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ARTICLE

UNLAWFUL STATUS AS A “CONSTITUTIONAL IRRELEVANCY”?:

THE EQUAL PROTECTION RIGHTS OF ILLEGAL IMMIGRANTS

JASON H. LEE*

In 1982, the Supreme Court decided *Plyler v. Doe*, the first and only case in which it has addressed the level of scrutiny applicable to state classifications of illegal immigrants under the Equal Protection Clause of the Fourteenth Amendment. In a complex and internally incoherent opinion, the Court declared that unlawful status is not a “constitutional irrelevancy” and thus proceeded to hold that classifications based on illegal immigrant status deserve only rational-basis review, even though classifications of legal immigrants are accorded strict judicial scrutiny. Subsequent courts have since cited to *Plyler* to uphold discriminatory legislation stripping illegal immigrants of basic economic and social benefits. With the recent rise in anti-illegal-immigrant sentiment, as evidenced by the passing of several state and local laws targeting the undocumented community, there is a serious risk that illegal immigrants in America will soon be converted into an outlaw caste, outside of the protection of the laws and neglected as nonpersons by those who nevertheless benefit from the contributions that they make to American society. The Equal Protection Clause extends its protections to all “persons” within the United States’ jurisdiction, including those who are unlawfully present in this country, and it should be interpreted in a manner that allows it to fulfill its universalist textual promise. This Article argues that the Supreme Court should re-examine its holding in *Plyler* and find that unlawful status is constitutionally irrelevant in the equal-protection context. Put differently, the Supreme Court should apply the same legal standard to illegal immigrant classifications that it accords legal immigrant classifications: strict-scrutiny review.

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INTRODUCTION

In recent times, arguably no community living within the United States has been as politically unpopular as the nation's swelling population of undocumented immigrants.¹ These immigrants have been accused of sapping government resources,² engaging in criminal behavior,³ overcrowding school classrooms,⁴ and disrupting the labor market by contributing to the lowering of wages as well as by occupying jobs that would have otherwise gone to citizens or legal immigrants.⁵ The number of illegal immigrants in the United States has skyrocketed over the last two decades, reaching an estimated 12 million by 2005.⁶ According to some reports, this population grows by as many as 500,000 people each year.⁷

Within the American undocumented community, the vast majority hail from Mexico,⁸ with a sizeable population coming from other Latin

¹ I use the terms "illegal immigrant" and "undocumented immigrant" interchangeably throughout this Article. They are meant to denote noncitizens who are present in the United States without legal permission. These individuals may have initially entered the country without authorization or may have entered legally but then overstayed their visas or violated a condition of their admission.

² See, e.g., Phyllis Schlafly, *Why Are Taxpayers Providing Hospital Care of Illegal Aliens?*, HUMAN EVENTS, Aug. 12, 2002, at 9; Plyler v. Doe, 457 U.S. 202, 249 (1982) (Burger, C.J., dissenting).

³ See, e.g., Dennis Hollingsworth, *Flawed Studies Ignore the Real Impact of Illegal Immigration*, NORTH COUNTY TIMES, Mar. 10, 2007, www.nctimes.com/articles/2007/03/17/perspective/16_28_123_10_07.txt; *Pa. City Gets Tough on Immigration; Hazleton, PA., Says Employers And Landlords Of Illegal Immigrants Face Steep Fines*, Associated Press, July 14, 2006, www.cbsnews.com/stories/2006/07/14/national/main1804372.shtml.

⁴ See, e.g., Thomas R. Ruge & Angela D. Iza, *Higher Education for Undocumented Students: The Case for Open Admission and In-State Tuition Rates for Students Without Lawful Immigration Status*, 15 IND. INT'L COMP. L. REV. 257, 276 (2005) ("Opponents argue that . . . allowing undocumented students to go to college will, in turn, deny opportunities to deserving U.S. citizens.").

⁵ See, e.g., *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976) ("Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens . . .").

⁶ FEDERATION FOR AMERICAN IMMIGRATION REFORM, HOW MANY ILLEGAL ALIENS?, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecentersb8ca (last visited Apr. 2, 2008). An estimated thirty-three percent of undocumented immigrants in the United States in 2000 initially entered the country with some type of authorization. Ruge & Iza, *supra* note 4, at 258.

⁷ FEDERATION FOR AMERICAN IMMIGRATION REFORM, HOW MANY ILLEGAL ALIENS?, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecentersb8ca (last visited Apr. 2, 2008).

⁸ In 2000, the Census Bureau estimated that there were 3,871,912 undocumented immigrants from Mexico living in the United States, while the Immigration and Naturalization Service put this number at 4,808,000. *Id.*

American countries,⁹ Cuba, China, and India.¹⁰ It is important to keep in mind, however, that undocumented immigrants come, in relatively large numbers, from all over the world, including developed nations such as the United Kingdom and Germany.¹¹ Once in the United States, illegal immigrants tend to settle in California, Texas, and Florida, with large numbers also in New York, Arizona, and Illinois.¹²

In reaction to the growing size of the illegal immigrant population and to common perceptions about this population's negative effects on American society, the 1980s and 90s witnessed a surge in anti-illegal-immigrant hostility. It was during this period that Congress passed the Immigration Reform and Control Act of 1986,¹³ which, among other things, penalizes employers for knowingly hiring unauthorized aliens.¹⁴ It was also during this period, in 1996, that Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act¹⁵ and the Illegal Immigration Reform and Immigrant Responsibility Act,¹⁶ a set of laws that cut millions of legal and illegal immigrants off from federal benefits programs.

At the state level, legislators and voters have been equally as active, enacting laws designed to strip undocumented immigrants of valuable social and economic rights. In 1994, the California electorate passed Proposition 187, which prohibited undocumented immigrants from receiving public social services, publicly funded health care, public elementary and secondary education, and public post-secondary education within the state.¹⁷ Although the various provisions of the initiative never became effective law and were ultimately found unconstitutional under the preemption doctrine,¹⁸ the fact that they were

⁹ The Census Bureau's estimated number of undocumented immigrants from El Salvador in 2000 was 336,717. The number for native Guatemalans was 238,977. *Id.*

¹⁰ The Census Bureau's estimated number of undocumented immigrants from Cuba, China, and India in 2000 was 216,297, 226,886, and 200,306, respectively. *Id.*

¹¹ The estimated number of United Kingdom citizens living unlawfully in the United States in 2000 was 123,246, and the number for German citizens was 113,327, both of which represent fairly sizeable populations. *Id.*

¹² HANS P. JOHNSON, PUBLIC POLICY INSTITUTE OF CALIFORNIA, *ILLEGAL IMMIGRATION* 4 (2006), available at http://www.ppic.org/content/pubs/atissue/AI_406HJAI.pdf.

¹³ 8 U.S.C.A. § 1324a (Westlaw 2007).

¹⁴ 8 U.S.C.A. § 1324a(a)(2) (Westlaw 2007).

¹⁵ Pub. L. No. 104-193, 110 Stat. 2105 (1996).

¹⁶ Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

¹⁷ *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 787-90 (C.D. Cal. 1995).

¹⁸ In 1997, a federal district court held that "substantially all of the provisions of Proposition 187" were unconstitutional and thus invalid. *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1261 (C.D. Cal 1997). After Gray Davis was elected governor of California in 1998, he

passed by a significant majority of California voters serves as a powerful example of the strong anti-illegal immigrant sentiment that thrived in the mid-1990s. This animus is still alive today; Texas state legislators recently considered a bill that would not only deny public services to illegal immigrants but also deprive their American-born children of birthright citizenship.¹⁹

Finally, over the last several years a number of city and county governments have begun to consider restrictive ordinances as well. On October 18, 2006, the City of Escondido, California, located in northern San Diego County, adopted a law that penalizes “any person or business that owns a dwelling unit” that “let[s], lease[s] or rent[s] a dwelling unit to an illegal alien.”²⁰ In this way, it attempted to exclude illegal immigrants from access to a major source of housing and shelter. Earlier in 2006, the city council of Hazleton, Pennsylvania, passed a set of laws that sought to “deny licenses to businesses that employ illegal immigrants, fine landlords \$1,000 for each illegal immigrant discovered renting their properties, and require city documents to be in English only.”²¹

What legal recourse do illegal immigrants have to fight against this wave of discriminatory legislation against them? What strategies can they pursue to insure their access to basic economic and social services such as housing, public education, and medical services?

With respect to federal classifications of immigrants (both legal and illegal immigrants), the Supreme Court has traditionally deferred to the judgments of Congress, citing Congress’s constitutional grant of

dropped the state’s appeal of this decision and essentially killed the initiative.

¹⁹ Miguel Bustillo, *Texas May Pull Up the Welcome Mat; The State, Long Friendly to Illegal Immigrants, Debates Tough Limits*, L.A. TIMES, Feb. 27, 2007, at A1. Birthright citizenship is citizenship conferred upon an individual at the time of his or her birth, as opposed to citizenship attained through the formal process of naturalization.

²⁰ Escondido, Cal., Ordinance 2006-38R (Oct. 18, 2006), available at <http://www.ci.escondido.ca.us/immigration/Ord-2006-38R.pdf> (Establishing Penalties for the Harboring of Illegal Aliens in the City of Escondido); see also *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1047-48 (S.D. Cal. 2006) (granting a temporary restraining order barring the city from enforcing the ordinance).

²¹ *Pa. City Gets Tough on Immigration; Hazleton, PA., Says Employers And Landlords Of Illegal Immigrants Face Steep Fines*, Associated Press, July 14, 2006, www.cbsnews.com/stories/2006/07/14/national/main1804372.shtml. See Hazleton, Pa., Ordinance 2006-13, (Aug. 15, 2006) (Landlord/Tenant Ordinance); Hazleton, Pa., Ordinance 2006-18 (Sep. 21, 2006) (Illegal Immigration Relief Act Ordinance); Hazleton, Pa., Ordinance 2006-19 (Sep. 21, 2006) (Official English Ordinance). The text of each one of these laws can be retrieved from a website established by the Mayor of Hazleton that encourages other small towns to adopt similar ordinances. See Small Town Defenders, <http://www.smalltowndefenders.com/public/node/6> (last visited Apr. 2, 2008).

“plenary power” over issues of immigration.²² Consequently, federal action that discriminates against noncitizens almost always survives judicial scrutiny.²³ The merits of this plenary-power doctrine adopted by the Court can be questioned and has been thoughtfully criticized by a number of scholars.²⁴ This article, however, will not address the plenary-power doctrine or its limitations.

Instead, this article focuses on *state* discrimination against illegal immigrants and the use of equal-protection doctrine to protect these immigrants’ rights to enjoy the array of benefits and services offered by state governments. There are two main reasons why this article will focus on the Equal Protection Clause rather than on federal preemption doctrine, which is the other major tool that illegal immigrants can use to attack discriminatory state classifications. First, the equal-protection doctrine highlights the dignity and membership of an individual in American society in a way that the more structural preemption analysis does not.²⁵ Second, preemption has become the more common, and successful, tactic over the last twenty years, leaving the equal-protection approach under-explored and undeveloped since the early 1980s. It is time to revive the analysis of illegal immigrants’ right to strong equal protection of the laws, both to highlight their equal moral membership in America and because the preemption approach does not always prevail.

State classifications of immigrants, unlike federal classifications, are not protected by the plenary power doctrine. Instead, the Supreme Court’s alienage cases reason that states typically have no business distinguishing between citizens and noncitizens, a strictly federal concern, and thus generally subject state alienage classifications to strict-scrutiny review.²⁶ The caveat for illegal immigrants, however, is that

²² See *Mathews v. Diaz*, 426 U.S. 67, 81-83 (1976).

²³ *Id.* at 83; Michael Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 496 (2001).

²⁴ See, e.g., Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 1-22, 53-66, 73-74 (1998); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

²⁵ Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51, 98-99 (1985).

