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ALIENATION: CONGRESSIONAL AUTHORIZATION OF STATE DISCRIMINATION AGAINST IMMIGRANTS

“You shall not [harass] or oppress an alien, for you were once aliens yourselves.” *Exodus 22:20*

I. INTRODUCTION

Recent anti-immigration legislation illustrates the tension between the federal and state governments over the distribution of power to regulate immigration in the United States.¹ In the era before the federal government took control of immigration, the states were primarily responsible for its regulation.² Because of a perceived abuse of authority, however, the Supreme Court began denying the states the power to regulate immigration.³ Today the federal government exclusively controls the admission of aliens into America, and the states must accept the decisions of the federal government in admitting these legitimate residents.⁴ This loss of control over the entry of immigrants has led some states to vent their frustrations through legislative action against aliens.⁵ Attempting to regulate immigration by discrimination against aliens, states may be crossing important federalism boundaries and infringing on the rights of legal resident aliens at the same time. State exclusion of aliens—both legal and illegal—from government benefits raises numerous issues of policy, law, and justice.

The method of analyzing laws that discriminate against aliens, however, remains unclear. In some cases, courts have combined ele-

1. See Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1452 (1995) [hereinafter Neuman, *Aliens as Outlaws*].

2. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1834 (1993).

3. See Neuman, *Aliens as Outlaws*, *supra* note 1, at 1436.

4. See *Graham v. Richardson*, 403 U.S. 365, 376-80 (1971); *Hines v. Davidowitz*, 312 U.S. 52, 62-67 (1941).

5. See Neuman, *Aliens as Outlaws*, *supra* note 1, at 1452.

ments of a Fourteenth Amendment equal protection test with a consideration of the plenary nature of Congress's power over immigration.⁶ In other cases, courts have applied a simple preemption analysis to determine if the law discriminating against aliens is preempted by an existing or possible federal statute or statutory scheme.⁷ The courts have yet to articulate a controlling constitutional doctrine upon which alienage cases must be decided. This ambiguity has led to confusion over which standard of review applies and what the respective capabilities of the state and federal governments are in discriminating against immigrants. Determination of the appropriate doctrinal basis is critically important because each produces a different result.

Thus, courts use three approaches in analyzing alienage cases—federal statutory authorization, federalism, and equal protection. This Comment argues that of the three approaches, equal protection should be the preferred method of analysis. If state discrimination against aliens were authorized through specific federal legislation, then the states would be allowed to discriminate against aliens under the authority of the federal government.⁸ Likewise, federal authorization of state discrimination against aliens raises little, if any, federalism concerns for the states. Either of these two doctrines requires a court to review the discriminating state law to determine if it conflicts with federal regulation of immigration.⁹ Using principles of equal protection, however, Congress could not authorize the states to discriminate against aliens because such an authorization would violate the Fourteenth Amendment.¹⁰ Because alien residents lack access to the political process, they are vulnerable to governmental ignorance of their concerns and are defenseless against mistreatment. By using equal protection as the underlying doctrinal basis, the courts would ensure that the states will not assume undeserved broad discretion in discriminating against immigrants.

This Comment discusses Congress's ability to authorize the states to discriminate against aliens. Part II explains the trend of nativism and its effects on legislation discriminating against immigrants. This Part asks whether state laws influenced by this trend are consti-

6. See *Graham*, 403 U.S. at 370-83; *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 412-22 (1948); *Truax v. Raich*, 239 U.S. 33, 35-43 (1915).

7. See *De Canas v. Bica*, 424 U.S. 351, 354-63 (1976).

8. See discussion *infra* Part V.A.

9. See discussion *infra* Part V.B.

10. See discussion *infra* Part V.C.

tutional and if not, under what doctrine they must be analyzed. Part III discusses the derivation of federal power to discriminate against aliens and to regulate immigration. Part IV then considers the states' power to discriminate against immigrants. Finally, Part V analyzes the ability of Congress to delegate power to the states to discriminate. It explores the three competing doctrinal bases underlying such power: federal statutory authorization, federalism, and equal protection. This Comment posits that an equal protection analysis is the preferred method by which to interpret alienage discrimination cases and that Congress cannot authorize the states to act in ways which violate the Fourteenth Amendment.

II. NATIVISM: IMMIGRANTS AS SCAPEGOATS

Nativism is defined as "intense opposition to an internal minority on the ground of its foreign (i.e., 'un-American') connections."¹¹ The undeniable history of nativism in America¹² demonstrates the need for heightened protection¹³ of alienage classifications at the state level. Under the doctrine of nativism, members of minorities become the "enemies of a distinctively American way of life."¹⁴ A recurring theme in American history is the resurgence of nativism during times of great national stress.¹⁵ For instance, the historical cycle of nativism roughly correlates with the fluctuation of a market economy.¹⁶ During times of economic and political instability, the states manifest their anxieties through hostile legislation against immigrants.¹⁷

Historically, nativist sentiment has been directed at the leading immigrant group of the day, such as the Irish in the early and mid-1800s, the Chinese in the late 1800s, and the Mexicans throughout

11. JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* 4 (2d ed. 1988).

12. See Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 277-78 (1992).

13. Groups considered to be "discrete and insular minorities" receive heightened judicial review. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

14. HIGHAM, *supra* note 11, at 4.

15. See Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. REV. 1509, 1511 (1995) [hereinafter Johnson, *Public Benefits and Immigration*].

16. See *id.*

17. See Neuman, *Aliens as Outlaws*, *supra* note 1, at 1437.

much of the twentieth century.¹⁸ The Irish were targeted because of their perceived political and economic threat to society.¹⁹ The desire to protect white labor against the competition of the Chinese²⁰ motivated the passage of the Chinese Exclusion Acts.²¹ In addition, especially in the West, nativist sentiment was aimed at Mexican immigrants because of their perceived threat to the economy and the labor force.²² During the 1930s, in response to the Depression, Mexican immigrants were subjected to "Operation Wetback," a system by which the Immigration and Naturalization Service (INS) immediately deported any alleged immigrant suspected of being illegal.²³ These historic situations illustrate the government's response to the theme of nativism in American history—defining "American identity through the law the using components of ethnicity."²⁴

Consistent with historical precedent, there have been many recent governmental actions against both legal and illegal aliens, fueled by feelings of nativism.²⁵ California's Proposition 187 (Prop. 187)²⁶ is one example of proposed state discrimination against aliens. The legislation denies basic benefits to immigrants and "imposes a sys-

18. See Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 635 (1995) [hereinafter Johnson, *An Essay on Immigration Politics*].

19. See HIGHAM, *supra* note 11, at 26.

20. See Neuman, *Aliens as Outlaws*, *supra* note 1, at 1436.

21. Act of May 6, 1882, Ch. 126, 22 Stat. 58 (1882); see GEORGE BROWN TINDALL & DAVID E. SHI, *AMERICA: A NARRATIVE HISTORY* 861, 894-95 (4th ed. 1996). In 1882 Congress voted to prohibit Chinese immigration for 10 years. The legislation received overwhelming support. Because the number of Asian laborers was increasing the tension between workers and management in the American economy, legislators reasoned that the gate to Chinese immigration must be closed. See *id.* at 895.

22. See Johnson, *An Essay on Immigration Politics*, *supra* note 18, at 633; see generally TINDALL & SHI, *supra* note 21, at 1561-65 (discussing new nativism).

23. See Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 274 (1996-1997); see also MY FAMILY (American Zoetrope 1995) (movie which graphically portrays the indiscretion of the INS in forcefully deporting those suspected of being illegal).

