643 A.2d 251, 264-65 (Conn. 1994) (invalidating welfare "deeming" provision applicable only to aliens); El Souri v. Dep't of Soc. Servs., 414 N.W.2d 679, 687 (Mich. 1987) (same); see also State Dep't of Revenue v. Cosio, 858 P.2d 621, 628 & n.7 (Alaska 1993) (noting that exclusion of resident aliens from budget surplus dividend program would be subject to strict scrutiny under federal equal protection clause); Minino v. Perales, 589 N.E.2d 385, 386-87 (N.Y. 1992) (invalidating provision as violative of state constitution).

[74] See supra note 41.

[75] Cabell v. Chavez-Salido, 454 U.S. 432, 436, 439 (1982) (upholding as rational state bar to noncitizens serving as deputy probation officers); Ambach v. Norwick, 441 U.S. 68, 80-81 (1979) (same, as to public school teachers); Foley v. Connelie, 435 U.S. 291 (1978) (same, as to state troopers).

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most recent decision, *Bernal v. Fainter*,[76] reaffirmed that the standard rule was strict scrutiny for state alienage restrictions.[77]

This divergent standard of review has not gone unnoticed. Some critics have argued that all alienage classifications, state or federal, should be evaluated under a single standard, but have disagreed whether the standard should be ratcheted up or down.[78] Others have defended the lack of congruence as sensible in light of the different roles state and federal governments play in immigration lawmaking.[79] And since the passage of the PRA, a number of commentators have criticized Congress's invitation to state anti-immigrant discrimination,[80] while others have defended the new shape of "immigration federalism."[81]

It is possible, of course, that the state alienage cases would be decided differently today, at least in their invocation of strict scrutiny.[82] The membership of the Supreme Court has changed, and more importantly, the Court largely has discarded a rigid two-tiered approach to equal protection analysis in favor of more flexible standards under various verbal formulations.[83] Yet even leaving aside principles

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[76] 467 U.S. 216 (1984).

[77] Id. at 222 n.7. Only Justice Rehnquist dissented, in a single sentence, from *Bernal*'s straightforward application of the settled rule of *Graham*. Id. at 228 (Rehnquist, J., dissenting); see also *Cabell*, 454 U.S. at 439 (applying "political function" exception to public employment but emphasizing that Court is "not retreating from the position that restrictions on lawfully resident aliens that primarily affect *economic* interests are subject to heightened judicial scrutiny" (emphasis added)).

[78] Compare Nyquist v. Mauclet, 432 U.S. 1, 20-22 (1977) (Rehnquist, J., dissenting) (outlining instances in which deferential review of anti-immigrant discrimination, state and federal, is more appropriate than strict scrutiny), Sugarman v. Dougall, 413 U.S. 634, 658 (1973) (Rehnquist, J., dissenting) (same), and Perry, supra note 61, at 1061-62 (same), with Rosberg, supra note 44, at 336-39 (criticizing deferential review of federal alienage classifications).

[79] See, e.g., Gerald L. Neuman, Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine, 42 UCLA L. Rev. 1425, 1430-35 (1995).

[80] See, e.g., Victor Romero, Equal Protection Held Hostage: Ransoming the Constitutionality of the Hostage Taking Act, 91 Nw. U. L. Rev. 573 (1997); Valerie L. Barth, Comment, Anti-Immigrant Backlash and the Role of the Judiciary: A Proposal for Heightened Review of Federal Laws Affecting Immigrants, 29 St. Mary's L.J. 105 (1997); Connie Chang, Comment, Immigrants Under the New Welfare Law: A Call for Uniformity, a Call for Justice, 45 UCLA L. Rev. 205 (1997); Recent Legislation—Welfare Reform—Treatment of Legal Immigrants, 110 Harv. L. Rev. 1191 (1997).

[81] See, e.g., Peter J. Spiro, Learning to Live with Immigration Federalism, 29 Conn. L. Rev. 1627 (1997).

[82] See Neuman, supra note 79, at 1438 ("After the development of intermediate scrutiny for gender classifications in the mid-1970s, one might ask whether alienage discrimination really requires the stricter scrutiny that race receives.").

[83] See United States v. Virginia, 518 U.S. 515, 531 (1996) (requiring "exceedingly persuasive justification" for gender discrimination and applying form of heightened scrutiny); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442-47 (1985) (discussing height-

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of stare decisis, if the Court were to abandon strict scrutiny for state alienage classifications, the rationale underlying *Graham* still should prompt heightened judicial scrutiny for state or local anti-immigrant discrimination. This rationale is based on the recognition that noncitizens, and especially permanent resident aliens, are indeed a discrete and insular minority, one that unquestionably has been subjected to historical discrimination.[84] Noncitizens are unable to protect their interests through the ordinary democratic process, yet they work, pay taxes, and can be required to serve in the military. Their status as noncitizens is and should be irrelevant to nearly all subfederal social and economic legislation, and therefore state or local rules classifying on the basis of citizenship should be required to demonstrate at least the "exceedingly persuasive justification" also demanded of gender discrimination.[85]

3. *Federalism Principles*

A third doctrinal thread traces through the jurisprudence of local anti-immigrant discrimination: preemption of state action on the grounds that immigration regulation is an exclusively federal power. Outside the realm of immigration law, the Supreme Court has demonstrated much recent interest in state-federal relations, and a narrow majority has altered dramatically (or resurrected finally, depending on one's point of view) long-settled notions of state sovereign immunity and the scope of federal commerce and civil rights enforcement powers.[86] There have been exceptions,[87] but the plain thrust of these decisions has been to elevate state power at the expense of federal authority.

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ened "quasi-suspect" standard of judicial review); Plyler v. Doe, 457 U.S. 202, 223-24, 230 (1982) (invalidating denial of free public education to undocumented children as failing to further "some substantial goal of the State" under heightened standard of review).

[84] See, e.g., Higham, supra note 26.

[85] *Virginia*, 518 U.S. at 532-33. This is not to say that the Court should abandon *Graham*'s strict scrutiny of state alienage classifications. Rather, in light of the desirability of a more flexible approach to equal protection analysis generally, and in recognition that immigration status is not always immutable, even were the current Court to revisit *Graham*, it should—and there is every reason to believe it would—continue to apply a standard of review no less demanding than that applied to gender classifications.

[86] See supra note 2.

[87] See Saenz v. Roe, 526 U.S. 489, 502-07 (1999) (holding that federally authorized, state-imposed durational residency requirements for welfare benefits violate federal right to travel protected by Privileges and Immunities Clause of Fourteenth Amendment); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 837-38 (1995) (holding state-imposed term limits on federal officeholders unconstitutional).

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In immigration, however, the federal government has reigned supreme for over a century.[88] Even before the federal government expanded its own regulation of immigration in the 1880s, the Supreme Court invalidated state and local efforts to regulate immigration or legal immigrants when those measures conflicted, expressly or implicitly, with federal immigration policy.[89] Since the late nineteenth century, when federal regulation of immigration intensified, the Court has been even more likely to conclude that state or local measures singling out immigrants are preempted.[90] The judicial opinions often speak of an "exclusive federal power" to control immigration, a power not exercised by the states and whose exercise necessarily overwhelms or ousts any state action.[91]

In its preemption decisions, the Supreme Court has distinguished between local regulation of legal and illegal immigrants. It has afforded states a degree of leeway regarding *illegal* immigrants, whose presence in the United States is unsanctioned by the federal government.[92] But the Court has insisted that state and local governments may not target *legal* immigrants in social and economic legislation, both permanent residents[93] and other legally present noncitizens.[94]

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88 Cf. Neuman, supra note 46, at 1834 (arguing that in nation's first century, most immigration regulation occurred at state and local level). The early history of state immigration regulation is addressed infra notes 337-40 and accompanying text.

89 See Chy Lung v. Freeman, 92 U.S. 275, 281 (1876) (invalidating state inspection and bond requirements for immigrants); Henderson v. Mayor of New York, 92 U.S. 259, 273 (1876) (invalidating state tax and bond requirement for immigrants); The Passenger Cases (Smith v. Turner), 48 U.S. (7 How.) 283 (1849) (invalidating state taxes on immigrants); cf. Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 142 (1837) (upholding state regulation regarding ship manifests).

90 See Toll v. Moreno, 458 U.S. 1, 17 (1982) (holding that state denial of student financial aid to G-4 visa holders is preempted and invalid); Graham v. Richardson, 403 U.S. 365, 376-80 (1971) (stating alternate holding that state welfare discrimination against permanent residents was preempted); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (holding state restriction on commercial fishing licenses preempted); Hines v. Davidowitz, 312 U.S. 52, 73-74 (1941) (finding state alien registration system preempted); Truax v. Raich, 239 U.S. 33, 43 (1915) (finding local employment restriction on immigrants preempted); see also Plyler v. Doe, 457 U.S. 202, 224-26 (1982) (noting that state denial of public education to undocumented children was not authorized by Congress). But see De Canas v. Bica, 424 U.S. 351, 365 (1976) (declining to hold that state employment restrictions as to undocumented workers are preempted).

91 See, e.g., *De Canas*, 424 U.S. at 354 ("[T]he power to regulate immigration is unquestionably exclusively a federal power."); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) (stating that federal immigration power is "incapable of transfer" and "cannot be granted away"); *Chy Lung*, 92 U.S. at 280 ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.").

92 See *Plyler*, 457 U.S. at 225; *De Canas*, 424 U.S. at 356-63.

93 *Graham*, 403 U.S. at 371 (noting that Fourteenth Amendment encompasses legal immigrants); *Hines*, 312 U.S. at 73-74 (invalidating state registration requirement for legal immigrants).

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The rationale in the preemption cases is that oppressive local measures are tantamount to a denial of "entrance and abode," and therefore conflict with the federal government's prior approval of a legal immigrant's admission.[95] In contrast, since the federal government has not sanctioned the "entrance and abode" of undocumented immigrants, the Court has held that local oppression of undocumented persons is not necessarily in conflict with federal policy.[96]

B. *The New Legislative Order*

The PRA enacts dramatic changes in federal, state, and local benefits programs for citizens and immigrants. Immigrants, especially legal immigrants, were plainly a chief congressional target. Approximately $23.7 billion of the PRA's anticipated $53.4 billion in federal fiscal savings, or forty-four percent of the overall estimated federal savings, derived from the provisions that would deny benefits to indigent legal immigrants[97]—even though a far lower percentage of

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[94] *Toll*, 458 U.S. at 17 (invalidating state denial of in-state tuition to nonimmigrant aliens who hold G-4 visas).

[95] See, e.g., *Graham*, 403 U.S. at 378 (noting that "aliens lawfully within this country have a right to enter and abide in any State"); *Truax*, 239 U.S. at 42 ("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 . . . ."). Early in the twentieth century the Court recognized a "special public interest" exception to the rule of *Truax*, permitting state or local authorities to enact some alienage classifications without contravening the prior federal authorization for entrance and abode. See, e.g., Crane v. New York, 239 U.S. 195, 198 (1915) (upholding state restriction on employment of noncitizens on public works projects); Patsone v. Pennsylvania, 232 U.S. 138, 143-46 (1914) (upholding state statute that prohibited noncitizens from hunting wild game and owning shotguns or rifles). The "special public interest" exception was discredited in *Takahashi*, 334 U.S. at 420, and rejected in *Graham*, 403 U.S. at 374 ("Whatever may be the contemporary vitality of the special public-interest doctrine in other contexts after *Takahashi*, we conclude that a State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify [welfare restrictions for permanent resident aliens].").

[96] See, e.g., *De Canas*, 424 U.S. at 365 (holding state prohibition on employment of undocumented immigrants not preempted). Some academic and judicial commentators have suggested that a preemption analysis of state and local anti-immigrant discrimination would be a more sensible approach than the equal protection analysis frequently employed. See, e.g., Perry, supra note 61, at 1060-65. The Supreme Court itself has shifted between the two modes of analysis, employing one, the other, or both. Compare Bernal v. Fainter, 467 U.S. 216, 219-22 (1984) (equal protection analysis only), *Toll*, 458 U.S. at 9-10 (preemption analysis only), and *Plyler*, 457 U.S. at 205 (equal protection analysis only), with Examining Bd. v. Flores de Otero, 426 U.S. 572, 602 (1976) (both equal protection and preemption analysis), and *Graham*, 403 U.S. at 376, 380 (same). Critics have responded persuasively that preemption analysis leads to a "hollow formalism" that denies the equality and anticaste force of the equal protection analysis. See, e.g., Koh, supra note 44, at 98.

[97] Cong. Budget Office, supra note 7, at 3; see also Fix & Tumlin, supra note 7, at 5 & n.14; Wheeler, supra note 7, at 1248. Congressional restoration of SSI and Medicaid bene-

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welfare recipients were legal immigrants.[98] Congress has achieved its goal: "Since the passage of welfare reform, benefit participation rates among noncitizens have dropped faster than among citizens."[99]

Devolution in general, and devolution of the immigration power in particular so as to evade the *Graham* rule were central to congressional design of the PRA. The Act itself declares that "[s]elf-sufficiency has been a *basic principle of United States immigration law* since this country's earliest immigration statutes"[100] and that state welfare rules regarding immigrants serve to further "the compelling government interest in assuring that aliens be self-reliant *in accordance with national immigration policy*."[101] The House conference report is even more stark, proclaiming that "it continues to be *the immigration policy* of the United States that noncitizens within the Nation's borders not depend on public resources,"[102] and further that "it is a compelling government interest to enact new eligibility and sponsorship rules to assure that noncitizens become self-reliant and *to remove any incentive for illegal immigration*."[103] Moreover, the legislative history makes plain that *Graham* was an explicit target of several provisions of the PRA,[104] and influential restrictionist

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fits for some legal immigrants in the Balanced Budget Act of 1997, Pub. L. No. 105-33, §§ 5301-5308, 111 Stat. 251, 577-603 (codified as amended in scattered sections of 8 U.S.C.), reduced the estimated federal savings by approximately $11.4 billion. Fix & Tumlin, supra note 7, at 5.

98 Michael Fix & Jeffrey S. Passel, Urban Inst., Trends in Noncitizens' and Citizens' Use of Public Benefits Following Welfare Reform: 1994-1997, Detailed Table B (1999), http://www.urban.org/immig/trends.html.

99 Zimmermann & Tumlin, supra note 9, at 12.

100 8 U.S.C. § 1601(1) (Supp. V 1999) (emphasis added).

101 Id. § 1601(7) (emphasis added).

102 H.R. Conf. Rep. No. 104-725, at 378 (1996) (emphasis added), reprinted in 1996 U.S.C.C.A.N. 2649, 2766.

103 Id. Nearly identical statements appear in the House report accompanying the legislation that would become Title IV of the PRA. See H.R. Rep. No. 104-651, at 1441 (1996) (stating:

> [I]t continues to be the *immigration policy* of the U.S. that noncitizens within the nation's borders not depend on public resources . . . and . . . it is a compelling government interest to enact new eligibility and sponsorship rules to assure that noncitizens become self reliant and *to remove any incentive for illegal immigration*.

(emphasis added)), reprinted in 1996 U.S.C.C.A.N. 2183, 2500.

104 See H.R. Conf. Rep. No. 104-725, at 384 (discussing *Graham* in section on federal authorization for state denial of state benefits and characterizing decision as prohibiting denial of state assistance to permanent residents "without authorization from Congress"), reprinted in 1996 U.S.C.C.A.N. 2649, 2772; id. at 386 (discussing *Graham* and its progeny in section on federal authorization for state attribution of sponsor's income and resources, and characterizing them as prohibiting state sponsor-deeming "without Federal authorization"), reprinted in 1996 U.S.C.C.A.N. at 2774. The House report contains nearly identical statements. See H.R. Rep. No. 104-651, at 1445 (discussing *Graham* in section on federal authorization for state denial of state benefits), reprinted in 1996 U.S.C.C.A.N. 2183, 2504;

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commentary has emphasized the view that welfare rules are an important aspect of our national immigration policy.[105]

As to legal immigrants, the PRA made two kinds of changes, mandatory and optional. The PRA requires that persons in specified statuses[106] be eligible for certain federal, state, or joint federal-state benefits programs,[107] and that persons in other specified statuses not be eligible for certain programs.[108] Second, the Act authorized—but in no way required—the states to impose an alienage classification in certain state or federal-state programs.[109] Nothing in the PRA or

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id. at 1448 (discussing *Graham* in section on federal authorization for state attribution of sponsor's income and resources), reprinted in 1996 U.S.C.C.A.N. at 2507.

105 See, e.g., George J. Borjas, Heaven's Door: Immigration Policy and the American Economy 105 (1999) ("[G]enerous welfare programs can create a magnet that influences the migration decisions of persons in the source countries . . . . [T]he empirical link between immigration and welfare is indisputable."); id. at 114 ("[T]here are good reasons to be concerned with the possibility that generous welfare programs might attract a particular type of immigrant . . . .").

106 The PRA created a new term, "qualified alien," which includes some, but far from all, legal immigrants. Legal permanent residents are "qualified aliens," as are some refugees and asylees, Cuban-Haitian entrants, Amerasians, persons paroled into the United States by the Attorney General for a period of one year or more, and certain aliens who have been the victims of domestic abuse. 8 U.S.C. § 1641 (Supp. V 1999). All other noncitizens are not eligible for federal benefits, including undocumented immigrants, refugees and asylees who have been in the United States for more than seven years, and legal immigrants who never were "qualified aliens" (such as persons with student or employment visas, or those with pending asylum or adjustment applications). See, e.g., id. §§ 1101(a)(15)(F), 1101(a)(15)(H), 1158(d)(2), 1255(a), 1612(a)(2)(A).

107 See, e.g., id. § 1611(b)(1) (stating that all persons, regardless of immigration status, are eligible for specified programs, including emergency Medicaid, disaster relief, and immunization programs); id. § 1611(a)(2) (describing certain qualified aliens who are eligible for SSI and Food Stamps programs); id. § 1612(b)(2) (stating that certain aliens "shall be eligible" for Medicaid, TANF, and Title XX social service block grant programs); id. § 1622(b) (stating that certain qualified aliens "shall be eligible" for state benefits programs).

108 See, e.g., id. §§ 1611(a), 1612(a) (Supp. V 1999) (stating that all nonqualified aliens, and some qualified aliens, are "not eligible" for SSI or Food Stamps); id. § 1611(a) (stating that all nonqualified aliens are ineligible for Medicaid, TANF, and Title XX social service block grant programs); id. § 1621(a) (stating that certain nonqualified aliens are "not eligible" for specified state benefits programs); see also id. § 1621(d) (stating that state may provide state or local benefits to undocumented immigrant "only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility"). This last provision would appear to violate the Tenth Amendment. See Printz v. United States, 521 U.S. 898 (1997) (holding that Congress may not "commandeer" state executive officials to implement federal mandate); New York v. United States, 505 U.S. 144 (1992) (holding that Congress may not compel states to enact or administer a federal regulatory program); Erwin Chemerinsky, Memorandum on the Constitutionality of Section 411(d) of H.R. 3734 (Sept. 1996) (unpublished memorandum, on file with the *New York University Law Review*) (arguing that provision that became § 1621(d) may violate Tenth Amendment).

109 See, e.g., 8 U.S.C. § 1612(b)(1) (authorizing states to "determine the eligibility" of qualified aliens for Medicaid, TANF, and Title XX block grants); id. § 1622(a) (authorizing states to "determine the eligibility for any State public benefits" of certain qualified and

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elsewhere in federal law penalizes or rewards state choices to grant or deny benefits to immigrants; as to this choice, the federal government is entirely neutral. In this Article, I am concerned only with the latter optional changes, the federal authorization for states to engage in alienage classifications.[110]

The PRA's sweeping changes to public benefits programs compelled nearly every state legislature to rewrite vast swaths of state law.[111] This process began in late 1996 in some states and continues to the present, as states refine their rules[112] and respond to restoration of some benefits at the federal level.[113] In addition, in all states, the state and local welfare changes could not actually take effect until state,

certain nonqualified aliens); id. § 1632(a) (authorizing states to "deem" income and resources of indigent alien to include income and resources of alien's sponsor).

110 The PRA made a number of other important changes relating to noncitizens, which are likely to prompt constitutional challenges. One set of provisions requires states that receive TANF grants to report quarterly to the Immigration and Naturalization Service (INS) the names and addresses of all persons the state knows to be "not lawfully present in the United States." PRA § 404, 42 U.S.C. § 611(a) (Supp. IV 1998). Such provisions raise "unconstitutional conditions" problems in the case, for example, of an undocumented mother with a child who is a U.S. citizen, where the child is eligible for benefits but the mother will be deported if she applies on behalf of her child for those benefits. See Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1427 (1989); see also Plyler v. Doe, 457 U.S. 202, 239 n.3 (Powell, J., concurring) ("If the resident children of illegal aliens were denied welfare assistance, made available by government to all other children who qualify, this also—in my opinion—would be an impermissible penalizing of children because of their parents' status."). Another set of PRA provisions prohibits state or local governments from adopting "antisnitch" policies, that is, policies directing state or local employees not to report persons to INS. 8 U.S.C. § 1644 (Supp. V 1999). The Second Circuit recently rejected a Tenth Amendment challenge to these provisions brought by the City of New York, City of New York v. United States, 179 F.3d 29, 35 (2d Cir. 1999), which, like a number of municipalities, has had an antisnitch ordinance for years, New York, N.Y., Exec. Order No. 124 (1989) (on file with the *New York University Law Review*).

