EQUAL PROTECTION — ALIENAGE CLASSIFICATIONS — ELEVENTH CIRCUIT UPHOLDS FLORIDA ALIEN LAND LAW UNDER RATIONAL BASIS REVIEW. — *Shen v. Commissioner, Florida Department of Agriculture & Consumer Services*, 158 F.4th 1227 (11th Cir. 2025).

In 1923, the Supreme Court issued a series of decisions upholding a state's right "to deny to aliens the right to own land within its borders."[1] Beginning with *Terrace v. Thompson*,[2] the Court sustained a slew of "alien land laws"[3] aimed at immigrants of Asian descent.[4] The following year, Congress cut off immigration from Asian countries entirely.[5] A century later, fears reminiscent of the Yellow Peril have resurfaced,[6] sparking a new wave of restrictions.[7] Amid rising geopolitical tensions and the COVID-19 pandemic,[8] "[m]ore than thirty states have introduced . . . legislation restricting Chinese property ownership."[9]

Recently, in *Shen v. Simpson*,[10] the Eleventh Circuit held that rational basis review, not strict scrutiny, applied to the alienage-based restrictions in Florida's Senate Bill 264[11] (SB 264), under either *Terrace* or, alternatively, on the theory that strict scrutiny for alienage is limited to lawful permanent residents (LPRs).[12] *Shen*'s treatment of precedent is internally inconsistent and doctrinally unsound. First, the court strained to revive *Terrace* from "the dustbins of history"[13] despite a

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1 Terrace v. Thompson, 263 U.S. 197, 217 (1923). Collectively known as the *Terrace* Cases, they include, in addition to *Terrace*: *Porterfield v. Webb*, 263 U.S. 225, 229 (1923); *Webb v. O'Brien*, 263 U.S. 313, 322 (1923); and *Frick v. Webb*, 263 U.S. 326, 333 (1923).

2 263 U.S. 197 (1923).

3 *Shen v. Comm'r, Fla. Dep't of Agric. & Consumer Servs.*, 158 F.4th 1227, 1266 (11th Cir. 2025) (Wilson, J., dissenting).

4 *See id.* at 1266–67; *Terrace*, 263 U.S. at 220.

5 *See* Immigration Act of 1924, ch. 190, § 13(c), 43 Stat. 153, 162 (repealed 1952); Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 80–81 (1999).

6 *See, e.g.*, Press Release, *Asian American Hate Incidents Remain Alarmingly High According to Newly Released FBI Hate Crime Data*, ASIAN AMS. ADVANCING JUST. (Aug. 5, 2025), https://www.advancingjustice-aajc.org/press-release/asian-american-hate-incidents-remain-alarmingly-high-according-newly-released-fbi [https://perma.cc/93CK-K2C8] (finding incidents of anti-Asian hate crimes remain "nearly three times higher than" pre-COVID-19 averages); Frank H. Wu, *Peter Thiel and Steve Bannon Fuel a New Yellow Peril over Google and China*, THE GUARDIAN (July 17, 2019, at 13:00 ET), https://www.theguardian.com/world/2019/jul/17/google-peter-thiel-yellow-peril-racism-tech [https://perma.cc/PR8R-493T].

7 *See Shen*, 158 F.4th at 1266–67 (Wilson, J., dissenting).

8 *See, e.g.*, Jacques deLisle, *Pursuing Politics Through Legal Means: U.S. Efforts to Hold China Responsible for COVID-19*, FOREIGN POL'Y RSCH. INST. (May 12, 2020), https://www.fpri.org/article/2020/05/pursuing-politics-through-legal-means-u-s-efforts-to-hold-china-responsible-for-covid-19 [https://perma.cc/S7ZE-96WL].

9 *Shen*, 158 F.4th at 1266 n.2 (Wilson, J., dissenting).

10 158 F.4th 1227 (11th Cir. 2025).

11 FLA. STAT. §§ 692.201–.205 (2025).

12 *Shen*, 158 F.4th at 1254–55.