24. Perea, *supra* note 12, at 277.

25. Motivated by feelings of economic and political instability, politicians and leaders have capitalized on anti-immigrant sentiment and have made aliens the scapegoats. See Johnson, *Public Benefits and Immigration*, *supra* note 15, at 1511-13. Economic and cultural anxiety today results from economic change and represents residual affects from the recession in the early 1990s. See *id.* There has been strong sentiment among the middle class over the last fifteen years that its economic status is tenuous. See *id.*

26. 1994 Cal. Legis. Serv. Prop. 187 (West).

tematic program for driving illegal aliens out of California.²⁷ It encourages aliens to deport themselves by depriving them of the economic and social resources necessary for survival: protection against crime and fire; rescue from floods and earthquakes; emergency medical treatment; health care; and inoculation against epidemics.²⁸ In addition, Prop. 187 makes children of illegal aliens ineligible for child protective services and women ineligible for social services, such as prenatal care and domestic violence centers' counseling and protection.²⁹ Using its federal preemption powers, a federal court recently declared Prop. 187 unconstitutional.³⁰ Accordingly, California is currently prohibited from acting on Prop. 187 because federal law supersedes the state law by virtue of the Supremacy Clause.³¹ Proponents of the legislation, however, are still actively working to put it into effect through other legal means.³²

Another example of recent governmental efforts to discriminate against aliens is the Welfare Reform Act (Welfare Act)³³ passed by Congress and signed by President Clinton on August 22, 1996.³⁴ The Welfare Act encourages states to discriminate against aliens by declaring that state and local governments may only continue aid to immigrants if states pass new laws specifically authorizing such assistance.³⁵ The federal legislation permits states to deny benefits such as

27. Neuman, *Aliens as Outlaws*, *supra* note 1, at 1445.

28. *See id.* at 1446.

29. *See id.* at 1446-47.

30. *See League of United Latin Am. Citizens v. Wilson*, No. CV 94-7569 MRP, 1997 U.S. Dist. LEXIS 18776, at *48 (C.D. Cal. Nov. 14, 1997); *see also* Patrick J. McDonnell, *Judges Final Order Kills Key Points of Prop. 187*, L.A. TIMES, Mar. 19, 1998, at A3 (discussing the unenforceability of Prop. 187 based on preemption principles). "California is powerless to enact its own legislative scheme to regulate immigration." *Id.*

31. *See* U.S. CONST. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

32. A federal judge ruled that California can use the nation's new welfare law to implement cuts in aid to illegal immigrants that were previously banned. *See* Patrick J. McDonnell & Virginia Ellis, *Welfare Law Will Allow Wilson to Cut Immigrant Aid*, L.A. TIMES, Nov. 2, 1996, at A1.

33. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

34. *See id.*

35. *See* Patrick J. McDonnell, *Legal Advocacy Groups Sue over Food Stamp*

food stamps to both legal and illegal aliens.³⁶ Therefore, the federal legislation allows states to argue that Congress is directing them to deny benefits to immigrants.

The Immigration in the National Interest Act (Act)³⁷ is yet another recent example of congressional efforts authorizing states to discriminate against aliens. The Act proposes increased efforts to strengthen border patrols and deportation.³⁸ As part of the legislation, Representative Elton Gallegly³⁹ proposed an amendment that authorizes states to deny public education benefits to aliens unlawfully present in the United States.⁴⁰ The amendment was later dropped from the Act but is presently being proposed as a separate bill.⁴¹

Are these recent examples of governmental efforts to discriminate against aliens constitutional? Who has the power to regulate immigration in this manner? If these laws are unconstitutional, under what doctrinal basis must they be analyzed? The next two Parts discuss which layer of government has the power to enact such laws.

III. FEDERAL DISCRIMINATION AGAINST ALIENS

The Constitution grants to the federal government the authority to create "uniform Rules of Naturalization,"⁴² and thereby the power to regulate immigration.⁴³ Immigration is exclusively the subject of federal power, and Congress has complete control over the admission of aliens to this country.⁴⁴ Therefore, "[t]he corollary of this plenary and exclusive federal power is that states are powerless to regulate immigration."⁴⁵

Changes, L.A. TIMES, Oct. 18, 1996, at A3.

36. *See id.*

37. 8 U.S.C. §§ 1101-1503 (1996); *see* Marc Lacey, *Conferees OK Bill to Crack Down on Illegal Immigrants*, L.A. TIMES, Sept. 25, 1996, at A1.

38. 8 U.S.C. §§ 1101-1503 (1996).

39. H-CA (R- Simi Valley).

40. *See* 142 CONG. REC. H2475 (daily ed. Mar. 20, 1996) (statement of Rep. Gallegly).

41. *See* Lacey, *supra* note 37, at A1.

42. U.S. CONST. art. I, § 8, cl. 4.

43. *See* *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875). Federal power to regulate immigration is also derived from the Commerce Clause and foreign affairs powers.

44. *See* *De Canas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power.").

45. Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L. Q. 939, 944-45 (1995); *see also* *Unenforced Boundaries: Illegal Immigration and the Limits of Judicial Federalism*, 108 HARV. L. REV. 1643, 1644-45 (1995) (noting that states have no power to control the influx of illegal

Because Congress can exercise complete control over immigration regulation, separation of powers concerns dictate the use of the lowest standard of judicial review for federal immigration laws.⁴⁶ The courts recognize their inability to differentiate between federal immigration policy and federal policy towards specific groups of immigrants, and apply a rational basis standard of judicial review to all actions the federal government takes regarding aliens.⁴⁷ The federal government is given more discretion than the states to discriminate against immigrants because of its role in protecting the nation's borders, regulating commerce, and controlling foreign affairs.⁴⁸ Thus, the courts have a limited function in reviewing any federal congressional action discriminating against immigrants.⁴⁹

A. *Plenary Powers Doctrine*

Based upon Congress's complete power over immigration and the reduced judicial standard of review—rational basis—given to federal statutes, special judicial deference is given to Congress regarding immigration law.⁵⁰ The Court has described this special judicial deference doctrine as Congress's "plenary power" to regulate immigration.⁵¹ The degree of deference the Supreme Court has given to Congress has varied. In the beginning, the concept of plenary power was viewed to be absolute, giving the courts virtually no power

immigrants) [hereinafter *Unenforced Boundaries*]. Despite its exclusive control over immigration, the federal government has generally been unwilling to assist states in defraying the costs of immigration. See *Unenforced Boundaries, supra*, at 1645. A flaw in state/federal relations regarding immigration is the ambiguous line of political and economic accountability. See *id.* at 1648. Lax enforcement of federal immigration prohibitions has created a huge economic burden on states. See *id.* Economic pressures have obligated states to allocate limited state resources to deal with the problem. See *id.* Therefore, voters, unaware of the state/federal dynamic at the heart of such economic difficulty, may perceive state and local representatives as unresponsive to popular will. See *id.* Dissatisfaction directed at state and local officials is more properly directed to the federal government. See *id.*

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

47. See *id.*; see also Corinna Barrett Lain, *Outraged over Immigration: Rethinking Doctrinal Responses*, 82 VA. L. REV. 987, 1005-19 (1996) ("[T]he Supreme Court cannot always distinguish between federal alien classifications designed to further immigration policy and those that are not, so it prefers to avoid the inquiry altogether.").

48. See *Mathews*, 426 U.S. at 81 n.17.

49. See *id.*

50. See Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 925-26 (1995); *infra* notes 102-05 and accompanying text.

51. See Legomsky, *supra* note 50, at 925-26.

to review the constitutional validity of the federal government's actions.⁵² However, in time, the Court has broadened its view and has established a larger, albeit limited, judicial role in assessing the constitutionality of federal immigration laws.⁵³

The Supreme Court has employed several justifications of its special judicial restraint in immigration cases.⁵⁴ For example, the Court has suggested that the constitutionality of immigration is inherently a political question because immigration is conjoined with foreign affairs.⁵⁵ Another theory offered by the Court is that because an alien is merely a "guest" asserting a "privilege," rather than a "member" asserting a "right," allowing aliens to assert constitutional rights would give them an unfair advantage over United States citizens.⁵⁶ A further justification is that aliens' lack of allegiance to our nation rightfully corresponds with lessened constitutional protection.⁵⁷ In addition, the Court has reasoned that the federal power to regulate immigration is inherent in national sovereignty and is therefore protected from normal constitutional restrictions.⁵⁸ A final theory offered by the Court to justify the plenary power given to Congress is *stare decisis*.⁵⁹ The Court has also recognized that the principle of plenary power given to the federal government to control immigration has become too indelible in precedent to be overruled.⁶⁰ Regardless of the theories behind the special deference given to Congress in immigration law, the plenary powers doctrine is firmly established and is a necessary consideration for courts evaluating

52. *See id.*; *see also* *Lees v. United States*, 150 U.S. 476, 480 (1893) (stating that power to exclude aliens is "absolute" and is "not open to challenge in the courts").

53. *See Legomsky, supra* note 50, at 926; *see also Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (stating that immigration legislation is "largely immune from judicial inquiry or interference").

54. *See Legomsky, supra* note 50, at 927-28.