111 In addition to the PRA's immigrant provisions, the act made numerous other revisions to federal and state welfare laws. To list but a few changes, the PRA eliminated Aid to Families with Dependent Children (AFDC), a categorical, need-based program, and replaced it with a system of block grants, called TANF, which allows each state significant discretion in determining how to spend the grant, 42 U.S.C. § 604(a), establishes time limits for recipients of TANF funds, subject to some exceptions, id. § 608(a)(7), and authorizes durational residency requirements, id. § 604(c). But see Saenz v. Roe, 526 U.S. 489, 507-11 (1999) (holding Congressional authorization of durational residency requirements unconstitutional).

112 See Zimmermann & Tumlin, supra note 9, at 6 ("It has been over two and a half years since the federal welfare law passed, but states are not done setting policy for immigrants.").

113 See, e.g., Balanced Budget Act of 1997, Pub. L. No. 105-33, §§ 5301-5308, 111 Stat. 251, 597-603 (codified as amended in scattered sections of 8 U.S.C.) (restoring eligibility of some legal immigrants for SSI); Agricultural Research, Extension and Education Reform Act of 1998 §§ 503-504, 8 U.S.C. § 1612(a)(2)(A), (F) (restoring eligibility of some legal immigrants for Food Stamps).

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county, and municipal welfare agencies had promulgated new regulations to implement the state and local legislative changes.[114]

States were surprisingly reluctant to restrict immigrant eligibility for benefits.[115] After passage of the PRA, only three states chose to close a major federal-state program—TANF or Medicaid—to legal immigrants entirely,[116] and no state closed its General Assistance (GA) program.[117] A number of other states declined to terminate eligibility for TANF or Medicaid entirely but did enact "immigrant-only" eligibility criteria, such as a durational residency requirement only for legal immigrants,[118] a requirement that immigrants eligible to

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114 Some states attempted to expedite the PRA's implementation through the use of emergency rulemaking authority. In Louisiana, for example, the state's Department of Health and Hospitals published an "emergency rule" in January 1997 directing the termination of Medicaid benefits for all immigrants except those required by the PRA to remain eligible, effective January 1, 1997. Declaration of Emergency, 23 La. Reg. 24, 25 (1997). In the face of local advocacy against implementation of the emergency rule, and on the eve of litigation, Louisiana rescinded its rule. The most extreme example of the use of emergency rulemaking was probably New Mexico's decision to bypass the state legislature entirely and simply to implement the PRA by agency rulemaking. This effort was enjoined by the state supreme court as violative of separation of powers principles. State ex rel. Taylor v. Johnson, 961 P.2d 768 (N.M. 1998).

115 The most detailed empirical study of state choices regarding immigrant access to benefits after the PRA is that of the Urban Institute. See Zimmermann & Tumlin, supra note 9.

116 Louisiana barred legal immigrants from eligibility for Medicaid, but rescinded its rule on the eve of implementation. Telephone Interview with Martha Kegel, former Legal Director, ACLU of Louisiana (Oct. 10, 2000). Alabama barred noncitizens from TANF, and Wyoming closed Medicaid to them. See supra note 9. In addition, shortly before the President signed the PRA into law, Pennsylvania denied cash and medical assistance to legal immigrants, see Act 1996-35, § 14.2, 1996 Pa. Laws 175, 202 (codified at 62 Pa. Cons. Stat. Ann. § 432.22 (West 1996)), but operation of the statute was suspended by an opinion letter issued by the state Attorney General, see Official Opinion No. 96-1, Op. Att'y Gen. of Pa. (Dec. 9, 1996), available in 1996 Pa. AG LEXIS 2.

117 "General Assistance" (GA) is the "generic term for public assistance programs that are funded and authorized exclusively by state and local law." Loffredo, supra note 19, at 164. Thirty-three states have a GA program. Zimmermann & Tumlin, supra note 9, at 31 & n.66. The Urban Institute reports that Michigan effectively limits immigrant eligibility to its GA program to those immigrants eligible for SSI, which has the effect of denying GA benefits to permanent residents who arrived in the United States before August 22, 1996, were not receiving SSI on that date, and are elderly but not disabled, as well as to permanent residents arriving after August 22, 1996. Zimmermann & Tumlin, supra note 9, at 66 tbl.10; id. at 66 nn.24-25. Under current Michigan regulations, however, it appears that all legal permanent residents, as well as other "qualified aliens," and even students and tourists, are eligible for Michigan's GA program. Family Independence Agency, State of Mich., State Emergency Relief Manual No. SER 201, Residence, Age, and Citizenship 1 (2001), http://www.mfia.state.mi.us/olmweb/ex/ser/ser.pdf.

118 Washington, Maryland, and Connecticut enacted durational residency requirements for immigrants only. See supra note 9; cf. Loffredo, supra note 19 (noting that right to travel derives from Commerce Clause). But see Saenz v. Roe, 526 U.S. 489, 500-07 (1999) (stating that durational residency requirement violates right to travel, which is protected by

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naturalize do so as a condition of eligibility for benefits,[119] a rule treating the income and resources of an immigrant's sponsor as available to the immigrant (known as "sponsor deeming"),[120] or shorter time-limits for legal immigrants.[121] Moreover, many states have chosen to restrict immigrant access to their GA or state medical assistance programs through a combination of the above requirements.[122]

In addition, the PRA prompted states to attempt to fill gaps left by immigration restrictions under federal benefits. Most states established at least one state-substitute program to assist permanent residents who are ineligible for TANF and Medicaid because they have arrived in the United States after enactment of the PRA, or to assist those who lost SSI or Food Stamps benefits.[123] This did not achieve the same level of pre-1996 assistance, however, as states also imposed

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Fourteenth Amendment provision safeguarding "the privileges or immunities *of citizens*" (emphasis added)).

[119] Connecticut and New Jersey now require legal immigrants to pursue naturalization as a condition of receipt of benefits. See Conn. Gen. Stat. Ann. § 17b-116(e) (West Supp. 2000) (TANF, Medicaid, and GA programs); N.J. Stat. Ann. § 44:10-48(a) (West Supp. 2000) (TANF and GA programs). But see Nyquist v. Mauclet, 432 U.S. 1, 7-12 (1977) (holding that under *Graham*, state may not require legal immigrants to pursue naturalization as condition of receipt of benefits). Perhaps aware of *Nyquist*, other states encourage but do not require immigrants to pursue citizenship. See, e.g., Col. Rev. Stat. § 26-2-111.8(6) (1999); Wash. Rev. Code Ann. § 74.08A.130 (West Supp. 2001).

[120] Forty-three states accepted the federal invitation to implement sponsor-deeming rules in their TANF programs for permanent residents who arrived before August 22, 1996. Zimmermann & Tumlin, supra note 9, at 27. But see supra note 73 (listing cases holding state sponsor-deeming rules unconstitutional).

[121] Compare Ind. Code Ann. § 12-14-2-5.1(a), (b) (West 2000) (two-year AFDC eligibility generally), and id. § 12-15 (West 1994) (two-year Medicaid eligibility), with id. § 12-14-2.5-2 (one-year AFDC eligibility for permanent residents), and id. § 12-15-2-7 (one-year Medicaid eligibility for permanent residents).

[122] Ten states deny GA to at least some permanent residents who arrived in the United States after August 22, 1996, four impose a residency requirement not imposed on citizens, six impose a naturalization requirement, and fourteen apply a sponsor-deeming rule, none of which are required by the PRA. Zimmermann & Tumlin, supra note 9, at 66-72 tbls.10-12. In addition, New Jersey provides GA for five years to citizens, but for only six months to legal immigrants. Id. at 33. Similarly, four states deny state medical assistance to at least some permanent residents who arrived in the United States after August 22, 1996, two impose a residency requirement not imposed on citizens, two impose a naturalization requirement, and eight apply a sponsor-deeming rule, none of which are required by the PRA. Id. at 73-79 tbls.13-15. Though not included in the Urban Institute tables, New York also currently denies nonemergency state medical assistance to some permanent residents who entered after August 22, 1996. See N.Y. Soc. Serv. Law § 122(1)(c)(i) (McKinney Supp. 2000).

[123] California is the only state to have established all four state substitute programs, but twenty-seven other states enacted at least one state substitute program. Zimmermann & Tumlin, supra note 9, at 23 fig.3, 59 tbl.4.

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eligibility criteria on these state-substitute programs that are not imposed on citizens participating in the parallel federal program.[124]

What is somewhat remarkable is that so many states, at least for the time being, have elected *not* to exclude legal immigrants from TANF, Medicaid, and general assistance programs, despite the express federal authorization to do so. The states with the largest population of immigrants, including relatively generous California and New York, imposed few or none of the menu of immigrant restrictions authorized by the PRA, and in some instances have been among the most aggressive in creating state-substitute programs for immigrants denied SSI and Food Stamps.[125] Legislatures in states with relatively small immigrant populations such as Maine and Nebraska, although likely less familiar with the day-to-day life of noncitizens, also generally did not engage in anti-immigrant discrimination to the extent invited by the PRA.[126]

These state choices probably were influenced by state and local advocacy efforts on behalf of immigrants and welfare recipients, a general public reaction to the 104th Congress's anti-immigrant extremism, and relatively prosperous state economies.[127] In addition, many state and local authorities recognized that TANF and Medicaid have federal matching funds for eligible legal immigrants, but emergency state programs, such as food pantries and homeless shelters, do not—and thus the fiscal incentive to save the state-funded portion of Medicaid and TANF likely would be at least partially offset by increased spending on 100% state and local emergency services.[128] Fi-

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124 For example, nineteen states have a state substitute TANF program for permanent residents during the five-year bar period. Id. at 60 tbl.5. Of those nineteen states, however, three established a naturalization requirement, seven imposed a residency requirement that exceeds that for citizens in the regular TANF program, and sixteen apply a sponsor-deeming rule not mandated by the PRA. Id. at 63 tbl.7.

125 Id. at 23 fig.3. INS estimates that over eighty percent of legal immigrants in this country live in six states: California (35.3%), New York (14.2%), Texas (7.8%), Florida (7.5%), New Jersey (4.4%), and Illinois (4.3%). Immigration & Naturalization Serv., U.S. Dep't of Justice, State Population Estimates: Legal Permanent Residents & Aliens Eligible to Apply for Naturalization (1996), http://www.ins.usdoj.gov/graphics/aboutins/statistics/lprest.htm.

126 Zimmermann & Tumlin, supra note 9, at 46.

127 Telephone Interview with Josh Bernstein, Senior Policy Analyst, National Immigration Law Center (Oct. 10, 2000); see also supra note 25. The Urban Institute concluded that states with higher per capita incomes and more generous benefits programs prior to the enactment of the PRA have tended "to keep that safety net open to immigrants," but that state budget surpluses have not correlated with higher immigrant access to benefits. Zimmermann & Tumlin, supra note 9, at 46.

128 Charles Wheeler states:

> Governors have every reason . . . not to eliminate Medicaid eligibility for [qualified aliens], since the states are reimbursed by the federal government for approximately 50 percent of the medical costs claimed under Medicaid . . . .

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nally, some states may have acted on an aversion to involve state legislative and administrative officials more deeply than necessary in the intricacies of federal immigration classifications, with its myriad categories of legal immigrants.[129]

In short, the legal landscape may be summarized thus: In 1996 Congress invited but did not require states to deny a variety of welfare benefits to legal immigrants. To date, about a half-dozen states have accepted the federal invitation in the major federal-state programs, TANF and Medicaid, by either totally denying benefits to legal immigrants or enacting "immigrant-only" eligibility restrictions.[130] A larger number of states have imposed immigrant-only eligibility restrictions in their purely state programs, GA and various state-substitute programs.[131] Yet it seems likely that upon the next economic downturn or wave of nativism, more states will seek to accept the broad federal invitation to enact anti-immigrant restrictions in local benefits programs.

The question posed, then, is whether the PRA's authorization for state anti-immigrant discrimination removes current and future state alienage classifications from *Graham*'s requirement of heightened scrutiny, and more broadly, whether Congress may by statute devolve the federal immigration power so that state measures receive the substantial judicial deference suggested by the "plenary power" doctrine. To answer these questions, one must return to the doctrinal traditions of equal protection, the plenary power decisions, and federalism.

II
PREVIOUS ANALYSES OF FEDERALLY IMPOSED, STATE-AUTHORIZED IMMIGRANT DISCRIMINATION

The judiciary hardly has begun to grapple with anti-immigrant welfare discrimination under the PRA. To date, challenges to *federal* alienage classifications in the PRA have been unsuccessful, as all courts have concluded that the *Mathews* "rational basis" standard applies and is satisfied.[132] In addition, the Attorney General of Penn-

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> [Moreover,] communicable diseases left untreated will spread to the general population, resulting in a threat to public health and even higher costs to the states and federal government.

Wheeler, supra note 7, at 1249-50 (footnote omitted).

129 Telephone Interview with Josh Bernstein, supra note 127.

130 See supra note 9.

131 See supra notes 9, 118-24.

132 See cases cited supra note 41. In addition, two state intermediate courts have addressed challenges to post-PRA state programs. See Aliessa v. Novello, 712 N.Y.S.2d 96, 98-99 (App. Div. 2000) (holding New York law providing state medical assistance benefits to eligible citizens, but denying same to some permanent residents and other legal immi-

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sylvania has issued a binding opinion letter concluding that Pennsylvania constitutionally may not accept the federal invitation to deny state benefits to legal immigrants.[133] Despite the dearth of case law, a limited body of precedent and commentary that predates the PRA considered the hypothetical implications of federally approved, state-imposed alienage classifications in welfare programs.

A. *Prelude: The* Graham v. Richardson *Rationale*

In *Graham v. Richardson*,[134] the Supreme Court invalidated state alienage classifications as violative of both equal protection and preemption principles. But the Court also was forced to address a third argument made by Arizona in defense of its alienage restrictions: Its immigrants-only durational residency requirement "is actually authorized by federal law."[135]

The *Graham* Court ducked this difficult question by construing the federal statute at issue as *not* authorizing Arizona's alienage classification. Foreshadowing the issues raised by the 1996 Welfare Act, the Court explained that if the federal statute "were to be read so as to authorize discriminatory treatment of aliens at the option of the States, *Takahashi* demonstrates that serious constitutional questions are presented."[136] The Court had two concerns in mind: first, the principle that "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause;"[137] and second, that "[a] congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene [the] explicit constitutional requirement of uniformity"[138] contained in the Naturalization Clause.[139]

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grants, subject to rationality review and valid); Alvarino v. Wing, 690 N.Y.S.2d 262, 263 (App. Div. 1999) (holding New York law providing substitute benefits to some but not all permanent residents denied federal Food Stamps, where program does not offer similar benefits to citizens because they remain eligible for federal Food Stamps, subject to rationality review and valid). Only the former decision involves a federally authorized, state-imposed classification between citizens and permanent residents. To the extent that either holds that post-PRA state discrimination against permanent residents is subject to rationality review and valid under the Fourteenth Amendment, they are incorrect.

133 Official Opinion No. 96-1, Op. Att'y Gen. of Pa. (Dec. 9, 1996), at 12, available in 1996 Pa. AG LEXIS 2, at *23-*24.

134 403 U.S. 365 (1971).

135 Id. at 380. This is precisely the argument that one would expect from a state defending a post-PRA alienage classification.

136 Id. at 382.

137 Id.

138 Id.

139 U.S. Const. art. I, § 8, cl. 4 (empowering Congress "[t]o establish an uniform Rule of Naturalization . . . throughout the United States").

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At one level, the *Graham* Court's first concern is unremarkable. The Court frequently has recited that Congress is without power to ratify or legitimize a state's violation of the Fourteenth Amendment.[140] And yet, the Court generally has made such declarations only when the state's conduct also would be forbidden were it undertaken by the federal government.[141] When it decided *Graham*, in contrast, the Supreme Court had not yet decided whether Congress itself could deny public benefits to permanent residents.[142]

One reasonably might counter that the *Graham* decision does not analyze in any great detail the rather striking proposition that Congress constitutionally is precluded from authorizing the states to undertake action that would be permissible if done directly by Congress itself.[143] Certainly the principle begs important questions. Why is Congress barred from doing indirectly what it could do directly? Is

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[140] See, e.g., Saenz v. Roe, 526 U.S. 489, 507-08 (1999) ("[W]hether congressional approval of durational residency requirements in the [PRA] somehow resuscitates the constitutionality of [California's rule] . . . is readily answered, for we have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment." (citation omitted)); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 732-33 (1982) ("Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."); Shapiro v. Thompson, 394 U.S. 618, 641 (1969) ("Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause."); White v. Hart, 80 U.S. (13 Wall.) 646, 649 (1871) (holding that Congress cannot authorize states to violate Contracts Clause). The same principle has been applied to other congressional attempts to limit by statute the constitutional rights of aliens. See Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) (explaining, in case involving Fourth Amendment rights of aliens, that "no Act of Congress can authorize a violation of the Constitution"); see also 1 Laurence Tribe, American Constitutional Law 1238 (3d ed. 2000) ("Congress cannot authorize a state to violate a constitutional command designed to protect private rights against government action (such as the commands of § 1 of the Fourteenth Amendment).").

[141] See, e.g., *Hogan*, 458 U.S. at 731 (forbidding gender discrimination in education). In *Saenz v. Roe*, for instance, the Court emphasized that the Fourteenth Amendment right at stake, the right to travel, "is a limitation on the powers of the National Government as well as the States." 526 U.S. at 508.

[142] *Graham*, 403 U.S. at 382 n.14 ("We have no occasion to decide whether Congress, in the exercise of the immigration and naturalization power, could itself enact a statute imposing on aliens a uniform nationwide residency requirement as a condition of federally funded welfare benefits."). It was not until five years after *Graham* that the Supreme Court answered this question in the affirmative. See Mathews v. Diaz, 426 U.S. 67, 82-83 (1976) ("[I]t is unquestionably reasonable for Congress to make an alien's eligibility [for benefits] depend on both the character and the duration of his residence.").

[143] The briefs to the Court barely explored the question of federal statutory authorization for state discrimination. The argument was raised only by the Arizona appellants, *Graham*, 403 U.S. at 380, but it was not even acknowledged by the Arizona appellees, see Brief for Appellee at 2, 7, 9, 11, *Graham* (No. 609) (on file with the *New York University Law Review*), and apparently addressed only in a single paragraph by one amicus brief, see Brief of Amicus Curiae American Civil Liberties Union at 10, *Graham* (Nos. 609, 727) (on file with the *New York University Law Review*).

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there something special about immigrants, or immigration law, or equal protection? If not, how is one to distinguish analysis of local alienage classifications from other constitutional doctrines in which Congress is capable of ratifying otherwise unconstitutional state practices—as in the Court's Commerce Clause jurisprudence, and perhaps, Native American law?[144] Is it even fair to characterize congressional approval of state and local anti-immigrant discrimination as "authorizing" a Fourteenth Amendment violation, when at best a federal statute might serve merely to ratchet down the degree of equal protection scrutiny applied to state discrimination, from strict scrutiny to rational basis review? That is, when a statute seeks to alter but not eliminate the degree of judicial scrutiny, can Congress be said even to be "authorizing" a constitutional violation?[145]

The *Graham* Court's second concern about a federal statute authorizing states to discriminate against immigrants arose from the Naturalization Clause.[146] It is not immediately evident that state welfare rules have anything to do with naturalization, the process by which one becomes a citizen.[147] It is possible that the *Graham* Court be-

144 See infra notes 344-51 and accompanying text.

145 In other contexts, the current Court has reacted poorly to congressional efforts to dictate the degree of constitutional scrutiny applied to local rules. See Dickerson v. United States, 120 S. Ct. 2326, 2332-33 (2000) (stating that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution . . . ." (citing City of Boerne v. Flores, 521 U.S. 507, 517-21 (1997))); *Boerne*, 521 U.S. at 507 (invalidating provision of Religious Freedom Restoration Act of 1993, which attempted to require application of balancing test of Sherbert v. Verner, 374 U.S. 398 (1963), to free exercise challenges to state laws of general applicability, rather than rule of Employment Div. v. Smith, 494 U.S. 872 (1990)).