²⁶ See, e.g., *Nyquist v. Mauclet*, 432 U.S. 1, 7, 12 (1977); *Sugarman v. Dougall*, 413 U.S. 634, 642, 646 (1973); *In re Griffiths*, 413 U.S. 717, 722-23 (1973); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); Wishnie, *supra* note 23, at 496. Strict scrutiny is the highest level of review accorded by the courts to state classifications. In order to survive strict scrutiny, a challenged law must be “necessary to achieve a compelling government purpose.” ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 645 (2d ed. 2002). Otherwise, it will be struck down. This is a high standard that usually leads to the invalidation of a challenged statute or regulation. *Id.*

they are not accorded the same degree of equal protection of the laws as legal immigrants. In *Plyler v. Doe*, the Supreme Court declared that unlawful status is not a “constitutional irrelevancy.”²⁷ While the Court was not completely clear on the level of review appropriate for classifications of illegal immigrants, it is clear that it found strict scrutiny inappropriate.²⁸ Moreover, except perhaps for legislation affecting both illegal immigrant children and their access to primary and secondary education, it appears from the Court’s language that it chose to endorse the rational-basis standard of review.²⁹ This result is incorrect. Illegal immigrant classifications should be held to the same standard of review as legal immigrant classifications: strict scrutiny. Contrary to the opinion of the *Plyler* majority, unlawful status should be a constitutional irrelevancy.

This article is organized in the following manner. Part I breaks down the U.S. Supreme Court’s holding in *Plyler v. Doe*, the first and only case in which it addressed the equal-protection status of illegal immigrants. In doing so, the article distills the justifications that the Court provides for declaring the constitutional relevance of unlawful status, which will then serve as the topics of discussion for the rest of the article’s critiques. Part II reviews four cases from outside the equal-protection context that conclude that unlawful status is irrelevant to an illegal immigrant’s right to receive the same protection of the laws as citizens and legal immigrants. It then explores and rejects possible reasons why the Court chose not to follow the approach adopted by these cases, and highlights the importance of according illegal immigrants a strong version of the equal protection of the laws. Finally, Part III argues that illegal immigrants are morally entitled to the same benefits and services provided by states to legal immigrants as well as most of the benefits reserved for citizens. This is accomplished through the

²⁷ See *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982). There has been recent discussion among scholars and in at least one court about whether Congress can devolve its immigration powers to the states, a consequence of which would be the extension of the plenary power shield from equal-protection liability to state classifications of immigrants. This issue is beyond the scope of this article. It is important to point out, however, that the Court of Appeals of New York has concluded that Congress may not devolve its plenary power over immigration to the states. *Aliessa v. Novello*, 754 N.E.2d 1085, 1098-99 (N.Y. 2001). Additionally, scholars and practitioners have argued against the legality and prudence of devolution. See, e.g., Wishnie, *supra* note 23, at 496; Ellen M. Yacknin, “Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy”: *Aliessa and Equal Protection for Immigrants*, 58 N.Y.U. ANN. SURV. AM. L. 391 (2002).

²⁸ See *Plyler*, 457 U.S. at 219 n.19.

²⁹ See discussion in Part I, below. Rational-basis review “is the minimum level of scrutiny that all laws challenged under equal protection must meet.” CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES, at 645. Under this standard, “a law will be upheld if it is rationally related to a legitimate government purpose.” *Id.* at 646.

articulation and application of a participation model of rights that stresses the moral significance of an individual's *membership* within a society rather than his or her status as a citizen or legal immigrant.

I. *PLYLER V. DOE*: UNLAWFUL STATUS AS CONSTITUTIONALLY RELEVANT

In *Graham v. Richardson*, decided in 1971, the Supreme Court established that the Equal Protection Clause requires that state classifications of legal immigrants in the United States be held to the standard of strict-scrutiny review.³⁰ It reasoned that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."³¹ Highlighting the traditional powerlessness of aliens, who as a class lack the ability to vote and thus directly influence the political process, the Court further noted that legal "[a]liens . . . are a prime example of . . . 'discrete and insular' minorit[ies] for whom such heightened judicial solicitude is appropriate."³² This decision has been applauded by several immigration and constitutional law scholars, not just because it protects the rights of a politically weak and historically abused group,³³ but also because it recognizes the fact that legal immigrants contribute much to American society and, in many ways, resemble citizens in their daily actions. As noted by the Court in *Graham*, "Aliens like citizens pay taxes and may be called into the armed forces. . . . [They] may live within a state for many years, work in the state and contribute to the economic growth of the state."³⁴ Indeed, due to the fact that oftentimes very little distinguishes the activities and contributions of citizens and legal immigrants except for their official status, Alexander Aleinikoff, Dean of the Georgetown University Law Center, has aptly referred to such immigrants as "citizens-in-training" who should be accorded near-equal treatment as full citizens, including a wide range of economic and social rights.³⁵

In contrast to the Supreme Court's provision of strong equal-

³⁰ *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

³¹ *Id.* at 372.

³² *Id.*

³³ See Wishnie, *supra* note 23, at 555 ("[T]here are reasons to be particularly concerned about anti-immigrant discrimination at the state or local level. Subfederal alienage classifications have an extensive history.")

³⁴ *Graham*, 403 U.S. at 376.

³⁵ T. Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 HASTINGS CONST. L.Q. 915, 921 (1995).

protection rights to legal aliens, the Court has historically treated illegal immigrants in a less favorable manner. Despite the fact that the Fourteenth Amendment has been found to apply to all *persons* within the jurisdiction of the United States, including illegal immigrants,³⁶ the Court held in *Plyler v. Doe* that illegal immigrants are not a “suspect class.”³⁷ It reasoned that undocumented status was not a “constitutional irrelevancy,”³⁸ and thus determined that state classifications based on the status of illegal alienage are subject to a lower standard of review than the strict scrutiny accorded to classifications of legal immigrants.³⁹ Instead, the *Plyler* Court applied an intermediate level of review, requiring the state to prove that the legislation under review – a Texas law denying undocumented children access to a free public education⁴⁰ – furthered some “substantial goal.”⁴¹ It justified this intermediate level of scrutiny by reasoning that illegal immigrant children did not choose to come to the United States but instead were brought into the country by their parents.⁴² The Court thus did not find these children morally culpable or responsible for their illegal status.⁴³ Additionally, the *Plyler* majority highlighted the importance of an education for children, arguing that prohibiting an illegal immigrant child from attaining a free public education would condemn him or her to a stigmatized and socially and economically marginalized life.⁴⁴ In this way the Court created a unique justification for the use of an intermediate level of review that was inconsistent with previously established equal-protection doctrine.⁴⁵ This part of the majority’s holding, however, has been both criticized by

³⁶ *Plyler v. Doe*, 457 U.S. 202, 215 (1982).

³⁷ *Id.* at 219 n.19.

³⁸ *Id.*

³⁹ *See id.*

⁴⁰ *Id.* at 205.

⁴¹ *Id.* at 224.

⁴² *Id.* at 220.

⁴³ *Id.*

⁴⁴ *Id.* at 223. The Supreme Court elaborated on its concern for educating illegal immigrant youths by stating:

Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.

Id.

⁴⁵ *See id.* at 243 (Burger, C.J., dissenting) (“[T]he Court’s opinion rests on such a unique confluence of theories and rationales that it will likely stand for little beyond the results in these particular cases.”); Dennis J. Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe*, 1982 SUP. CT. REV. 167, 169 (1982).

scholars⁴⁶ and interpreted narrowly by subsequent courts as limited to its specific facts (a state classification affecting illegal immigrant children *and* their access to public education).⁴⁷ Indeed, no court has applied intermediate review to a classification of illegal immigrants except in *Plyler*.

Plyler has instead been cited principally for its more negative view toward adult illegal immigrants. In this way, lower courts have interpreted *Plyler*'s declaration of the constitutional relevancy of unlawful status to mean that state classifications of illegal immigrants are due only rational-basis review, at least with respect to state action affecting illegal immigrants older than eighteen and outside the kindergarten-to-twelfth-grade education context.⁴⁸ That is, such classifications need to bear only "some fair relationship to a legitimate public purpose,"⁴⁹ an extremely easy standard to meet, which has been employed in numerous cases since *Plyler* to uphold local legislation designed to exclude illegal immigrants from benefits available to citizens and other categories of immigrants.⁵⁰ For example, since *Plyler*, lower courts have cited to its less favorable equal-protection ruling to uphold a state law that prohibits the issuance of state drivers' licenses to illegal immigrants,⁵¹ to find that a state's denial of vocational rehabilitation to undocumented workers did not violate the Equal Protection Clause,⁵² and to conclude that a state regulation excluding illegal immigrants from

⁴⁶ See, e.g., Michael J. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of the Constitutional Theory: Reflections on, and Beyond, Plyler v. Doe*, 44 U. PITT. L. REV. 329, 339-40 (1983) (observing several flaws in the *Plyler* majority's opinion and accusing the Court of improper judicial activism). *But see* Gerald Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1443-44 (1995) (noting that the *Plyler* majority adopted an intermediate level of review for legislation affecting undocumented immigrant children and approving of this development in equal-protection doctrine).

⁴⁷ See, e.g., *State v. Cosio*, 858 P.2d 621, 627 (Alaska 1993) (narrowly interpreting *Plyler*'s intermediate review holding and rejecting the illegal immigrant plaintiffs' equal-protection claim, noting that they are both adults and that the permanent fund dividend that they sought was not "comparable to education"); *Am. G.I. Forum v. Miller*, 267 Cal. Rptr. 371, 376 (Cal. Ct. App. 1990) ("[The] factors of nonaccountability for status and lifetime hardship are not present here. Therefore, the test in this case is whether collecting and disseminating 'undocumented person' information 'bears some fair relationship to a legitimate public purpose.'"); Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1124-26 (1994).

⁴⁸ See, e.g., *Cosio*, 858 P.2d at 627; *Am. G.I. Forum*, 267 Cal. Rptr. at 376; Bosniak, *supra* note 47, at 1124-26.

⁴⁹ *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

⁵⁰ See Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 984 (1988).

⁵¹ *Doe No. 1 v. Georgia Dep't of Pub. Safety*, 147 F. Supp. 2d 1369, 1373, 1376 (N.D. Ga. 2001).

⁵² *Tarango v. State Indus. Ins. Sys.*, 25 P.3d 175, 182-83 (Nev. 2001).

eligibility to receive permanent fund dividends was permissible.⁵³

In contrast to the Supreme Court's view of undocumented children's moral innocence, it used rather bold language to describe the impropriety of adult illegal immigrants' choices to violate American immigration laws, and suggested that they have no right to feel entitled to receive any of the benefits provided by a state to its residents.⁵⁴ The Court noted, "Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct."⁵⁵ It further declared that "undocumented status is not irrelevant to any proper legislative goal. . . . [N]or is undocumented status an absolutely immutable characteristic since it is the product of conscious . . . unlawful action."⁵⁶ It is this tone and view of the Court that informs unlawful status's alleged constitutional relevance, not the more sympathetic language that the Court employed when discussing illegal immigrant children and education.

In order to justify its different constitutional treatment of legal and illegal immigrants, the *Plyler* Court relied primarily on the fact that illegal immigrants are within the United States without official government permission.⁵⁷ According to the Court, "those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences" of their actions,⁵⁸ which include deportation and exclusion from certain state benefits. Chief Justice Burger's dissent articulated this line of reasoning more bluntly: "By definition, illegal aliens have no right whatever to be here, and the state may reasonably, and constitutionally, elect not to provide them with governmental services at the expense of those who are lawfully in the state."⁵⁹

The *Plyler* Court also articulated a second justification for distinguishing between state classifications of legal and illegal immigrants – a state's interest in protecting its economy and preserving its limited financial resources.⁶⁰ While recognizing that "the relationship between the alien and this country" is normally an exclusive federal

⁵³ *Cosio*, 858 P.2d at 626-29.

⁵⁴ *See Plyler*, 457 U.S. at 219-20.

⁵⁵ *Id.* at 219.

⁵⁶ *Id.* at 220.

⁵⁷ *See id.* at 219.

⁵⁸ *Id.* at 219-20.

⁵⁹ *Id.* at 250 (Burger, C.J., dissenting) (citation omitted).