55. *See id.* at 927; *see also Reno v. Flores*, 507 U.S. 292, 305 (1993) (describing alien regulation as "committed to the political branches of the Federal Government"). The political question doctrine refers to the Supreme Court's restraint in deciding matters which it concludes are committed by the Constitution to other branches of government for decision. *See Baker v. Carr*, 369 U.S. 186, 210-11 (1962).

56. *See Legomsky, supra* note 50, at 927-28.

57. *See id.* at 928.

58. *See id.*

59. *See id.*

60. *See id.*; *see also Galvan v. Press*, 347 U.S. 522, 531-32 (1954) (stating that "[w]e are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors . . . and must therefore under our constitutional system recognize congressional power in dealing with aliens.").

sensitive policy decisions.⁶¹

B. Federal Discrimination Cases

*Mathews v. Diaz*⁶² illustrates the need for flexibility in national policy choices and demonstrates why decisions regarding immigration are more appropriately left to either the legislative or the executive branches, rather than to the judiciary.⁶³ In *Mathews* the Court held that Congress may condition an alien's eligibility for participation in a federal medical insurance program on continuous residence in the United States for five years and on admission for permanent residence.⁶⁴ The Court's holding hinged upon the conclusions reached in *Graham v. Richardson*,⁶⁵ where the Court held that the state's denial of welfare benefits to resident aliens not satisfying residency requirements encroached upon the exclusive federal power over the regulation of immigrants.⁶⁶ The *Mathews* Court used this reasoning in determining that "it is the business of the political branches of the [f]ederal [g]overnment, rather than that of either the [s]tates or the [f]ederal [j]udiciary, to regulate the conditions of entry and residence of aliens."⁶⁷

Mathews emphasized that although there are millions of aliens within the jurisdiction of the United States, each one of these persons is guaranteed the Fifth and Fourteenth Amendment protections against deprivation of life, liberty, and property without due process of law.⁶⁸ Even a person "whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."⁶⁹ However, the acknowledgment that all persons, including aliens, are protected by the Constitution, does not imply that all aliens

61. *But see* Legomsky, *supra* note 50, at 936-37. Some scholars predict a weakening of the special judicial deference to Congress in immigration. *See id.* at 936. Legomsky envisions the emergence of a weaker version of the plenary powers doctrine. He believes that specific exceptions will be created, other constitutional challenges will emerge, and that the Court will begin to make less frequent references to the plenary nature of Congress's power. *See id.* at 937.

62. 426 U.S. 67 (1976).

63. *See id.* at 81.

64. *See id.* at 69.

65. 403 U.S. 365 (1971).

66. *See id.* at 378; discussion *infra* Part IV.A.

67. *Mathews*, 426 U.S. at 84.

68. *See* U.S. CONST. amend. V; U.S. CONST. amend. xiv, § 1; *Mathews*, 403 U.S. at 77.

69. *Mathews*, 426 U.S. at 77.

are entitled to all the advantages of citizenship.⁷⁰

The federal government has the discretion to create distinctions between citizens and aliens as part of the exercise of its broad power over immigration regulation.⁷¹ "The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.'"⁷² As long as Congress satisfies the rational basis standard of review—assuring that the distinctions are not wholly irrational—then Congress can impose whatever restrictions it desires on alienage.⁷³

Even if legislation satisfies rational basis review, the inevitable result of drawing classifications is that arbitrary and harsh consequences will occur.⁷⁴ The plenary powers doctrine, however, gives Congress substantial leeway in creating policy to protect the borders and regulate foreign affairs. The consequence of a lower standard of review regarding alienage classifications for the federal government is that rational lines will be drawn between citizens and aliens, with great deference given to Congress.

IV. STATE DISCRIMINATION AGAINST ALIENS

Because Congress's power over immigration is so broad and plenary, any state law attempting to regulate in this area must not be preempted. Where a state law discriminating against aliens is not preempted, that law must also pass scrutiny under the Fourteenth Amendment. This Part discusses the scope of states' power to regulate immigration and, as a corollary, discriminate against aliens.

A. Federal Preemption of State Laws

Based upon the Supremacy Clause, the federal government can establish laws that the states are required to follow.⁷⁵ Federal law supersedes any conflicting state laws. State and federal laws often

70. *See id.* at 78.

71. *See id.* at 79-80.

72. *Id.* at 80.

73. *See id.* at 82-83.

74. *See id.* at 83.

75. *See* U.S. CONST. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

conflict for one of two reasons. First, it may be impossible to obey the state and federal regulations simultaneously if the language of the statutes is in direct opposition.⁷⁶ Second, even if the federal and state regulations do not conflict on their face, the objectives behind the two regulations may be inconsistent.⁷⁷ State regulations can therefore be invalidated upon this basis as well.⁷⁸ The problems of conflict between federal and state regulations most often arise where there is a need to balance national and local concerns.⁷⁹

States may not regulate immigration or conditions of residency for aliens when federal laws preempt them.⁸⁰ Federal authority to regulate the status of aliens derives from various constitutional and inherently sovereign sources, including the power “[t]o establish [a] uniform Rule of Naturalization,”⁸¹ the power to regulate commerce,⁸² and broad authority over foreign affairs.⁸³ The federal government possesses the preeminent role of regulating aliens within our borders.⁸⁴

In *Graham v. Richardson* the Court prevented a state from conditioning welfare benefits on alien residency requirements under the auspices of federal preemption and equal protection principles.⁸⁵ The Court reasoned that the federal government has broad constitutional power to admit aliens and regulate the terms and conditions of their

76. See, e.g., *McDermott v. Wisconsin*, 228 U.S. 115 (1913) (invalidating Wisconsin law which conflicted with the Federal Food and Drug Act).

77. See *Manheim*, *supra* note 45, at 944-45 n.35.

78. See *Hillsborough County v. Automated Med. Labs. Inc.*, 471 U.S. 707, 713 (1985). State and federal law conflict when “‘compliance with both federal and state regulations is a physical impossibility’ . . . or when state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’” *Id.* For a general review of the preemption doctrine, see *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 281-83 (1987).

79. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52 (1941) (balancing the state’s need to secure information in regard to aliens within its own boundaries and the federal government’s responsibilities in the field of international affairs).

80. See *Graham v. Richardson*, 403 U.S. 365, 379 (1971).

81. U.S. CONST. art. I, § 8, cl. 4.

82. *Id.* cl. 3.

83. See *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

84. See *Harisiades*, 342 U.S. at 588-89; *Hines*, 312 U.S. at 62 (holding that federal power in the field of foreign affairs, including power over immigration, is supreme); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).

85. See *Graham*, 403 U.S. at 376, 382-83. The Arizona and Pennsylvania laws at issue imposed minimum residency requirements on the welfare eligibility of aliens, but not of citizens. See *id.* at 367-68.

stay and naturalization.⁸⁶ "State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the [f]ederal [g]overnment."⁸⁷ Where the federal government has established a scheme of regulation, states cannot act inconsistently with congressional intent or interfere with federal law.⁸⁸ Furthermore, "[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid."⁸⁹

In addition to invalidating the state law on federal preemption grounds, the *Graham* Court also considered equal protection principles.⁹⁰ Although the federal government has broad constitutional power to regulate immigration, "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause."⁹¹ In analyzing alienage cases on both principles of preemption and equal protection, the doctrinal basis behind these cases remains unclear.⁹²

Although the Court's analysis in *Graham* was unclear, an equal protection approach is the better method of analysis. If alienage cases are instead based on principles of preemption or federalism,

86. See *id.* at 382; see also *Harisiades*, 342 U.S. at 587 (upholding the deportation of a legally resident alien because of his membership in the Communist Party due to Congress's wide discretion in this area); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (invalidating a state statute barring issuance of commercial fishing licenses to noncitizens due to the federal government's exclusive regulation of immigration); *Hines*, 312 U.S. at 66 (emphasizing that the regulation of aliens is "intimately blended and intertwined" with responsibilities of the federal government); *Ting v. United States*, 149 U.S. 698, 713 (1893) (stating that the power to exclude aliens is "vested in the political departments of the government, and is to be regulated by . . . acts of Congress"); *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889) (stating that the power of exclusion of foreigners is an incident of sovereignty belonging to the federal government).

87. *Graham*, 403 U.S. at 378.