146 *Graham*, 403 U.S. at 382; see also U.S. Const. art. I, § 8, cl. 4 (empowering Congress "[t]o establish an uniform Rule of Naturalization . . . throughout the United States"). In his post-PRA Opinion Letter, the Attorney General of Pennsylvania reached a similar conclusion. See Official Opinion No. 96-1, Op. Att'y Gen. of Pa. (Dec. 9, 1996), at 5-6, available in 1996 Pa. AG LEXIS 2, at *11; see also Gilbert Paul Carrasco, Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection, 74 B.U. L. Rev. 591, 637 (1994) ("[S]tate legislation that disqualifies lawful resident aliens from eligibility for public benefits, even if enacted pursuant to a federal statute, would clearly contravene the Naturalization Clause."). Recent amendments to the immigration laws providing for incorporation of diverse state criminal statutes have prompted similar criticism. See, e.g., Solorzano-Patlan v. INS, 207 F.3d 869, 874 (7th Cir. 2000) (noting that need for uniform interpretation of immigration statutes leads federal courts to develop common definitions of terms such as "burglary"); Iris Bennett, Note, The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions, 74 N.Y.U. L. Rev. 1696, 1730-34 (1999) (arguing that federal courts should develop "uniformity requirement" in immigration law in order to "prevent ununiform immigration consequences for state law criminal convictions, promote fairness, and ensure that immigration law is consonant with the Constitution").

147 Naturalization generally is available to permanent residents who have resided continuously for five years in the United States (three years if married to a citizen), satisfy a local residency requirement, pass an English and a civics test, demonstrate good moral

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lieved denial of state benefits could interfere with a naturalization applicant's ability to satisfy certain residency requirements,[148] echoing the preemption analysis sometimes applied to state alienage classifications,[149] but this is probably far-fetched.[150] It is also possible that the *Graham* Court erroneously conflated naturalization law with immigration law.[151]

The *Graham* Court's statement that a federal statute authorizing state alienage classifications would be unconstitutional fails to address a number of important questions. Yet the unanimous conviction of nine Justices that such a law would violate core principles of immigration law and the constitutional architecture is well warranted. In Part III, I return to the questions prompted by the final *Graham* holding and argue that the Court's 1971 intuition was indeed correct.

B. The Membership Rationale: Immigration and Alienage Law

In addition to some limited elaboration of the *Graham* rationale,[152] before the 1996 enactment of the PRA academic commenta-

character, and take an oath of allegiance. See 8 U.S.C. §§ 1423, 1427, 1430, 1448 (1994 & Supp. V 1999); 8 C.F.R. §§ 312, 316, 319.1, 337 (2000).

148 A naturalization applicant must reside within the state or INS district from which she applies "for at least three months" before making her application, and continuously thereafter. 8 U.S.C. § 1427(a) (Supp. V 1999). At the time *Graham* was decided, the statute established a six-month state residency requirement. 8 U.S.C. § 1427(a) (1970).

149 See Truax v. Raich, 239 U.S. 33, 34 (1915) (holding denial of employment to be tantamount to denial of entrance and abode and, therefore, preempted by federal immigration law).

150 Far-fetched, but not impossible. One amicus brief to the *Graham* Court made this point. See Brief of Amicus Curiae Center on Social Welfare Policy and Law at 10, *Graham* (No. 609) (on file with the *New York University Law Review*) (stating that "[w]hen the emergency arises and [a permanent resident] requires assistance, he is forced to emigrate from Arizona to seek assistance elsewhere, thereby *terminating* his federally required period of state residence for purposes of naturalization" under 8 U.S.C. § 1427(a)).

151 The Justices would not have been alone. See, e.g., Carrasco, supra note 146, at 631 (arguing that federal permission for state welfare discrimination against immigrants "is inconsistent with the Naturalization Clause because it authorizes nonconformity within the immigration policy of the United States"); Harold G. Maier, Preemption of State Law: A Recommended Analysis, 83 Am. J. Int'l L. 832, 832 n.2, 834 n.14 (1989).

152 On one occasion between the *Graham* decision and the enactment of the PRA, Congress enacted a narrow provision permitting states to deny welfare benefits to a small class of permanent residents. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394 (codified at 8 U.S.C. § 1255a(h)(1) (1994)) (authorizing states to deny financial or medical assistance for five years from date alien is granted "temporary resident" status under amnesty provision and including aliens who adjust to permanent resident status in less than five years pursuant to § 1255a(b)(1)(A)). Apparently no state accepted this federal invitation to deny benefits to permanent residents, Carrasco, supra note 146, at 596 n.23, but the hypothetical possibility led Professor Carrasco to examine the rationale and offer additional theories in opposition to federal authorization of state anti-immigrant classification, id. at 625 (suggesting that "ratchet theory" of Fourteenth Amendment "precludes Congress from using its Section Five power to authorize states to deny

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tors advanced another significant analysis that could be applied to the constitutional questions raised by federally authorized, state-imposed alienage classifications.

This analysis arises from theories of membership in the national community,[153] which seek in part to resolve the tension between "plenary power" principles and the imperative of national borders on the one hand, and equality principles at stake in government regulation of all persons within its borders on the other. They describe the case law as reflecting a debate about the extent to which the power to regulate membership in a national community can and should reach into the civil, social, and economic lives of aliens present within a community's borders; that is, to what extent "immigration law"—the direct regulation of entrance and abode, with its attendant notions of extreme judicial deference to legislative and executive action—is properly distinct from "alienage law"—general civil, economic, and social regulation of noncitizens, with its own attendant notions of equal personhood.[154] In this view, cases involving immigrants are largely a dispute about classification: If a case is categorized as involving regulation of membership and borders, anti-immigrant discrimination will be upheld as legitimate; if the case is categorized as not involving membership and borders, anti-immigrant discrimination will be invalidated as violative of equality principles.[155] Thus, one powerful insight of the member-

benefits to newly legalized aliens"); id. at 626-31 (suggesting that 1986 statute violates "nondelegation doctrine"). Carrasco is no doubt correct that Section 5 of the Fourteenth Amendment does not empower Congress to "dilute" the Fourteenth Amendment's guarantee of equal protection, but I cannot imagine the government defending the PRA as authorized by Section 5. As to the nondelegation doctrine, while it may not be quite so "dead" as previously reported, cf. Whitman v. Am. Trucking Ass'ns, Nos. 99-1257, 99-1426, 2001 WL 182549, at *8-*10 (U.S. Feb. 27, 2001) (reversing Court of Appeals determination that portions of Clean Air Act violated nondelegation doctrine), it derives from "the principle of separation of powers," Mistretta v. United States, 488 U.S. 361, 371 (1989), and "the nondelegation doctrine[ ] simply [is] not implicated by Congress's 'delegation' of power to the states," Ky. Div., Horsemen's Benevolent & Protective Ass'n v. Turfway Park Racing Ass'n, 20 F.3d 1406, 1417 (6th Cir. 1994).

153 See, e.g., Aleinikoff, Martin & Motomura, supra note 46, at 194, 511-14; Bosniak, supra note 54, at 1047; Martin, supra note 66, at 190-204; Michael Scaperlanda, Partial Membership: Aliens and the Constitutional Community, 81 Iowa L. Rev. 707 (1996); Margaret Taylor, Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine, 22 Hastings Const. L.Q. 1087 (1995).

154 Bosniak, supra note 54, at 1087-1101.

155 For a particularly thoughtful examination of the theoretical underpinnings of this approach, see Bosniak, supra note 54. Employing the work of political theorist Michael Walzer, see Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality (1983), Linda Bosniak contends that immigration and alienage cases are understood best as reflecting "a deep uncertainty and conflict over the proper scope of the government's authority to regulate membership . . . . The chronic question that drives the doctrine is when and to what degree membership regulation properly subsumes matters of alien status

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ship theorists is that not "every federal regulation based on alienage is necessarily sustainable as an exercise of the immigration power."[156]

This theoretical analysis is helpful in understanding the competing values underlying alienage jurisprudence, but important questions regarding application of the theory remain largely unexplored. In addition, the approach essentially was rejected by a unanimous Supreme Court in *Mathews v. Diaz*.[157] In this Article, my purpose is to ask not whether *Mathews* (or *Graham*) should be overruled, but rather, whether devolution of the immigration power would be consistent with an understanding of the Constitution that accepts the core holdings of both *Mathews* and *Graham*. Moreover, even assuming *Mathews* and its reasoning were not an obstacle to recognition of a distinction between immigration and alienage law, there still would be reasons to hesitate to adopt this approach.

First, it is not obvious that the theoretical distinction between "immigration" and "alienage" law can supply a meaningful standard in particular cases, since many laws regulating immigrants have features of both regimes.[158] For instance, a number of grounds of deportation under the immigration laws press directly on the social and economic behavior of legal immigrants: Under certain circumstances, if a legal immigrant receives welfare benefits,[159] accepts employ-

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beyond the border," Bosniak, supra note 54, at 1089. Bosniak identifies two broad responses to this conflict, which she terms the "separation" and "convergence" models:

> [The former] supports a minimalist understanding of the scope of the government's authority to regulate membership and urges a relatively strict separation between the membership domain and the domain of territorial personhood. The other supports an expansive understanding of the proper domain of membership regulation and argues that membership concerns are rightfully part of the regulation of social relationships among all territorially present persons.

Id. at 1138.

156 T. Alexander Aleinikoff, Federal Regulation of Aliens and the Constitution, 83 Am. J. Int'l L. 862, 869 (1989) (emphasis omitted); see also Rosberg, supra note 44, at 338 ("[E]ven where the federal government is exercising its undeniable power to establish immigration policy . . . its power must still be confined within constitutional limits.").

157 426 U.S. 67 (1976) (upholding restriction on eligibility of legal permanent residents for Medicare Plan B, federal medical insurance program, after subjecting provision to equivalent of rationality review); see also cases cited supra note 41.

158 While implicitly critical of the Court's ruling in *Mathews*, Bosniak does not attempt to apply her theory to the Court's conclusion that denial of Medicare Plan B benefits to newly arrived immigrants is (at least in part) a bona fide regulation of immigration and national borders. See Bosniak, supra note 54, at 1101-10. Agreement on any guidelines may not be possible absent consensus on the fundamental debate regarding the reach of legitimate border regulation into the lives of territorially resident immigrants.

159 8 U.S.C. § 1227(a)(5) (Supp. V 1999) ("Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry [is deportable].").

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ment,[160] engages in disfavored speech and associational activities,[161] commits certain criminal offenses,[162] marries for reasons disapproved of by the INS,[163] or fails to maintain sufficient student status,[164] that legal immigrant becomes deportable under the immigration laws. Some of these categories of behavior also are regulated directly by the federal government, in addition to the indirect regulation that follows from threatening deportation if the immigrant engages in the listed activity.[165] It is not apparent what principle can distinguish as "immigration" law the rule that says a legal immigrant who accepts public benefits within five years of entry may be deportable,[166] from the "alienage" law that outright denies certain public benefits to immigrants for the first five years after entry.[167] So too with employment: If employment without INS authorization renders an immigrant deportable and is therefore "immigration law,"[168] why is a direct prohibition on employment of certain immigrants merely "alienage law"?[169]

A second reason that the immigration/alienage law distinction may not provide a workable rule of decision, one of direct relevance to judicial review of post-PRA state welfare laws, arises from a consideration of institutional roles. That is, if Congress determines that state welfare rules are an important element of border regulation, as it

160 Id. § 1227(a)(1)(C)(i) (stating that nonimmigrant who "has failed . . . to comply with the conditions" of admission, such as prohibition on employment, is deportable).

161 See Reno v. Am.-Arab Anti-Discrimination Comm. (*AADC*), 525 U.S. 471 (1999) (discussing deportation provisions regarding membership in designated organizations and speech and associational activities relating to organizations designated as terrorist).

162 8 U.S.C. § 1227(a)(2).

163 Id. § 1227(a)(1)(G).

164 *AADC*, 525 U.S. at 473 (reviewing deportation proceedings for "failure to maintain student status").

165 See, e.g., 8 U.S.C. § 1324a(a)(1) (1994) (prohibiting employment of immigrants who lack work authorization); id. § 1612(a)(1), (a)(3) (Supp. V 1999) (restricting eligibility of legal immigrants for federal SSI and Food Stamps programs); Exec. Order No. 11,935, 5 C.F.R. § 7.4 (2000) (prohibiting employment of all noncitizens in federal Civil Service, subject to limited exceptions on temporary basis), reprinted in 5 U.S.C. app. at 667.

166 8 U.S.C. § 1227(a)(5).

167 Id. § 1613(a) (stating that qualified alien who enters United States on or after August 22, 1996 "is not eligible for any Federal means-tested public benefit for a period of 5 years beginning on the date of the alien's entry"). In this regard, it also must be noted that Congress chose to codify the PRA's immigrant provisions in Title 8 of the U.S. Code, where the Immigration and Nationality Act is codified, rather than in Title 42, where many federal welfare provisions appear.

168 See id. § 1227(a)(1)(C)(i) ("Any alien who was admitted as a nonimmigrant and who has failed . . . to comply with the conditions of such status, is deportable.").

169 See, e.g., id. § 1324a(a)(1) (1994) (prohibiting employment of aliens who lack work authorization); Hampton v. Mow Sun Wong, 426 U.S. 88, 99-105 (1976) (approving citizenship requirement for federal civil service where government supplies rational basis).

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arguably declared in the preamble to the PRA[170] and confirmed by codifying the Act's immigrant restrictions in Title 8 of the U.S. Code,[171] are courts competent to review that conclusion? Assume Congress engages in legislative factfinding, concluding that manipulation of certain incentives for entrance or continued abode, such as access to employment[172] or public benefits,[173] play an important role in regulating membership and borders. There is reason to question whether the judiciary meaningfully could review such a finding.[174] If courts must defer to congressional (or executive) classification of a particular regulation as an immigration rule, and if the judicial debate is, as it seems, largely about classification, then the courts will cede any role in these issues.

Certainly the Supreme Court has not embraced the "immigration law vs. alienage law" distinction, and the unanimous decision in *Mathews* arguably repudiates the position. To the extent that the differences between immigration and alienage law do underlie the jurisprudence, the Supreme Court partially could accommodate the tension between border regulation and equality principles by adopting the nondevolution principle urged here, and thereby treat all state legislation as necessarily "alienage" law. Thus, even if *federal* legislation singling out legal immigrants is presumptively about border regulation and entitled to judicial deference (except in cases which shock the ju-

170 8 U.S.C. § 1601(7) (Supp. V 1999).

171 See supra note 167.

172 Some have so stated. See, e.g., Montero v. INS, 124 F.3d 381, 384 (2d Cir. 1997) ("The primary purpose of the provision [8 U.S.C. § 1324a, prohibiting employment of unauthorized aliens] was to reduce the flow of illegal immigration into the United States by removing the employment 'magnet' that draws undocumented aliens into the country . . . ." (citing H.R. Rep. No. 99-682, pt. 1, at 45-46, 56 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5649-50, 5660)); Aleinikoff, Martin & Motomura, supra note 46, at 602 ("Virtually all scholars agree that economic factors provide the most common incentive for illegal entry and residence . . . .").

173 See, e.g., Borjas, supra note 105, at 105 ("[T]he empirical link between immigration and welfare is indisputable."). Even scholars arguing for a liberalization of U.S. immigration policies have characterized welfare laws as an aspect of immigration lawmaking. See, e.g., Howard F. Chang, Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor, 3 UCLA J. Int'l L. & Foreign Aff. 371, 390 (1998) ("A country of immigration may implement a positive tariff on immigration . . . through restrictions on immigrant access to public entitlement programs.").

174 The contested standard for judicial review of legislative factfinding has been at the center of some of the Supreme Court's recent federalism cases. Compare Bd. of Trs. v. Garratt, No. 99-1240, 2001 WL 173556, at *8-*11 (U.S. Feb. 21, 2001) (holding that Congress lacked sufficient evidence of disability discrimination to abrogate state sovereign immunity in Americans with Disabilities Act), with id. at *16 (Breyer, J., dissenting) ("If any state of facts reasonably can be conceived that would sustain challenged legislation, then there is a presumption of the existence of that state of facts." (internal quotation marks omitted)).

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dicial conscience sufficiently to rebut the presumption[175]), *state* legislation singling out legal immigrants is presumptively *not* about border regulation and admission to membership, and must be justified.[176]

If the Court has used federalism as a proxy for accommodating the tension between border regulation and equality principles, then the important effort by membership theorists to undermine the extreme judicial deference to *federal* regulation of immigrants may not be necessary to resolving the questions raised by the PRA's authorization of state discrimination. In fact, both judicial deference to legislative immigration/alienage law classifications, and judicial scrutiny of such classifications, present real practical difficulties. Excessive deference could permit Congress to distort constitutional jurisprudence merely by claiming to act in furtherance of immigration policymaking,[177] but even moderate judicial scrutiny of the classification is also problematic.[178] No matter how coherent in theory, application of the immigration/alienage distinction, at least to a statute like the PRA which Congress itself has announced is an "immigration" law, is problematic.

III
THE NONDEVOLVABLE IMMIGRATION POWER

Commentators have argued that post-PRA state discrimination against immigrants is invalid because *Mathews v. Diaz* was decided

175 The principal example may be Wong Wing v. United States, 163 U.S. 228 (1896), in which the Supreme Court rejected the argument of the federal government that it could imprison an alien at hard labor for violation of an immigration law, without providing a trial by jury. Id. at 236-38; see also Bosniak, supra note 54, at 1097.

176 The "political function" cases, in which the Supreme Court upheld state alienage classifications, may be understood as driven by legitimate concerns about admission to membership in a state political community. See Cabell v. Chavez-Salido, 454 U.S. 432 (1982); Ambach v. Norwick, 441 U.S. 68 (1979); Foley v. Connelie, 435 U.S. 291 (1978); Bosniak, supra note 54, at 1112. However, the Court's determination of the scope of the "political function" exception has been overly expansive. See Koh, supra note 44, at 83.

177 Imagine that Congress declared the establishment of affirmative action programs served to attract talented, desirable immigrants of color or women immigrants, and therefore furthered critical immigration policies. Should courts defer to the classification as "immigration law" and therefore the legislative choice? Or imagine the converse: Congress abolishes affirmative action programs, declaring that such an action would serve to attract talented, desirable white male immigrants who otherwise would not come to this country, and therefore the abolition furthered critical immigration policies. Plainly, broad judicial deference to Congress's conclusion that a particular statute is an immigration rule would produce absurd results.

178 In addition to compelling courts to engage in extensive review of legislative factfinding (as to whether, for example, the availability of certain public benefits or employment opportunities in fact contributes to border regulation), there is no obvious constitutional grounding for the theory and no constitutional standards to be applied.

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wrongly[179] and because states who elect to discriminate remain subject to the rule of *Graham v. Richardson*, regardless of the PRA.[180] But the principles of *Mathews*, a unanimous decision embraced by justices and judges across the ideological spectrum,[181] likely will remain with us, and scholars have yet fully to explore the constitutional and policy questions inherent in immigration devolution. In recognition of these limitations, I propose an alternative analysis of federally approved, state-imposed immigrant discrimination. The analysis proceeds from two propositions. First, governmental discrimination against immigrants, at any level and in any field, is offensive to bedrock equality principles and anticaste values embodied in the Fifth and Fourteenth Amendments.[182] Second, the federal government is empowered to regulate immigration because immigration lawmaking can implicate foreign policy and national security concerns;[183] thus, when the federal government exercises its immigration power, foreign affairs considerations, to some extent, may be balanced with equality principles in assessing the justification for that regulation.[184]

Both of these propositions were applied in the welfare context in unanimous decisions of the Burger Court, and both have endured for decades. There is every reason to believe they will continue to last. If they do, then the only possible defense of post-PRA state alienage classifications will be that Congress has delegated its power to regulate immigration.[185] This question is dispositive because state alienage classifications enacted pursuant to traditional police or spending pow-

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179 See supra note 80.

180 See id.

181 The *Mathews* decision was joined without concurrence or dissent by everyone from Justices Brennan, Marshall, and Blackmun (who wrote many of the Court's modern decisions invalidating state alienage classifications), to Justice Rehnquist (often the sole dissenter in the state alienage cases). The opinion is discussed supra notes 67-72 and accompanying text. Lower courts also have applied the *Mathews* decision without hesitation in a series of post-1996 challenges to new federal alienage classifications. See cases cited supra note 41.

182 I take this to be the heart of *Graham* and its progeny.

183 See supra notes 49-50 and accompanying text.

184 I view this as the core of *Mathews*, see supra notes 67-72, although I believe the principle was applied wrongly in *Mathews*. Federal discrimination against immigrants should be subject to heightened scrutiny, and the Medicare discrimination in *Mathews* should not have passed this standard, even taking account of foreign affairs considerations.