⁶⁰ *Id.* at 229 n.23.

interest and thus irrelevant to legislation by a state,⁶¹ the Court referred to its reasoning in *De Canas v. Bica*,⁶² a federal preemption case that it decided six years earlier, and concluded: “Despite the exclusive federal control of this Nation’s borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.”⁶³ Such state concerns, according to the Court, include a state’s ability to provide important government services to its residents and to make sure that it has a healthy economy.⁶⁴ Thus, even though *De Canas* was a federal preemption case, the *Plyler* Court adopted *De Canas*’s distinction between state action affecting legal and illegal immigrants as part of new equal-protection doctrine.

Upon initial inspection, the Court’s justifications for providing illegal immigrants a weaker set of rights under the Equal Protection Clause than legal immigrants seems to make sense. After all, the Equal Protection Clause was designed to “protect against arbitrary and irrational classifications”⁶⁵ and it can be argued that the classification of illegal immigrants in a group distinct from, and less favored than, legal immigrants is both principled and rational. Technically speaking, legal and illegal immigrants are not similarly situated in the United States. One group is present with the official permission of the U.S. government while the other group is not. Upon deeper consideration, however, the Supreme Court’s distinction between legal and illegal immigrants begins to lose much of its force doctrinally, morally, and empirically.

The remainder of this article examines a variety of reasons why the Court should revisit its holding in *Plyler* regarding state classifications of illegal immigrants outside the context of children and their access to public education. However, unlike those who think that the Court should adopt a lower standard of rational-basis review,⁶⁶ this article argues that the Supreme Court should treat legal and illegal immigrants as indistinguishable, and thus accord illegal immigrant classifications strict judicial scrutiny.

⁶¹ *Id.* at 225 (citation omitted).

⁶² *De Canas v. Bica*, 424 U.S. 351 (1976).

⁶³ *Plyler*, 457 U.S. at 229 n.23.

⁶⁴ *See id.*

⁶⁵ *Id.* at 245 (Burger, C.J., dissenting).

⁶⁶ *See, e.g., Perry, supra* note 46, at 339-40.

II. THE ANOMALOUS ROLE OF UNLAWFUL STATUS IN EQUAL-PROTECTION DOCTRINE

The following discussion lays out a first set of objections against the Supreme Court's holding in *Plyler*. By examining a group of cases from lower courts, this section highlights that unlawful status, standing alone, has consistently been held to be irrelevant in a variety of legal contexts, and that the U.S. Supreme Court provides no principled explanation for treating the issue of unlawful status differently in the equal-protection realm than in others. Moreover, this section reveals that the Court's improper decision to treat equal-protection doctrine as unique has significant consequences, as it essentially allows illegal immigrants to be considered outlaws, free to be abused as members of a special caste in American society.

A. LEGAL TREND OUTSIDE OF THE EQUAL-PROTECTION CONTEXT

While the Supreme Court in *Plyler* explicitly declared the immigration status of illegal immigrants relevant (and determinative) when deciding their legal rights, there exists a long line of state and federal cases, addressing diverse areas of the law outside the realm of equal protection, that have concluded otherwise.⁶⁷ For example, over the last half century, state and federal courts have held that illegal immigrants possess the right to sue in tort and contract, bring actions for divorce, recover workers' compensation, receive due process of law, and seek relief under federal labor-protection statutes, regardless of their unlawful presence within the nation's borders.⁶⁸ In these cases, various courts found the fact that illegal immigrants do not have the government's permission to be in the country not to be determinative, a fact that the *Plyler* Court found to be the most important reason for providing such individuals weaker equal-protection rights than are provided to legal immigrants. As this article discusses below, some

⁶⁷ See, e.g., *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987); *Moreau v. Oppenheim*, 663 F.2d 1300, 1308 (5th Cir. 1981); *Coma Corp. v. Kan. Dep't of Labor*, 154 P.3d 1080, 1087, 1094 (Kan. 2007); *Montoya v. Gateway Ins. Co.*, 401 A.2d 1102, 1105-06 (N. J. Super. Ct. App. Div. 1979); *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1258-60 (N.Y. Ct. App. 2006).

⁶⁸ *Bosniak*, *supra* note 50, at 978-82; see, e.g., *Commercial Standard Fire & Marine Co. v. Galindo*, 484 S.W.2d 635, 637 (Tex. Civ. App. 1972) ("We conclude that a person residing in this State whose entry may be contrary to the immigration laws is not barred, by that reason alone, from receiving workmen's compensation benefits."); Comment, *Equal Protection for Undocumented Aliens*, 5 CHICANO L. REV. 29, 45-48 (1982) (discussing a range of cases in which courts have decided to grant undocumented immigrants the same protection of the laws as citizens and legal immigrants).

courts⁶⁹ have continued to insist on the irrelevancy of illegal status even in the face of recent precedent that appears to state the contrary.⁷⁰

In *Moreau v. Oppenheim*, the Fifth Circuit Court of Appeals affirmed a district court judgment in favor of plaintiffs who were unlawfully present in the United States on five separate causes of action, including fraud, breach of fiduciary duty, conversion, and tortious interference with business and contractual relations.⁷¹ In doing so, it rejected the defendant's contention that the plaintiffs' illegal status rendered their legal claims invalid. The defendant argued, with respect to the plaintiffs' tortious interference claims, that "as illegal aliens, [plaintiffs] had no right to come into federal court and demand damages for 'what (they) could have earned by entering into and performing illegal employment in violation of the regulations and laws of the United States.'" ⁷² The Fifth Circuit, however, disagreed.⁷³ In holding for the plaintiffs, it reasoned: "We seriously doubt whether illegal entry, standing alone, makes outlaws of individuals, permitting their contracts to be breached without legal accountability."⁷⁴ The appellate court's use of the term "outlaw" here is telling. It suggests a principle adopted by the court that one illegal act, such as being in the country without official permission, does not make a member of society an outlaw for all purposes.⁷⁵

The Fifth Circuit's use of the term outlaw is of note for another reason as well. It foreshadows Professor Gerald Neuman's concern, articulated twenty-four years later, that applying only rational-basis review to state classifications of illegal immigrants will effectively convert such immigrants into outlaws, "non-person[s]...outside the protection of the legal system."⁷⁶ According to Neuman, affording illegal immigrants only rational-basis equal protection will leave states free to cut the undocumented population from all kinds of important

⁶⁹ I chose the four cases to examine in this section, out of the many that have found unlawful status irrelevant to an individual's right to certain benefits of the law, because each one does a good job highlighting a particular benefit of disregarding unlawful status or harm from recognizing its significance.

⁷⁰ It is important to note that this recent precedent in no way represented an announcement by the Supreme Court of a *constitutional* principle recognizing the relevance of unlawful status. Instead, it involved a federal statute targeting illegal immigrant employment, which Congress was permitted to enact, despite its clear discriminatory effects, under the plenary power doctrine. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148-49 (2002).

⁷¹ *Moreau v. Oppenheim*, 663 F.2d 1300, 1304-05 (5th Cir. 1981).

⁷² *Id.* at 1307.

⁷³ *Id.* at 1308.

⁷⁴ *Id.*

⁷⁵ *The Rights of Undocumented Aliens*, 96 HARV. L. REV. 1433, 1454 (1983).

⁷⁶ See Neuman, *supra* note 46, at 1441-44.

government services that are necessary to secure a humane livelihood. As an extreme example, he suggests that even excluding illegal immigrants from basic services such as police protection and the prosecution of crimes committed against them would pass constitutional muster under a rational-basis regime.⁷⁷ Paralleling the logic expressed by the *Plyler* dissent,⁷⁸ which advocated strongly for rational-basis review of illegal-immigrant classifications, Neuman points out that such services “have incremental costs, and they create marginal incentives” for other individuals to try to illegally immigrate to the United States.⁷⁹ Thus, it seems reasonable to suggest that the *Plyler* dissent would deem the extreme actions of depriving illegal immigrants of police protection and other basic services as possessing a fair relationship to legitimate state goals.⁸⁰ This is particularly so given that Chief Justice Burger’s dissent notes that “the Equal Protection Clause does not mandate that a state choose either the most effective and all-encompassing means of addressing a problem or none at all.”⁸¹

Such treatment of a segment of American society, however, would seem to violate the basic principles of equality and dignity underlying the Equal Protection Clause.⁸² Converting illegal immigrants into outlaws “would deny them the minimal respect for their humanity that the state owes even to criminals – and even to criminals whose crimes are more serious than the immigration violations of which ‘illegal’ aliens may be guilty.”⁸³ The *Plyler* majority noted the development of a permanent caste of illegal immigrants living and working in the United States, a so-called shadow population.⁸⁴ Denying illegal immigrants strong equal protection of the laws, especially given the long history of anti-illegal-immigrant treatment within the law⁸⁵ and more recent proposals to limit

⁷⁷ *Id.* at 1447.

⁷⁸ *Plyer v. Doe*, 457 U.S. 202, 250 (1982) (Burger, C.J., dissenting) (“Without laboring what will undoubtedly seem obvious to many, it simply is not ‘irrational’ for a state to conclude that it does not have the same responsibility to provide benefits for persons whose very presence in the state and this country is illegal as it does to provide for persons lawfully present.”).

⁷⁹ Neuman, *supra* note 46, at 1447.

⁸⁰ In his dissent, Chief Justice Burger reasons: “The Texas law might also be justified as a means of deterring unlawful immigration. While regulation of immigration is an exclusively federal function, a state may take steps, consistent with federal immigration policy, to protect its economy and ability to provide governmental services from the ‘deleterious effects’ of a massive influx of illegal immigrants.” *Plyler*, 457 U.S. at 249 n.10 (Burger, C.J., dissenting).

⁸¹ *Id.*

⁸² See Kenneth L. Karst, *Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4-8 (1977).

⁸³ Neuman, *supra* note 46, at 1448.

⁸⁴ *Plyler*, 457 U.S. at 218-19.

⁸⁵ Neuman, *supra* note 46, at 1448 n.109; Wishnie, *supra* note 23, at 555.

illegal immigrants' access to basics for survival such as housing⁸⁶ and employment,⁸⁷ will only ensure that this shadow population will remain perpetually destitute and susceptible to various kinds of abuse. Most members of this caste will not just leave the United States and return to their home countries after being denied access to government services. The majority of illegal immigrants come to the United States not for the benefits provided by the government to its residents but for jobs,⁸⁸ which will always illicitly be available for immigrants to occupy, whether it is serving as a busboy at a restaurant, a janitor at a hospital, or working in agricultural fields. Moreover, many illegal immigrants have come to the United States to escape persecution or extreme poverty at home. Such individuals will not just pack up their items and leave the country once they find that they no longer have access to certain state-provided benefits. Rather, they will remain – poor, abused, and forgotten – members of the shadow population that the *Plyler* Court was so concerned about.

Montoya v. Gateway Ins. Co. is another notable case in which a court found an illegal immigrant's unlawful presence in the United States irrelevant when deciding whether he was entitled to certain protections of the law.⁸⁹ In *Montoya*, the plaintiff initially entered the United States as a “visitor for pleasure” but then remained in the country despite never receiving official permission to do so.⁹⁰ He eventually began taking on employment and ended up working at one job for over a year until he was prevented from doing so by injuries suffered in a serious automobile accident.⁹¹ The plaintiff sought to exercise the personal-injury-protection provisions of his automobile insurance plan to recover medical costs and income lost as a result of his injuries.⁹² When his insurance company refused to cover all of these expenses, the two parties ended up in court where the insurance company based its defense on the plaintiff's illegal

⁸⁶ See *Pa. City Gets Tough on Immigration; Hazleton, PA., Says Employers And Landlords Of Illegal Immigrants Face Steep Fines*, Associated Press, July 14, 2006, www.cbsnews.com/stories/2006/07/14/national/main1804372.shtml.

⁸⁷ See *id.* (discussing proposed local legislation that “would deny licenses to businesses that employ illegal immigrants”).

⁸⁸ *Plyler*, 457 U.S. at 228 (“The dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country, or presumably to the State of Texas, in order to avail themselves of a free education.”); Ruge & Iza, *supra* note 4, at 276 (noting that the “availability of public welfare benefits is not what attracts immigrant families to the United States”).