13 *Id.* at 1269 (Wilson, J., dissenting).

century of intervening precedent.[14] Second, its alternative holding — that strict scrutiny is limited to LPRs — finds no support in Supreme Court precedent, which cuts the other way. Finally, by engineering rational basis either way, *Shen* invites states to enact restrictions that predictably ensnare citizens, LPRs, and entire communities alike.

In 2023, Florida passed SB 264, which restricts land acquisition by persons and entities associated with a "foreign country of concern."[15] SB 264 operates by three key provisions: It bars certain foreign domiciliaries from acquiring property (purchase ban),[16] mandates affidavits certifying compliance with the statute (affidavit requirement),[17] and requires registration of covered transactions (registration requirement).[18] Notably, it singles out the People's Republic of China,[19] barring Chinese domiciliaries from owning any real property interest, "regardless of [that property's] proximity to military installations or critical infrastructure."[20]

In June 2023, Yifan Shen, Yongxin Liu, Zhiming Xu, Xinxi Wang, and Multi-Choice Realty, LLC, filed a pre-enforcement challenge to SB 264 in the Northern District of Florida.[21] The four individual plaintiffs were Chinese nationals who either owned property in Florida or planned to purchase some in the future[22]: Three were on visas and the fourth was seeking asylum.[23] The plaintiffs raised four claims: that SB 264 violated the Equal Protection Clause, constituted a discriminatory housing practice under the Fair Housing Act,[24] was unconstitutionally vague under the Due Process Clause, and was preempted by federal law governing foreign investment.[25]

On August 17, 2023, the district court denied the plaintiffs' motion for a preliminary injunction.[26] Judge Winsor first conceded that SB 264 "facially classif[ies] by alienage,"[27] but concluded that *Terrace* was

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[14] *See id.*

[15] 2023 Fla. Laws 2023–33 (codified at FLA. STAT. § 692.201(3), (4)(a)–(d)). In addition to China, the list of countries includes Russia, Iran, North Korea, Cuba, Venezuela, and Syria. *Id.* § 692.201(3).

[16] *See id.* §§ 692.202–.204. "[N]atural person[s]" domiciled in China with non-tourist visas or asylum status may purchase one residential property of up to two acres that is not within five miles of a military installation. *Id.* § 692.204(2).

[17] *See id.* § 692.204(6)(a).

[18] *See id.* § 692.204(4)(a).

[19] Under SB 264's "two-tiered system for property prohibitions," harsher penalties attach to violations of the China prohibitions than for other countries. Matthew S. Erie, *Property as National Security*, 2024 WIS. L. REV. 255, 302.

[20] Shen v. Simpson, 687 F. Supp. 3d 1219, 1230 (N.D. Fla. 2023). *Compare* 50 U.S.C. § 4565(a)(4)(C)(i) (exempting single-residence transactions from federal foreign investment review), *with* FLA. STAT. § 692.204(1)(a), (3) (no exception for single-unit residences).

[21] *See Shen*, 687 F. Supp. 3d at 1229–30.

[22] *Id.* at 1230.

[23] *Id.*

[24] 42 U.S.C. §§ 3601–3619.

[25] *Shen*, 687 F. Supp. 3d at 1243–46.

[26] *Id.* at 1229.

[27] *Id.* at 1236.

"directly on point" because the statute regulated property ownership.[28] Even if the Supreme Court might "not decide the *Terrace* Cases today the way it did in 1923," Judge Winsor believed lower courts bound by that precedent.[29] Applying rational basis under *Terrace*,[30] he deferred to Florida's asserted interest in protecting agriculture and critical infrastructure under the more lenient standard.[31]

On February 1, 2024, a unanimous panel[32] of the Eleventh Circuit granted a partial injunction pending appeal, temporarily halting enforcement of SB 264 against two of the five plaintiffs.[33] The court found that the plaintiffs had demonstrated that they were likely to succeed on their preemption claims,[34] but did not reach the Equal Protection issue.[35] Concurring, Judge Abudu would have enjoined SB 264 on Equal Protection grounds.[36]

That partial victory proved short-lived. On November 4, 2025, a new panel of the Eleventh Circuit affirmed the district court's denial of a preliminary injunction.[37] Writing for the divided panel, Judge Luck[38] first concluded that none of the plaintiffs had standing to challenge the purchase restriction because they were either domiciled in Florida, and thus outside the statute's scope,[39] or grandfathered in.[40] The court then turned to the remaining provisions.