185 See Helen Hershkoff & Stephen Loffredo, The Rights of the Poor 121 n.224 (1997) ("[The PRA] delegates broad authority to fifty state governments to adopt fifty different, uncoordinated, and inconsistent state policies toward immigrants, policies over which the federal government has no control."); Wheeler, supra note 7, at 1255 (stating that constitutional question raised by PRA is as follows: "[A]ssuming the provision of state public benefits can be controlled by the federal government, as part of its foreign policy powers, can the federal government delegate that authority to the states?").

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ers are subject to heightened scrutiny and generally invalid.[186] The Court upheld anti-immigrant welfare discrimination in *Mathews* solely on the grounds that the federal Medicare provisions were enacted (at least in part) as an exercise of the federal immigration power.[187] Indeed, the *Mathews* Court took great pains to distinguish its holding from that of *Graham*, emphasizing the different roles of the state and federal government in regulating immigration.[188] Thus, if the states have no original power to regulate immigration,[189] and federal anti-immigrant welfare discrimination is constitutionally permissible only as an exercise of the federal immigration power, then state anti-immigrant discrimination will survive if and only if Congress can devolve its immigration power to the states.[190] The Supreme Court previously has employed structural arguments to resolve claims of individual right involving immigrants. In several decisions, the Court has scrutinized carefully the government entity claiming to exercise the power to regulate immigration and has invalidated devolutions contrary to the constitutional architecture.[191]

This Part attempts to answer the devolvability question. It begins with a review of the few Supreme Court comments on the topic, and then proceeds to a close examination of the devolvability of the

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186 Graham v. Richardson, 403 U.S. 344 (1971).

187 Mathews v. Diaz, 426 U.S. 67, 79-82 (1976).

188 Id. at 85.

189 See infra notes 193-204 and accompanying text.

190 That the PRA addresses preemption, a second and independent ground for decision in *Graham*, see 403 U.S. at 376-80, is necessary but not sufficient to a defense of post-PRA discrimination by the states.

191 The most famous example is probably INS v. Chadha, 462 U.S. 919 (1983), in which the Court declared the legislative veto unconstitutional. Fundamental to the Court's reasoning in *Chadha* was the conviction that even when Congress exercises its "plenary immigration power," the legislature is bound by the Constitution's other structural requirements, there bicameralism and presentment. Id. at 952-55.

But of perhaps greater relevance to the devolvability question is the Court's opinion in Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), handed down the same day as *Mathews*. In *Mow Sun Wong*, the Court invalidated federal Civil Service Commission regulations barring the employment of immigrants over the objections of the Civil Service Commission that the citizenship requirement was justified "as an exercise of the plenary federal power over immigration and naturalization." Id. at 99. The Court rejected this last contention after concluding that the agency in fact was not authorized to exercise any immigration power. Id. at 114 ("[The Civil Service Commission] has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies . . . ."); see also Hiroshi Motomura, Immigration and Alienage, Federalism and Proposition 187, 35 Va. J. Int'l L. 201, 211-12 (1994) (noting that in *Mow Sun Wong*, "the Court held that a federal interest in immigration and alienage matters must be articulated by those who are institutionally competent to do so"). Shortly after the Court's decision, President Gerald Ford issued an Executive Order establishing an alienage classification substantially similar to that struck down in *Mow Sun Wong*. Exec. Order No. 11,935, 5 C.F.R. § 7.4 (2000), reprinted in 5 U.S.C. app. at 667.

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sources of the unenumerated power to regulate immigration, as identified by the Supreme Court: the Naturalization Clause, the Foreign Affairs Clauses, the Foreign Commerce Clause, and an extraconstitutional theory of inherent national sovereignty. It also considers policy arguments for and against treating the immigration power as devolvable. The section concludes that the immigration power is an exclusively federal power which Congress may not, by statute, devolve to the states.[192]

This conclusion indicates, therefore, that the PRA's attempt to share federal power to regulate immigration with the states—the effort to label state legislative choices as an exercise in immigration lawmaking—must fail. State discrimination against permanent residents, in any field, remains subject to searching judicial review, and the operative equality principles may not be balanced with any considerations of foreign affairs or national security. The PRA has not disturbed the rule of *Graham*. State discrimination against permanent residents offends core constitutional equality principles and is presumptively invalid.

A. Judicial Statements on the Exclusivity of the Federal Immigration Power

Since it discerned a federal power to regulate immigration in the late nineteenth century, the Supreme Court consistently has described this power as exclusively federal. In *Chy Lung v. Freeman*,[193] for example, the Court considered a California statute that empowered state officials to examine noncitizens arriving at port and to impose an onerous bond if the state official determined that the immigrant fell within one of numerous classes of undesirable persons.[194] Writing in 1875, the Court invalidated the California statute, declaring: "The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores *belongs to Congress, and not to the States*."[195]

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[192] In infra Part IV, I attempt to identify and answer possible objections to this conclusion.

[193] 92 U.S. 275 (1875).

[194] Id. at 277.

[195] Id. at 280 (emphasis added); see also Henderson v. Wickham, 92 U.S. 259 (1875) (invalidating state regulation of immigration). Both *Chy Lung* and *Henderson* followed the Court's decision in The Passenger Cases (Smith v. Turner), 48 U.S. (7 How.) 283 (1849), which had invalidated as violative of the Foreign Commerce Clause state taxes on the importation of immigrant passengers. The Court's decision in *The Passenger Cases* represented something of a reversal of its earlier determination that a city rule regarding importation of immigrant passengers was not unconstitutional. See Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837). By the post-Civil War era, federal power in this regard

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A century later, the Court considered another California statute, this one regulating employers of undocumented immigrants in *De Canas v. Bica*.[196] This time the Court left the California statute in place—on the theory that states do have a degree of leeway to enact general social and economic legislation regarding undocumented persons[197]—but only after reminding the state that the "[p]ower to regulate immigration is *unquestionably exclusively a federal power*."[198] In the years between *Chy Lung* and *De Canas*, and since, the Court repeated this assertion many times.[199]

Judicial declarations that the immigration power arises exclusively at the federal level, however, do not address the question whether the power may be transferred or delegated by Congress. On at least one occasion the Court has stated that Congress may not share or devolve the immigration power. Ironically, this was in the notorious *Chinese Exclusion Case*,[200] in which the Supreme Court declared

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was unquestioned. See The Head Money Cases, 112 U.S. 580 (1884) (upholding federal tax on importation of immigrant passengers).

196 424 U.S. 351 (1976). The California statute at issue in *De Canas* subsequently was preempted by the Immigration Reform and Control Act of 1986 § 101, 8 U.S.C. § 1324a(h) (1994).

197 *De Canas*, 424 U.S. at 355-56.

198 Id. at 354 (emphasis added). Even as to undocumented immigrants, moreover, a state's power to legislate, and especially to discriminate, is limited. See Plyler v. Doe, 457 U.S. 202, 230 (1982) (invalidating Texas law barring undocumented children from attending public schools as violative of Fourteenth Amendment Equal Protection Clause).

199 See, e.g., United States v. Valenzuela-Bernal, 458 U.S. 858, 864 (1982) ("The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government."); Toll v. Moreno, 458 U.S. 1, 10 (1982) ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders."); *Plyler*, 457 U.S. at 225 ("The States enjoy no power with respect to the classification of aliens. This power is 'committed to the political branches of the Federal Government.'" (quoting Mathews v Diaz, 426 U.S. 67, 81 (1976)) (citation omitted)); Nyquist v. Mauclet, 432 U.S. 1, 7 n.8 (1977) ("Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States."); Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976) ("[T]he authority to control immigration is . . . vested solely in the Federal Government, rather than the States . . . ."); Mathews v. Diaz, 426 U.S. 67, 81 (1976) ("[T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government."); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 416 (1948) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government."); Hines v. Davidowitz, 312 U.S. 52, 68 (1941) ("[T]he power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continually existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law."); see also Edmond v. Goldsmith, 183 F.3d 659, 664 (7th Cir. 1999) (Posner, C.J.) (describing "sovereign powers over foreign relations, foreign commerce, citizenship, and immigration that states and cities do not possess" (citation omitted)).

200 Chae Chan Ping v. United States, 130 U.S. 581 (1889).

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that the federal power to regulate immigration is "incapable of transfer"[201] and "cannot be granted away."[202] In contexts other than immigration, the Court similarly has concluded that Congress may not devolve exclusive federal powers to the States.[203]

Thus, it is fair to say that to the extent the Supreme Court has considered the nature of the immigration power, it has concluded repeatedly that the power is exclusively federal and "incapable of transfer."[204] But these judicial statements have appeared in cases that did not present squarely the question posed by the PRA: May Congress devolve the immigration power by statute to the states?

B. Sources of the Immigration Power

The power to regulate immigration is not enumerated in the Constitution. Over the years, the Supreme Court has located the power as deriving "from various sources,"[205] including the Naturalization Clause,[206] the Foreign Affairs Clauses,[207] the Foreign Commerce Clause,[208] and extraconstitutional theories of inherent national sovereignty.[209] To date no Supreme Court decision has turned on the pre-

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201 Id. at 609.

202 Id.

203 See Calbeck v. Travelers Ins. Co., 370 U.S. 114, 118 (1962) (noting past decisions in which Court held that Congress may not devolve powers of maritime law); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 163-64 (1920) (same); White v. Hart, 80 U.S. (13 Wall.) 646, 649 (1871) (noting that Congress may not authorize by statute violation of Contract Clause); Van Allen v. Assessors, 70 U.S. (3 Wall.) 573, 585 (1865) (recognizing that Congress may not devolve taxation power). But see Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 207 (1824) ("Although congress cannot enable a state to legislate, congress may adopt the provisions of a state on any subject."); Henkin, supra note 33, at 433-34 n.56 ("Although never overruled, it is unlikely that [*Knickerbocker*] still express[es] constitutional limits on Congressional authority, since the Court later allowed Congress to adopt state law in other areas" (citing Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946), and Davis v. Dep't of Labor & Indus., 317 U.S. 249 (1942))).

204 *Chae Chan Ping*, 130 U.S. at 609.

205 Toll v. Moreno, 458 U.S. 1, 10 (1982).

206 U.S. Const. art. I, § 8, cl. 4.

207 Id. art. I, § 8, cl. 10 ("To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . ."); id. art. I, § 8, cl. 11 ("To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . . ."); id. art. II, § 2, cl. 2 (stating that President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors").

208 Id. art. I, § 8, cl. 3.

209 See, e.g., *Toll*, 458 U.S. at 10 (describing immigration power as arising from naturalization, foreign commerce, and foreign affairs powers); Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976) (listing sources of immigration power); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (describing immigration as inherent sovereign power). See generally Aleinikoff, Martin & Motomura, supra note 46, at 185-95 (discussing sources of federal immigration power).

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cise origin of the immigration power. Examination of the text, structure, and history of each source, however, demonstrates that each constituent element of the immigration power is an exclusively federal power. That the sources of the immigration power are exclusively federal, and incapable of transfer to the states, strongly indicates that the immigration power is itself an exclusively federal, nondevolvable power.

1. Textual Sources

a. The Naturalization Clause. The Naturalization Clause empowers Congress "[t]o establish an uniform Rule of Naturalization . . . throughout the United States."[210] The Constitution does not in express terms forbid the States to exercise any naturalization authority,[211] but the textual requirement that there be a single naturalization rule that is "uniform . . . throughout the United States" long has been understood to establish an exclusively federal power, one which states may neither exercise nor impede.[212]

Such has been the Supreme Court's view at least since 1817, when Chief Justice Marshall declared: "That the power of naturalization is exclusively in congress does not seem to be, and certainly ought not to be, controverted."[213] Three years later, Justice Story elaborated, explaining that the powers affirmatively granted the federal government by the Constitution

> are never exclusive of similar powers existing in the States, unless where the constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States. The example . . . of the third class, as this Court have already held, [is] the power to establish an uniform rule of naturalization . . . .[214]

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210 U.S. Const. art. I, § 8, cl. 4.

211 Cf. id. art. I, § 10 (expressly forbidding States from engaging in certain activities, without mention of naturalization).

212 See Michael T. Hertz, Limits to the Naturalization Power, 64 Geo. L.J. 1007, 1025 (1976) (arguing that naturalization is area "in which the state has no legitimate interest and over which Congress has exclusive authority").

213 Chirac v. Chirac's Lessee, 15 U.S. (2 Wheat.) 259, 269 (1817) (declining to apply Maryland statute that would have required French property owner to naturalize).

214 Houston v. Moore, 18 U.S. (5 Wheat.) 1, 49 (1820) (citing *Chirac*, 15 U.S. (2 Wheat.) at 269); see also United States v. Wong Kim Ark, 169 U.S. 649, 701 (1898) ("The power, granted to Congress by the Constitution, 'to establish an uniform rule of naturalization,' was long ago adjudged by this court to be vested exclusively in Congress."); Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 160 (1892) ("The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so.").

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This has remained the Court's view through the modern period.[215]

That the naturalization power is exclusively federal is also supported by historical evidence, previously presented and only summarized here.[216] British restraints on naturalization and on immigration to the American colonies appear as a grievance in the Declaration of Independence.[217] The Articles of Confederation left the establishment of naturalization rules to each state,[218] resulting in divergent standards.[219] Because all states were bound to respect the "privileges and immunities" of the "free inhabitants" of other states,[220] frustration at the patchwork of state naturalization rules arose, particularly within restrictionist states that resented the more generous naturalization rules of some neighbors. Pennsylvania, for example, was accused of having "chosen to receive all that would come there . . . at the expense of religion and good morals."[221]

At the Constitutional Convention and during the ratification period, there was apparently little debate over the desirability of establishing a national, uniform rule of naturalization,[222] as even Anti-Federalists seemed to agree that in this area a unitary national rule had to prevail.[223] In short, the Constitution's textual allocation of the

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215 See, e.g., Nyquist v. Mauclet, 432 U.S. 1, 10 (1977) ("Control over . . . naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere."); see also Nemetz v. INS, 647 F.2d 432, 435-36 (4th Cir. 1981) (stating that naturalization is exclusively federal power).

216 See Carrasco, supra note 146, at 631-32 (reviewing history of Naturalization Clause and noting clear intent of Framers that naturalization would be exclusively federal power); Hertz, supra note 212, at 1009-13 (same); Bennett, supra note 146, at 1704-05 (same).

217 The Declaration of Independence para. 9 (U.S. 1776) ("[King George III] has endeavoured to prevent the Population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; [and] refusing to pass others to encourage their migration hither . . . .").

218 Articles of Confederation art. IV (1781).

219 The Federalist No. 42, at 269 (James Madison) (Clinton Rossiter ed., 1961) ("The dissimilarity in the rules of naturalization has long been remarked as a fault in our system, and as laying a foundation for intricate and delicate questions . . . ."); Hertz, supra note 212, at 1009; Bennett, supra note 146, at 1704.

220 Articles of Confederation art. IV (1781).

221 Agrippa, Letter to the *Massachusetts Gazette* (Dec. 28, 1787), reprinted in Essays on the Constitution of the United States 79, 79 (Paul Leicester Ford ed., 1892), quoted in Carrasco, supra note 146, at 631-32 n.204; see also Carrasco, supra note 146, at 631-32; Hertz, supra note 212, at 1009.

222 Bennett, supra note 146, at 1705.

223 Carrasco, supra note 146, at 632; Hertz, supra note 212, at 1009-13; see also The Federalist No. 32, at 198-99 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that naturalization power is "exclusively delegated" to federal government and that state naturalization authority would be "absolutely and totally *contradictory* and *repugnant*" to constitutional scheme, for "if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE"); The Federalist No. 42, at 269-71 (James Madison) (Clinton Rossiter ed., 1961) (noting that "[t]he dissimilarity in the rules of naturalization

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naturalization power exclusively to the federal government reflected a purposeful, uncontroversial choice by the Framers, following logically from a brief and unsatisfying experiment with disuniform state regulation of naturalization under the Articles of Confederation.

The Supreme Court has never determined the precise contours or operation of the uniformity requirement for naturalization, but the issue has arisen before other federal courts. For instance, courts have had to determine whether the federal statutory requirement that a naturalization applicant be of "good moral character" should be interpreted with reference to disuniform state laws regarding adultery and sodomy, or whether the Naturalization Clause's uniformity provision instead demands the development of a federal common law of "good moral character," without regard to state law.[224] In this context, the majority and better view has been that the constitutional command of uniformity in naturalization compels the development of a federal common law of "good moral character," lest the success of one's naturalization application depend on the state in which it is submitted.[225]

One could counter that the uniformity requirement of the Naturalization Clause should be interpreted to allow room for some state role, because that is how the Supreme Court interpreted the uniform-

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has long been remarked as a fault in our system," and so was necessary to remedy such defects in Constitution).

[224] See 8 U.S.C. § 1427(a) (1994 & Supp. V 1999) (requiring that naturalization applicant be "a person of good moral character" from five years preceding date of application through date of naturalization). A person who has admitted to or been convicted of certain crimes or other bad acts during the relevant period, or who has been convicted of an "aggravated felony" at any time since November 1990, may be precluded from establishing "good moral character." Id. § 1101(f). In 1981, Congress eliminated one provision that had prompted federal courts to consider the propriety of incorporation of state law standards: the provision that had prohibited adulterers from establishing "good moral character." Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 2(c)(1), 95 Stat. 1611, 1611 (repealing 8 U.S.C. § 1101(f)(2) (1976)).

[225] See Solorzano-Patlan v. INS, 207 F.3d 869, 874 (7th Cir. 2000) (need for uniformity in immigration law compels courts to develop federal common law of "burglary" as that term is used in immigration statutes, rather than to incorporate divergent state criminal law definitions). Compare Nemetz v. INS, 647 F.2d 432, 435 (4th Cir. 1981) (rejecting reliance on Virginia antisodomy statute to interpret "good moral character" requirement for naturalization purposes, because "reference to laws which vary from state to state can only lead to differing and often inconsistent results" and ignores "the constitutional mandate of uniformity in the area of naturalization"), Moon Ho Kim v. INS, 514 F.2d 179, 181 (D.C. Cir. 1975) (same, as to state law definitions of adultery), Wadman v. INS, 329 F.2d 812, 816-17 (9th Cir. 1964) (same, as to adultery), and In re Schroers, 336 F. Supp. 1348, 1349 (S.D.N.Y. 1971) ("[U]niformity . . . cannot be attained if resort is had to the laws of the 50 states to determine whether a particular applicant for citizenship has committed adultery."), with Brea-Garcia v. INS, 531 F.2d 693, 696-98 (3d Cir. 1976) (disagreeing with *Wadman* and *Moon Ho Kim* regarding need for uniform federal definition of "adultery" in disregard of state law in deportation case).

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ity requirement of the Bankruptcy Clause,[226] in the case of *Hanover National Bank v. Moyses*.[227] There, the Court rejected a "uniformity" challenge to an 1898 federal bankruptcy statute, which incorporated dissimilar state bankruptcy exemptions. The Court reasoned that the federal bankruptcy statute incorporated divergent state law in a uniform manner, and therefore "[t]he general operation of the law is uniform although it may result in certain particulars differently in different States."[228] The Court has continued to adhere to the *Moyses* understanding of uniformity in the bankruptcy context.[229]

Yet there are several reasons why one should hesitate to apply the *Moyses* uniformity analysis to the Naturalization Clause. First, the *Moyses* reasoning is less than compelling on its own terms, and it has not been free of academic criticism.[230] In addition, it long has been understood that the Constitution establishes concurrent, not exclusive, federal authority over bankruptcy;[231] in contrast, there appears to be no suggestion, by judge or academic, that since the abandonment of

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226 The Naturalization and Bankruptcy Clauses share the phrase "uniform . . . throughout the United States. U.S. Const. art. I, § 8, cl. 4 ("To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States . . . ."). The proposal to combine these otherwise unrelated clauses originated with the Committee on Style, apparently because of the linguistic rather than substantive relationship between the draft provisions. Hertz, supra note 212, at 1012.

227 186 U.S. 181 (1902).

228 Id. at 190; see also id. at 188 ("[U]niformity is geographical and not personal, and we do not think that the provision of the act of 1898 as to exemptions is incompatible with the rule.").

229 See Blanchette v. Conn. Gen. Ins. Corp. (Regional Rail Reorganization Act Cases), 419 U.S. 102, 159 (1974) ("[T]he uniformity clause [in bankruptcy] was not intended to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for remedy only in certain regions."); Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 172 (1946) (Frankfurter, J., concurring) ("To establish uniform laws of bankruptcy does not mean wiping out the differences among the forty-eight States in their laws governing commercial transactions."); Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 440, 463 n.7 (1937) (noting that federal bankruptcy law accommodates different state property laws).

230 See Judith Koffler, The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity, 58 N.Y.U. L. Rev. 22, 101-06 (1983) (arguing for rejection of *Moyses* doctrine and revival of spirit of uniformity as understood by Framers); Note, Bankruptcy Exemptions: Whether Illinois's Use of the Federal 'Opt Out' Provision Is Constitutional, 1981 S. Ill. U. L.J. 65, 72-73 (noting that debtor arguing for application of true uniformity doctrine must establish that *Moyses* was decided incorrectly). The federal bankruptcy code continues the practice and permits a state "opt-out" of default federal exemptions. 11 U.S.C. § 552(b) (1994).