⁸⁹ *Montoya v. Gateway Ins. Co.*, 401 A.2d 1102, 1105-06 (N.J. Super. Ct. App. Div. 1979).

⁹⁰ *Id.* at 1103.

⁹¹ *Id.*

⁹² *Id.*

immigration status. The appellate court, however, like the Fifth Circuit in *Moreau*, denied the significance of illegal alienage.⁹³ In so holding, it made a number of interesting and important observations. As part of its defense, the insurance company argued that the plaintiff could not recover on his insurance policy because he could not possibly be said to be “in an occupational status” at the time of the accident since, at the time, he was prohibited by the law from engaging in gainful pursuits.⁹⁴ As policyholders were required to be in an occupational status in order to recover certain losses, contended the insurance company, the plaintiff was not eligible to recover on his policy.⁹⁵ The appellate court disagreed with this reasoning and concluded that the plaintiff’s “illegal presence and his disability from engaging in gainful pursuits cannot, consistent with the plain and ordinary meaning of the policy language, be held to deprive him of occupational status.”⁹⁶ The court also rejected the defendant’s claim, based on “obscure considerations of public policy,” that the plaintiff’s unlawful status, in and of itself, prohibited him from prevailing on his automobile-insurance claim.⁹⁷

Montoya is significant not only because it forgave and overlooked the plaintiff’s illegal status when deciding his legal claim, but also because it appears to have recognized, and attempted to find a just accommodation for, the reality that there are millions of undocumented immigrants living and working within America’s borders. Despite border enforcement and other laws aimed at controlling the tide of illegal immigration, the fact remains that illegal immigrants are here in the country and are interacting with employers, landlords, and all other segments of society on a daily basis. To deprive these individuals of legal recourse for wrongs that they have suffered would create an incentive for their abuse by others⁹⁸ and would also violate basic norms of fairness and equality underlying the Equal Protection Clause. The language used by the *Montoya* court recognizes the idea that illegal immigrants may be in this country against the law, but the bottom line is that they are here and thus should be accorded certain rights and protections so that they will not develop into an outlaw class of individuals accorded a lower degree of humanity than everyone else in the United States.

⁹³ *Id.* at 1103-05.

⁹⁴ *Id.* at 1105.

⁹⁵ *Id.* at 1104-05.

⁹⁶ *Id.* at 1105.

⁹⁷ *See id.* at 1104.

⁹⁸ *See id.* (“Insurance companies may well be encouraged to insure [illegal immigrants] in anticipation of being able to renege with impunity after a covered loss has occurred.”).

A third case of interest is *In re Reyes*,⁹⁹ in which the Fifth Circuit discussed the relevancy of unlawful status with respect to coverage by the Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”)¹⁰⁰ and the Fair Labor Standards Act of 1938 (“FLSA”).¹⁰¹ In that case, the court of appeals held that the protections of both the AWPA and FLSA applied to citizens, legal immigrants, and illegal immigrants alike.¹⁰² It reached this conclusion despite the fact that the AWPA specifically prohibits the employment of illegal immigrants by farmers and farm-labor contractors.¹⁰³ The court of appeals also found unpersuasive the argument that allowing illegal immigrants to recover benefits on par with legal workers would undercut the statute’s policy goal of deterring further illegal immigration of farm workers.¹⁰⁴ As a result, the Fifth Circuit issued a writ of mandamus prohibiting the lower court from entering a discovery order that would have required the plaintiffs to reveal their immigration statuses to the court.¹⁰⁵ Since the AWPA and FLSA were deemed to cover illegal immigrants, the plaintiffs’ answers to the discovery order questions regarding their legal statuses were irrelevant. Moreover, given the irrelevant nature of the discovery order, the court of appeals worried that it would only serve to inhibit certain migrant workers from pursuing their rights because of the possibility that they may be targeted for deportation.¹⁰⁶ Thus, the Fifth Circuit ruled that undocumented immigrants had the right to utilize certain labor-protection laws even though those very laws prohibited the hiring of illegal immigrants. This represents a powerful commitment by the court to the protection of immigrant workers’ rights, including the rights of the undocumented. It recognizes the humanity and vulnerability of undocumented farm workers who are often subject to abuse by their employers. Like the court in *Montoya*, the Fifth Circuit, in disregarding the fact that the AWPA actually prohibits the hiring of illegal immigrants, adopted the attitude that while illegal immigrants may be present within our borders unlawfully, this does not mean that they

⁹⁹ *In re Reyes*, 814 F.2d 168 (1987).

¹⁰⁰ 29 U.S.C.A. § 1801-1872 (Westlaw 2007).

¹⁰¹ 29 U.S.C.A. § 201-219 (Westlaw 2007).

¹⁰² *In re Reyes*, 814 F.2d at 170.

¹⁰³ *See id.* at 171-72 (Jones, J., dissenting).

¹⁰⁴ *See id.* at 172 (Jones, J., dissenting).

¹⁰⁵ *Id.* at 171. The original discovery order entered by the district court asked the plaintiffs to answer the following questions: “Are you a citizen of the United States? If so, were you born in the United States? If so, please state where you were born and your birthdate. If you are a naturalized citizen of the United States, please state where and when you became a citizen of the United States. If you are not a citizen of the United States, please state your immigration status.” *Id.* at 170.

¹⁰⁶ *See id.* at 170.

should be completely stripped of all legal protections. That would allow such immigrants to be discriminated against and wronged freely, a result that would offend the spirit of the Constitution.¹⁰⁷

The body of state and federal cases in support of the irrelevancy of an illegal immigrant's unlawful status has continued to grow even after the rash of anti-immigrant and anti-illegal-immigrant legislation that was passed during the 1980s and 90s. For example, in 1986 Congress enacted the Immigration Reform and Control Act ("IRCA"),¹⁰⁸ which sought to prohibit immigrants from working in the United States without government authorization¹⁰⁹ and also penalized employers for knowingly hiring unauthorized immigrants.¹¹⁰ Based on this legislation, in 2002 the Supreme Court held, in *Hoffman Plastics Compounds, Inc. v. National Labor Relations Board*, that allowing the National Labor Relations Board to award back pay to illegal immigrants for their improper termination would conflict with the explicit statutory goals of the IRCA and was thus impermissible.¹¹¹ The Court reasoned that any conclusion to the contrary would only "encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."¹¹² This was very powerful language against the awarding of back pay and federal labor remedies to illegal immigrants. While it was not a declaration of the relevancy of unlawful status as a constitutional principle, it reflected strong Congressional action against illegal immigration that the Supreme Court accorded great deference. Even with this legislative and recent doctrinal history, however, the Court of Appeals of New York, in 2006, concluded that the unauthorized status of an illegal immigrant did not preclude her from recovering lost earnings under New York State labor laws.¹¹³ In *Balbuena v. IDR Realty LLC*, the high court of New York held that a state law awarding an illegal immigrant past wages and future losses of earnings due to an accident suffered while working was not preempted by the IRCA.¹¹⁴ The court distinguished *Balbuena* from *Hoffman Plastics*, decided just four years earlier by the Supreme

¹⁰⁷ Neuman, *supra* note 46, at 1448 ("Like the perpetuation of a caste, the transformation of unlawful entrants into outlaws who could be mistreated with impunity would violate the core historical purpose of the Equal Protection Clause.").

¹⁰⁸ 8 U.S.C.A. § 1324a (Westlaw 2007).

¹⁰⁹ 8 U.S.C.A. § 1324a(h)(3) (Westlaw 2007).

¹¹⁰ 8 U.S.C.A. § 1324a(a)(2) (Westlaw 2007).

¹¹¹ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151-52 (2002).

¹¹² *Id.* at 151.

¹¹³ *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1258-60 (N.Y. Ct. App. 2006).

¹¹⁴ *Id.* at 1255-58.

Court.¹¹⁵ It then declared: “We recognize, of course, that plaintiffs’ presence in this country without authorization is impermissible under federal law. Standing alone, however, this transgression is insufficient to justify denying plaintiffs a portion of the damages to which they are otherwise entitled.”¹¹⁶

More recently, in *Coma Corp. v. Kansas Department of Labor*, the Supreme Court of Kansas held that an undocumented worker was eligible to receive not just compensatory damages for his employer’s failure to pay him wages that he had earned but also statutory penalty damages authorized by a Kansas wage-hour law.¹¹⁷ In reaching this conclusion, the court rejected the defendant employer’s claim that the plaintiff was precluded from bringing his lawsuit by both the IRCA and *Hoffman Plastics*.¹¹⁸

Balbuena and *Coma Corp.* reveal two important points. First, they represent the insistence with which some courts have declared the irrelevancy of unlawful status in areas of the law outside the equal-protection doctrine. Second, they reveal that this trend has continued from the days of *Moreau* in the 1970s to 2007 when *Coma Corp.* was decided.

B. SEARCHING FOR THE SUPREME COURT’S UNARTICULATED JUSTIFICATION FOR TREATING EQUAL-PROTECTION DOCTRINE AS DIFFERENT FROM OTHER AREAS OF THE LAW

The above discussion reveals that for the last half-century, state and federal courts have been recognizing illegal immigrants’ rights to enjoy the protection of a wide range of laws on the same basis as all other members of American society. Yet the Court in *Plyler v. Doe* chose not to follow this path when considering the scope of the Equal Protection Clause. This section explores potential distinctions that the *Plyler* Court may have drawn between the line of cases declining to recognize the

¹¹⁵ The Court of Appeals of New York pointed out that unlike in *Hoffman Plastics*, where the undocumented immigrant plaintiff committed a criminal act under the IRCA by providing his employer with fraudulent identifying documents, the plaintiffs in *Balbuena* did not commit a criminal act under the IRCA. *Id.* at 1258. The *Balbuena* court noted that the plaintiffs in its case did not produce any false documents to gain employment and were never asked by their employers to present work authorization documents as required by the IRCA. It then highlighted the fact that the “IRCA does not make it a crime to work without documentation.” *Id.* The Court of Appeals of New York essentially limited *Hoffman Plastics* to the facts in that case and narrowed the reach of the *Hoffman Plastics* holding. *Id.*

¹¹⁶ *Id.*

¹¹⁷ See *Coma Corp. v. Kan. Dep’t of Labor*, 154 P.3d 1080, 1087, 1094 (Kan. 2007).

¹¹⁸ See *id.* at 1083-84.

relevancy of unlawful status and its holding in *Plyler*. After concluding that these explanations are unsatisfactory, it examines and responds to concerns raised by Professors Michael Perry and Peter Schuck, both of whose critiques support *Plyler's* endorsement of rational-basis review for most state illegal-immigrant classifications.

1. Exploring Some Initial Explanations

In contrast to the cases discussed above, why did the *Plyler* majority decide to hold that in the equal-protection realm, “undocumented status is [not] a ‘constitutional irrelevancy’”?¹¹⁹ Why did the Supreme Court conclude in *Plyler* that unlawful presence, in and of itself, affects an individual’s expectation of legal protections while several other courts have, in contexts outside the Equal Protection Clause, found unlawful presence completely irrelevant? The Court itself does not directly provide an answer to these questions.

The Supreme Court’s distinction between legal and illegal immigrants is even less understandable when one considers that states, unlike the federal government, typically do not have a legitimate constitutional interest in evaluating the relationship between an alien and the United States when drafting legislation.¹²⁰ As the Court noted in *Nyquist v. Mauclet*, one of its most prominent alienage cases, “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.”¹²¹

Additionally, illegal immigrants share several of the same key characteristics of legal immigrants that the Court felt justified the application of strict-scrutiny review of state classifications of this latter group. In *Graham v. Richardson*, the Court declared that “[a]liens as a class are a prime example of a ‘discrete and insular’ minority for whom heightened judicial solicitude is appropriate.”¹²² Legal immigrants, who do not have the right to vote, often lack effective means to influence the political process and are thus subject to political abuse by the states.

¹¹⁹ *Plyer v. Doe*, 457 U.S. 202, 219 n.19 (1982).