While the panel found that at least one plaintiff had standing to challenge the affidavit requirement,[41] it concluded that the provision did not discriminate based on alienage as it "applie[d] to every 'buyer of real property' in Florida" regardless of citizenship status.[42] In contrast, the

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[28] *Id.* at 1238.

[29] *Id.* at 1239; *see id.* at 1240 ("This court has no power to declare the *Terrace* Cases 'implicitly overruled' or superseded." (quoting Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2038 (2023))).

[30] *See id.* at 1237.

[31] *See id.* at 1243. Judge Winsor then found the plaintiffs unlikely to succeed on their Fair Housing Act, *id.*, vagueness, *id.* at 1245–46, and preemption claims, *id.* at 1246–50.

[32] The panel was composed of Judges Jordan, Newsom, and Abudu.

[33] *See* Shen v. Simpson, No. 23-12737, 2024 WL 6899210, at *1 (11th Cir. Feb. 1, 2024) (granting motion as to plaintiffs Shen and Xu).

[34] The court found the purchase requirement likely preempted by 50 U.S.C. § 4565, the Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, 132 Stat. 2174, and 31 C.F.R. § 802.701 (2020), but declined to enjoin the affidavit and registration requirements. *See Shen*, 2024 WL 6899210, at *1.

[35] *See Shen*, 2024 WL 6899210, at *1.

[36] *See id.* (Abudu, J., concurring).

[37] *See Shen*, 158 F.4th at 1239.

[38] Judge Luck was joined by Judge Lagoa.

[39] *Shen*, 158 F.4th at 1242, 1244–47. The purchase ban applies when an individual "is domiciled in China" and "not a United States citizen or [LPR]." *Id.* at 1242. Because Shen planned to apply for permanent residency, she was legally domiciled in Florida, not China. *Id.*

[40] *Id.* at 1244. SB 264 applied to purchases made after July 1, 2023. *Id.* (citing FLA. STAT. § 692.204(3) (2025)).

[41] *Id.* at 1249.

[42] *Id.* at 1251 (quoting FLA. STAT. § 692.204(6)(a)).

registration requirement expressly classified by alienage, exempting citizens and LPRs.[43] The question was what level of scrutiny should apply.

Judge Luck offered two grounds for applying rational basis. First, he deemed the registration requirement analogous to the ownership ban upheld in *Terrace*, reasoning that the authority to prohibit noncitizens from owning land necessarily includes "the lesser power to require noncitizens to register their ownership."[44] SB 264 thus fell within *Terrace*'s exception to the general rule that alienage classifications warrant strict scrutiny.[45] Second, even assuming — as the dissent argued[46] — that later cases had "effectively abrogated *Terrace*,"[47] the court reasoned that because SB 264's registration requirement exempted citizens and LPRs, it burdened only "nonimmigrant aliens," who fall outside the general rule.[48] Applying rational basis, Judge Luck deferred to Florida's asserted "food, individual, and national security concerns" as "a 'reasonably conceivable' basis for" the law.[49]

The panel rejected the remaining claims. It refused to credit plaintiffs' claim that SB 264's use of "domicile" served as a proxy for national origin — a suspect classification that would trigger strict scrutiny.[50] On the Fair Housing Act claim, it found that the registration and affidavit requirements were "not discriminatory housing practices."[51] On vagueness, it held that the statute's key terms were either defined with sufficient specificity or constituted established legal terms of art, thereby providing fair notice.[52] And on preemption, the court concluded that SB 264 did not conflict with and "[a]t most . . . complement[ed] the federal foreign investment review regime."[53]

Dissenting, Judge Wilson denounced *Terrace* as "shameful precedent."[54] He would have adhered to "more than a half-century of post-Civil Rights era precedent" and struck down the statute under strict scrutiny.[55]

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[43] *Id.*

[44] *Id.* at 1253.

[45] *Id.*

[46] *See id.* at 1271 (Wilson, J., dissenting).

[47] *Id.* at 1253 (majority opinion).