88. See *Hines*, 312 U.S. at 66-67 (striking down a Pennsylvania alien registration statute on grounds of federal preemption).

89. *Takahashi*, 334 U.S. at 419.

90. See *Graham*, 403 U.S. at 370-76.

91. *Id.* at 382 (citing *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969)).

92. See, e.g., *Toll v. Moreno*, 458 U.S. 1 (1982) (invalidating a university's policy of granting preferential treatment for purposes of tuition and fees to students with in-state status). The Court recognized that both the federal government's broad authority over immigration and the substantial limitations upon the states in making classifications based on alienage constrains the states from discriminating against aliens. See *id.* at 10-17. The Court invalidated the law based on a mixed Fourteenth Amendment/Supremacy Clause rationale. See *id.*

states could constitutionally discriminate against aliens. That is, because of the federal government's plenary power over immigration, Congress could validly delegate some of its authority to the states to act on its behalf or in congruence with federal legislation. The rights of immigrants, however, would be better protected against exploitation and abuse by the states through the use of an equal protection analysis. Based on an equal protection approach, Congress cannot authorize the states to discriminate against aliens because this would entail a violation of the Fourteenth Amendment.

B. Equal Protection Analysis of State Laws

The Fourteenth Amendment's Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."⁹³ However, this is not a guarantee that every law will treat every person equally.⁹⁴ Most legislation involves classifications placing special burdens on, or granting specific benefits to, individuals or groups.⁹⁵ According to the doctrine of reasonable classification, laws may indeed discriminate.⁹⁶ In essence, the Fourteenth Amendment merely requires that those who are similarly situated be similarly treated.⁹⁷

Because aliens cannot participate in the political process and lack societal decision-making power, discrimination against them is more carefully evaluated.⁹⁸ Aliens might be singled out for disparate treatment because they have no direct political recourse. If this is the perceived purpose for discriminatory treatment, courts will more closely scrutinize the law.⁹⁹

The Supreme Court has applied different levels of scrutiny to certain categories of alienage classifications.¹⁰⁰ This has led to the de-

93. U.S. CONST. amend. XIV, § 1.

94. See WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 679 (9th ed. 1993).

95. See *id.*

96. See generally Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344-53 (1949) (discussing the concept of reasonable classification).

97. See *id.*

98. See JOHN H. ELY, *DEMOCRACY AND DISTRUST* 161-62 (1980).

99. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938). The infamous footnote four establishes a framework for heightened judicial review. Groups considered to be "discrete and insular minorities" receive heightened review—state legislation involving race and alienage receive strict scrutiny, whereas gender and illegitimacy receive intermediate scrutiny. See *id.*

100. See *Bernal v. Fainter*, 467 U.S. 216 (1984) (state discrimination against

velopment of a complex equal protection doctrine.¹⁰¹ Alienage discrimination by the federal government is subject to a rational basis standard of review.¹⁰² The rational basis test generally presumes that legislation is constitutional,¹⁰³ and a court will uphold a law if the classification drawn by the statute is rationally related to a legitimate state interest.¹⁰⁴ Under this standard of review, the court defers to legislative judgment whenever possible, requiring some plausible set of facts to justify the statute.¹⁰⁵

State discrimination against aliens, however, is subject to strict scrutiny, with some exceptions.¹⁰⁶ In order to survive strict scrutiny, the suspect classification must be closely tailored to a compelling state interest.¹⁰⁷ Two suspect classes trigger strict scrutiny: race or national origin and alienage.¹⁰⁸ Laws implicating a suspect class are almost always found to be unconstitutional because strict scrutiny is difficult to satisfy.¹⁰⁹ State action regarding alienage is subject to a higher standard of review than federal action in most cases.¹¹⁰

1. Discrimination by states against legal aliens

Under traditional equal protection principles, a state may discriminate against individuals or groups so long as its classification has a reasonable basis.¹¹¹ In *Graham v. Richardson*,¹¹² however, the Court established that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close ju-

aliens is usually subject to strict scrutiny except when it involves a political function); *Plyler v. Doe*, 457 U.S. 202 (1982) (legislation received heightened scrutiny when children of illegal aliens were deprived of public school education); *Mathews v. Diaz*, 426 U.S. 67 (1976) (alienage discrimination by Congress remains subject to the rational basis test).

101. See Neuman, *Aliens as Outlaws*, *supra* note 1, at 1426.

102. See *Mathews*, 426 U.S. at 82-84.

103. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 601 (5th ed. 1995).

104. See *id.*

105. See *id.*

106. See *Bernal*, 467 U.S. at 220 (holding that alienage is subject to strict scrutiny unless the political function exception applies).

107. See NOWAK & ROTUNDA, *supra* note 103, at 601-02.

108. See *id.* at 602.

109. See *id.*

110. The inconsistent standard of review applied to state and federal action has been criticized by scholars who question "whether alienage discrimination really requires the stricter scrutiny that race receives." Neuman, *Aliens as Outlaws*, *supra* note 1, at 1438.

111. See *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

112. 403 U.S. 365 (1971).

dicial scrutiny.”¹¹³ The Court reasoned that “[a]liens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.”¹¹⁴ The statutes at issue in *Graham* failed the strict scrutiny test because the Court concluded that the states’ desire to preserve welfare benefits for their own citizens was not a compelling interest.¹¹⁵

Although some challenge heightened equal protection scrutiny for discrimination against aliens by states, the need for protection against state alienage discrimination is crucial.¹¹⁶ “The government’s decision to permit aliens to reside within the community and to subject them to its governance without giving them political rights creates responsibilities on the part of the government.”¹¹⁷ Many alien residents are exposed to governmental neglect or even hostility without access to the political process.¹¹⁸ Since the 1920s, no state has permitted aliens to vote in statewide or federal elections, and political processes do not represent those who do not vote.¹¹⁹ In addition, the realities of nativism affect discriminatory legislation and exacerbate feelings of powerlessness among aliens without a political voice.¹²⁰ Thus, Justice Blackmun correctly characterized aliens as a suspect class in *Graham*.¹²¹

State laws classifying on the basis of alienage are subject to strict scrutiny except when the state acts to bar aliens from performing “political functions.”¹²² The exception applies to laws that “exclude aliens from positions intimately related to the process of democratic

113. *Id.* at 371-72. Aliens who were denied welfare benefits challenged two laws: an Arizona law that provided welfare to citizens but not to aliens unless they had resided in the United States for fifteen years, and a Pennsylvania law that excluded aliens from certain state funded welfare benefits. The Court held that the laws violated the Equal Protection Clause. *See id.* at 376.

114. *Id.* at 372 (citation omitted).

115. *See id.* at 374-75.

116. *See* Neuman, *Aliens as Outlaws*, *supra* note 1, at 1439; *see, e.g.*, Toll v. Moreno, 458 U.S. 1, 41 (1982) (Rehnquist, J., dissenting) (doubting whether political powerlessness is a legitimate reason for treating immigrants as a suspect class subject to heightened judicial review); Sugarman v. Dougall, 413 U.S. 634, 651-57 (1973) (Rehnquist, J., dissenting) (invalidating a law making citizenship a requirement for any position in the class of a state civil service system).

117. Neuman, *Aliens as Outlaws*, *supra* note 1, at 1427.

118. *See id.* at 1428.

119. *See id.*

120. *See* HIGHAM, *supra* note 11, at 4; discussion *supra* Part II.

121. *See Graham*, 403 U.S. at 371-72.

122. *See* Bernal v. Fainter, 467 U.S. 216, 225 (1984) (holding the political function exception inapplicable to notary publics).

self-government."¹²³ The political function exception lowers the standard of review from strict scrutiny to rational basis in applicable cases.¹²⁴

In *Bernal v. Fainter*¹²⁵ the Court applied a two-part test in determining whether an activity qualified as a political function.¹²⁶ The Court concluded that a notary public did not qualify under the political function exception.¹²⁷ First, the Court examined the function of the position.¹²⁸ In looking "to the actual *function* of the position as the dispositive factor,"¹²⁹ and not the source of the position, the Court determined that the function of a notary public is "essentially clerical and ministerial."¹³⁰ Second, it looked to the extent of the policy-making responsibility:

The focus of [the Court's] inquiry [was] whether a position was such that the officeholder would necessarily exercise broad discretionary power over the formulation or execution of public policies importantly affecting the citizen population—power of the sort that a self-governing community could properly entrust only to full-fledged members of that community.¹³¹

The rationale behind the political function exception is that states may establish their own form of government within broad boundaries and limit the right to govern to those who are full-fledged members of the political community.¹³² In establishing the political function exception, the Court emphasized that it must be narrowly construed.¹³³ Otherwise, "the exception will swallow the rule and de-

123. *Id.* at 220.