¹²⁰ *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977); *Mathews v. Diaz*, 426 U.S. 67, 84-87 (1976).

¹²¹ *Nyquist*, 432 U.S. at 7 n.8. The Supreme Court has held that only in a narrow set of circumstances do states ever have a legitimate interest in even distinguishing its residents based on their immigration status. This “political function” exception applies when distinguishing between citizens and aliens “is fundamental to the definition and government of a state.” *Ambach v. Norwick*, 441 U.S. 68, 75 (1979). This exception has been used to justify state distinctions between aliens and citizens with respect to eligibility to hold public office, as well non-elective executive, legislative, and judicial positions. *Id.* at 74.

¹²² *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (citation omitted).

Similarly, illegal immigrants' unrepresented status, and the strong popular sentiment against them, renders their community particularly susceptible to discriminatory state and local action.¹²³ Like legal immigrants, illegal immigrants are "subject to disadvantages not shared by the remainder of the community. . . . are not entitled to vote and . . . are often handicapped by a lack of familiarity with our language and customs."¹²⁴ States' rising frustration with the federal government's inability to slow the pace of illegal immigration presents an even stronger reason to be concerned that unrepresented illegal immigrants will be the victims of draconian sub-federal legislation.¹²⁵

Of course, one major difference between the cases finding unlawful status irrelevant and cases involving state classifications of illegal immigrants is that the former set of cases involved private disputes and wrongs for which the courts allowed illegal immigrants to seek judicial relief, while the latter set of cases typically involve the provision of benefits by a state to its residents. By providing illegal immigrants remedies for private disputes and wrongs, courts allow illegal immigrants to collect damages and seek justice from private actors such as employers and insurance companies. State and local governments do not have to pay any of the direct costs of the illegal immigrants' recoveries except for the administrative costs of allowing access to the courts.¹²⁶ On the other hand, in most Fourteenth Amendment equal-protection cases it is the state that bears the expenses of a plaintiff's victory. This means that allowing illegal immigrants to have strong equal protection of the laws could be characterized as forcing the government to subsidize an illegal entrant's continued presence in the country.¹²⁷ Moreover, concerns about a state's limited financial resources and its ability to provide quality government services to all of its lawful residents becomes a concern in a way not present when allowing illegal immigrants to remedy private wrongs.

If these are the types of concerns driving the Supreme Court's distinction between legal and illegal immigrants, however, it appears that there is not so much something inherently relevant and wrong about an immigrant's unlawful status when deciding the scope of protection to

¹²³ Neuman, *supra* note 46, at 1449.

¹²⁴ Hampton v. Mow Sun Wong, 426 U.S. 88, 102 (1976) (footnote omitted).

¹²⁵ Neuman, *supra* note 46, at 1450.

¹²⁶ See Montoya v. Gateway Ins. Co., 401 A.2d 1102, 1106 (N.J. Super. Ct. App. Div. 1979) ("Should defendants be held liable on the policy, the State would not be subsidizing and indeed aiding the alien to continue his illegal presence in this country. Rather, an insurance company compensated for the risks it described and assumed would be paying in accord with its agreement.")

¹²⁷ *Id.*

offer him or her under U.S. laws. Rather, the *Plyler* Court's real justification for its distinction would then appear to be economic in nature. As discussed earlier, the Court had listed a state's interest in preserving its economic resources for those legally residing within its borders¹²⁸ as a reason why courts should apply a weaker level of review to state classifications of illegal immigrants.¹²⁹ The Court used this economic justification, however, as an independent and separate rationale for treating illegal immigrants differently, not simply as a way to further support its claim that illegal status, standing alone, somehow makes a constitutional difference. Moreover, traditionally the Supreme Court has held that an asserted state interest in preserving limited financial resources for citizens is not a sufficiently compelling justification for an alienage classification.¹³⁰ Indeed, the Supreme Court has declared that: "Since an alien as well as a citizen is a 'person' for equal-protection purposes, a concern for fiscal integrity is [not a] compelling . . . justification for the questioned classification in these cases . . ."¹³¹ Therefore, even in the context of an economic justification, we again return to the undeveloped idea that there is something fundamentally important and relevant about an illegal immigrant's unlawful status in the equal-protection arena but not other areas of the law.

Another difference between the cases discussed above and *Plyler* that may have influenced the Court's thinking is that the former group of cases involved primarily statutory or common law rights and remedies while *Plyler* involved constitutional doctrine. It is not clear, however, what difference this should make. The Court did not provide any guidance on this point. Furthermore, the Equal Protection Clause addresses itself to all *persons* in the United States' jurisdiction, making it less likely, as a constitutional matter, that an illegal immigrant's unlawful status should be relevant to equal-protection doctrine.

Ironically, one possible explanation for the *Plyler* Court's view of the relevancy of an immigrant's unlawful status may be the mounting public hostility toward illegal immigrants over the last few decades. Illegal immigrants are a politically unpopular class. Thus, while a

¹²⁸ See *Plyler v. Doe*, 457 U.S. 202, 225-26 (1982).

¹²⁹ As the discussion in Part III.B reveals, the *Plyler* Court's economic justification for distinguishing between legal and illegal immigrants does not stand up to a number of empirical studies that have been conducted since the time the case was decided. These studies have found that illegal immigrants make substantial economic contributions to their local communities and to the nation as well.

¹³⁰ Wishnie, *supra* note 23, at 505-06.

¹³¹ *Graham v. Richardson*, 403 U.S. 365, 375 (1971).

number of lower courts were willing to overlook these individuals' violations of the country's immigration laws, legal realism would suggest that the Supreme Court may have felt uncomfortable doing so when *Plyler* was decided in 1982, a period in which animus toward illegal immigration was beginning to flourish.¹³² The irony, of course, is that one of the major purposes behind the Equal Protection Clause is to protect the rights of unpopular and vulnerable groups.¹³³

2. Examining and Responding to Scholarly Justifications

Even though the Court did not explicitly articulate a reason for treating unlawful status as relevant in the equal-protection context but not in others, scholars have stepped in to fill this void. Professors Michael Perry and Peter Schuck argue in favor of limiting the constitutional rights and benefits accorded to noncitizens. These arguments could be used to support and justify the Court's more restrictive holding in *Plyler* (and against the more liberal holding with respect to undocumented children and their access to education). By addressing them, I aim to reveal their faults and urge that they be disregarded if and when the Court decides to readdress the question of the level of scrutiny applicable to illegal-immigrant classifications.

While discussing the Court's treatment of illegal immigrants in *Plyler*, Michael Perry has argued that noncitizen status, both legal and illegal, is a morally relevant factor when discussing what he identifies as the principle behind equal-protection law.¹³⁴ He posits: "It is tempting to say, in a generous if unreflective spirit of egalitarianism, that a person's status as an alien indicates nothing about the worth or desert of the person. But such a statement would be problematic. Alienage is conventionally, if implicitly, regarded as a morally relevant status."¹³⁵

¹³² See, e.g., Immigration Reform and Control Act of 1986, 8 U.S.C.A. § 1324a (Westlaw 2007).

¹³³ See *Romer v. Evans*, 517 U.S. 620, 634 (1996); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

¹³⁴ Perry, *supra* note 46, at 334; see also Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1061 (1979). According to Perry, "the moral worth or status of a person is determined by the nature and extent of the person's activities, native talents, acquired skills, and need." Michael J. Perry, *The Principle of Equal Protection*, 32 HASTINGS L.J. 1133, 1138 (1981). If "a factor is not a determinant of a person's moral status – if the factor does not itself refer to or indicate anything about a person's activities, talents, skills, or needs – then that factor is morally irrelevant" and thus should not be used by a state as a basis for determining who is more or less deserving of respect and concern. *Id.* at 1138-39.

¹³⁵ Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1061 (1979). Interestingly, Perry makes this observation with respect to legal immigrants even though he concedes that "a person's status as an alien is [not], without more, a

He further argues that even if legal-immigrant status could be characterized as immaterial, “a person’s status, not as an alien, but as one who is illegally present in the territorial jurisdiction in question – indicating as it does that particular acts, acts contrary to law, have been committed – does not seem to be a problematic basis for differential treatment.”¹³⁶ The weakness of Perry’s claims, however, is that they draw their moral strength from questionable sources of morality: the United States Constitution¹³⁷ and the importance of the concept of formal, national citizenship.¹³⁸

Perry contends that the Supreme Court should not be able to “deem alienage to be a morally irrelevant status when to do that would be to deny the validity of something the Constitution itself does, namely, treat aliens and citizens differently for many purposes.”¹³⁹ An initial objection to this position is that it is not clear why the Constitution is being employed as a source of *moral* relevancy. A further objection is that, while it is true that the Constitution does, at times, treat aliens and citizens differently, it is also true that several of the Constitution’s provisions are addressed to all *persons* within the jurisdiction of the United States, not just to citizens.¹⁴⁰ The Equal Protection Clause of the Fourteenth Amendment is such a provision.¹⁴¹ Indeed, it is even possible to view the Constitution as primarily about *persons*, with citizenship taking on significance only “in particular situations as a special case.”¹⁴²

reliable indicator of particular choices, activities, talents, or skills,” the set of factors that he uses to determine whether certain characteristics of classes of persons are morally irrelevant and thus impermissible distinctions with which to justify state discrimination under the Equal Protection Clause. *Id.* at 1066.

¹³⁶ Perry, *supra* note 46, at 335.

¹³⁷ *Id.* at 334; Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1066 (1979).

¹³⁸ Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1061 (1979).

¹³⁹ *Id.* at 1066.

¹⁴⁰ *See, e.g.*, U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”); U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .”).

¹⁴¹ U.S. CONST. amend. XIV (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

¹⁴² T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 21 (1990) (discussing several clauses within the Constitution which identified its beneficiaries as persons or did not identify a specific beneficiary at all); *see also* ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 54 (1975) (“[T]he concept of citizenship plays only the most minimal role in the American constitutional scheme.”).

Thus, the mere fact that the Constitution draws some distinctions between citizens and noncitizens does not mean, as Perry asserts, that it “limits the jurisdiction of the principles of equal protection.”¹⁴³

Perry also argues, in a related manner, that the value and existence of formal citizenship in American society provides further support for the view that noncitizen status must be a morally relevant factor in the equal-protection context. According to Perry, a person, in at least some respects, “is more deserving by virtue of his status as a citizen than a person who is not a citizen.”¹⁴⁴ Again, an initial objection to this position is that Perry does not offer any support for his view that formal citizenship, as opposed to some other vision of the sphere of moral relevance such as notions of membership¹⁴⁵ or personhood,¹⁴⁶ is the appropriate community with which to judge the morality of a state’s relationship with those in its jurisdiction. As Part III argues below, a strong case can be made for a membership or participation model of rights, rather than one that revolves around the primacy of formal citizenship. A second problem with the significance that Perry attaches to citizenship is that he incorrectly contends that alienage must be a morally relevant consideration “unless one is prepared to abolish the status of citizenship.”¹⁴⁷

Despite Perry’s concerns, it is possible to have a coherent system of rights that recognizes both the legal significance of formal citizenship and the moral importance of a noncitizens’ membership within a community. Take political rights as an example. Today the right to serve as an elected official and to vote in elections is typically limited to citizens. Creating a subset of individuals within the United States that can run for office and vote, however, “does not entail that persons outside the subset are non-members” of American society, undeserving of several of the important rights and benefits accorded to citizens.¹⁴⁸

¹⁴³ Perry, *supra* note 46, at 334.

¹⁴⁴ Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1061 (1979). Perry elaborates on this point by reasoning that: “The concept of citizenship itself implies the existence of a central favored group; laws favoring citizens express primary respect and concern for one’s own ‘family’ or ‘club.’” *Id.*

¹⁴⁵ See, e.g., Joseph H. Carens, *On Belonging: What We Owe People Who Stay*, BOSTON REV., Summer 2005, at 1, available at <http://bostonreview.net/BR30.3/carens.html>.

¹⁴⁶ See, e.g., Victor C. Romero, *Expanding the Circle of Membership by Reconstructing the “Alien”*: Lessons from Social Psychology and the “Promise Enforcement Cases,” 32 U. MICH. J.L. REFORM 1, 24 (1998); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 715-17 (1996).