[48] *See id.* at 1255 (quoting LeClerc v. Webb, 419 F.3d 405, 419 (5th Cir. 2005)).

[49] *See id.* at 1256 (quoting Estrada v. Becker, 917 F.3d 1298, 1311 (11th Cir. 2019)).

[50] Plaintiffs–Appellants' Principal Brief at 9, *Shen*, 158 F.4th 1227 (No. 23-12737) ("SB 264's restrictions based on Chinese 'domicile' are in fact restrictions based on national origin, because 99.9% of people domiciled in China are of Chinese origin."). The panel rejected this proxy argument, reasoning that the proffered data concerned residence and thus did not map precisely onto SB 264's use of "domicile." *Shen*, 158 F.4th at 1251 n.4. Moreover, the evidence had not been submitted below. *Id.*

[51] *Shen*, 158 F.4th at 1260.

[52] *Id.* at 1261–62.

[53] *Id.* at 1265.

[54] *Id.* at 1271 (Wilson, J., dissenting) (quoting Trump v. Hawaii, 138 S. Ct. 2392, 2448 (2018) (Sotomayor, J., dissenting)).

[55] *Id.* at 1269.

Shen's selective treatment of precedent quietly reshaped the equal protection framework for alienage, clearing a path for states to adopt restrictions that sweep well beyond the targeted class. First, by invoking *Terrace*, *Shen* revived a doctrinal relic that the Supreme Court's modern equal protection jurisprudence has effectively displaced. In upholding Washington's alien land statute, *Terrace* declared that "[t]he quality and allegiance of those who own, occupy and use the farm lands within [a state's] borders are matters of highest importance and affect the safety and power of the State itself."[56] The Court's reasoning drew on common law principles tracing back to the English feudal system's linkage of "allegiance with landholding,"[57] under which foreigners had to pledge fealty to the Crown to acquire land.[58]

Despite its influence, *Terrace* started to unravel two decades after it was decided, as the Supreme Court moved toward more rigorous review of alien land laws in the post–World War II period.[59] In *Oyama v. California*,[60] the Court set aside an escheat proceeding against Fred Oyama, a U.S.-born citizen of Japanese descent, under California's Alien Land Law because the statute impermissibly presumed his land ownership invalid based on his father's ancestry.[61] That same Term, the Court invalidated California's denial of commercial fishing licenses to Japanese immigrants in *Takahashi v. Fish & Game Commission*,[62] rejecting the state's claim that it could reserve economic opportunities for

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56 263 U.S. 197, 221 (1923).

57 Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152, 159 (1999).

58 *Id.* at 157, 159, 177, 195 (tracing the doctrine's roots in English common law, its development in the colonies by courts, and its later codification in state statutes).

59 These judicial developments intersected with a parallel shift in positive law. In 1952, Congress removed barriers to naturalization for previously excluded groups by enacting the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.). Afterwards, states could no longer justify property restrictions on the grounds that certain aliens were inherently "ineligible for citizenship." *See* Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 UCLA ASIAN PAC. AM. L.J. 129, 144 (1996). Coupled with evolving social attitudes during the Civil Rights era, these developments prompted states to abandon enforcement or formally repeal their statutes. *See* Nicole Grant, *White Supremacy and the Alien Land Laws of Washington State*, SEATTLE C.R. & LAB. HIST. PROJECT (2008), https://depts.washington.edu/civilr/alien_land_laws.htm [https://perma.cc/6G7X-6HBB]; Leo Yu, *Reviving Exclusion*, 12 TEX. A&M L. REV. 1683, 1689 (2025) ("Legislatures and judiciaries frequently cited America's Cold War-related geopolitical need for allyship when considering abolishing the alien land laws.").

60 332 U.S. 633 (1948).

61 *Id.* at 640, 646–47.

62 334 U.S. 410 (1948).

citizens.[63] While neither decision formally displaced *Terrace*,[64] they repudiated its assumptions of alien loyalty, capability, and civic participation.[65]

The shift culminated in *Graham v. Richardson*,[66] which overhauled the equal protection framework for alienage.[67] There, the Court formally established aliens as a suspect class, emphatically declaring alienage classifications "inherently suspect and subject to close judicial scrutiny."[68] Two years later, in *Sugarman v. Dougall*,[69] the Court invalidated a New York statute restricting civil service employment, holding that discrimination against aliens is permissible only with respect to positions "that go to the heart of representative government."[70] These landmark decisions left little room for *Terrace* to persist as a freestanding exception.