124. *See Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982) (concluding that strict scrutiny was inappropriate when the restriction on lawfully resident aliens primarily serves a political function).

125. 467 U.S. 216 (1984).

126. *See id.* at 221-22.

127. *See id.* at 225-27.

128. *See id.* at 223.

129. *Id.*

130. *Id.* at 225.

131. *Id.* at 223-24.

132. *See id.* at 224; *see also Ambach v. Norwick*, 441 U.S. 68 (1979) (extending the political function exception to include public school teachers); *Foley v. Connelie*, 435 U.S. 291 (1978) (upholding a New York statute that required police force members to be citizens and barred aliens from positions as police officers because of the fundamental obligation of the government which has broad discretionary powers); *Sugarman*, 413 U.S. at 651-57 (striking down a state civil service statute that reserved certain permanent positions for citizens).

133. *See Bernal*, 467 U.S. at 222 n.7.

preciate the significance that should attach to the designation of a group as a 'discrete and insular' minority for whom heightened judicial solicitude is appropriate."¹³⁴ Thus, states have the power to discriminate against legal aliens if a strict scrutiny standard of review is satisfied, or if the political function exception applies and rational basis is met.

2. Discrimination by states against undocumented aliens

Undocumented alien adults do not enjoy the same constitutional protections as legal aliens.¹³⁵ Unauthorized entry into the United States is a crime,¹³⁶ and those who have entered illegally are subject to deportation.¹³⁷ Despite the existence of these legal barriers, however, a substantial number of people have entered the United States unlawfully.¹³⁸ Underenforcement of the laws prohibiting entry into this country, coupled with the failure to prevent the employment of undocumented aliens, has resulted in a massive influx of illegal immigrants.¹³⁹ While an increasing number of undocumented resident aliens are encouraged to remain here as a source of cheap labor, they are denied the benefits provided to legal residents.¹⁴⁰ They are left defenseless against abuse and exploitation, but their presence is tolerated and their employment is welcomed.¹⁴¹ "The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law."¹⁴²

While legal aliens are given protection as a suspect class, the Supreme Court has explicitly stated that undocumented alien adults are not a suspect class.¹⁴³ According to the Court, their presence in the United States is the product of their own voluntary unlawful conduct.¹⁴⁴ Their entry into the United States is a crime.¹⁴⁵ In addition, the Court created suspect classes to protect discrete and insular mi-

134. *Id.*; see Neuman, *Aliens as Outlaws*, *supra* note 1, at 1438 (commenting that some scholars believe the public function exception has become too expansive and contributes to an inconsistent equal protection doctrine).

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

136. See 8 U.S.C. § 1325 (a)(1996).

137. See *id.* §§ 1251, 1252.

138. See *Plyler*, 457 U.S. at 205.

139. See *id.* at 218.

140. See *id.* at 219.

141. See *id.* at 219 n.18.

142. *Id.* at 219.

143. See *id.* at 219 n.19.

144. See *id.* at 219.

145. See 8 U.S.C. § 1325.

norities discriminated against based on "immutable characteristics."¹⁴⁶ Undocumented status is not "an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action."¹⁴⁷ Thus, classifications that discriminate against undocumented aliens are subject to rational basis review, with substantial deference given to the legislature.¹⁴⁸

Although undocumented alien adults are not a suspect class, the children of undocumented aliens are viewed differently.¹⁴⁹ While those electing voluntarily to enter the United States in violation of the laws should be prepared to bear the consequences, "the children of those illegal entrants are not comparably situated."¹⁵⁰ The adults have the ability to abide by the law, but the children "can affect neither their parents' conduct nor their own status."¹⁵¹

In 1982 the Supreme Court in *Plyler v. Doe* extended intermediate scrutiny protection beyond traditional classes to include undocumented alien children.¹⁵² In that case the Court invalidated a law that denied undocumented alien children the right to attend public schools.¹⁵³ The Court reasoned that controlling the conduct of adults by acting against their children "does not comport with fundamental conceptions of justice."¹⁵⁴ However, these children were not designated as a quasi-suspect class deserving intermediate scrutiny. Rather, the Court applied a new standard of review that has come to be known as "rational basis plus."¹⁵⁵ The Court effectively created

146. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

147. *Plyler*, 457 U.S. at 220.

148. *See id.* at 216.

149. *See id.* at 219-20.

150. *Id.* at 220.

151. *Id.* (citing *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

152. *See id.* at 230. Increasing dissatisfaction with a two-tiered approach to equal protection—strict scrutiny and rational basis—prompted the Supreme Court to add a third standard of review. *See Craig v. Boren*, 429 U.S. 190, 210-11 (1976) (Powell, J., concurring). The Court developed intermediate scrutiny to protect other groups that lack access to the political process and confined it to gender and illegitimacy classifications. *See id.* Under this standard of review, classifications must be substantially related to the achievement of important governmental objectives. *See id.* at 210-11.

153. *See Plyler*, 457 U.S. at 230.

154. *Id.* at 220.

155. The standard has also been called "rational basis with bite." *See Gayle Lynn Pettinga*, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 784-85 (1986-1987). The Court broke from the traditional equal protection analysis. *See id.* at 784. This can be seen as an effort by the Court to put more teeth into the rational basis test without approaching intermediate scrutiny. *See id.* Rational basis plus is one step beyond rational

this new standard of review without explicitly articulating its existence.¹⁵⁶

The Court offered three justifications for its decision in *Plyler*. First, the Court reasoned that the children deserved some protection approaching a quasi-suspect class because they were practically powerless against their parents and society.¹⁵⁷ Second, although the right to education is not fundamental,¹⁵⁸ it deserved some protection as a quasi-fundamental right.¹⁵⁹ The Court found that education is not a fundamental right but “[it] has a fundamental role in maintaining the fabric of our society.”¹⁶⁰ The Court’s finding of “the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child” supports its status as a quasi-fundamental right.¹⁶¹ Third, the children had been completely denied access to education.¹⁶² The Court reasoned that “education provides the basic tools by which individuals might lead economically productive lives to the benefit [of society].”¹⁶³ Invoking rational basis plus allowed the Court to consider these factors and prevent “unreasonable obstacles to advancement on the basis of individual merit.”¹⁶⁴ Due to the importance of education in forming a person’s ability to function in society and the fact that denial of all education benefits would result in the total deprivation of any opportunity to advance on the basis of individual merit, the Court concluded that it should not allow the state to deny education to these children.¹⁶⁵

Thus, *Plyler* established that state action denying undocumented

basis because it looks more closely at the fit between the legitimate governmental interest and the means of achieving that interest, without giving complete deference to the legislature. *See id.* at 784-85. It can be used to review legislation burdening a right on a group approaching quasi-suspect status. *See id.* at 785.

156. *See id.* at 786-87.

157. *See Plyler*, 457 U.S. at 219-20; Pettinga, *supra* note 155, at 785.

158. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). If a classification burdens a fundamental right, the classification will be subject to strict scrutiny. Two general classes of rights are considered fundamental, meaning that any interference with them will give rise to strict equal protection scrutiny. The first consists of rights which are independent and explicitly guaranteed by a constitutional provision. The second are rights which are felt to be both important and implicitly granted by the Constitution, so that large deviations in equality as to them are viewed as suspect. *See id.*

159. *See Plyler*, 457 U.S. at 221-23; Pettinga, *supra* note 155, at 785.

160. *Plyler*, 457 U.S. at 221.

161. *See id.*

162. *See id.* at 226.

163. *Id.* at 221.

164. *Id.* at 222.