231 See *Moyses*, 186 U.S. at 187 (claiming that Framers intended that "the States, in surrendering the [bankruptcy] power, did so only if Congress chose to exercise it, but in the absence of congressional legislation retained it"); see also Brown v. Smart, 145 U.S. 454, 457 (1892) ("So long as there is no national bankruptcy act, each state has full authority to pass insolvent laws binding persons and property within its jurisdiction . . . .").

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the Articles of Confederation, the states retain any concurrent authority over naturalization.

Moreover, there is an important textual difference between the two clauses. The Naturalization Clause employs the singular "Rule," providing for "an uniform *Rule* of Naturalization," but the Bankruptcy Clause uses the plural "Laws," empowering Congress to establish "uniform *Laws* on the subject of Bankruptcies."[232] The textual difference is consistent with evidence that the Framers intended different meanings for the singular naturalization "Rule" and the plural bankruptcy "Laws."[233] Finally, the phrase "uniform throughout the United States" appears in one other clause in the Constitution, the Taxation Clause,[234] and it has been interpreted there to require strict geographic uniformity.[235]

In short, constitutional text, structure, history, and precedent all indicate that the naturalization power is an exclusively federal power, and moreover one that may be exercised only in a manner that is geographically consistent across the nation. To the extent that the federal immigration power arises from the Naturalization Clause, it too is reserved constitutionally to the federal government.

b. The Foreign Affairs Clauses.[236] The Supreme Court often has spoken in sweeping terms of the federal government's exclusive control of foreign affairs.[237] Historical materials too support this

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232 U.S. Const. art. I, § 8, cl. 4 (emphasis added).

233 Hertz, supra note 212, at 1012, 1015-17; cf. Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 748-49 (1999) (describing mode of constitutional interpretation that examines clauses in light of use of similar words and phrases elsewhere in document).

234 U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises . . . but all Duties, Imposts, and Excises shall be uniform throughout the United States.").

235 See Knowlton v. Moore, 178 U.S. 41, 83-109 (1900) (holding that uniformity requirement of Taxation Clause requires uniformity across geographic jurisdictions even if tax itself was not "internally" uniform, that is, tax rate could be progressive or include exemptions). The *Knowlton* view remains the modern one. See, e.g., United States v. Ptasynski, 462 U.S. 74, 84-85 (1983); Steward Machine Co. v. Davis, 301 U.S. 548, 583 (1937); Apache Bend Apartments, Ltd. v. United States, 702 F. Supp. 1285, 1292 (N.D. Tex. 1988), aff'd, 964 F.2d 1556 (5th Cir. 1992).

236 The separate proposition that the federal government's foreign affairs powers arise in part from extraconstitutional, nontextual sources, and the theory's implications for the devolvability of the federal immigration power, are discussed infra notes 288-305 and accompanying text.

237 See United States v. Pink, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); United States v. Belmont, 301 U.S. 324, 331 (1937) ("[I]n respect of our foreign relations generally, state lines disappear. As to such purpose the State . . . does not exist."); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 317 (1936) ("The Framers' Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs are one."); Chae Chan Ping v. United

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view.[238] To the extent that the power to regulate immigration arises from the foreign affairs powers,[239] therefore, the immigration power would seem similarly to be reserved to the federal government.

The role of the states in foreign affairs has received relatively little attention from the courts and commentators.[240] This no doubt re-

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States (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power . . . ."); Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575 (1840) ("It was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation . . . ."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 228 (1824) (Johnson, J., concurring) ("The States are unknown to foreign nations . . . ."). As Henkin points out, "[e]ven in the Articles of Confederation, the states had left themselves little independent authority in foreign relations." Henkin, supra note 33, at 149. That also was the case under the Constitution of the Confederate States. Id. at 422 n.2.

238 See, e.g., The Federalist No. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations.").

239 See, e.g., Toll v. Moreno, 458 U.S. 1, 10 (1982); Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976).

240 On the states and foreign relations generally, see Henkin, supra note 33, at 149-69; Richard B. Bilder, The Role of States and Cities in Foreign Relations, 83 Am. J. Int'l L. 821 (1989); Maier, supra note 151; John Norton Moore, Federalism and Foreign Relations, 1965 Duke L.J. 248, 297-319. Those few cases and commentaries that have examined issues of federalism in foreign affairs fall into two broad categories: (1) those that evaluate the rare attempts by states to exercise one of the few foreign affairs powers allowed them by the Constitution, subject to congressional approval, and (2) those that consider the far more common circumstance of an ordinary exercise of state power that may affect foreign affairs and therefore be subject to a dormant foreign affairs preemption. See Zschernig v. Miller, 389 U.S. 429, 432 (1968) (holding that dormant foreign affairs preemption bars application of Oregon escheat statute to putative East German heirs).

There is a significant literature concerning the proper scope of this dormant foreign affairs preemption. See, e.g., Brannon P. Denning & Jack H. McCall, Jr., The Constitutionality of State and Local "Sanctions" Against Foreign Countries: Affairs of State, States' Affairs, or a Sorry State of Affairs?, 26 Hastings Const. L.Q. 307, 310-11 (1999) (arguing that state and local sanctions on foreign countries are unconstitutional); David Schmahmann & James Finch, The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar), 30 Vand. J. Transnat'l L. 175, 179 (1997) (concluding that city and state sanctions on Myanmmar violate preemption doctrine); Shawna Fullerton, Note, State Foreign Policy: The Legitimacy of the Massachusetts Burma Law, 8 Minn. J. Global Trade 249, 260-64 (1999) (concluding that Massachusetts Burma law runs afoul of preemption); Grace A. Jubinski, Note, State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign, 54 U. Cin. L. Rev. 543, 572-75 (1985) (arguing that state South Africa divestment legislation might not violate preemption doctrine); Lori A. Martin, Comment, The Legality of Nuclear Free Zones, 55 U. Chi. L. Rev. 965, 965 (1988) (arguing that preemption doctrine is biggest obstacle to Nuclear Free Zones); Peter J. Spiro, Note, State and Local Anti-South Africa Action as an Intrusion upon the Federal Power in Foreign Affairs, 72 Va. L. Rev. 813, 815 (1986) (concluding that local sanctions against South Africa may be preempted). The Supreme Court sidestepped an opportunity to revisit the topic of dormant foreign affairs preemption at the end of its last term. See Crosby v. Nat'l Foreign Trade Council, 120 S. Ct. 2288, 2294 n.8 (2000).

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flects a longstanding consensus that the constitutional architecture contemplates no significant state participation in foreign affairs.[241] But in fact, the Constitution does recognize limited foreign affairs powers to be exercised directly by the states, subject to the consent of Congress[242]—a ready parallel to Congress's effort in the PRA to allow the states to exercise an immigration power directly. The grant of enumerated, conditional foreign affairs powers to the states, however, strongly suggests that the Constitution contemplates no exercise of unenumerated foreign affairs powers by the states, even with congressional approval.

The Constitution confers no general "foreign affairs power" on any branch of government. The text empowers Congress to declare war and to define and punish offenses against the law of nations[243] and the Senate to advise and consent on the appointment of ambassadors;[244] the President is designated as Commander-in-Chief of the armed forces and is authorized to make treaties, with the advice and consent of the Senate, and to send and receive ambassadors.[245] Many further foreign affairs powers are mentioned nowhere in the text, but

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A related debate has arisen concerning the compatibility of federal courts' incorporation of customary international law (CIL) and federalism. See Bradley, supra note 33, at 402-09 (warning that greater power of treaties to preempt state law than that of Congress could be used to overcome federalism restraints); Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 861-70 (1997) (arguing that CIL is not supreme over state law unless incorporated into federal law by political branches); Goldsmith, supra note 33, at 1664-65 (arguing that absent action by federal political branches to incorporate CIL, interpretation should be left to state courts); Spiro, supra note 33, at 1226 (calling for abandonment of exclusivity principle, including inclusion of CIL in federal common law, as no longer justified infringement on state authority). But see Flaherty, supra note 33, at 1280 (arguing that federal foreign affairs doctrine does and should trump prohibition against federal government enlisting state officials); Harold H. Koh, Is International Law Really State Law?, 111 Harv. L. Rev. 1824, 1827 (1998) (challenging notion that federal courts should not apply CIL without Congressional authorization as chaotic and not in spirit of federalism).

241 See Henkin, supra note 33, at 149-51 (explaining that under U.S. Constitution, foreign affairs are national affairs, leaving states limited room for independent participation); Moore, supra note 240, at 297 ("It is a generally accepted constitutional principle that the states have no independent foreign affairs powers as such . . . .").

242 See U.S. Const. art. I, § 10, cls. 2-3 (permitting states, with consent of Congress, to engage in war, enter into agreement or compact with foreign nation, lay certain duties or imposts on exports, imports, and tonnage, and keep troops or ships of war in time of peace).

243 Id. art. I, § 8, cls. 10-11.

244 Id. art. II, § 2, cl. 2.

245 Id. art. II, §§ 2-3.

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have been implied from the text or derived from broader political theories and extraconstitutional notions of inherent sovereignty.[246]

The Constitution also forbids the states to engage in certain foreign affairs activities, some absolutely and some conditionally. For example, Article I, Section 10 provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal."[247] On the other hand, the same section's third clause contains a series of *conditional* prohibitions: "No State shall, *without the Consent of Congress* . . . keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."[248]

The text's specification of certain foreign affairs powers as the domain of the President, the Senate, or the Congress, and its absolute denial of other powers to the states, indicate that states are to have no role in foreign affairs. But the *conditional* denial of yet other powers to the states—particularly the Compact Clause, the only conditional foreign affairs power yet exercised by a state[249]—indicates otherwise.[250] Indeed, the conditional denial of state authority in clause 3 of Article I, Section 10 also must be read as a conditional *grant* of authority, and at a minimum, reflects a textual contemplation of some

246 See Henkin, supra note 33, at 14-15 (identifying power "to regulate immigration" as among the "missing" foreign relations powers that "were clearly intended for, and have always been exercised by, the federal government"). Although the Foreign Commerce Clause, U.S. Const. art. I, § 8, cl. 3, often is treated as a further source of a general foreign affairs power, the Supreme Court has identified it as a discrete source of the immigration power, see supra note 209, and for that reason I examine it separately, see infra notes 267-85 and accompanying text.

247 U.S. Const. art. I, § 10, cl. 1.

248 Id. art. I, § 10, cl. 3 (emphasis added).

249 Congress has approved few formal compacts between a state and another nation. Henkin, supra note 33, at 153 (listing examples); see also id. at 155 ("[S]tate and local authorities have in fact entered into agreements and arrangements with foreign counterparts without seeking consent of Congress, principally on matters of common local interest, such as the coordination of roads, police cooperation, [or] border control.").

250 One might contend as well that the Tenth Amendment's reservation to the states of powers not conferred on the federal government demonstrates a textual basis for state power to regulate immigration. The Supreme Court and commentators generally have not suggested, however, that the gaps in the Constitution's enumeration of foreign affairs powers must be understood, in light of the Tenth Amendment, as leaving to the states all unenumerated foreign affairs powers. See Missouri v. Holland, 252 U.S. 416, 434 (1920) (rejecting Tenth Amendment challenge to federal migratory bird treaty and implementing statute, concluding that neither treaty nor statute "is forbidden by some invisible radiation from the general terms of the Tenth Amendment").

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situations in which Congress may authorize the states to engage in foreign affairs activity.[251]

The Supreme Court has considered the Compact Clause in a case involving a state and a foreign country only once. In *Holmes v. Jennison*,[252] an equally divided Court affirmed a ruling that the governor of Vermont was empowered to arrest a fugitive and extradite him to Canada, despite the absence of any formal extradition treaty between the countries. The fugitive, Holmes, brought a petition for habeas corpus, challenging the Governor's conduct as an unconstitutional "agreement" with a foreign country to which Congress had not consented.

Chief Justice Taney, writing for himself, Justice Story, and two other Justices, agreed with Holmes that the Governor's arrangement with Canada was an unauthorized "agreement," and therefore invalid. Taney's opinion reflects a conviction that "[a]ll the powers which relate to our foreign intercourse are confided to the general [federal] government,"[253] and that because "the framers . . . anxiously desired to cut off all connection or communication between a state and a foreign power: and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification."[254] The other four Justices, however, in four separate opinions, concluded that the record did not establish the existence of an "agreement" requiring congressional consent and upheld the extradition.[255] Beyond demonstrating a strong bias in favor of exclusive federal foreign affairs power, however, *Holmes v. Jennison* does not clarify the scope of state authority under the Compact Clause and its possible relation to a congressional desire to authorize the states to regulate immigration. The question remains: If the constitutional text expressly allows Congress to authorize the states to engage in some foreign affairs activities, why cannot the PRA authorize the states to engage in regulation of immigration, long considered an activity at least related to, if not part of, foreign relations?

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251 And if a state is empowered to enter into an "Agreement or Compact" with congressional approval, then it presumably is empowered as well to negotiate with a foreign country to achieve an "Agreement or Compact." Henkin, supra note 33, at 156 n.†.

252 39 U.S. (14 Pet.) 540 (1840).

253 Id. at 570.

254 Id. at 572. In the alternative, Taney concluded that the extradition power was an exclusively federal one and could not be exercised by the states at all. See id. at 574-79.

255 Id. at 581 (opinion of Thompson, J.); id. at 588 (opinion of Barbour, J.); id. at 596 (opinion of Catron, J.); id. at 619 (opinion of Baldwin, J.).

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One answer may be the canon of construction of negative implication:[256] The expression of one area in which Congress may authorize state foreign affairs activity—Agreements and Compacts—implies the exclusion of others.[257] Such an answer does not seem entirely fair, however, as the immigration power is itself unenumerated, so one hardly would expect a conditional grant to the states to be enumerated. Moreover, the same canon could be applied as easily to the *absolute* prohibitions of state foreign affairs activity enumerated in Article I, Section 10, to argue that the expression of specified absolute prohibitions implies the exclusion of any others (such as a prohibition on state authority to regulate immigration).[258]

On the other hand, to derive a negative implication from the conditional grant of foreign affairs powers to the states would not be unique. There are other powers granted to the federal government that are neither expressly denied to the states,[259] nor reserved to the federal government in specific terms,[260] but which nonetheless must be exclusively federal.[261] For example, the Constitution empowers

256 See Felker v. Turpin, 518 U.S. 651, 660-61 (1996) (holding that provision of Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214, did not eliminate Court's jurisdiction to adjudicate original habeas corpus petitions because Act explicitly barred certain modes of review but made no mention of original petitions).

257 What sort of negative implications, if any, could be derived from the Compact Clause was an aspect of the recent exchange regarding the constitutionality of the North American Free Trade Agreement (NAFTA). Compare Laurence Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221, 1270-71 (1995) (suggesting that Constitution's express grant of congressional power to approve state compacts with foreign nations implies lack of similar congressional power to approve executive agreements with foreign nations, outside ordinary treaty approval requirements of Section 2 of Article II), with Bruce Ackerman & David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799, 919-20 (1995) (arguing that Articles I and II present independent grants of power sufficient to create international obligations). See generally Made in the U.S.A. Found. v. United States, No. 99-13138, 2001 WL 194857 (11th Cir. Feb. 27, 2001) (dismissing challenge to NAFTA as "treaty" requiring Senate ratification on grounds that objection is nonjusticiable political question).

258 See Bradley & Goldsmith, supra note 240, at 863 (stating:

> [T]he natural inference is that Article I, Section 10's self-executing limitations on state power in foreign relations are exhaustive and that other foreign relations activities fall within the concurrent authority of the state and federal governments until the federal political branches exercise their foreign relations powers in a manner that preempts state law.).

259 See U.S. Const. art I, § 10, cl. 1.

260 See id. art. I, § 8, cl. 4 (requiring "an uniform Rule of Naturalization . . . throughout the United States"); id. art. I, § 8, cl. 17 (authorizing Congress to "exercise *exclusive* Legislation" over military property and what could become District of Columbia (emphasis added)).

261 See Tribe, supra note 257, at 1246 ("There are national responsibilities that simply may not be delegated to the states.").

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Congress "[t]o constitute Tribunals inferior to the supreme Court."[262] This power is nowhere denied to the states, nor reserved to the federal government in the terms of its grant. Yet were Congress to pass a statute devolving to the states the authority to establish lower federal courts, it would be invalidated as inconsistent with the constitutional structure and with the implication that such a power is exclusively, nondevolvably federal.[263]

Another answer may be that, regardless of which precise foreign affairs power gives rise to the immigration power, the Compact Clause does not. Therefore, the conditional authority granted states by the Compact Clause does not extend to federal authorization for state immigration policy. There is intuitive appeal to this answer, as one does not think of federal immigration regulation as following principally from international agreements,[264] and it would not seem that much state regulation of immigration would derive from a "compact" or "agreement." But this explanation too is not completely satisfying, as the immigration power of course cannot be traced to one or another foreign affairs power in particular.

Perhaps the best that can be said of Article I, Section 10's limited, conditional grant of foreign affairs power to the states is that it represents a small portion of the foreign affairs powers expressly contemplated by the constitutional text, and an even smaller portion of those now understood to comprise the foreign affairs powers of the modern nation. The plain text and structure of the Constitution contemplate that the vast amount of the foreign affairs powers are lodged exclusively at the federal level. This has long been the view of the Supreme Court and authoritative commentators.[265] To the extent that the power to regulate immigration arises from the Foreign Affairs Clauses, it must arise elsewhere than from the limited Article I, Section 10 carve-out for some federally approved, state-conducted foreign affairs activity.

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262 U.S. Const. art. I, § 8, cl. 9.

263 See, e.g., Henkin, supra note 33, at 428 n.33 ("Surely, constitutional provisions that give Congress power to legislate in regard to U.S. courts . . . deny such power to the states.").

264 There are important exceptions in the realms of refugee and asylum law, however. See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277, § 2242, 112 Stat. 2681, 2681-82 (implementing United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988)); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (implementing United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268).

265 See Henkin, supra note 33, at 149-50 & 422 nn.1-2 (listing commentators).

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In short, the text of the Foreign Affairs Clauses, as interpreted by courts and commentators, leaves no significant role for the states in foreign relations. Nor does the Constitution's limited provision for federally approved state involvement in foreign affairs, in narrow, specified areas, allow for federally authorized state involvement in immigration policymaking. If the immigration power arises from the Foreign Affairs Clauses, then it may be exercised exclusively by the federal government and may not be devolved to the states.[266]

c. The Foreign Commerce Clause. The Supreme Court initially derived the power to regulate immigration from Congress's authority "[t]o regulate Commerce with foreign Nations."[267] Can the foreign

266 A word about the contemporary debate regarding "dormant" foreign affairs preemption is appropriate, if only to distinguish that discussion from the issues raised by an attempted devolution of the federal immigration power. The more common circumstance in which federalism concerns arise in foreign affairs occurs when a state or local authority exercises ordinary police or spending powers in a way that directly or potentially affects national foreign policy. The courts have dealt with state intrusion into foreign affairs by applying a preemption doctrine, which in its most expansive form embraces a broad "dormant" foreign affairs preemption. See, e.g., United States v. Pink, 315 U.S. 203, 233 (1942) (asserting that "[p]ower over external affairs" lies in national, rather than state, governmental focus); United States v. Belmont, 301 U.S. 324, 330 (1937) ("Governmental power over external affairs is not distributed, but is vested exclusively in the national government."). The most forceful statement of this "dormant" foreign affairs preemption appears in Zschernig v. Miller, 389 U.S. 429 (1968), where the Supreme Court held that application of an Oregon escheat statute to putative East German heirs was an impermissible "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and Congress," id. at 432, notwithstanding the U.S. government's disclaimer of any contention that "'application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations,'" id. at 434 (quoting Brief of Amicus Curiae United States at 6 n.5, *Zschernig* (No. 21)).

Academic commentators recently have mounted a challenge to *Zschernig*'s muscular notion of a "dormant" foreign affairs preemption. See supra notes 33-34, 240. As recently as 1999, the First Circuit applied *Zschernig* to invalidate a Massachusetts law barring state procurement from companies that do business with Burma. See Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999). The Supreme Court affirmed on other grounds, but declined an express invitation to revisit *Zschernig*. Crosby v. Nat'l Foreign Trade Council, 120 S. Ct. 2288 (2000) (holding that state law was preempted specifically by federal Burma statute). The outcome of the debate on the scope or extent of "dormant" foreign affairs preemption ultimately will not be that significant, though, in assessing the legitimacy of the PRA's express devolution of the federal immigration power. In the *Zschernig* debate, even *proponents* of a new "foreign affairs federalism" have not argued that a state's participation in foreign policymaking reflects a constitutional devolution of the foreign affairs powers, or that state action affecting foreign policy must now be treated with the same judicial deference as federal action. Rather, they advance the much more limited claim that courts should hesitate to hold preempted all ordinary exercises of state power that happen to touch on foreign affairs, where no express conflict exists.