Terrace's factual and constitutional premises have likewise unraveled, undermining any remaining justification for its resurrection. As a practical matter, land ownership is no longer a meaningful proxy for political participation.[71] In an era of investment properties and interstate mobility, property often bears little relationship to membership in the political community.[72] Nor is the decision's state-sovereignty rationale as persuasive today. The federal government's plenary authority over immigration, naturalization, and foreign relations leaves less room for states to define political allegiance through property law.[73] Taken together, *Terrace* appears "overruled in the court of history."[74]

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[63] *Id.* at 417–18, 422.

[64] *See id.* at 422 & nn.8–9; *Oyama*, 332 U.S. at 649 & n.3 (Black, J., concurring).

[65] *See* Rose Cuison Villazor, *Rediscovering* Oyama v. California: *At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 985 (2010) ("*Oyama* helped to turn the tide against ongoing public discrimination directed at the . . . Japanese . . . ."). After these rulings, several state supreme courts invalidated their land laws on equal protection grounds. *See, e.g.*, Fujii v. State, 242 P.2d 617, 630 (Cal. 1952) (finding the alienage classification in *Oyama* operated as a proxy for race and was thus subject "to the most rigid scrutiny," *id.* at 625 (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944))); State v. Oakland, 287 P.2d 39, 42 (Mont. 1955); Namba v. McCourt, 204 P.2d 569, 583 (Or. 1949).

[66] 403 U.S. 365 (1971).

[67] *Id.* at 376.

[68] *Id.* at 372.

[69] 413 U.S. 634 (1973).

[70] *Id.* at 647; *see id.* at 648–49.

[71] *Cf.* Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 367 (1989) (describing the "disestablishment" of property-based suffrage as labor and the economy evolved); Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Slouching Toward Universality: A Brief History of Race, Voting, and Political Participation*, 62 HOW. L.J. 809, 816 (2019) (recounting that in the colonies, "property ownership demonstrated the requisite independence and free will that all voters must have").

[72] *Cf. 2025 Out-of-State Investor Overview*, SUBSTACK: SFR ANALYTICS (Dec. 29, 2025), https://sfranalytics.substack.com/p/2025-out-of-state-investor-overview [https://perma.cc/ZH5X-78BA] (finding "[n]on-resident investors purchased 5.56% of U.S. single-family homes in 2025").

[73] *See* Mathews v. Diaz, 426 U.S. 67, 84 (1976); Hines v. Davidowitz, 312 U.S. 52, 73 (1941). *But see* Erie, *supra* note 19, at 265 (contrasting this "conventional view" of "foreign affairs federalism" with the "countervailing view [that] . . . states retain unenumerated powers, including over foreign affairs").

[74] Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

Second, *Shen*'s alternate holding — that strict scrutiny applies only to LPRs[75] — finds no support in Supreme Court precedent. The panel imported the holding from *Estrada v. Becker*,[76] where the Eleventh Circuit applied rational basis to a Georgia policy that denied university admission to undocumented citizens granted deferred action.[77] *Shen* took that logic further, extending *Estrada* to lawful visa holders. The panel justified its ruling by characterizing LPRs as "virtual citizens," who lack the political capacity to protect their rights through ordinary democratic processes.[78] Nonimmigrant aliens, by contrast, are "subject to a variety of restrictions"[79] given "their temporary connection to this country."[80] Strict scrutiny protection is just another thing they must do without.

Shen's LPR-only rule inverts *Graham*'s core logic: Whereas *Graham* grounded strict scrutiny in the political marginalization of noncitizens,[81] *Shen* treats proximity to citizenship as a reason to withhold protection from non-LPRs,[82] despite their greater vulnerability.[83] Moreover, ever since the Supreme Court declared aliens a suspect class, it has never limited that protection to LPRs.[84] On the contrary, outside the context of *Sugarman* (political functions)[85] and *Terrace* (land ownership),[86] the Court has never relegated non-LPRs to ordinary rational basis review.[87] At a minimum, it has applied some form of intermediate scrutiny, and on facts strikingly similar to *Estrada*.