165. *See id.* at 221-23.

alien children a quasi-fundamental right should receive a higher level of judicial scrutiny than should federal action.¹⁶⁶ The rational basis plus standard in this context only applies to state laws.¹⁶⁷ Federal laws discriminating against all undocumented aliens still receive highly deferential review.¹⁶⁸ This distinction allows the federal government to pass laws satisfying a lower standard of review and to essentially un-preempt state laws that normally would have to meet a higher level of judicial review.¹⁶⁹ Because federal law is supreme, the federal government can create laws exacting a lower constitutional standard of review.¹⁷⁰ The states therefore can act in concert with federal authority if federal preemption is the underlying doctrinal basis.¹⁷¹

If *Plyler* were based on an equal protection approach, however, state legislation denying illegal immigrant children access to education would be invalid because Congress would be violating the Constitution. In *Plyler*, the Supreme Court for the first time expanded the scope of the Equal Protection Clause of the Fourteenth Amendment to give undocumented resident aliens limited protection from state laws which arbitrarily denied them benefits:¹⁷² "Justice Brennan found no reason not to apply the [E]qual [P]rotection [C]lause literally; the majority ruled that laws which gave unequal treatment to unlawfully resident aliens were subject to some form of judicial review under the terms of the [E]qual [P]rotection [C]lause."¹⁷³

Though the decision in *Plyler* has been criticized as an unprecedented deviation from standard equal protection principles,¹⁷⁴ the Court's application of heightened judicial review can be justified as emphasizing the value of the equal protection doctrine.¹⁷⁵ In *Plyler* Justice Marshall advocated "rejecting a rigidified approach to equal protection analysis, and . . . employing an approach that allows for varying levels of scrutiny depending upon 'the constitutional and societal importance of the interest adversely affected and the recog-

166. See Manheim, *supra* note 45, at 1011.

167. See *id.*

168. See *id.*

169. See *id.* at 944-45.

170. See *id.* at 945-46.

171. If equal protection is the underlying doctrinal basis for challenge, Congress cannot authorize the states to violate the Constitution. See *Graham v. Richardson*, 403 U.S. 365, 382 (1971) (citing *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969)).

172. See *Plyler*, 457 U.S. at 230.

173. NOWAK & ROTUNDA, *supra* note 103, at 755.

174. See, e.g., Lain, *supra* note 47, at 1005-19.

175. See Neuman, *Aliens as Outlaws*, *supra* note 1, at 1444.

nized invidiousness of the basis upon which the particular classification is drawn."¹⁷⁶

Thus, as Justice Marshall seemed to recognize, the equal protection doctrine should be viewed as subject to a sliding scale of scrutiny rather than to a static three-tiered approach. This perspective allows for flexibility in protecting important societal interests from invidious discrimination that do not fit neatly into pre-determined categories. Therefore, the Court's decision in *Plyler* can be justified in its treatment of education as extremely important, though not fundamental, and undocumented children as special, though not suspect. This approach acknowledges the equal protection doctrine's value in protecting those who most need insulation from state discrimination.

V. FEDERAL AUTHORIZATION OF STATE ACTION WHICH WOULD OTHERWISE BE UNCONSTITUTIONAL

As discussed above, federal power to discriminate against aliens is derived from the Constitution and is merely subject to a rational basis standard of review.¹⁷⁷ States, on the other hand, only have the power to discriminate against immigrants as long as their laws are not preempted by federal laws and they either satisfy strict scrutiny or the political function exception.¹⁷⁸ The distinction between the higher standard of review applied to the states and the broad discretion given to the national government raises an important legal question: if the federal government delegates some of its power over immigration to the states, thereby allowing states to discriminate on Congress's behalf, which standard of review applies? The three competing doctrinal bases underlying the review of alienage laws become critically important because each produces a different result.

A. State Discrimination Against Aliens Based on Federal Statutory Authorization

Based upon the Supremacy Clause,¹⁷⁹ federal law supersedes any conflicting state laws. In the case of a direct and obvious conflict between federal and state statutes, the resolution is clear: the state statute is simply invalid.¹⁸⁰ Federal law effectively preempts state

176. *Plyler*, 457 U.S. at 231 (Marshall, J., concurring) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting)).

177. See discussion *supra* Part III.

178. See discussion *supra* Part IV.

179. See U.S. CONST. art. VI, cl. 2.

180. See *id.*

law.¹⁸¹

Although state laws may be invalidated by federal preemption, the federal government has the ability to specifically authorize—or un-preempt—state laws.¹⁸² By making federal legislation consistent with state legislation, the federal government can undo the conflict. This act of un-preempting gives states the ability to act in congruence with federal legislation. Therefore, states initially foreclosed from legislation in a certain arena due to preemption can regulate if the federal government grants authorization.¹⁸³

State and federal regulations regarding air pollution illustrate the dynamics of federal preemption and authorization. The original Clean Air Act¹⁸⁴ enacted by Congress in 1955, for example, was primarily aimed at increasing federal research and assistance in air pollution prevention.¹⁸⁵ It contained no provision for federal automobile emission standards.¹⁸⁶ However, several states established their own motor vehicle emission standards.¹⁸⁷ Subsequently, the Senate Committee on Public Works decided that a single national standard was preferable.¹⁸⁸ It believed that each state having its own regulation would “result in chaos insofar as manufacturers, dealers, and users are concerned.”¹⁸⁹

A number of states, including California, continued to establish separate emission regulations.¹⁹⁰ In response, Congress amended the Clean Air Act in 1967 to “impose federal preemption over motor vehicle emission standards.”¹⁹¹ Consequently, state regulation of automobile tailpipe emissions was preempted by the federal Clean Air Act.

The federal government, however, created an exception for California¹⁹² because of its early efforts to control its severe air quality problems.¹⁹³ Congress essentially un-preempted the California state

181. *See id.*

182. *See* Manheim, *supra* note 45, at 944-45.

183. *See id.* at 949.

184. 42 U.S.C. §§ 7401, 7671q (1988 & Supp. III 1991).

185. *See* Motor Vehicle Mfrs. Ass'n, Inc. v. New York State Dep't of Env'tl. Conservation, 17 F.3d 521, 524 (2d Cir. 1994).

186. *See id.*

187. *See id.* at 525.

188. *See id.* at 524.

189. S. REP. NO. 89-192, at 6 (1965).

190. *See* Motor Vehicle Mfrs. Ass'n, 17 F.3d at 525.

191. *Id.*; Air Quality Act of 1967, Pub. L. No. 90-148, § 208, 81 Stat. 485 (1967).

192. *See* Air Quality Act of 1967, § 208(b).

193. *See* Motor Vehicle Mfrs. Ass'n, 17 F.3d at 525.

emission standards. "Over the adamant objection of the auto industry, which sought a single national standard to avoid undue economic strain,"¹⁹⁴ the Senate Committee was persuaded by the state's arguments that "their unique problems and pioneering efforts' warranted a waiver from preemption."¹⁹⁵ California was allowed to create its own emission standards, subject to the approval of the Environmental Protection Agency, the agency responsible for enforcing the federal standards.¹⁹⁶ This un-preemption gave California the power to enforce its own regulations, which were parallel to, but more stringent than, the federal regulations.¹⁹⁷

Federal preemption in the area of automobile emissions standards demonstrates Congress's ability to authorize states to act if the underlying doctrinal basis is federal statutory authorization. Similarly, Congress could constitutionally authorize the states to regulate alienage and discriminate against immigrants if the underlying basis for congressional authorization is federal statutory authorization. Federal statutes initially foreclose states from the regulation of immigration.¹⁹⁸ If Congress un-preempts the federal immigration statutes and allows the states to act in concert with federal law, as Congress did with California regarding emission standards, the states could regulate in the area of immigration.

The issue then becomes whether the underlying doctrinal basis of a state's authority to regulate in alienage cases is that they were authorized—or un-preempted. The Supreme Court has yet to clarify the actual basis.¹⁹⁹ An argument can be made, however, that if alienage cases are analyzed based on principles of federal preemption, the federal government can authorize the states to discriminate against aliens. This approach, however, would give the states broad discretionary power over immigration that would be detrimental to the rights of immigrants, and contrary to the plenary powers doctrine.

If judicial scrutiny of state laws discriminating against aliens were based upon federal statutory authorization, the states would be allowed to act on the federal government's behalf because they are merely following supreme authority. The federal government can es-

194. *Id.* at 525.

195. *Id.*

196. *See* *Motor Vehicle Mfrs. Ass'n, Inc. v. New York State Dep't of Envtl. Conservation*, 79 F.3d 1298, 1302 (2d Cir. 1996).

197. *See id.*

198. *See* *Immigration in the National Interest Act*, 8 U.S.C. § 1101 (1988).