267 U.S. Const. art. I, § 8, cl. 3; see also The Head Money Cases, 112 U.S. 580, 600 (1884) ("Congress ha[s] the power to pass a law regulating immigration as a part of the commerce of this country with foreign nations . . . ."); Chy Lung v. Freeman, 92 U.S. 275, 280 (1876) ("The passage of laws which concern the admission of citizens and subjects of foreign na-

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commerce power, and therefore by implication, the immigration power also, be devolved to the states?

Unlike the Naturalization Clause, there is no textual restriction on the exercise of a foreign commerce power by the states.[268] Indeed, at first glance, one might suppose that like its cousin, the Interstate Commerce Clause, the Foreign Commerce Clause was intended to establish concurrent jurisdiction in the state and federal governments.[269]

The Supreme Court, however, long has recognized a profound distinction between the federal government's concurrent authority to regulate interstate commerce and its "exclusive and absolute" power over foreign commerce.[270] The Court's authoritative modern statement on the federal power to regulate foreign commerce appears in *Japan Line, Ltd. v. County of Los Angeles*,[271] in which the Court invalidated a California *ad valorem* tax on shipping containers as violative of the Foreign Commerce Clause. Writing for the Court two

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tions to our shore belongs to Congress . . . . [I]t has the power to regulate commerce with foreign nations . . . ."); Henderson v. Mayor of New York, 92 U.S. 259, 270 (1876); The Passenger Cases (Smith v. Turner), 48 U.S. (7 How.) 283, 400 (1849) (attributing to Congress power to regulate foreign commerce); Bilder, supra note 51, at 745-47 (noting that, until 1889, Court based immigration jurisprudence on Commerce Clause).

268 The U.S. Constitution provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [sic] inspection Laws." U.S. Const. art. I, § 10, cl. 2. Like the Compact Clause, id. art. I, § 10, cl. 3, this provision is both a prohibition on the States and a conditional grant of authority to act, see generally Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976). I am not aware that the suggestion has been made that the immigration power arises from the Import-Export Clause. Like the Compact Clause, this narrow grant of power to the states to participate in the regulation of foreign commerce is not significant in evaluating whether the broad federal power to regulate foreign commerce may be devolved to the states. See supra notes 250-64 and accompanying text. If anything, the specific enumeration of a narrow area for federally authorized state regulation implies that the states possess no other direct power in foreign commerce.

269 See U.S. Const. art. I, § 8, cl. 3 (stating that Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States").

270 See Buttfield v. Stranahan, 192 U.S. 470, 492 (1904) (noting that regardless of debate regarding scope of Congress's interstate commerce power, "it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries"). This view was echoed in Bowman v. Chi. & Northwestern Ry. Co., 125 U.S. 465 (1888):

> Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation. The organization of our state and federal system of government is such that the people of the several states can have no relations with foreign powers in respect to commerce or any other subject, except through the government of the United States . . . . The same necessity perhaps does not exist equally in reference to commerce among the states.

Id. at 482; see also *Henderson*, 92 U.S. at 273.

271 441 U.S. 434 (1979).

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years earlier, Justice Blackmun had explained that a state tax does not burden interstate commerce impermissibly if it satisfies four criteria.[272] The issue in *Japan Line* was whether satisfaction of the four interstate commerce requirements alone would render California's tax permissible under the Foreign Commerce Clause.[273]

Again writing for the Court, Justice Blackmun concluded that "there is evidence that the Founders intended the scope of the foreign commerce power to be [ ] greater" than that of the Interstate Commerce Clause, and "[c]ases of this Court, stressing the need for uniformity in treating with other nations, echo this distinction."[274] Accordingly, cases involving the Foreign Commerce Clause require "a more extensive constitutional inquiry,"[275] in which a court must consider two additional criteria: whether a state tax creates a substantial risk of international multiple taxation, and "whether the tax prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'"[276] The Court concluded that the California tax at issue in *Japan Line* failed on both prongs: It resulted in international multiple taxation and "prevent[ed] this Nation from 'speaking with one voice' in regulating foreign trade."[277]

The constitutional mandate that the nation "speak with one voice" in foreign commerce would seem contrary to any assertion that Congress could devolve the power to the states. But Congressional approval of a state regulation can satisfy the "one voice" requirement of *Japan Line*, as implied by the *Japan Line* Court's alternate phrasing of the inquiry as whether a state regulation would impair federal uniformity "in an area where federal uniformity is essential."[278] Thus, in three leading foreign commerce cases since *Japan Line,* satisfaction of the "one voice" criteria has depended on a determination whether Congress considered federal uniformity sufficiently "essential" to

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272 The Court held that a state tax does not violate the Interstate Commerce Clause if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

273 *Japan Line*, 441 U.S. at 445.

274 Id. at 448.

275 Id. at 445-46.

276 Id. at 451. The reference to the federal government's need to "speak with one voice" is to Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976), a case arising under the Export-Import Clause.

277 *Japan Line*, 441 U.S. at 452. The Court also offered a less absolute formulation of the "one voice" requirement, defining the inquiry as whether a state regulation would "impair federal uniformity in an area where federal uniformity is essential." Id. at 448.

278 Id.

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have demonstrated an intention to prohibit irregular state regulation.[279] Commentators generally agree that current foreign commerce jurisprudence enables Congress to approve state regulation of foreign commerce "in ways that would not stand were Congress silent."[280]

The Supreme Court's "one voice" Foreign Commerce Clause jurisprudence is essentially a jurisprudence of preemption, in which the Court scrutinizes state regulation of foreign commerce for compatibility with federal goals. In its most recent cases, the Court has been reluctant to find an incompatibility.[281] But the issue raised by the PRA is not whether post-1996 state alienage classifications violate the Foreign Commerce Clause.[282] Rather, it is whether Congress may devolve the federal immigration power to the states, and with it the substantial immunity from judicial review that attends its exercise. The modern foreign commerce cases do not consider whether Congress may delegate its own foreign commerce powers; they assume a con-

279 In Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983), the Court rejected a Foreign Commerce Clause challenge to the use of California's "worldwide combined reporting" method to determine the franchise tax owed by a domestic corporation with foreign subsidiaries. The Court's analysis of the "one voice" criteria hinged on its conclusion that there were no "specific indications of congressional intent" to preempt California's scheme. Id. at 196-97. In Wardair Canada, Inc. v. Florida Department of Revenue, 477 U.S. 1 (1986), the Court rejected a "one voice" challenge to a Florida tax on the sale of fuel to common carriers, including airlines. Even though the United States as amicus curiae contended that Florida's regime undermined the nation's ability to speak with one voice, the Court disagreed, perceiving no clear demonstration of a federal policy against state sales taxation of airplane fuel. Id. at 9. Finally, returning to California's franchise tax in Barclays Bank PLC v. Franchise Tax Board, 512 U.S. 298 (1994), the Court again upheld the state scheme, this time as applied to a foreign corporation and a domestic corporation with a foreign parent. Again, because the Court could "discern no 'specific indications of congressional intent' to bar the state action," the Court concluded that the "one voice" requirement was not violated. Id. at 324.

280 Henkin, supra note 33, at 162; see also Tribe, supra note 257, at 1151-52 ("The Supreme Court, in the face of congressional silence, has allowed only such state action [regulating foreign commerce] as it has deemed consistent with the nationality policies perceived to underlie the congressional power delegated in the Commerce Clause itself.").

Some scholars recently have criticized the scope of "dormant" foreign commerce preemption. See Goldsmith, supra note 33, at 1681-90 (condemning doctrine of dormant foreign commerce preemption as unnecessary and harmful); Spiro, supra note 33, at 1266 (applauding *Barclays Bank* decision as "bod[ing] ill for 'one-voice' jurisprudence"); Peter Spiro, The States and Immigration in an Era of Demi-Sovereignties, 35 Va. J. Int'l L. 121, 164 (1994) (criticizing *Barclays Bank* decision for stressing "the institutional preeminence of Congress over foreign commerce" rather than taking "full account of the possibility of foreign government retaliation").

281 See *Barclays Bank PLC*, 512 U.S. at 324; *Wardair Can., Inc.*, 477 U.S. at 12; *Container Corp. of Am.*, 463 U.S. at 197.

282 Actually, they might, even if the PRA satisfies the "one voice" requirement by manifesting a congressional determination that this is not "an area [of commercial activity] where federal uniformity is essential." *Japan Line*, 441 U.S. at 448. This is because state anti-immigrant discrimination may violate a different requirement, the nondiscrimination prong of *Complete Auto Transit*, by disfavoring foreign immigration (or commerce).

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current state power to regulate commerce generally. The decisions therefore do not shed much light on whether, if the federal immigration power emanates from the Foreign Commerce Clause, it may be devolved to the states.

Yet there are reasons to conclude that Congress may not devolve its power to regulate foreign commerce to the states, nor any immigration power that may arise from it. Certainly any argument for devolvability would contradict the Court's longstanding conviction that the foreign commerce power is the "exclusive and absolute" domain of the federal government.[283] The argument also would contradict the more modern characterization of the power to regulate foreign commerce as merely an aspect of the broad power to regulate foreign affairs, the devolution of which, as discussed above, should not be tolerated.[284] Finally, it is noteworthy that even opponents of "dormant foreign commerce preemption" have not suggested that states possess an independent power to regulate foreign commerce; theirs is the narrower claim that a state's otherwise constitutional regulation of all commerce should not be invalidated simply because the regulation also applies to international commerce.[285]

In sum, consideration of the three textual provisions identified by the Supreme Court as giving rise to the immigration power—the Naturalization, Foreign Affairs, and Foreign Commerce Clauses—indicates that the powers therein conferred are exclusively federal and not devolvable to the states by statute. The evidence is not unequivocal, as the constitutional text does contemplate some limited, direct exercise of these powers by the states, as in the Compact Clause and the Import-Export Clause. These textual exceptions are narrow, however, and serve to confirm the rule against state power and against the capacity of the federal government to authorize by statute state exercise of these powers. In addition, the conclusion that the immigration power is "truly national"[286] and incapable of devolution to the states would not render the power uniquely so.[287] To the extent, therefore, that the federal immigration power arises from one or more of these textual sources, it would appear that the PRA's attempted devolution,

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283 Buttfield v. Stranahan, 192 U.S. 470, 493 (1904); see also Bowman v. Chi. & Northwest Ry. Co., 125 U.S. 465, 482 (1888) ("The organization of our state and Federal system of government is such that the people of the several States can have no relations with foreign powers in respect to commerce . . . .").

284 See supra notes 237-66 and accompanying text.

285 See supra note 280.

286 United States v. Morrison, 529 U.S. 598, 676 (2000).

287 See supra notes 260-63 and accompanying text.

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along with the attendant judicial deference to exercises of the immigration power, is impermissible.

2. *Extraconstitutional Sources of the Immigration Power*

The difficulty of extrapolating the full immigration power from the text of the Naturalization, Foreign Affairs, and Foreign Commerce Clauses, however, has led the Supreme Court to propose that the federal immigration power may arise as well from an extraconstitutional source: the inherent sovereignty of the nation. The Court first articulated this theory in the notorious *Chinese Exclusion Case*,[288] repeated it in other early cases,[289] and the doctrine soon was entrenched.[290]

The Supreme Court rarely has analyzed the theory of an extraconstitutional or inherent sovereignty as a source of the immigration power.[291] That analysis has appeared, rather, in judicial and

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288 Chae Chan Ping v. United States, 130 U.S. 581 (1889). The Court stated:

> That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power . . . . The power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution . . . .

Id. at 603-04, 609.

Sarah Cleveland has pointed out that the inherent sovereignty theory's antecedents also include decisions involving regulation of Native American affairs. Sarah Cleveland, The Plenary Power Background of *Curtiss-Wright*, 70 U. Colo. L. Rev. 1127, 1135-42 (1999).

289 See, e.g., Fong Yue Ting v. United States, 149 U.S. 698, 707-08 (1893) (citing numerous international law commentators for proposition that right to "expel or deport foreigners" is "essential attribute[ ] of sovereignty" (citations omitted)); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions . . . . In the United States this power is vested in the national government . . . .").

290 The notion that the power to regulate immigration is an incident of sovereignty predates this nation. See, e.g., Cleveland, supra note 288, at 1143 ("Citing Vattel's works on international law, the Federalists argued [in 1798] that because the law of nations recognized the absolute right of a nation to expel aliens, the Alien Act . . . violated no constitutional provisions.").

291 Early criticism by some dissenting Justices, who insisted that all federal authority must derive from the constitutional text, soon faded. For example, in *Fong Yue Ting*, Justice Field stated in dissent:

> The government of the United States is one of limited and delegated powers . . . . When, therefore, power is exercised by Congress, authority for it must be found in express terms in the Constitution, or in the means necessary or proper for the execution of the power expressed. If it cannot be thus found, it does not exist.

149 U.S. at 757-58 (Field, J., dissenting); see also id. at 737 (Brewer, J., dissenting) ("It is said that the power here asserted is inherent in sovereignty. This doctrine . . . is one both

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academic discussion of the related notion that the federal government possesses some foreign affairs powers "not rooted in the Constitution, but inherent in the nationhood and sovereignty of the United States."[292] Given the consistent reference in the foreign affairs cases to immigration cases citing inherent sovereignty, it seems likely that the Supreme Court would apply its broader analysis of inherent sovereignty and foreign affairs to the specific context of immigration. Thus, analysis of the foreign affairs "sovereignty" cases should inform the inquiry regarding devolvability of the federal government's inherent immigration power.

The Court's principal statement of the view that foreign affairs powers are sovereign powers appears in *United States v. Curtiss-Wright Export Co*.[293] In that case, a joint resolution of Congress had empowered the President to declare an arms embargo on countries involved in fighting in the Chaco region of South America, with violations punishable as criminal acts. President Roosevelt declared an embargo, and the *Curtiss-Wright* defendants were indicted for conspiring to sell arms to Bolivia. They defended on the grounds that the joint resolution was an improper delegation of legislative power to the executive branch.

Writing for the Court, Justice Sutherland rejected the defendants' nondelegation argument with a sweeping theory: "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."[294] In foreign affairs, the Constitution did not redistribute powers between the federal government and states because "the states severally never possessed international powers."[295] Rather,

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indefinite and dangerous."). Yet the modern Court's tendency to emphasize constitutional text as the source of the immigration power may reflect an enduring unease with a full-throated doctrine of extraconstitutional authority. See, e.g., Toll v. Moreno, 458 U.S. 1, 11 (1982) (declaring that federal immigration power is "*constitutionally derived*" and that "[t]he Federal Government has broad *constitutional* powers in determining what aliens shall be admitted to the United States" (emphasis added) (citing Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418-19 (1948))); De Canas v. Bica, 424 U.S. 351, 358 (1976) ("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." (emphasis added) (citing Hines v. Davidowitz, 312 U.S. 52, 66 (1941))).

292 Henkin, supra note 33, at 15-16 & 328 n.3 (gathering sources).

293 299 U.S. 304 (1936).

294 Id. at 315-16.

295 Id. at 316.

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> [a]s a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America .... When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union.[296]

In light of this transfer of sovereign powers directly from Great Britain to the new federal government, "[i]t results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."[297] Among the unenumerated powers incident to national sovereignty, Justice Sutherland listed the power to acquire territory by discovery and occupation, "the power to expel undesirable aliens,"[298] and the power to make international agreements that do not amount to "treaties" in the constitutional sense.[299]

The *Curtiss-Wright* theory of extraconstitutional foreign affairs powers inherent in national sovereignty is the subject of a substantial literature,[300] but what is significant for the instant inquiry is whether, assuming the theory's validity, Congress and the President may by statute devolve to the states some part of that inherent sovereignty which gives rise to the federal immigration power. As to this question, it seems difficult categorically to answer in the negative, for "inherent sovereignty" is a theory of international law and political philosophy,[301] ungrounded in the normal legal interpretive sources of text, structure, and history.[302]

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296 Id. at 316-17.

297 Id. at 318.

298 Id. (citing Fong Yue Ting v. United States, 149 U.S. 698 (1893)).

299 Id. (citing B. Altman & Co. v. United States, 224 U.S. 583 (1912)).

300 See Henkin, supra note 33, at 329 nn.9-10 (listing commentary critical of Sutherland's theory); id. at 20 ("Students of the Constitution may have to accept Sutherland's theory, with its difficulties, or leave constitutional deficiencies unrepaired."). Cleveland has demonstrated that Justice Sutherland's theory of an extraconstitutional, plenary foreign affairs power had "roots deep into the early nineteenth century, particularly in judicial decisions relating to Indians, aliens, and territories." Cleveland, supra note 288, at 1135.

301 See Emmerich Vattel, The Law of Nations 169-70 (Joseph Chitty ed., Philadelphia, T. & J.W. Johnson 1858) ("The sovereign may forbid the entrance of his territory either to foreigners in general or in particular cases, or to certain persons or for certain particular purposes, according as he may think it advantageous to the state.").

302 Louis Henkin explains that international law restricts the exercise of all foreign affairs powers, including "inherent" powers recognized under Sutherland's theory. Henkin, supra note 33, at 20. Others specifically have argued that international law limits the sovereign immigration powers of the federal government in some respects, such as in the treatment of refugees and asylum seekers. See, e.g., James A.R. Nafziger, The General Admission of Aliens Under International Law, 77 Am. J. Int'l L. 804 (1983); Michael Scaperlanda, Polishing the Tarnished Golden Door, 1993 Wisc. L. Rev. 965. I am unaware,

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Certainly, by Sutherland's own definition, powers incident to the nation's sovereignty are exclusively federal powers. It would seem to follow that only the sovereign can exercise sovereign powers, for transfer or devolution of such powers is a surrender of sovereignty itself. After all, Sutherland's own example of a transfer of sovereign powers was British recognition of the colonies' independence and reconstitution as the United States.[303] Under *Curtiss-Wright*, then, one sovereign may surrender inherent power to another sovereign. But any congressional attempt to devolve inherent powers to nonsovereign states would be incompatible with the very creation of the United States "in their collective and corporate capacity."[304]

It is not possible, of course, to point to definitive text, history, or precedent denying Congress's power to devolve powers inherent in national sovereignty, and hence the conclusion that sovereign powers can be exercised only by the sovereign is at best a natural, not inevitable, implication of *Curtiss-Wright*. But if the power to regulate immigration truly derives from some fundamental attribute of sovereignty, relinquishment of that power must be tantamount to relinquishment of sovereignty.[305] Such a basic reordering of our constitutional architecture, and of the very Union of the states, is not achievable by statute. If the PRA sought to devolve an immigration power arising from our nation's sovereignty, that devolution must be a nullity.

C. Policy Considerations

In addition to immigration law precedent and the text, history, and structure of the constituent elements of the immigration power, there are sound policy reasons favoring a conclusion that the federal immigration power should not be capable of devolution by statute. It seems obvious that states should not, as a matter of policy, engage in classic immigration lawmaking—a federal statute empowering the states to erect border crossings, issue visas, or proscribe fifty different grounds for deportation plainly would be unwise, inefficient, and likely to draw the nation into international disputes based on the actions of individual states.[306] Yet if the immigration power extends to less direct regulation of entrance and abode, encompassing laws such

however, of any principle of international law specifically limiting the devolution of sovereign powers.

303 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936).

304 Id.

305 Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889).

306 Recall the unhappy experiment in state control of naturalization rules under the Articles of Confederation, see supra notes 218-21 and accompanying text.

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as employment and welfare rules affecting immigrants,[307] is devolution still misguided? Why not allow Congress to devolve at least that portion of the immigration power that regulates the socioeconomic lives of immigrants, and let states wishing to exercise the delegated power do so?

There are several reasons. Most importantly, devolution would erode the antidiscrimination and anticaste principles that are at the heart of our Constitution and that long have protected noncitizens at the subfederal level.[308] The plenary power doctrine of immigration law inevitably shields governmental action from the level of judicial scrutiny that ordinarily would be applied, distorting constitutional jurisprudence and countenancing what otherwise would be invalidated as arbitrary or discriminatory government behavior.[309] Permitting devolution would amplify this distortion, privileging the plenary power doctrine over equal protection norms at the state and local level. Given the choice, one should reject a constitutional theory that endorses the creation of state and local laboratories of bigotry against immigrants.