¹⁴⁷ Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1061 (1979).

¹⁴⁸ Aleinikoff, *supra* note 142, at 22; see also Karst, *supra* note 82, at 25.

Valuing the role of citizenship in contemporary America is not the same as, and does not require, denying the moral significance of the contributions that noncitizens make to American society.

A last critique of Perry's articulation of the principle of equal protection pertains to the importance that he places on illegal immigrants' presence in the United States in violation of the law. Perry, as well as the *Plyler* majority, subscribes to the view that by breaking the country's immigration laws, illegal immigrants are bereft of any legitimate expectation of receiving government benefits and the protection of the laws accorded citizens and legal immigrants.¹⁴⁹ This view, however, inaccurately stresses a static nature of morality. An individual's actions at one point in time should not permanently affect his moral standing or culpability at a later point in time.¹⁵⁰ This idea is consistent with the use of moral judgments in other familiar areas of the law such as the criminal justice system. Even though society may at one point find that it is just to punish an individual for a wrongful act,¹⁵¹ over time, most individuals who receive punishment are deemed to have sufficiently paid their debt to society. Their initial act, which was morally proscribed, is forgiven and no longer justifies their punishment by the state. Similarly, over time, an illegal immigrant's original condition of admission becomes morally irrelevant.¹⁵² The longer that such an immigrant lives in the United States and becomes a productive member of American society, the more attenuated the moral significance of his or her initial unlawful entry into the country.

Related to Perry's concerns, Peter Schuck has argued that giving too many rights and constitutional protections to legal immigrants, and *a fortiori* illegal immigrants, leads to a devaluation of American citizenship.¹⁵³ This devaluation, in turn, has significant "emotional consequences,"¹⁵⁴ which Schuck identifies as the weakening of formal citizenship's ability to serve as a "bond among individuals in a polygot society like ours in which there are relatively few other affective linkages

¹⁴⁹ See Perry, *supra* note 46, at 335; *Plyler v. Doe*, 457 U.S. 202, 219 (1982).

¹⁵⁰ See Carens, *supra* note 145, at 11.

¹⁵¹ See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 16-18 (3d ed. 2001); Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437, 441-42 (1993); Jason H. Lee, Note, *Dislocated and Deprived: A Normative Evaluation of Southeast Asian Criminal Responsibility and the Implications of Societal Fault*, 11 MICH. J. RACE & L. 671, 695 (2006).

¹⁵² Carens, *supra* note 145, at 11.

¹⁵³ See Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIGR. L.J. 1, 13 (1989).

¹⁵⁴ *Id.* at 14.

or commonalities.”¹⁵⁵ This view highlights citizenship’s ability to signify a national community and build national consensus on important political issues.¹⁵⁶

Providing illegal immigrants strong equal protection of the laws, and thus implying their entitlement to receive several of the same benefits as citizens, however, does not negatively affect citizenship’s ability to serve as a unifying force for those who possess it. The mere fact that an illegal immigrant is provided the right to receive health-care benefits or some other government service does not mean that an American citizen will feel any less connected to a national American community if, in fact, one can fairly be said to exist.¹⁵⁷ Moreover, I agree with Alexander Aleinikoff that there is something “distasteful” about afflicting a harm on certain individuals or excluding them from benefits accorded to others in order to make the non-afflicted and included “feel special.”¹⁵⁸ Finally, it is not clear at all why a national community should necessarily center around citizenship. Instead, it seems perfectly possible, and more logical, to develop a communitarian ethos “among all persons living and working within the territory of the United States.”¹⁵⁹ The bond amongst citizens created by their shared American nationality, standing alone, is weak¹⁶⁰ and thus does not serve as a solid springboard from which to develop a sense of belonging in America. In a sense, then, the strength of the various sub-national affiliations that Schuck identifies as potentially divisive forces – “ethnic, wealth, gender, religious, and lingual differences”¹⁶¹ – highlights the impracticality, and more importantly, the impropriety of seeking to form a national community grounded on citizenship. Ironically, given the importance and power of certain sub-national affiliations to those living within the United States, it may make more sense to construct a national community in a way that acknowledges and leverages the power of these more tangible ties rather than depending principally on the typically distant commonality of citizenship.

Both Perry and Schuck present arguments in support of limiting the constitutional rights and government benefits made available to illegal immigrants. In this way, their contentions provide possible justifications for the *Plyler* Court’s decision to treat unlawful status as a constitutional

¹⁵⁵ *Id.*

¹⁵⁶ *See id.* at 14-15.

¹⁵⁷ *See* Aleinikoff, *supra* note 142, at 28-29.

¹⁵⁸ *Id.* at 28.

¹⁵⁹ *Id.* at 30.

¹⁶⁰ *Id.* at 30-31.

¹⁶¹ Schuck, *supra* note 153, at 14.

relevancy. As this section's discussion has begun to make clear, however, Perry's and Schuck's views should not be accorded too much weight, as they do not offer a satisfactory justification for the denial of strong equal-protection rights to illegal immigrants, especially given the harmful consequences that such a denial entails.

C. THE IMPORTANCE OF CLOSE JUDICIAL SCRUTINY AND RELIANCE ON STRONG EQUAL PROTECTION OF THE LAWS FOR ILLEGAL IMMIGRANTS

Regardless of the reason, or lack thereof, for the Supreme Court's finding that undocumented status is constitutionally relevant in the equal-protection context, there are a number of important reasons why the Court should adopt the view of the several other courts¹⁶² that have overlooked an individual's immigration status when determining the scope of the protection of the laws. First, as Gerald Neuman has pointed out, holding classifications of illegal immigrants to a less-stringent standard of review than those of legal immigrants may very well convert the undocumented population into a community of outlaws living within our borders.¹⁶³ This result seems patently unacceptable under any notion of respect for individuals' dignity and humanity underlying the Equal Protection Clause.¹⁶⁴ It would treat illegal immigrants as nonpersons "beyond the effective protection of the laws" and subject to abuse by all but assistance by none.¹⁶⁵ Proposition 187, passed by the California electorate in 1994, is just one sign that this fear of turning illegal immigrants into outlaws is not merely a hypothetical matter.¹⁶⁶ Although the law was ultimately found to be preempted by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, it aggressively sought to deny illegal immigrants access to social services, health care, and public education.¹⁶⁷

A second reason that the Supreme Court should reevaluate its position that undocumented status is a relevant consideration in the equal-protection context is that the Equal Protection Clause recognizes the humanity of illegal immigrants in a way that preemption doctrine, the other major tool that illegal immigrants can use to try to invalidate

¹⁶² See discussion of cases in Part II.A.

¹⁶³ Neuman, *supra* note 46, at 1447-48.

¹⁶⁴ *Id.* at 1448; Karst, *supra* note 82, at 4-8.

¹⁶⁵ Neuman, *supra* note 46, at 1447-48.

¹⁶⁶ *Id.* at 1448.

¹⁶⁷ *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1266 (C.D. Cal. 1997).

discriminatory state classifications, does not. The protection of an individual's rights under the Equal Protection Clause acknowledges his personhood and right to basic support by the state in a way that the preemption analysis' focus on federalism issues and constitutional structure ignores.¹⁶⁸ As Harold Koh, Dean of Yale Law School, has argued in stressing the importance of legal immigrants' abilities to utilize the full force of the Equal Protection Clause:

I prefer an equal protection approach to a preemption approach, not simply because it clearly separates what is constitutional from what federal policy makers happen to think is wise, but more fundamentally, because it answers, in a way that preemption reasoning does not, the moral and philosophical claims that resident aliens make against their state governments.¹⁶⁹

The same argument applies to illegal immigrants, whose personhood is often devalued by discriminatory state laws, and who participate daily as members of American society in a productive and oftentimes similar way as citizens and legal immigrants.¹⁷⁰

According undocumented immigrants strong equal-protection rights is also important because preemption sometimes fails as an alternative strategy. A recent example is *Equal Access Education v. Merten*, in which a federal district court found that a blanket policy of Virginia post-secondary educational institutions denying admission to illegal immigrants was not preempted by the exclusively federal authority to regulate immigration.¹⁷¹ In another example, in 2004, a federal district judge in Arizona concluded that Arizona's Proposition 200,¹⁷² which effectively prohibits all agencies in the state from administering "state and local public benefits [to illegal immigrants] that are not federally

¹⁶⁸ See Koh, *supra* note 25, at 98-99; Wishnie, *supra* note 23, at 511 n.96 ("Critics have responded persuasively that preemption analysis leads to a 'hollow formalism' that denies the equality and anticaste force of the equal protection analysis.").

¹⁶⁹ Koh, *supra* note 52, at 99.

¹⁷⁰ See discussion *infra*, Part III.B.

¹⁷¹ *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 608 (E.D. Va. 2004). The post-secondary institutions named in the complaint included George Mason University, James Madison University, Northern Virginia Community College, the University of Virginia, Virginia Commonwealth University, Virginia Polytechnic Institute and State University (Virginia Tech), and the College of William and Mary. *Id.* at 592. Denial of admission of undocumented applicants was encouraged by the Attorney General of Virginia. See ALISON P. LANDRY, COMMONWEALTH OF VIRGINIA, OFFICE OF THE ATTORNEY GENERAL, IMMIGRATION LAW COMPLIANCE UPDATE MEMORANDUM, Sept. 5, 2002, available at www.schev.edu/AdminFaculty/ImmigrationMemo9-5-02APL.pdf.

¹⁷² The full text of the proposition as presented to Arizona voters in 2004 is available at <http://www.azsos.gov/election/2004/info/PubPamphlet/english/prop200.pdf>.

mandated,”¹⁷³ was not precluded by the federal preemption doctrine elaborated by the Supreme Court in *De Canas v. Bica*.¹⁷⁴ Strong equal-protection rights would allow undocumented immigrants to challenge the admissions policies of Virginia’s public, post-secondary educational institutions. It would also allow them to fight for access to the myriad of other rights and benefits that the doctrine of preemption cannot safeguard, such as those regulated by Arizona’s Proposition 200.

The Supreme Court should reject the distinction between legal and illegal immigrants that it recognized in *Plyler*. It has failed to identify a principled reason for claiming the relevancy of unlawful status in the equal-protection sphere but not in other areas of the law. This failure is particularly questionable given the important reasons for granting illegal immigrants strong protections of the law and for treating them, like legal immigrants, as a suspect class when dealing with equal-protection claims.

III. THE PARTICIPATION MODEL OF RIGHTS: ILLEGAL IMMIGRANTS AS MEMBERS OF AMERICAN SOCIETY

The claim that illegal immigrants should receive the same level of equal protection of the laws as legal immigrants gains further, normative support from the application of a participation model of rights.¹⁷⁵ In what follows, this article will lay out the values and mechanics behind the participation model. It will then apply this model to the case of illegal immigrants.

A. THE PARTICIPATION MODEL DEFINED

The participation model of rights is relatively straightforward. It is premised on the idea that *membership* in a community is what matters morally when it comes to the distribution of most Constitutional protections and government benefits.¹⁷⁶ Textually, it is consistent with

¹⁷³ Ariz. Rev. Stat. Ann. § 46-140.01(A) (Westlaw 2007).

¹⁷⁴ *Friendly House v. Napolitano*, CV 04-649 TUC DCB, at 28 (D. Ariz. Nov. 20, 2004); see also Joshua J. Herndon, *Broken Borders: De Canas v. Bica and the Standards that Govern the Validity of State Measures Designed to Deter Undocumented Immigration*, 12 TEX. HISP. J.L. & POL’Y 31, 82-91 (2006) (discussing the district court’s analysis of the preemption issue in *Friendly House v. Napolitano*).

¹⁷⁵ See *A Theory of Alien’s Rights*, 96 HARV. L. REV. 1292, 1292 (1983); Carens, *supra* note 145, at 10-11; see also Aleinikoff, *supra* note 142, at 20-22.