199. *See supra* notes 6-7 and accompanying text; *see also Plyler v. Doe*, 457 U.S. 202 (1982) (omitting the explicit basis for the decision).

establish laws the states are required to follow; if state law conflicts with federal law, the federal government, by revising its law, can essentially un-preempt the state law.²⁰⁰ In addition, if the analysis of state discrimination against aliens were based upon principles of federalism, the same analysis would apply.²⁰¹ The federal government has exclusive control over alienage, and if the federal government is authorized by the Constitution to act, it can plausibly delegate some of that power to the states.²⁰²

On the other hand, if the challenge to state discrimination against aliens were based upon equal protection principles, the federal government would be constrained by the Fourteenth Amendment: Congress cannot authorize the states to violate the Constitution.²⁰³ The preferred method of analyzing alienage cases should be based upon equal protection principles. Applying this method of analysis, immigrants affected by recent legislation—Proposition 187, the Welfare Reform Act, the Immigration in the National Interest Act—would be given the protection they deserve under the Constitution. The states cannot avoid the constitutional constraints imposed on them simply because the federal government has decided to let them act on their behalf with a lower standard of judicial review.

B. State Discrimination Against Aliens Based on Federalism

The federal government has exclusive, plenary power over the regulation of immigration.²⁰⁴ Therefore, "any entry by states into this realm necessarily invades federal power, whether it is affirmatively exercised or not."²⁰⁵ State interference with national immigration matters is generally not tolerated.²⁰⁶

200. See *Plyler*, 457 U.S. 202 (1982). See also *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896) (holding that a New York statute and a [f]ederal statute directly conflict). State interference with [f]ederal policies and agencies is "absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the [f]ederal government to discharge the duties, for the performance of which they were created." *Id.*

201. See Manheim, *supra* note 45, at 958-60; discussion *supra* Part III.A.

202. See Manheim, *supra*, note 45, at 949.

203. See *Graham v. Richardson*, 403 U.S. 365, 382 (1971) (citing *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969)).

204. See discussion *supra* Part III.

205. Manheim, *supra* note 45, at 959.

206. See *id.*; see also *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (holding that California cannot use a federal law that creates racial ineligibility for citizenship as a basis for barring commercial fishing licenses).

This concept is an extension of the standard preemption doctrine.²⁰⁷ A federal/state conflict—whether of statutory provisions or of objectives—is only one of two ways in which congressional action may render state action invalid. An additional way is for Congress to “occupy the field” of the regulated area.²⁰⁸ If Congress decides to occupy the field, state action in that area is invalid regardless of its congruence with federal actions and policies.²⁰⁹ “Where federal power is not only plenary but also exclusive, it may be said that Congress ‘occupies the field’ whether or not it exercises that power.”²¹⁰

The dynamics of federalism and the interplay of federal and state power are illustrated in the context of the Commerce Clause. The Constitution grants Congress the power to regulate commerce.²¹¹ Specifically, it provides that Congress “shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”²¹² Based on this express delegation of authority, Congress can regulate persons, products, or activities connected to interstate transactions.²¹³ In fact, the Supreme Court defers significantly to Congress’s regulation of private sector activities falling within its commerce power.²¹⁴ This grant of power is interpreted as committing this subject matter to Congress—allowing Congress to occupy the field—and therefore removing the powers of states to oversee local matters that are considered a regulation of commerce.²¹⁵

A broad reading of the Commerce Clause “not only grant[s] a sweeping power to the federal government but it . . . also restrict[s] the ability of individual states to adopt laws which burden the forms of commerce which [are] committed to the control of the federal government.”²¹⁶ Due to federal plenary power in this area, when a state regulation conflicts with federal legislation enacted under the Commerce Clause, the federal statute controls.²¹⁷ On the other hand, Congress may enact legislation specifically approving state regulation

207. See Manheim, *supra* note 45, at 959-60.

208. See *id.* at 959.

209. See *id.*

210. *Id.*

211. See U.S. CONST. art. 1, § 8, cl. 3.

212. *Id.*

213. See NOWAK & ROTUNDA, *supra* note 103, at 132.

214. See *id.*

215. See *id.* at 131.

216. *Id.*

217. See *id.* at 281.

affecting commerce.²¹⁸

The Constitution, however, does not explicitly define the boundaries of commerce power when Congress has not acted in a certain area.²¹⁹ If the federal government is authorized to legislate in an area of commerce and institutes no law, it remains unclear whether Congress intends that area to be free of regulation or whether Congress intends states to enact any law they wish.²²⁰ This question is commonly referred to as the Dormant Commerce Clause problem.²²¹

In the alienage context, when Congress has not exercised its power and it lies dormant, states may not regulate in this area.²²² Because Congress has so completely dominated the regulation of immigration, there is no room for additional state regulation even if Congress's power is dormant.²²³ However, Congress may choose to delegate some of its exclusive power to the states.²²⁴ Based on principles of federalism, as long as Congress itself has the constitutional authority to act, it can authorize the states to act.

The Supreme Court addressed the issue of whether Congress may direct the states to regulate in a particular field or a particular way in *New York v. United States*.²²⁵ In that case, the state of New York challenged the provisions of the Low-Level Radioactive Waste Policy Act.²²⁶ The Act stated that "[e]ach State shall be responsible for providing . . . for the disposal of . . . low-level radioactive waste generated within the State"²²⁷ The Court held the Act was unconstitutional because "Congress may not simply 'commandeer' the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."²²⁸

The Court reasoned the Constitution has never been interpreted to give Congress the authority to require the states to govern in a

218. *See id.*

219. *See id.*

220. *See id.*

221. *See id.*

222. *See id.*

223. *See* Manheim, *supra* note 45, at 958-60 (discussing the "dormant immigration clause").

224. *See id.*

225. 505 U.S. 144 (1992).

226. *See id.* at 154.

227. *Id.* at 151 (quoting 42 U.S.C. § 2021c(a)(1)(A) (1985)).

228. *Id.* at 161 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)).

particular way.²²⁹ “The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate the state governments’ regulation of interstate commerce.”²³⁰ Therefore, Congress does have the power to encourage the states to regulate in particular areas, but it lacks the power to directly compel the states to require or prohibit certain acts.²³¹ Limited by principles of the Tenth Amendment,²³² the Court held that Congress can authorize—but not require—the states to act on its behalf as long as Congress itself has the power.²³³

An analogy can be drawn between the Dormant Commerce Clause and state regulation of immigration. Congress may affirmatively consent to state action which would otherwise be an unconstitutional violation of the Commerce Clause if the underlying doctrinal basis is federalism.²³⁴ As demonstrated in *New York*, “[t]he Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government . . . to [encourage the states] to adopt suggested regulatory schemes.”²³⁵ Similarly, Congress could authorize the states to regulate immigration as long as the federal government is not “commandeering” a state legislature.²³⁶ Because Congress itself would have the power to discriminate against aliens, there is no reason why such discrimination cannot be conducted by Congress in conjunction with the states.

Thus, if the underlying doctrinal basis of alienage cases is federalism, Congress has the ability to validly authorize the states to discriminate against aliens. The federal government can delegate its exclusive power to the states. State legislation otherwise subjected to a higher standard of judicial review would now be dictated by Congress. Therefore, discrimination against aliens would need only satisfy the federal government’s standard of review—rational basis.

229. *See id.* at 166.

230. *Id.*

231. *See id.*

232. U.S. CONST. amend. X. “If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.” *New York*, 505 U.S. at 156.

233. *See New York*, 505 U.S. at 166-67.

234. *See NOWAK & ROTUNDA, supra* note 103, at 281.

235. *New York*, 505 U.S. at 188.

236. *See id.* at 175-76.

This would allow the states to avoid a higher standard of review—strict scrutiny for alienage—because they are being directed by Congress. The federal government, in a sense, would be delegating its lower standard of review to the states. In order to implement their legislation, state legislators would argue that the underlying doctrinal basis of alienage cases is federalism. Like the preemption approach, however, this approach is detrimental to the status of immigrants because it grants broad discretionary power to the states thereby enabling them to deprive aliens of rights and benefits.

C. State Discrimination Against Aliens Based on Equal Protection

State discrimination against aliens is likely to be upheld by courts if the basis behind the analysis of laws regulating alienage is federal statutory authorization or federalism. Because of the federal government's exclusive control of immigration, Congress can authorize the states to act on its behalf, limited only by Tenth Amendment principles.²³⁷ However, if judicial scrutiny of state laws discriminating against aliens were based upon equal protection principles, the states will have a more difficult time implementing legislation directed against immigrants even if authorized by Congress.