Plyler v. Doe[88] is case in point. There, the Court applied heightened rationality review to strike down a Texas statute that prohibited

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[75] *See Shen*, 158 F.4th at 1254–55.

[76] 917 F.3d 1298 (11th Cir. 2019).

[77] *Id.* at 1310–11. In so holding, the Eleventh Circuit joined the Fifth and Sixth Circuits in limiting *Graham* strict scrutiny to classifications that burden LPRs. *See* LeClerc v. Webb, 419 F.3d 405, 416, 425–26 (5th Cir. 2005) (applying rational basis to a Louisiana law prohibiting "nonimmigrant aliens," *id.* at 425, from sitting for the state bar); League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 533 (6th Cir. 2007) (upholding a Tennessee law that excluded nonimmigrant aliens from obtaining driver's licenses because "[LPRs] are the only subclass of aliens who have been treated as a suspect class"). Finding these attempts to narrow *Graham* to "resident aliens" unpersuasive, the Second Circuit created a circuit split in *Dandamudi v. Tisch*, 686 F.3d 66, 74 (2d Cir. 2012) (applying strict scrutiny to strike down a New York bar admission rule that excluded nonimmigrant aliens).

[78] *Shen*, 158 F.4th at 1255 (quoting *LeClerc*, 419 F.3d at 417).

[79] *Id.* (citing *LeClerc*, 419 F.3d at 419).

[80] *Id.* (quoting *LeClerc*, 419 F.3d at 417).

[81] *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) ("Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938))).

[82] *See Shen*, 158 F.4th at 1255.

[83] *See* Recent Case, LeClerc v. Webb, 419 F.3d 405 (5th Cir. 2005) 119 HARV. L. REV. 669, 674 (2005).

[84] *See* Dandamudi v. Tisch, 686 F.3d 66, 74–75 (2d Cir. 2012).

[85] *See* Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

[86] *See* Terrace v. Thompson, 263 U.S. 197, 220 (1923).

[87] *See Dandamudi*, 686 F.3d at 74 (holding that state laws that discriminate against "aliens are subject to strict scrutiny unless they fall within two narrow exceptions").

[88] 457 U.S. 202 (1982).

undocumented children from attending public school.[89] While *Plyler* involved unique factors — children, whose legal status is largely beyond their control, and education, a core civic interest[90] — the case demonstrates a broader principle: Constitutional scrutiny does not collapse entirely into rational basis as individuals move further from formal political membership. Indeed, *Plyler* is the sole instance where the Supreme Court applied less than strict scrutiny to an alienage classification, yet the *Shen* court does not cite it at all.[91] But if undocumented aliens warrant heightened review under *Plyler*, why do the *Shen* plaintiffs — who have lawful presence and work or student authorization — receive only rational basis?

This disparity reflects *Shen*'s selective treatment of precedent. The court insisted that it was bound to follow *Terrace*, however "'moth-eaten' [its] foundation,"[92] because only the Supreme Court may "bury[] its own decisions."[93] Yet, it showed little hesitation in sidelining key equal protection cases to reach the same result. By rigidly adhering to outdated precedent while narrowing modern precedent from below,[94] *Shen* effectively reshapes the governing framework without acknowledging that it is doing so.

Finally, *Shen*'s insistence on rational basis invites states to enact sweeping restrictions while evading judicial scrutiny. This approach is especially destabilizing when states invoke national security because such interests are capacious and difficult to disprove.[95] Rationality review ensures that courts will rarely question whether such exclusions

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[89] *See id.* at 205, 230; *see also id.* at 238 (Powell, J., concurring) ("Our review in a case such as these is properly heightened.").

[90] *See id.* at 220–21 (majority opinion).