If devolution were permissible, the corrosive effects of the plenary power doctrine on equality norms would not necessarily be limited to the realm of welfare rules. These same norms generally have invalidated state anti-immigrant employment restrictions,[310] although as with the welfare cases, identical employment classifications have been upheld at the federal level.[311] Devolution of the immigration power might enable Congress by statute to authorize the states to re-

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307 As noted previously, membership theorists have criticized this broad interpretation of the immigration power, but the proposed distinction between "immigration" and "alienage" law may not be workable in application. See supra notes 158-74 and accompanying text. Moreover, *Mathews v. Diaz* and its progeny represent a failure to embrace this distinction. My task in this Article is to ask whether, even assuming the continuing validity of *Mathews*, devolution of the immigration power is violative of the Constitution.

308 Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948) ("The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of privileges with all citizens under nondiscriminatory laws."); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . . . [Its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . .").

309 See, e.g., Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999) (holding that INS does not violate First Amendment when it engages in selective enforcement of immigration laws based on disfavored speech or associational activities of noncitizens); Fiallo v. Bell, 430 U.S. 787 (1977) (upholding sex discrimination in immigration statute).

310 See cases cited supra note 12.

311 Compare Sugarman v. Dougall, 413 U.S. 634 (1973) (invalidating citizenship requirement for *state* civil service), with Mow Sun Wong v. Campbell, 626 F.2d 739 (9th Cir. 1980) (upholding citizenship requirement for *federal* civil service).

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strict the employment opportunities of legal immigrants, by barring access to public jobs and commercial licenses necessary for private employment.[312] Immigrant access to education, largely a matter of state and local concern, also might be at risk were devolution permissible, as equal protection norms have invalidated state or local restrictions on immigrant access to student financial aid[313] and free primary and secondary education.[314]

Together, decades of decisions regarding employment, education, and public benefits for permanent residents to a great degree have guaranteed equal treatment under law for millions of noncitizens in this country. The decisions reveal a recurring state and local impulse to enact anti-immigrant socioeconomic legislation.[315] But the equality principles prohibiting these measures are sound: Legal distinctions between citizens and permanent residents are rarely justifiable.[316] As a policy matter, devolution should be rejected to preserve the vitality of equality principles at the subfederal level.

One should also be concerned about the possibility of a race-to-the-bottom among states.[317] Whether prompted by nativism or a stated desire to conserve fiscal resources for citizens, the enactment of state or local alienage classifications under a devolvability doctrine also could be accelerated by such a competition. It remains to be seen whether the absence of such a competition since the PRA's enactment is a result of temporary factors such as a robust economy and the PRA's initial windfall to the states, or of more enduring factors.

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312 "Might," because 42 U.S.C. § 1981 (1994), which prohibits alienage discrimination in contracting, should nevertheless limit public and private employment discrimination on the basis of citizenship. See *Takahashi*, 334 U.S. at 419-20.

313 Nyquist v. Mauclet, 432 U.S. 1 (1977) (invalidating state restriction on student aid to legal permanent residents). The Supreme Court also struck down a restriction on immigrant eligibility for in-state tuition rates, although in that instance the Court's rationale rested on preemption grounds. Toll v. Moreno, 458 U.S. 1, 1 (1982).

314 Plyler v. Doe, 457 U.S. 202 (1982) (invalidating denial of free public primary and secondary education to undocumented children).

315 Devolution's threat to the civil liberties of immigrants would not necessarily be limited to equality norms; noncitizens' freedom of speech, for example, might be at risk. Congress has debated but not approved restrictions on campaign contributions by permanent residents. See, e.g., Note, Campaigns, Contributions and Citizenship: The First Amendment Right of Resident Aliens to Finance Federal Elections, 38 B.C. L. Rev. 771 (1997); Note, "Foreign" Campaign Contributions and the First Amendment, 110 Harv. L. Rev. 1886 (1997). Devolution might permit states to enact their own immigrant-specific limits.

316 See supra Part I.A.2.

317 See Borjas, supra note 105, at 118 ("[T]he main immigrant-receiving state will soon be leading the 'race to the bottom,' as they attempt to minimize the fiscal burden imposed by the purposive clustering of immigrants in those states that provide the highest benefits."); Fix & Tumlin, supra note 7, at 4 ("Devolution of immigrant policy—like other areas of social welfare policy—also invokes the specter of a race to the bottom.").

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Moreover, there are reasons to be particularly concerned about anti-immigrant discrimination at the state or local level. Subfederal alienage classifications have an extensive history.[318] Yet as Gerald Neuman has observed, "[l]ocal anti-foreign movements may have difficulty enlisting the national government in their crusades, in part because emotions are not running so high in other states at the moment, and in part because aliens have some virtual representation in Washington by means of the foreign affairs establishment."[319]

In addition, there is something to be said for holding Congress to the foreign affairs rationale that has come to insulate federal alienage classifications from close judicial scrutiny. If foreign policy considerations truly require deferential judicial treatment of immigration lawmaking, then that lawmaking should be undertaken exclusively at the national level, where foreign affairs are properly conducted.[320]

The principal policy defense of devolution is the argument by Peter Spiro that the PRA's authorization to the states "should be applauded as a lesser evil."[321] This view is directed at devolution of the immigration power in the specific context of welfare restrictions. Spiro posits that allowing states to deny benefits to immigrants will reduce the likelihood that frustrated anti-immigrant states would press Congress to mandate discriminatory classifications nationally.

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318 See Neuman, supra note 79, at 1436 ("The geographical distribution of immigrants from various countries has often led to localized anti-alien movements . . . .") (citing historical examples from Thomas J. Curran, Xenophobia and Immigration, 1820-1930 (1975)). See generally Higham, supra note 26, at 165-75; Nativism, Discrimination, and Images of Immigrants (George E. Pozzetta ed., 1991); Joe R. Feagin, Old Poison in New Bottles: The Deep Roots of Modern Nativism, in Immigrants Out! The New Nativism and the Anti-Immigrant Impulse in the United States 13, 19-28 (Juan F. Perea ed., 1997).

319 Neuman, supra note 79, at 1436-37. It bears noting as well that devolution of the immigration power might lead to the undermining of state-level constitutional protections even for citizens, in the name of a broader immigration policy. See supra note 177.

320 See supra notes 237-39 and accompanying text; see also Neuman, supra note 79, at 1439 ("Congress's abdication of the eligibility issue to the states would demonstrate that these considerations of foreign policy and national sovereignty do not require ineligibility for state benefits.").

321 Spiro, supra note 81, at 1637. Of course, devolution of the immigration power also is consistent with an undifferentiated preference for "states rights" and state exercise of governmental power of all sorts. See Fix & Tumlin, supra note 7, at 3 ("The case for . . . devolution of immigrant policy to the states mirrors arguments for . . . devolution generally. That is, proponents of devolution argue that lodging immigrant policy with state and local governments allows them to target benefits and services more efficiently to the needs of local populations."). The remainder of this Section will address Peter Spiro's argument as a more refined version of the general policy preference for local control.

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This argument for "steam valve federalism"[322] draws on public choice analysis[323] and history.[324]

It is far from clear, however, that the episodic history of federal anti-immigrant legislation fairly is described as resulting from the efforts of states frustrated by the judicial invalidation of local discriminatory measures. This historical claim probably holds up best for the Chinese Exclusion Act of 1882,[325] whose passage was championed by California legislators reacting in part to the Supreme Court's invalidation of a restrictionist California state statute.[326] But the claim does not explain adequately passage of three anti-immigrant statutes in 1996,[327] nor passage of other major restrictionist legislation in the last

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322 Spiro, supra note 81, at 1630; see also id. at 1627 ("[S]tate-level authority will allow those states harboring intense anti-alien sentiment to act on those sentiments at the state level . . . [thereby ensuring that] one state's preferences, frustrated at home, are not visited on the rest of us by way of Washington.").

323 The public-choice analysis reasons that congressional representatives of a state with an "intense preference" for anti-immigrant measures may overcome the "more or less neutral posture" of representation from other states, "by virtue of political logrolling." Id. at 1634-35 & 1634 n.29.

324 In an essay that does not purport to undertake a major historical analysis of federal anti-immigrant legislation, Spiro contends that two significant enactments of federal anti-immigrant legislation, one in the late nineteenth century and the other in 1996, followed judicial invalidation of local anti-immigrant measures. Id. at 1630-32.

325 Act of May 6, 1882, ch. 126, 22 Stat. 58 (suspending immigration from China for ten years).

326 Chy Lung v. Freeman, 92 U.S. 275 (1875) (striking down California law requiring ships bringing "lewd and debauched women" to post bonds for them); Spiro, supra note 81, at 1631-32 (summarizing historical materials). The notion of "steam valve federalism" also may explain the enactment of a second restrictionist measure in 1882, the passage of which was advocated by New York following invalidation of its immigration statute. Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (excluding paupers, convicts, and "lunatics"); Henderson v. Wickham, 92 U.S. 259 (1875) (invalidating similar New York law requiring bonds for all arriving immigrants); see also Salyer, supra note 48, at 5-6 (recounting that New York advocates, "finally accepting the Supreme Court's rulings that only the federal government could legislate in the area, began to lobby Congress to enact head taxes and to exclude criminals and paupers . . . . New York succeeded in getting congressional action." (footnote omitted)).

327 In addition to the PRA, Congress passed AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996), on the first anniversary of the bombing of a federal building in Oklahoma City, principally to enact revisions to the federal habeas corpus statute long sought by conservative proponents of capital punishment. But AEDPA also made important changes to the immigration laws regarding permanent residents with criminal convictions. Five months later, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 U.S.C.), which also focused primarily on legal immigrants with criminal convictions and thereby implemented an important aspect of the House Republicans' 1994 "Contract with America." See Contract with America: The Bold Plan by Rep. Newt Gingrich, Rep. Dick Armey, and the House Republicans to Change the Nation 38, 54-58 (Ed Gillespie & Bob Schellhas eds., 1994) [hereinafter Contract with America] (stating that Republicans would "address[ ] one of the most pressing problems in our country today" by "streamlin[ing] the current [convicted] alien deportation system").

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century.[328] Nor does the "steam valve" narrative of frustrated anti-immigrant states resorting to national legislation correlate well with the history of judicial invalidation of state alienage classifications, including judicial invalidation of state or local anti-immigrant discrimination in welfare programs,[329] education,[330] and employment.[331]

As to the PRA, Spiro is undoubtedly correct that judicial injunctions of California's Proposition 187, reprinted in League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 app. A at 787-91 (C.D. Cal. 1995), which had attempted to deny most benefits to noncitizens in the state, spurred some California legislators to press for federal welfare reform. But the PRA was itself the product of multiple forces, including the House Republicans' Contract with America, see Contract with America, supra, at 73, 76 (calling for denial of AFDC, SSI, Food Stamps, and other benefits to noncitizens, subject to narrow exceptions); the intention of the Republican presidential nominee, Senate Majority Leader Bob Dole, to pass welfare legislation that President Bill Clinton would fear to veto, see Adam Clymer, Republicans Shift Strategy in Bid to Avoid Welfare Bill Veto, N.Y. Times, July 12, 1996, at A18; and the desire of the President to remove an issue from the campaign while making good on his own 1992 campaign commitment to "ending welfare as we know it," see Bill Clinton & Al Gore, Putting People First: How We Can All Change America 164 (1992). That the House, Senate, and President had compelling reasons to enact major welfare cuts in the summer of 1996 had little to do with California's frustration at the judicial determination that Proposition 187 was preempted by federal law, and indeed the legislative decision to focus those cuts on immigrants hardly received unanimous support from the California legislative delegation. See, e.g., 142 Cong. Rec. S8501 (daily ed. July 23, 1996) (showing that both senators from California opposed anti-immigrant provisions of PRA); 142 Cong. Rec. H7796 (daily ed. July 18, 1996) (same, as to leading representatives from California).

328 In addition to the two episodes considered by Spiro, Congress enacted significant restrictionist legislation in 1891, 1917, 1921, 1924, 1952, and 1986. Immigration Reform and Control Act of Nov. 6, 1986, Pub. L. No. 99-603, 100 Stat. 3359; Act of June 27, 1952, ch. 477, 66 Stat. 163; Immigration Act of 1924, ch. 190, 43 Stat. 153; Quota Act of 1921, ch. 8, 42 Stat. 5; Immigration Act of 1917, ch. 29, 39 Stat. 874; Act of March 3, 1891, ch. 551, 26 Stat. 1084. Yet these enactments do not fit the model of "steam valve federalism." See Salyer, supra note 48, at 23-32 (attributing 1891 Act to scandal involving mismanagement of New York immigration station by state officials and to frustration at federal courts overwhelmed with habeas corpus petitions in California); id. at 122-35 (attributing 1921 and 1924 Acts to rise of nativism, economic difficulties after end of World War I boom, growth of eugenics movement, fear of war with Japan, lingering World War I nationalism, and Red Scare of 1919-20); U.S. Select Comm'n on Immigration & Refugee Policy, Staff Report on U.S. Immigration Policy and the National Interest 182-84 (1981) (linking passage of 1891 Act to rise of nativism, itself grounded in closing of U.S. frontier, increasing urbanization and industrialization, arrival of immigrants from southern and eastern Europe, and Catholic and Jewish religion of many new immigrants); id. at 189 (explaining 1917 Act as passed "in large measure because World War I brought nervousness about the loyalty and assimilability of the foreign born to a fever pitch"); id. at 203-04 (stating that 1952 Act resulted from virulent anticommunism that "often took the form of opposition to anything foreign").

329 For example, in the welfare context, it was in 1971 that Graham v. Richardson, 403 U.S. 365 (1971), struck down state anti-immigrant provisions (those in Pennsylvania and Arizona), but it was not until 1996 and the PRA that federal legislation authorized or mandated similar classifications.

330 In 1977, the Supreme Court invalidated New York's denial of student financial aid to permanent residents, Nyquist v. Mauclet, 432 U.S. 1 (1977), and in 1982 it held further that Texas public schools could not exclude undocumented children, Plyler v. Doe, 457 U.S. 202

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Finally, it bears repeating that the episodic history of restrictionist legislation at the federal level sadly is matched by the extensive record of state and local anti-immigrant discrimination.[332] This history undermines any claim that occasional national anti-immigrant legislation is preferable to widespread local measures.

In short, judicial invalidation of state alienage classifications rarely has provoked frustrated states to seek to impose their anti-immigrant preferences at the national level. Rather, invalidation generally has led to local accommodation. Moreover, historical accounts of most restrictionist federal legislation do not reveal frustrated states seeking an outlet for their anti-immigrant bias. History simply does not support reliance on "steam valve federalism" as a reason to celebrate the claimed new state freedom to discriminate against immigrants. Instead, to preserve the vitality of antidiscrimination principles that should continue to protect permanent resident aliens from oppressive state and local measures, and to cabin the corrosive effects of judicial deference to immigration lawmaking, we should embrace nondevolvability on principle.

IV
OBJECTIONS AND RESPONSES TO A NONDEVOLVABILITY PRINCIPLE

A critic might identify several defects in the proposition that the federal immigration power is exclusively federal and not subject to devolution by statute. A historical objection derives from recent scholarship demonstrating that in the nation's first century, states heavily regulated immigration.[333] A second objection arises from Native American law, the only other area of equal protection jurisprudence in which the standard of constitutional scrutiny varies

(1982), but neither state rushed to Congress for a fix. It was not until 1996 that Congress seriously debated a federal provision to deny public education to undocumented children. See Spiro, supra note 81, at 1633 n.27.

331 The Supreme Court began invalidating state restrictions on the commercial or employment activities of permanent residents as early as 1886, see Yick Wo v. Hopkins, 118 U.S. 356 (1886) (invalidating state alienage-based restrictions on license to operate laundry); see also Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (invalidating state law preventing noncitizens of Japanese descent from holding commercial fishing licenses); Truax v. Raich, 239 U.S. 33 (1915) (invalidating state law placing cap on employment of noncitizens), and then again in a wave of modern cases, see cases cited supra note 12. None of these decisions appears to have prompted a state effort to obtain national legislation mandating or authorizing the failed state licensing and employment rules.

332 See Higham, supra note 26, at 46, 72-73, 161-62, 260, 268 (mentioning states' anti-immigrant legislation); Neuman, supra note 79, at 1436 (noting states' history of xenophobia-inspired legislation).

333 See infra notes 337-43 and accompanying text.

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depending on whether a classification is state or federal.[334] It appears that in Native American law the federal government can authorize an otherwise impermissible state classification. Third, William Cohen has argued that adoption of a "consent principle" would bring greater theoretical coherence to several doctrines of congressional authorization of state activity.[335] In one specific application of his proposed principle, Cohen contends that Congress should be able to authorize states to deny benefits to legal immigrants.[336]

A. An Objection from History

For many years, it was generally believed that our borders were unregulated before the 1880s.[337] A landmark study by Gerald Neuman dispelled that myth, however, and demonstrated not only that the borders were regulated, but that to a large extent it was the states that enacted and enforced controls over immigration.[338] Historical evidence that the states once engaged in substantial immigration lawmaking could challenge any theory that the power to regulate immigration is an exclusively federal, nondevolvable power.

One response could be that these state laws were widespread but unconstitutional.[339] A second possibility is that the Reconstruction Amendments, which broadly confirmed the supremacy of federal power over states' rights, also extinguished state authority to regulate immigration—sort of an implicit "constitutional moment" for immigration law. This interpretation would build on Neuman's hypothesis that it was the dispute over slavery which made federal immigration regulation impossible before the Civil War.[340] On this view, one might posit that with the abolition of slavery, the federal immigration power was unleashed and all state power destroyed irrevocably.

A better interpretation is that the pre-Civil War characterization of constitutionally acceptable state border regulation was correct: It was an exercise of the state police power.[341] And while the exercises

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334 See infra notes 344-51 and accompanying text.

335 William Cohen, Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma, 35 Stan. L. Rev. 387 (1983).

336 Id. at 419-22.

337 See Neuman, supra note 46, at 1833-34.

338 Neuman's research reveals that state legislation long restricted the movement across state boundaries of slaves, free blacks, and black seamen; indigent and disabled persons; persons with criminal convictions; and persons with contagious diseases. Id. at 1841-80.

339 But see id. at 1885-96 (suggesting that early state laws regulating immigration may have been constitutional).

340 See id. at 1897 ("When slavery ceased to divide the nation, national immigration regulation became possible.").

341 Compare The Passenger Cases (Smith v. Turner), 48 U.S. (7 How.) 283 (1849) (invalidating state head taxes on passengers as beyond police power and infringing on federal

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of state police power detailed by Neuman undeniably operated as regulation of immigration, there is no evidence that they were entitled to any sort of special judicial deference.[342] That is, the state rules were not an exercise of an immigration power, and they were therefore not insulated from judicial review by the "plenary power doctrine" or any other theory that connects immigration with foreign affairs or national sovereignty. Under this view, there is no inconsistency between Neuman's history and a nondevolvability theory.[343]

Thus, although the early history of state border regulation might suggest that the constitutional immigration power is not necessarily an exclusively federal power, in fact these early state regulations were nothing more than an exercise of traditional state police powers. It is unlikely that these state laws were understood by the courts or others as in any way a local exercise of foreign affairs or national security powers, and even more unlikely that these laws received special judicial deference because they touched on international relations or emanated from national sovereignty. In this sense, then, early state immigration regulation is no different from modern state laws affecting immigrants: These rules, including state welfare rules, are enacted pursuant to traditional spending and police powers, and they are entitled to no special judicial deference. The history of early state regulations affecting immigrants is not at all inconsistent with the theory that the federal *immigration* power is nondevolvable.

B. An Objection from Native American Jurisprudence

Native American law appears to be the only other area of equal protection jurisprudence in which the degree of constitutional scrutiny depends on whether a measure is undertaken by the federal govern-

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commerce authority), with Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837) (upholding state rule requiring provision of ship manifests as valid exercise of police power).

342 See, e.g., *Miln*, 36 U.S. (11 Pet.) at 142-43 (upholding ship manifest rule as valid exercise of state police power without granting special deference to rule as immigration regulation); id. at 148 (opinion of Thompson, J.) (stating:

> Can anything fall more directly within the police power and internal regulation of a state, than that which concerns the care and management of paupers or convicts, or any other class or description of persons that may be thrown into the country, and likely to endanger its safety, or become chargeable for their maintenance?).

343 Moreover, it is not surprising that to the extent that exercises of state police power discriminated between citizens and immigrants, that discrimination was not challenged in the courts. For one thing, until ratification of the Fourteenth Amendment in 1868, federal due process norms did not apply to the states, let alone did any embedded equal protection norms. And even as to equal protection clauses in state constitutions, which might have provided the basis to challenge state anti-immigrant measures, perhaps all that can be said is that contemporary understandings of those clauses were unknown in the first part of the nineteenth century.