¹⁷⁶ Carens, *supra* note 145, at 6; see also Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law into the Breach Once More*, 21 N.M. L. REV. 219, 247 (1991) (discussing the moral claim to benefits that illegal immigrants have due to their “contributions to economic growth

the Constitution's explicit provision of several important rights to persons (as opposed to citizens), as well as its declaration of other major rights without identifying any specific beneficiary.¹⁷⁷

The driving force behind a participation based model has been explained by political scientist Joseph Carens in the following manner:

Whatever their legal status, individuals who live in a society over an extended period of time become members of that society, as their lives intertwine with the lives of others there. These human bonds provide the basic contours of the rights that a state must guarantee; they cannot be regarded as a matter of political discretion.¹⁷⁸

This view focuses on the social and economic interaction that an individual has with the society that he or she lives in when determining a claim to the protection of that society's laws.¹⁷⁹ It stresses three related principles. First, an individual's legal status within a country (e.g., citizen, legal permanent resident, undocumented immigrant) is not the fairest or most morally significant criterion with which to adjudge his or her claim to rights.¹⁸⁰ Second, the more an individual contributes to the society that he or she lives in, the more he or she deserves to receive in terms of rights and benefits. The participation model "correlates rights with social and economic involvement."¹⁸¹ Third, the more an individual acts like a citizen, the more he or she deserves to be treated like a citizen by the state.

Of course, in making the argument in favor of a participation model

and social stability" in the United States).

¹⁷⁷ See, e.g., U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . ."); U.S. CONST. amend. XIV ("[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."); Aleinikoff, *supra* note 142, at 21. *But see* Sugarman v. Dougall, 413 U.S. 634, 651 (1973) (Rehnquist, J., dissenting) ("[T]he Constitution itself recognizes a basic difference between citizens and aliens.").

¹⁷⁸ Carens, *supra* note 145, at 1.

¹⁷⁹ *The Rights of Undocumented Aliens*, *supra* note 75, at 1453.

¹⁸⁰ See David Held, *Between State and Civil Society: Citizenship*, in *CITIZENSHIP* 19, 20 (Geoff Andrew ed., 1991) (stressing the importance of "social participation" and involvement of people in the community in which they live when defining the concept of citizenship); Bryan S. Turner, *Postmodern Culture/Modern Citizens*, in *THE CONDITION OF CITIZENSHIP* 153, 159 (Bart Van Steenberg ed., 1994) ("Citizenship can be defined as a set of practices which constitute individuals as competent members of a community. This definition involves a sociological orientation because it avoids an emphasis on juridical or political definitions of citizenship."); *see also* Schuck *supra* note 153, at 17 ("[T]he conception of membership that drives political institutions has steadily grown more fluid, functional, and context-dependent and seems likely to become even more so in the future.").

¹⁸¹ *The Rights of Undocumented Aliens*, *supra* note 75, at 1453.

of rights, I recognize that there are a number of citizens who contribute very little to the country that they live in, yet are still accorded the full panoply of rights that their country has to offer by dint of their citizenship in that country. Indeed, many citizens contribute negatively to the society that they are a part of by, for example, engaging in criminal acts. The participation theory of rights advocated in this article, however, relates specifically to the moral claims of those individuals excluded from the full set of rights that a nation offers its citizens. As such, this article is not arguing that everyone, including citizens, living in the United States should receive rights commensurate to the amount and type of social and economic contributions that they make to American society. Rather, it is presenting a moral argument in support of noncitizens' claims – including immigrants both legally and illegally in the United States – to a larger set of rights and benefits that have traditionally been limited to those with citizenship status. More specifically, it is arguing that illegal immigrants should receive the same Constitutional rights as legal immigrants who, as a class, have been accorded strict-scrutiny protection under the Equal Protection Clause of the Fourteenth Amendment.

Moreover, it is true that the Constitution rightfully treats citizenship as a special requirement for some rights and purposes. As noted earlier, the rights to vote and hold public office have been limited to citizens.¹⁸² However, as Alexander Aleinikoff has pointed out when supporting the extension of membership rights to legal immigrants, “one can understand constitutional membership as extending to all persons within the jurisdiction of the United States even if the document privileges citizenship in certain respects.”¹⁸³ Limiting the pool of individuals that can vote and run for office does not lead to the conclusion that those persons excluded from this pool are non-members of American society. Formal citizenship and membership in a community are distinct concepts. Each confers a different set of rights on its constituents, and both can co-exist with one another.

B. THE PARTICIPATION MODEL APPLIED

Some commentators have observed that, in its line of alienage cases addressing classifications of legal immigrants, the Supreme Court has

¹⁸² Some have argued that even these rights should be extended to noncitizens as well. See, e.g., Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote*, 75 MICH. L. REV. 1092 (1977); Bryant Yuan Fu Yang, Note, *Fighting for an Equal Voice: Past and Present Struggle for Noncitizen Enfranchisement*, 13 ASIAN AM. L.J. 57 (2006).

¹⁸³ Aleinikoff, *supra* note 142, at 22.

already appeared, at times, to adopt the participation model of rights.¹⁸⁴ Indeed, in *Graham v. Richardson*, the Court struck down a statute that sought to exclude permanent resident aliens from state welfare programs.¹⁸⁵ In doing so, it noted that legal immigrants, like citizens, pay taxes, are subject to the military draft, may live and work in a state for several years, and contribute to a state's economy through the purchasing and producing of goods.¹⁸⁶ Tacitly endorsing the participation model, the Court recognized that "in day-to-day terms, permanently residing aliens and citizens are . . . virtually indistinguishable"¹⁸⁷ and thus determined that legal immigrants should be accorded virtually the same set of rights and benefits as citizens.¹⁸⁸

The same logic that drove the Court's holding in *Graham*, which exemplifies the participation theory of rights, should be applied to the equal-protection analysis of illegal-immigrant classifications as well. In nearly all respects, except for their immigration status, illegal immigrants interact daily as members of American society in ways almost indistinguishable from most legal immigrants and citizens. This is significant for two reasons. First, it supports the idea that illegal immigrants should be given several of the same rights and benefits as citizens and legal immigrants because similarly situated people should be treated similarly by the laws of a state. This notion is consistent with the norms underlying equal-protection doctrine.¹⁸⁹ Second, similarity among citizens, legal immigrants, and illegal immigrants supports a fairness argument in favor of the irrelevancy of unlawful status in the equal-protection realm because, through their daily actions as members of American society, illegal immigrants have helped contribute to the vibrancy of their local communities and paid for many of the government benefits (through taxes) that states have tried to take away from them.¹⁹⁰

¹⁸⁴ Aleinikoff, *supra* note 142, at 23-24; *A Theory of Alien's Rights*, *supra* note 175, at 1303-07.

¹⁸⁵ *Graham v. Richardson*, 403 U.S. 365, 376 (1971).

¹⁸⁶ *Id.*

¹⁸⁷ Aleinikoff, *supra* note 142, at 23; *see also In re Griffiths*, 413 U.S. 717, 722 (1973) ("Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities."); *Sugarman v. Dougall*, 413 U.S. 634, 645 (1973).

¹⁸⁸ *See Graham*, 403 U.S. at 376.

¹⁸⁹ *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment . . . is essentially a direction that all persons similarly situated should be treated alike."); *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

¹⁹⁰ *See, e.g.*, JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* 296 (1989); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217, 231-32 (1994); Reich, *supra* note 176, at 244-46.

In this sense, allowing states to discriminate against illegal immigrants under rational-basis review is unfair because illegal immigrants have actually paid for part, if not all, of the benefits that they are being denied. In what follows, I will briefly demonstrate the different ways that illegal immigrants act as economic and social members of the United States and thus have a moral claim to the same level of constitutional protections as legal immigrants.

As discussed above, illegal immigrants contribute to the local economies in which they live, as well as the national economy, in a variety of ways identical to those in which legal immigrants and citizens do. They work, oftentimes in jobs that others in the country do not wish to occupy¹⁹¹ and in ways that result in subsidiary job creation;¹⁹² they pay taxes; and they also contribute to economic expansion by acting as consumers.¹⁹³ Today, an estimated one in twenty-five workers in the United States is an illegal immigrant.¹⁹⁴ In California, which has by far the largest illegal immigrant population in the country, roughly eight percent of workers are undocumented.¹⁹⁵ Contrary to common misperceptions, the majority of these immigrants do not work under the table for labor contractors on farms or for small construction companies.¹⁹⁶ Rather, they receive regular wages and year-end W-2 forms, and are employed by some of the nation's largest and best-known companies.¹⁹⁷

¹⁹¹ According to the Pew Hispanic Center, twelve percent of workers in the food-preparation industry are illegal immigrants, and "more than a quarter of a million illegal immigrants are janitors, 350,000 are maids and housekeepers and 300,000 are groundskeepers." Eduardo Porter, *Here Illegally, Working Hard and Paying Taxes*, N.Y. TIMES, June 19, 2006, at 1.

¹⁹² See, e.g., JAMES J. KIELKOPF, HISPANIC ADVOCACY AND COMMUNITY EMPOWERMENT THROUGH RESEARCH, THE ECONOMIC IMPACT OF UNDOCUMENTED WORKERS IN MINNESOTA 2 (2000), available at www.hacer-mn.org/downloads/English_Reports/EconomicImpactUndocumentedWorkers.pdf ("Up to 50,000 Minnesotans owe their jobs to the presence of undocumented labor in the industries that were studied. On average, every undocumented worker that is removed from the economy causes another worker somewhere in Minnesota to lose his or her job.").

¹⁹³ Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 3 (2006). According to the Pew Research Center, illegal immigrants add 600,000 to 700,000 new consumers to the economy each year. LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ECONOMIC IMPACT OF UNDOCUMENTED IMMIGRANTS, <http://www.lulac.org/advocacy/issues/immigration/truth.html> (last visited Apr. 4, 2008).

¹⁹⁴ JOHNSON, *supra* note 12, at 9. Some have found this proportion of illegal immigrant workers to be even higher at one out of every twenty workers in the United States. Porter, *supra* note 191, at 1.

¹⁹⁵ JOHNSON, *supra* note 12, at 9.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

With respect to taxes, which help to fund government benefits, studies have found that illegal immigrants pay billions of dollars annually in all kinds of taxes, including sales, excise, property, income, and payroll.¹⁹⁸ At the federal level, illegal immigrants make payments into benefits programs that they are not even lawfully permitted to draw on such as Social Security, Medicare, and unemployment insurance programs.¹⁹⁹ Much of the \$7 billion in the Social Security Administration's suspense file²⁰⁰ is believed to have been contributed by illegal immigrants.²⁰¹ Thus, illegal immigrants help subsidize a number of popular government benefits that millions of citizens enjoy each year. At the state level, recent estimates have identified illegal-immigrant tax contributions in the hundreds of millions of dollars annually, even where the local undocumented populations in these states were relatively small.²⁰² While the research is inconclusive, a significant body of empirical studies has found that illegal immigrants pay enough in taxes to cover the costs of the social services that they use²⁰³ and, in some circumstances, have even contributed to a net fiscal gain for local economies.²⁰⁴ Even in cases where a study found that the cost of services

¹⁹⁸ Lipman, *supra* note 193, at 5.

¹⁹⁹ *Id.* at 3-4.

²⁰⁰ The Social Security Administration suspense file keeps track of the amount of wages that are taxed for collection but not credited to a specific worker. It serves as a proxy for the tax contributions made by illegal immigrants who often provide employers with false social security numbers.

²⁰¹ Anna Quindlen, *Undocumented, Indispensable*, NEWSWEEK, May 15, 2006, at 78.

²⁰² See, e.g., SARAH BETH COFFEY, GEORGIA BUDGET AND POLICY INSTITUTE, UNDOCUMENTED IMMIGRANTS IN GEORGIA: TAX CONTRIBUTION AND FISCAL CONCERNS 1 (2006), available at <http://www.gbpi.org/pubs/garevenue/20060119.pdf>; OREGON CENTER FOR PUBLIC POLICY, ISSUE BRIEF: UNDOCUMENTED WORKERS ARE TAXPAYERS, TOO 1 (rev. ed. Apr. 10, 2007), available at <http://www.ocpp.org/2007/issue070410immigranttaxeseng.pdf>.