[91] The *Estrada* court at least acknowledged the tension of its holding with *Plyler* but distinguished *Plyler* on its facts, describing it as involving "unique circumstances" specific to the education of undocumented children. *See* Estrada v. Becker, 917 F.3d 1298, 1309 n.13 (11th Cir. 2019) (quoting Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 459 (1988)). Similarly, the Fifth Circuit "characteriz[ed] the *Plyler* standard as a '*sui generis* level of rational basis review.'" Szymakowski v. Utah High Sch. Activities Ass'n, 756 F. Supp. 3d 1238, 1252 (D. Utah 2024) (quoting LeClerc v. Webb, 419 F.3d 405, 416 (5th Cir. 2005)).

[92] *Shen*, 158 F.4th at 1253 (quoting Evans v. Sec'y, Fla. Dep't of Corr., 699 F.3d 1249, 1263 (11th Cir. 2012)).

[93] *Id.* (quoting Jefferson County v. Acker, 210 F.3d 1317, 1320 (11th Cir. 2000)).

[94] *See generally* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016) (describing the process by which lower courts reshape Supreme Court precedent through incremental distinction).

[95] *See, e.g.*, Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1365, 1420 (2009); Erie, *supra* note 19, at 269–70.

are necessary, narrowly tailored, or free from animus.[96] The risk is legitimizing the same nativist fears that historically animated alien land laws.[97]

SB 264 illustrates this danger. Although public messaging and the legislative record reflected a singular focus on China,[98] the *Shen* majority refused to credit racist undertones as "a motivating factor"[99] for the legislation. During state Senate hearings, bill sponsor Jay Collins disparaged the bill's target as "people who just don't believe in the American dream and the American way of life[,] . . . our thoughts or ideals[,] . . . and [our] principles."[100] Representative Daniel Alvarez joked that the disappearance of Kmart was "probably the Chinese fault too."[101] These remarks echo a familiar trope.[102] By equating "Asians" with foreign "agents," SB 264 "exacerbates long held perceptions of Asian Americans as perpetual foreigners, who hold loyalty to their ancestral homelands rather than the United States."[103] Nominally framed as a national security measure, SB 264 shields cultural and ideological suspicion from scrutiny.[104]

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[96] *See* Erie, *supra* note 19, at 270; *cf.* Alexander v. Sandoval, 532 U.S. 275, 306 n.13 (2001) (Stevens, J., dissenting) ("Many policies whose very intent is to discriminate are framed in a race-neutral manner. It is often difficult to obtain direct evidence of this motivating animus.").

[97] *See* Plaintiffs–Appellants' Principal Brief, *supra* note 50, at 54 ("SB 264 is explicitly based upon and perpetuates a malignant stereotype: that Chinese nationals are fundamentally un-American and untrustworthy, and thus are appropriately excluded from being able to purchase their home of choice in America. The law also sows widespread housing discrimination because it threatens sellers with criminal penalties for transacting with Chinese persons . . . .").

[98] *See, e.g.*, Ryan Saavedra, *Ron DeSantis Takes on the Chinese Communist Party by Signing 3 Bills into Law*, DAILY WIRE (May 9, 2023), https://www.dailywire.com/news/ron-desantis-takes-on-the-chinese-communist-party-by-signing-3-bills-into-law [https://perma.cc/R975-J625] (quoting Governor DeSantis touting SB 264 as part of "the strongest legislation in the nation to date to counteract the influence of the United States' greatest economic, strategic, and security threat — the Chinese Communist Party"); PROFESSIONAL STAFF OF THE COMM. ON RULES, THE FLORIDA SENATE BILL ANALYSIS AND FISCAL IMPACT STATEMENT 3–4 (2023) (spotlighting Chinese cargo cranes, a Chinese spy balloon, and the TikTok ban as evidence of espionage threats).

[99] Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

[100] Complaint ¶ 65, Nat'l Fair Hous. All., Inc. v. Kelly, No. 24-cv-21749 (S.D. Fla. filed May 6, 2024).

[101] *House in Session — May 3, 2023*, 2023 Leg., Reg. Sess., at 2:51:01 (Fla. 2023), https://m.myfloridahouse.gov/VideoPlayer.aspx?eventID=8955.

[102] *See* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 595 (1889) ("[Chinese immigrants] remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people . . . ."); Fong Yue Ting v. United States, 149 U.S. 698, 717 (1893) (explaining the government's belief that "Chinese laborers . . . unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests").