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ment or a state,[344] and it is from this jurisprudence that a second potential criticism might arise. Federal laws that single out Native Americans are subject to rational basis review, provided the law is related to federal trust and treaty responsibilities,[345] while state laws that single out Native Americans are subject to strict scrutiny.[346]

Importantly for the post-1996 alienage cases, however, the Supreme Court has indicated in a brief passage that federally authorized state legislation regarding Native Americans is subject only to rationality review. In *Washington v. Yakima Indian Nation*,[347] the Supreme Court upheld a state's assertion of partial jurisdiction over "Indian country." The Court concluded that the state legislation was enacted "under explicit authority granted by Congress,"[348] and therefore the state statute was subject only to rationality review when challenged on equal protection grounds.[349] Since 1979, several courts have interpreted *Yakima Indian Nation* as holding that federally authorized state legislation singling out Native Americans is subject only to rationality review[350]—at least where states have legislated for the bene-

344 Actually, one other example of disparate standards of equal protection review exists, although it seems to be little more than an historical anomaly. For six years between the Supreme Court's decisions in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (stating that state and local affirmative action programs are subject to strict scrutiny), and Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (same, as to federal affirmative action programs), there technically existed different standards of review for state and federal affirmative action programs. See Neuman, supra note 79, at 1432-34; see also Carrasco, supra note 146, at 604-05 (noting, in article written between *Croson* and *Adarand*, different standards of review for state and federal affirmative action programs).

345 Morton v. Mancari, 417 U.S. 535, 555 (1974) (upholding employment preference for Native Americans at Bureau of Indian Affairs as rationally related to federal trust and treaty responsibilities); Felix S. Cohen's Handbook of Federal Indian Law 654-58 (1982) [hereinafter Cohen's Handbook].

346 Washington v. Yakima Indian Nation, 439 U.S. 463, 500-01 (1979) ("'[T]he unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. States do not enjoy this same unique relationship with Indians." (quoting *Morton*, 417 U.S. at 551-52)); Cohen, supra note 335, at 658-59. But see Cohen, supra note 335, at 659 (stating:

> [S]ome of the Supreme Court equal protection decisions seem to be based more on the unique status of the tribes themselves .... If Indians are a legitimate classification for protective federal laws, their status is arguably the same for state laws of that character. Such state laws have long been assumed valid.

(footnotes omitted)).

347 439 U.S. 463 (1979).

348 Id. at 501.

349 Id. at 500-01. The two intermediate state court decisions upholding post-PRA alienage classifications have relied, erroneously, see infra notes 352-70 and accompanying text, on this very passage from *Yakima Indian Nation*, see Aliessa v. Novello, 712 N.Y.S.2d 96, 98-99 (App. Div. 2000); Alvarino v. Wing, 690 N.Y.S.2d 262, 263 (App. Div. 1999).

350 E.g., Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1218 (5th Cir. 1991) (subjecting exemption for Native American Church from state prohibition on peyote

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fit of Native Americans.[351] By analogy, one might suggest that Congress's effort to authorize state welfare discrimination against permanent residents should operate similarly to ratchet down the constitutional scrutiny to mere rationality review.

Such an analogy would be inapt, however. First, the Supreme Court has held that federal legislation singling out Native Americans is subject to rationality review in the context of laws that *benefit* Native Americans.[352] Similarly, those few courts to apply rationality review to state laws singling out Native Americans did so in the context of reviewing benign state laws.[353] Nothing in the Native American cases suggests that rationality review is appropriate for federally authorized state welfare laws that discriminate *against* immigrants.[354]

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possession to rationality review on grounds that "*Yakima* teaches that states may exercise the federal trust power pursuant to express Congressional authorization"); see also Livingston v. Ewing, 601 F.2d 1110, 1115-16 (10th Cir. 1979) (finding that state's compelling "educational, cultural and artistic interests" justify ordinance allowing only Native American vendors on museum grounds); St. Paul Intertribal Hous. Bd. v. Reynolds, 564 F. Supp. 1408, 1412 (D. Minn. 1983) (upholding state Native American housing program and noting that "state action for the benefit of Indians can also fall under the trust doctrine and therefore be protected from challenge under the equal protection clause or civil rights statutes" (citations omitted)); Krueth v. Indep. Sch. Dist., 496 N.W.2d 829, 836 (Minn. Ct. App. 1993) (upholding state layoff protection for Native American teachers because "[t]he trust doctrine also applies to state action" (citing *St. Paul Intertribal Hous. Bd.*, 564 F. Supp. at 1412)).

351 See *Peyote Way*, 922 F.2d at 1218 (upholding exemption for Native American Church for state prohibition on peyote possession); *Livingston*, 601 F.2d at 1116 (upholding exemption for Native Americans from ordinance barring sale of goods in town plaza); *St. Paul Intertribal Hous. Bd.*, 564 F. Supp. at 1412 (upholding state program for Native American housing); *Krueth*, 496 N.W.2d at 836 (upholding state layoff protection for Native American teachers).

352 E.g., Morton v. Mancari, 417 U.S. 535 (1974) (upholding employment preference for Native Americans in federal Bureau of Indian Affairs). Although the Court declared the principle of rationality review upon consideration of a remedial classification, it also has applied the standard to uphold jurisdictional statutes over the objection of Native Americans who resisted them. See Yakima Indian Nation, 439 U.S. 463 (1979) (upholding state's assertion of partial jurisdiction over reservation); United States v. Antelope, 430 U.S. 641 (1977) (upholding federal criminal jurisdiction over Indians); see also Duro v. Reina, 495 U.S. 676, 692 (1990) (remarking upon "the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits").

353 See cases cited supra note 351.

354 The constitutional distinction between benign and invidious race classifications has been rejected by the Supreme Court in Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (stating that federal affirmative action programs are subject to strict scrutiny); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (same, as to state and local affirmative action programs). Neither of those cases should call into question the continuing validity of *Morton v. Mancari*. This is because *Mancari* phrased the constitutional standard for review of tribal classifications as rationally related to the special trust relationship. It is hard to understand how singling out Native Americans for *disfavored* treatment would be in furtherance of the trust relationship. Cf. *Adarand*, 515 U.S. at 244-45 & 244 n.3 (Stevens, J., dissenting) ("We should reject a concept of 'consistency' that would view the special preferences that the National Government has provided to Native Americans since

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Second, the constituent elements of the federal power to regulate Native American affairs differ in important ways from those of the federal immigration power, and the former well may be devolvable. A comprehensive analysis of the plenary power to regulate Native American affairs is beyond the scope of this Article, but a few points bear noting. The Supreme Court has described the sources of the plenary power over Native Americans as arising from the Indian Commerce Clause,[355] the Treaty Clause,[356] and the unique "guardian-ward" relationship which arose from the history of United States conquest and oppression of Native Americans.[357] Of the textual sources of the plenary power over Native American affairs, the treaty power is exclusively federal.[358] The Supreme Court has not treated the Indian

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1834 as comparable to the official discrimination against African-Americans that was prevalent for much of our history." (citing *Mancari*, 417 U.S. at 541)). Nor are the Supreme Court cases upholding assertion of general civil or criminal jurisdiction over "Indian country" to the contrary, see *Yakima Indian Nation*, 439 U.S. at 463; *Antelope*, 430 U.S. at 641, as those decisions involved the extension of rules of general applicability (albeit over Indians' objections), rather than the enactment of laws that singled out Native Americans for disfavored treatment. But cf. Stuart Minor Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537, 597 n.246 (1996) (noting that trust relationship may allow legislation that actually does not benefit Indians).

355 U.S. Const. art. I, § 8, cl. 3 (granting Congress power to "regulate Commerce . . . with the Indian Tribes").

356 Id. art. II, § 2, cl. 2 (authorizing President to make treaties, by and with advice and consent of Senate).

357 See *Antelope*, 430 U.S. at 645 & n.6 (justifying preferential treatment of Native Americans on basis of "a history of treaties and the assumption of a 'guardian-ward' status"); *Mancari*, 417 U.S. at 551-53 (discussing unique status of Native American tribes under federal law); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973) ("The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."); Cohen's Handbook, supra note 345, at 211 ("Court opinions most often refer to the Indian Commerce Clause, the Treaty Clause, and the Supremacy Clause in discussing the source of federal power over Indian affairs."); see also id. at 209 (noting that Property Clause, U.S. Const. art. IV, § 3, cl. 2, granting Congress power to dispose of and regulate "the Territory or other Property belonging to the United States," also has been identified as source of federal power to regulate Indian affairs). In addition, in the nineteenth century, the Court occasionally described the power to regulate Native American affairs as inherent or extraconstitutional, in a manner not unlike some explanations for the source of the federal immigration and foreign affairs powers. See, e.g., United States v. Kagama, 118 U.S. 375, 384-85 (1886); see also Cleveland, supra note 288, at 1137-42; Philip Frickey, Domesticating Federal Indian Law, 81 Minn. L. Rev. 31, 60-66 (1996). As one commentator has observed, however:

> More recently, the Court has moved away from *Kagama*'s suggestion of extraconstitutional powers and has instead grounded Congress's power over Indians—and the concomitant special relationship between the federal government and Indian tribes—in the Indian Commerce Clause and, at least to some extent, the Treaty Clause of Article II.

Benjamin, supra note 354, at 543.

358 See supra note 247 and accompanying text.

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commerce power as analogous to the foreign commerce power, however, with the latter's attendant requirement that the nation "speak with one voice;"[359] rather, the Court has analogized the Indian commerce power to the interstate commerce power,[360] the latter a power plainly shared by the states. Likewise, in light of the history of state participation in the conquest and oppression of Native Americans, it is not far-fetched to suggest that the states too bear a special responsibility towards Native Americans.[361] Certainly, there are not textual or precedential limitations on the devolvability of the elements of the plenary federal power over Native American affairs comparable to those restricting the devolvability of the elements of the immigration power, namely the naturalization,[362] foreign affairs,[363] and foreign commerce powers.[364]

Finally, the Supreme Court's basis for applying rationality review to federal tribal classifications differs significantly from the rationale underlying the Court's rulings on federal alienage classifications. In *Morton v. Mancari*,[365] a unanimous Court held that tribal classifications were "political rather than racial in nature,"[366] based on membership in "quasi-sovereign tribal entities whose lives and activities are governed by the [U.S. Bureau of Indian Affairs] in a unique fashion."[367] These political classifications derived from the political history of Native Americans, and thus "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians, such legislative judgments will not be disturbed."[368] The rationale underlying alienage classifications, of course, is quite different. Only three years before *Morton*, its author, Justice Blackmun, had likened discrimination against immigrants to

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359 See supra notes 267-80 and accompanying text.

360 See Seminole Tribe v. Florida, 517 U.S. 44, 62 (1996).

361 In a brief passage, the Supreme Court would appear to have rejected this proposition. See Washington v. Yakima Indian Nation, 439 U.S. 463, 500-01 (1979) ("[T]he unique legal status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians .... States do not enjoy this same unique relationship with Indians ...." (internal quotation marks omitted)).

362 See supra notes 210-35 and accompanying text.

363 See supra notes 236-66 and accompanying text.

364 See supra notes 267-86 and accompanying text.

365 417 U.S. 535 (1974).

366 Id. at 553 n.24; see also id. at 553 ("[T]his preference does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference."); id. at 553 n.24 ("The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.'").

367 Id. at 554.

368 Id. at 555; see also Benjamin, supra note 354, at 545-48 (reviewing rationale for treating tribal classifications as political, not racial).

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discrimination "based on nationality or race,"[369] and concluded for another unanimous Court that "classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny."[370] Therefore, the different rationales underlying the Supreme Court's analysis of tribal and alienage classifications further undermine any suggestion that judicial treatment of federally authorized state tribal classifications supplies a helpful analogy for understanding federally authorized state alienage classifications.

C. *An Objection from Theory*

A final objection arises from the scholarship of William Cohen, who in considering legislative authorization of otherwise impermissible state conduct has proposed a "consent principle," pursuant to which "Congress can consent to state laws where constitutional restrictions bind the states but not Congress."[371] As an example, Cohen specifically contends that Congress conceivably could authorize the states to deny welfare benefits to permanent resident aliens.[372]

In the context of federally authorized state alienage classifications, Cohen's proposal should be rejected. Most importantly, it overlooks the core anticaste principles at issue in all alienage classifications, state or federal. The "consent principle" account of federally authorized state discrimination against immigrants treats *Graham* and its progeny in effect as preemption cases,[373] ignoring the equal protection holdings that, as applied to noncitizens, trace an arc from *Yick Wo* through *Takahashi* and *Graham*. Yet in the Supreme Court's reasoning, only when these antidiscrimination principles must be balanced with concerns of foreign affairs, as in *Mathews*, or implicate core political functions of state government, as in *Ambach*, do alienage classifications survive. In its most recent application of *Graham*, the Court declined to ignore the equality principles at the core of the jurisprudence,[374] however, and wisely so.[375] In addition,

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369 Graham v. Richardson, 403 U.S. 365, 372 (1971).

370 Id.; see also Toll v. Moreno, 458 U.S. 1, 20-21 (1982) (Blackmun, J., concurring) ("[D]isparate treatment accorded a class of similarly circumstanced persons who historically have been disabled by the prejudice of the majority . . . led the Court to conclude [in *Graham*] that alienage classifications in themselves supply a reason to infer antipathy . . . and therefore demand close judicial scrutiny." (internal quotation marks omitted)).

371 Cohen, supra note 335, at 406.

372 Id. at 419-22.

373 See id. at 420.

374 See Bernal v. Fainter, 467 U.S. 216, 219-20 (1984) (invalidating state law barring permanent residents from serving as notaries public, as failing strict scrutiny).

375 See Koh, supra note 44, at 103 (criticizing argument that preemption analysis of state alienage classifications is superior to equal protection assessment).

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the consent principle should be rejected as to state alienage classifications in light of the history of local anti-immigrant measures, and the fallacy of any notion of "steam valve federalism."[376]

Moreover, contrary to Cohen's conclusion, the PRA would not even survive application of the proposed consent principle. This is so because Congress itself may not be empowered directly to legislate the post-PRA patchwork of divergent state welfare laws, in light of the requirement of national uniformity found in at least one source of the federal immigration power, the Naturalization Clause.[377] Cohen recognizes that application of his consent principle may be complicated when "there is an express constitutional requirement that national laws be geographically uniform."[378] He does not address the uniformity issue in his discussion of state alienage classifications,[379] however, and elsewhere he acknowledges "not having done any homework" on the uniformity requirement of the "Rules [sic] of Naturalization."[380]

CONCLUSION

Common sense instructs that a world in which states issue visas and operate border crossings would be absurd. But upon reflection, answering the questions raised by the 1996 Welfare Act's attempted devolution of the federal immigration power becomes less straightforward. In the nation's first century, the states did enact numerous regulations that look to the modern eye like immigration rules. Moreover, while the Supreme Court has identified several sources for the federal immigration power, the power is itself unenumerated. As

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376 See supra notes 325-32 and accompanying text.

377 U.S. Const. art. I, § 8, cl. 4. Under Mathews v. Diaz, 426 U.S. 67 (1976), a federal alienage classification survives equal protection scrutiny only because it was enacted as a permissible exercise of the federal immigration power. See id. at 79-80.

378 Cohen, supra note 335, at 404. Cohen suggests that when a uniformity requirement limits only the federal government and not the states, the requirement should not prevent federal authorization of disuniform state measures. Id. at 405-06. But if the state measures are impermissible in their own right, regardless of their uniformity (as with state alienage classifications under *Graham*), and the federal government must act uniformly or not at all, then Cohen's resolution yields bizarre results: In effect, he is arguing that states should be able to engage in disuniform practices that would be impermissible if done directly by Congress.

379 See id. at 419-22.

380 Id. at 409 n.102. In Cohen's defense and as discussed supra Part III.B.1, the Naturalization Clause is but one source of the federal immigration power, and the other sources are not necessarily limited by uniformity requirements. Moreover, as the Court explained in Knowlton v. Moore, 178 U.S. 41 (1900), geographic uniformity may well differ from "intrinsic" uniformity, id. at 89, and it is uncertain that only the former would be implicated by divergent state welfare rules.

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such, it is impossible to point to an express textual bar to devolution of immigration lawmaking.

But consideration of the past century of precedent on state regulation of immigration, the textual, historical, and jurisprudential limits on devolution of the identified sources of the immigration power, and the desirability of preserving the vitality of the equality norms that have for over a century shielded noncitizens from state and local bigotry, together confirm that first impression: States possess no power to regulate immigration, and the federal government may not devolve by statute its own immigration power. Accordingly, although states are plainly empowered to enact welfare rules pursuant to their traditional spending and police powers, those rules are entitled to none of the judicial deference reserved for exercises of the federal immigration power. State anti-immigrant rules should be subject to heightened equal protection scrutiny, as they were before the PRA. Only the secondary objection to discriminatory local rules—that they are preempted by federal permission for legal immigrants to reside here—has been eliminated.

Application of a nondevolvability principle and the existing jurisprudence of alienage classifications to the range of post-PRA state measures yields several conclusions. Most obviously, the several states that have outright denied Medicaid, TANF, or GA benefits to permanent residents are presumptively in violation of the Fourteenth Amendment.[381] Nearly as obvious, those states that have conditioned receipt of Medicaid, TANF, or GA on satisfaction by permanent residents of immigrant-only eligibility criteria, including special residency requirements, naturalization rules, or other provisions, similarly have engaged in discrimination that is presumptively invalid.[382]

More complicated to assess are those state-*substitute* programs, created for some immigrants, in which a state has used 100% state funds to replace either purely federal benefits now denied permanent residents (such as SSI and Food Stamps) or joint federal-state benefits now denied permanent residents (such as TANF benefits for permanent residents arriving after August 22, 1996 and subject to a five-year

[381] These include Alabama, which has denied TANF benefits to permanent residents, see supra note 9; Wyoming, which has denied Medicaid benefits, see id.; Pennsylvania, which enacted a bar on cash and medical benefits for permanent residents but has not enforced its bar because of an Opinion Letter issued by its Attorney General, Official Opinion No. 96-1, Op. Att'y Gen. of Pa. (Dec. 9, 1996), 1996 Pa. AG LEXIS 2; Louisiana, which promulgated but then rescinded an emergency rule denying Medicaid to permanent residents, see supra note 9; and states such as New York, which have denied to permanent residents state medical or cash assistance provided to citizens, see supra note 122.

[382] See supra notes 9, 119-24.

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bar).[383] As to the joint federal-state programs, at a minimum, a state may not permissibly deny to permanent residents those state funds previously spent as the state share of the joint federal program—that is, for every dollar the state spends on a resident citizen, it must spend an equal amount on a resident alien. It may be as well that because the state's expenditures for citizens reap a federal match, thereby ensuring full benefits to the resident citizen, a state is obligated constitutionally to replace the federal portion now denied resident aliens with a like amount. States, however, may not be constitutionally obligated to replace purely federal programs with state-funded programs, where the state is not already spending any of its own funds for resident citizens.[384]

The proposition that Congress may not devolve by statute its immigration power to the States may be faulted for exalting a structural argument over the more compelling moral claim that legal immigrants are entitled to equality of treatment by all government entities, state or federal.[385] But a nondevolvability approach fits well within the settled jurisprudence of alienage classifications, accommodating both *Graham* and *Mathews*. It also avoids the shortcomings of previous analyses of federally authorized, state-imposed alienage classifications, and it is responsive to the Court's attention to constitutional structure and design, even in cases pressing a claim for individual rights.[386]

In the end, Congress's attempt to devolve its exclusive immigration power to the states must fail. Evaluation of anti-immigrant state welfare rules is not about the "plenary power doctrine" of immigration law, or deference to foreign affairs and national security interests, because states do not and cannot exercise any immigration power.

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383 See supra note 9.

384 Similarly, while the current alienage jurisprudence does not extend clearly to legal immigrants other than permanent residents, the rationale of *Graham* and its progeny would seem to apply with equal force to other legally present noncitizens, who also work, pay taxes, and often form extensive and long-term ties to their communities in the United States.

385 Cf. Koh, supra note 44, at 103 (urging rejection of "cold, impersonal, and incomplete" preemption approach to state alienage classifications in favor of equal protection approach that can address "moral and personal concerns" of noncitizens); Neuman, supra note 79, at 1439 ("[P]reemption doctrine is not directly responsive to the problem . . . .").

386 See Saenz v. Roe, 526 U.S. 489, 498-505 (1999) (holding that California statute limiting benefits for new residents violated Privileges and Immunities Clause by deterring intrastate "migration" despite contrary argument that such deterrence merely was "incidental" and bore rational relation to state interest); Romer v. Evans, 517 U.S. 620, 626-36 (1996) (finding clear violation of Equal Protection Clause despite contrary argument that Colorado constitutional amendment merely "den[ied] homosexuals special rights"); Tribe, supra note 4, at 110 & n.3 (arguing that current Court repeatedly has protected individual rights by reasoning from "structural inference").

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Rather, to determine the constitutionality of these rules under the Equal Protection Clause, courts should heed the four words with which Justice Blackmun opened the Court's modern alienage jurisprudence: "These are welfare cases."[387]

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[387] Graham v. Richardson, 403 U.S. 365, 366 (1971).

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