²⁰³ See, e.g., Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1197 (1997); Lipman, *supra* note 193, at 2; Reich, *supra* note 176, at 244-46; Sidney Weintraub, *Illegal Immigrants in Texas: Impact on Social Services and Related Considerations*, 18 INT'L MIG. REV. 733, 745 (1984); Derrick Z. Jackson, *Undocumented Workers Contribute Plenty*, BOSTON GLOBE, Apr. 12, 2006, at 13 ("Analysts at Standard & Poor's wrote last week that there is no clear correlation between undocumented families and local costs, as the states with the highest number of such families also have relatively low unemployment rates, high property values, and strong income growth . . ."). But see ROBIN BAKER & RICH JONES, THE BELL POLICY CENTER, STATE AND LOCAL TAXES PAID IN COLORADO BY UNDOCUMENTED IMMIGRANTS 1 (2006); DENNIS PROUTY, IOWA LEGISLATIVE SERVICES AGENCY FISCAL SERVICES, UNDOCUMENTED IMMIGRANTS' COST TO THE STATE 2-3 (2007) (noting that "legal residents are subsidizing illegal residents to some extent").

²⁰⁴ SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION 296; Larry J. Obhof, *The Irrationality of Enforcement? An Economic Analysis of U.S. Immigration Law*, 12 KAN. J.L. & PUB. POL'Y 163, 175-76 (2003); Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L., at 227 ("[A] fair review of all the evidence shows that undocumented aliens are, by the most reliable studies, a net gain for the economy, even if not for the

used by illegal immigrants exceeded their tax contributions to state and local coffers, they noted that this difference tended to be rather small,²⁰⁵ or at least a lot smaller than critics of illegal immigration would make it appear. Moreover, to the extent that some illegal immigrants are using more in services than what they contribute in taxes, they are behaving just like many citizens. The Public Policy Institute of California has noted that, due to the costs of public education, “most U.S. native families with children probably receive more in services . . . than they pay in taxes.”²⁰⁶

In addition to their role as economic actors in America, the longer illegal immigrants remain in the United States, the stronger their social and cultural connections become with the country, its way of life, and its people.²⁰⁷ It is in this sense that they also have a moral claim to a wide range of rights and strong constitutional protections as members of American society.²⁰⁸ Scholars from varying disciplines have argued that immigrants living in the United States often end up developing significant ties to and identities defined by their experiences in America, even while maintaining some degree of connection with their countries of origin.²⁰⁹ As noted by sociologist Peter Kivisto when discussing his formulation of “transnational social spaces”:

[P]lace counts. . . . Contrary to the image of transnational immigrants living simultaneously in two worlds, in fact the vast majority is at any moment located primarily in one place. If the location where they spend most of their day-to-day lives is the receiving country, then over

polity . . .”).

²⁰⁵ See, e.g., BAKER & JONES, *supra* note 203, at 1 (“All together, undocumented immigrant tax payments are equal to 70 to 86 percent of the state and local governments’ costs for providing federally mandated services.”). But see Edward Sifuentes, *Researchers Disagree on Illegal Immigrant Cost-Benefit Analysis*, NORTH COUNTY TIMES, Aug. 12, 2006, http://www.nctimes.com/articles/2006/08/13/news/top_stories/21_52_058_12_06.txt (noting that some studies funded by conservative think tanks have found that illegal immigrants cost taxpayers significantly more in the public services that they use than they contribute in taxes).

²⁰⁶ JOHNSON, *supra* note 12, at 9-10.

²⁰⁷ See Leo R. Chavez, *Outside the Imagined Community: Undocumented Settlers and Experiences of Incorporation*, 18 AM. ETHNOLOGIST 257, 269 (1991) (“[T]he longer undocumented immigrants reside in the United States, regardless of their motivations for migration and despite their lack of documentation, the stronger and more numerous their ties to it become.”); Carens, *supra* note 145, at 1.

²⁰⁸ Carens, *supra* note 145, at 11.

²⁰⁹ See, e.g., Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 484 (2000) (within the context of describing citizenship as identity or solidarity); Chavez, *supra* note 207, at 267-69; Peter Kivisto, *Theorizing Transnational Immigration: A Critical Review of Current Efforts*, 24 ETHNIC & RACIAL STUD. 549, 571-72 (2001).

time the issues and concerns of that place will tend to take precedence over the more removed issues and concerns of the homeland.²¹⁰

The roots that illegal immigrants establish in the United States, as well as the social roles that they play in their communities, represent another dimension in which they are active participants in American society, deserving of similar treatment as all other members.

It has been suggested by some commentators that the Supreme Court has actually showed signs that it is willing to adopt a participation model of rights with respect to the equal protection of illegal immigrants.²¹¹ Alexander Aleinikoff identifies, as an example, the *Plyler* majority, which, despite its declaration that undocumented status is not a constitutional irrelevancy, still applied an intermediate level of review to the Texas statute at issue in that case. He argues that the *Plyler* analysis can be interpreted as “grounded in the recognition that undocumented children were likely to be permanent members of American society.”²¹² Indeed, as noted earlier in this article, in striking down Texas’s discriminatory statute seeking to exclude undocumented children from public schools, the Court hinted several times at the fact that undocumented children are, and will continue to be, a part of American society regardless of whether they are provided a free public education.²¹³

Despite such an optimistic view of the *Plyler* majority’s implementation of a participation model of rights, however, the Court’s opinion was full of language suggesting that its endorsement of a participation theory, if it even adopted one, was extremely limited. The degree of significance attached by the *Plyler* Court to illegal immigrants’ contributions to, and membership in, American society was restricted to undocumented children, whom the Court did not hold morally culpable for their unlawful presence in the country.²¹⁴ The Court had a much different view of the parents of these children and other adult illegal

²¹⁰ Kivisto, *supra* note 209, at 571.

²¹¹ See, e.g., Aleinikoff, *supra* note 142, at 25.

²¹² *Id.*

²¹³ *Plyler v. Doe*, 457 U.S. 202, 230 (1982). The Court noted that:

[T]he record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.

Id.

²¹⁴ Bosniak, *supra* note 47, at 1123.

immigrants, suggesting that their choices to violate the nation's immigration laws singled them out as less entitled to the protection of the states' laws.²¹⁵ Unlike the district court opinion in the matter,²¹⁶ it did not recognize the degree to which adult illegal immigrants are members of the national community.

However, while the Supreme Court may not yet have fully embraced a participation model of illegal immigrant rights, the above discussion suggests that it should. Illegal immigrants make significant contributions to their communities as active members of American society. In most economic and social respects, they are indistinguishable from legal immigrants and citizens. They pay taxes, work, send their kids to school, go to church, and shop just like everyone else in the country. In this way, they embody the principles that underlie the participation model of rights. Just as the Court has begun to subscribe to the participation model when it comes to the rights of legal immigrants, it should employ the participation model in its treatment of illegal-immigrant classifications as well.

This extension of the participation model to the equal-protection doctrine's treatment of illegal immigrants is consistent with the principle of equal citizenship that Professor Kenneth Karst powerfully identified as the substantive core of the Equal Protection Clause. To Karst, "[t]he essence of equal citizenship," and thus the Equal Protection Clause, "is the dignity of full membership in . . . society."²¹⁷ This view stresses that an individual should "be treated by the organized society as a respected, responsible, and participating member."²¹⁸

While Karst does not speak specifically on the (ir)relevancy of undocumented status, he has used the concept of equal citizenship to argue that classifications of noncitizens generally should be viewed by the Court with suspicion, and has posited that equal citizenship "is broader than the legal status of citizenship."²¹⁹ Indeed, "the broader

²¹⁵ *Plyler*, 457 U.S. at 220.

²¹⁶ The district court in *Plyler* explicitly recognized the membership of several illegal immigrants within American society that made them worthy of receiving many of the same benefits as those with legal immigration and citizen status. It noted:

[T]he subcategory of illegal aliens affected by section 21.031 consists of more or less settled families, who have established deeper roots in this country than the much more typical temporary worker. The plaintiff families in this suit, for example, have lived in Tyler for years and are likely to remain unless deported. The state has accepted their taxes and its citizens have profited by, perhaps even exploited, their labor.

Doe v. Plyler, 458 F. Supp. 569, 591 (E.D. Tex. 1978), *aff'd*, 457 U.S. 202 (1982).

²¹⁷ Karst, *supra* note 82, at 5.

²¹⁸ *Id.* at 4.

²¹⁹ *Id.* at 25.

principle of equal citizenship extends its core values to noncitizens, because for most purposes they are members of our society.”²²⁰ Karst also approves of the Supreme Court’s decision to strike down Texas’s discriminatory statute in *Plyler v. Doe*,²²¹ suggesting that an individual’s unlawful status does not affect his claim to equal citizenship and the dignity of full membership in American society. In this sense, then, according illegal immigrants the same equal-protection rights as legal immigrants (close judicial scrutiny) is in accord with the substance of the Equal Protection Clause. Conversely, viewing unlawful status as constitutionally relevant impermissibly denies illegal immigrants the respect, responsibility, and participation rights²²² that they are morally and constitutionally entitled to enjoy.

CONCLUSION

With an estimated population of twelve million in 2006,²²³ the “shadow population” that the *Plyler* Court was so concerned about in 1982 has grown dramatically in size. This has made it imperative to reexamine the declaration in *Plyler* that unlawful status is a constitutionally relevant consideration, which has led to the commonly accepted conclusion that state illegal-immigrant classifications are to be subjected to only rational-basis review.²²⁴ Since *Plyler* was decided, the United States has witnessed a steady increase in anti-illegal-immigrant sentiment as well as a proliferation of state and local laws denying basic economic and social benefits to illegal immigrants.²²⁵ This sentiment and these laws seek to deprive the undocumented population of some of the most basic elements of survival such as housing and health services. In this way, they also seek to deprive undocumented individuals of their humanity as well as the dignity of full membership in the communities in which they live, work, and interact every day.

Under a rational-basis regime, illegal immigrants may soon be

²²⁰ *Id.* at 45.

²²¹ KENNETH L. KARST, *BELONGING IN AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 143-45 (1989).

²²² Karst, *supra* note 82, at 25.

²²³ FEDERATION FOR AMERICAN IMMIGRATION REFORM, *HOW MANY ILLEGAL ALIENS?*, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecentersb8ca (last visited Apr. 2, 2008).

²²⁴ See, e.g., *Tarango v. State Indus. Ins. Sys.*, 25 P.3d 175, 182-83 (Nev. 2001); *Am. G.I. Forum v. Miller*, 267 Cal. Rptr. 371, 376 (Cal. Ct. App. 1990).

²²⁵ See, e.g., Hazleton, Pa., Ordinance 2006-18 (Sep. 21, 2006) (Illegal Immigration Relief Act Ordinance); Escondido, Ca., Ordinance 2006-38R (Oct. 18, 2006) (Establishing Penalties for the Harboring of Illegal Aliens in the City of Escondido).

converted into an outlaw class within American society. This result is unacceptable under the anti-caste principles animating the Equal Protection Clause of the Fourteenth Amendment.²²⁶ It is also morally unacceptable when considering the fact that, aside from their unlawful presence in the United States, illegal immigrants are virtually indistinguishable in their activities from most citizens and legal immigrants.

The Equal Protection Clause extends its protection to all persons within the United States jurisdiction. The broad sweep of this language is something for Americans to be proud of, as it underscores this nation's universalist commitment to the preservation of human dignity. The Supreme Court in *Plyler v. Doe*, however, incorrectly rendered a judgment that would allow illegal immigrants to be treated as nonpersons. Accordingly, the Court should reconsider its holding in that case and recognize the constitutional irrelevancy of unlawful status. State classifications of illegal immigrants could then take their rightful place in the modern line of alienage cases declaring that state discrimination based on noncitizen status must be subjected to strict-scrutiny review.

²²⁶ Karst, *supra* note 82, at 6 (“The principle of equal citizenship . . . presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a nonparticipant.”).