[103] Edgar Chen, *With New "Alien Land Laws" Asian Immigrants Are Once Again Targeted by Real Estate Bans*, JUST SEC. (May 26, 2023), https://www.justsecurity.org/86722/with-new-alien-land-laws-asian-immigrants-are-once-again-targeted-by-real-estate-bans/ [https://perma.cc/5MJU-J28X].

[104] *See* Yu, *supra* note 59, at 1715 ("No state has been able to provide any incident in which foreign ownership compromised national security in their states. States often treat the mere *existence* of any foreign ownership as evidence of a national security threat, especially when the owner is Chinese.").

Shen's LPR carve-out also produces perverse incentives. A state need only exempt LPRs to avoid heightened review, even when the law's impact extends far beyond the targeted group.[105] On the ground, SB 264 has sown widespread confusion. Faced with a complex statute carrying criminal penalties,[106] sellers and real estate agents have reportedly avoided transactions with Asian clients out of an abundance of caution.[107] Advocacy groups likewise warn that the law will "cast an undue burden of suspicion on anyone . . . whose name sounds remotely Asian."[108] By exempting LPRs, SB 264 feigns neutrality while operating as broadly as a law targeting the entire Asian community — all without triggering heightened scrutiny.

This practical reality underscores the broader stakes of *Shen*. The panel's selective application of precedent quietly transforms *Graham*'s protection for aliens into a rule about immigration status. *Graham* is reduced to "resident aliens"[109] — a term the Court itself did not use — *Terrace* is resurrected; *Plyler* forgotten. Century-old precedent must be followed to the letter, while inconvenient modern precedent may be distinguished away. Either path leads to rational basis.

Many non-LPRs, including long-term visa holders, refugees, and parolees, live in the United States for years, pay taxes, and are deeply integrated into local economies,[110] yet under *Shen* they are treated no differently than tourists under rational basis review. The cost is not merely doctrinal incoherence but the revival of assumptions about alienage and belonging that the modern equal protection framework was designed to displace.[111]

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[105] Professor Matthew Erie has observed that anti-China legislation is driven not just by "populist nativism," Erie, *supra* note 19, at 267, but by corporate lobbying, as U.S. firms push for restrictions that serve their competitive interests, *id.* at 296–97.

[106] *See* FLA. STAT. § 692.204(8), (9) (2025).

[107] *See* Complaint, *supra* note 100, ¶¶ 249–52 (explaining how one real estate firm "lost over 40 prospective clients" and fired "two real estate agents" due to insufficient work because it "had to turn away several prospective Chinese buyers over fear of how the law will impact them," *id.* ¶ 252); Frank Wu, *'Can We Move?' Chinese Residents Are Fearful over New US Laws Banning Property Ownership*, THE GUARDIAN (July 26, 2023, at 07:13 ET), https://www.theguardian.com/us-news/2023/jul/26/florida-law-discrimination-china-immigrant-property-purchase [https://perma.cc/9XQ6-TNP2].

[108] Press Release, ACLU of Fla., *Chinese Immigrants Sue Florida over Unconstitutional and Discriminatory Law Banning Them from Buying Land*, ACLU (May 22, 2023, at 15:00 ET), https://www.aclu.org/press-releases/chinese-immigrants-sue-florida-over-unconstitutional-and-discriminatory-law-banning-them-from-buying-land [https://perma.cc/X7SL-5B7P].

[109] *Shen*, 158 F.4th at 1254.

[110] *See* NAT'L ACADS. OF SCIS., ENG'G & MED., THE INTEGRATION OF IMMIGRANTS INTO AMERICAN SOCIETY 93–94 (Mary C. Waters & Marisa Gerstein Pineau eds., 2015); CARL DAVIS ET AL., INST. ON TAX'N & ECON. POL'Y, TAX PAYMENTS BY UNDOCUMENTED IMMIGRANTS 5 (2024).

[111] *Shen*, 158 F.4th at 1271 (Wilson, J., dissenting) ("[T]he premises on which the *Terrace* cases rest — deference to states' generalizations about its own 'power' and the need for 'safety' from outsiders to support discriminatory policies — have been 'overruled in the court of history.'" (quoting Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018))).