At least outside the alienage context, equal protection principles apply identically to the states and to the federal government.²³⁸ The federal government, however, cannot authorize the states to violate the Constitution. The Supreme Court has held that Congress may not sanction what would otherwise be a violation of equal protection.²³⁹

1. Cases supporting an equal protection approach

In *Metropolitan Life Insurance Co. v. Ward*,²⁴⁰ the Court held that Congress may not sanction state violations of Equal Protection.²⁴¹ The Court found that the state of Alabama violated the Equal Protection Clause by taxing out-of-state insurance companies at a higher rate than domestic insurance companies.²⁴² The Commerce Clause

237. See *id.* at 156-57.

238. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995); *City of Richmond v. Croson*, 488 U.S. 469 (1989).

239. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982).

240. 470 U.S. 869 (1985).

241. See *id.* at 880.

242. See *id.* at 869.

was not violated because Congress authorized the action.²⁴³

The Commerce Clause, unlike the Equal Protection Clause, is integrally concerned with whether a state purpose implicates local or national interests. The Equal Protection Clause, in contrast, is concerned with whether a state purpose is impermissibly discriminatory; whether the discrimination involves local or other interests is not central to the inquiry to be made. Thus, the fact that promotion of local industry is a legitimate state interest in the Commerce Clause context says nothing about its validity under equal protection analysis.²⁴⁴

Therefore, the Court was left to invalidate the law on equal protection grounds.²⁴⁵ The State argued that because Congress, through the McCarran-Ferguson Act,²⁴⁶ authorized the states to impose taxes burdening interstate commerce, the tax at issue was valid.²⁴⁷ The Court found, however, that “the State’s view ignore[d] the differences between the Commerce Clause and equal protection analysis and the consequent different purposes those two constitutional provisions serve.”²⁴⁸ Based on a Commerce Clause analysis, the Court balanced a state’s legitimate interest against the burden the state law would impose on interstate commerce.²⁴⁹ Under equal protection, if the state’s purpose is found to be legitimate, the state law stands, as long as the burden is rationally related to that purpose.²⁵⁰ “The two constitutional provisions perform different functions in the analysis of the permissible scope of a State’s power—one protects interstate commerce, and the other protects persons from unconstitutional discrimination by the States.”²⁵¹ The Court found that “[e]qual protection restraints [were] applicable even though the *effect* of the discrimination in [the] case [was] similar to the type of burden with which the Commerce Clause also would be concerned.”²⁵²

Thus, the Court distinguished Congress’s authorization of the states to impose taxes that burden interstate commerce on grounds of

243. *See id.* at 880.

244. *Id.* at 876-77 n.6.

245. *See id.* at 869.

246. 15 U.S.C. §§ 1011-1015 (1997).

247. *See Metropolitan Life Ins. Co.*, 470 U.S. at 880.

248. *Id.* at 881.

249. *See id.*

250. *See id.*

251. *Id.* (citing *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421, 423-24 (1921)).

252. *Id.*

equal protection.²⁵³ Although economic regulation can satisfy the Equal Protection Clause by bearing a rational relation to a legitimate state purpose,²⁵⁴ the Court found that the promotion of domestic insurance business was not a legitimate state purpose.²⁵⁵ Under equal protection, the promotion of domestic industry is not a legitimate state purpose when furthered by discrimination.²⁵⁶

If the reasoning of *Metropolitan Life* is applied in the alienage context, Congress can be prevented from authorizing the states to violate the Constitution in the same way. Congress cannot direct states to discriminate against immigrants if the discrimination would violate the Equal Protection Clause. The holding in *Metropolitan Life* implies that valid exercises by the federal government authorizing the states to act under the Commerce Clause or other constitutional provisions may well be deemed invalid if analyzed under equal protection principles.

Roe v. Anderson,²⁵⁷ a recent California case, demonstrates the inability of Congress to authorize the states to enact laws which violate equal protection.²⁵⁸ In *Roe* new residents of California brought an action challenging the constitutionality of a durational residency requirement which limited welfare benefits through the recipient's first year of residency.²⁵⁹ The district court "held that the requirement penalized migration and violated equal protection."²⁶⁰

In August of 1996 Congress enacted a new federal welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).²⁶¹ PRWORA replaced the previous Aid to Families with Dependent Children (AFDC)²⁶² program with a new program entitled Temporary Assistance to Needy Families (TANF).²⁶³ Through PRWORA, Congress substantially increased the

253. See *id.* at 880.

254. See *id.*

255. See *id.* at 882.

256. See *id.*

257. 966 F. Supp. 977 (E.D. Cal. 1997).

258. See *id.* at 984; see also *Maldonado v. Pennsylvania Dept. of Pub. Welfare*, No. 97-4155, 1997 U.S. Dist. LEXIS 15474 (E.D. Pa. Oct. 6, 1997) (applying same analysis and holding similar Pennsylvania law unconstitutional on basis of equal protection).

259. See *Roe*, 966 F. Supp. at 979-80.

260. *Id.* at 983.

261. 42 U.S.C. § 604 (Supp. 1997).

262. CAL. WELF. & INST. CODE § 11450.03 (West 1991).

263. See *Roe*, 966 F. Supp. at 979.

states' discretion to create federally supported welfare plans.²⁶⁴ Congress "specifically authorized the states to apply a one-year durational residency requirement" for full welfare benefits.²⁶⁵

The PRWORA provides: A State operating a program funded under this part may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.²⁶⁶

In October of 1996, California submitted its TANF plan to the United States Department of Health and Human Services: its plan included a durational residency requirement consistent with California law and PRWORA.²⁶⁷

PRWORA effectively limited the level of benefits of welfare recipients to those provided in their state of prior residence.²⁶⁸ The plaintiffs argued "that the disparity between the California level and the level of the other forty-nine states will vary a good deal depending on the state of prior residence."²⁶⁹ In addition, "[t]he cost of living in the various states may also affect a comparison of the relative benefit levels."²⁷⁰ Plaintiffs asserted that "the residency requirement . . . [placed] many recently arrived welfare families on an inferior footing relative to welfare families in the state from which the newcomers moved."²⁷¹

In support of the congressional authorization, defendants argued that the "overriding purpose of [the state legislation] is to limit California's welfare expenditures."²⁷² The defendants contended that California spends a significant amount of money each year on welfare benefits and has the right to control the program.²⁷³ Furthermore, the defendants claimed that the legislation does not violate equal protection because "new residents receive the same level of cash benefits as they would have received in the state of their prior residency."²⁷⁴

264. *See id.*

265. *Id.*

266. *Id.* at 979 n.5.

267. *See id.* at 979.

268. *See id.* at 980.

269. *Id.* at 981.

270. *Id.*

271. *Id.*

272. *Id.* at 983.

273. *See id.*

274. *Id.*

The court based its analysis on the right to travel and equal protection cases in which the Supreme Court "set aside as unconstitutional distinctions drawn among residents of a state—all of whom are bona fide residents—based on the incipiency or duration of their residency."²⁷⁵ The court stated that the "right of migration 'protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents.'"²⁷⁶ Acknowledging that the states have broad discretion to create welfare benefit programs through congressional authorization, "Congress may not authorize the States to violate the Equal Protection Clause."²⁷⁷ Thus, the court held that the state legislation based on congressional authorization was an unconstitutional violation of the Fourteenth Amendment.²⁷⁸

If the rationale of *Roe* is applied in the alienage context, Congress can be prevented from authorizing the states to violate the Constitution in the same way. Congress cannot direct the states to discriminate against immigrants if the discrimination would violate the Equal Protection Clause. The holding in *Roe* implies that seemingly valid exercises by the federal government authorizing the states to act may be deemed invalid if analyzed under equal protection principles.

2. Recent legislation against aliens

Legislation enacted by the states under the Immigration in the National Interest Act²⁷⁹ and the Welfare Reform Act²⁸⁰ denying benefits to aliens can be effectively challenged based upon equal protection principles. These federal laws authorize the states to institute legislation discriminating against both legal and illegal aliens.²⁸¹ The denial of benefits is subject to different standards of judicial review depending on the status of the alien being discriminated against.²⁸² If the state is enacting legislation against a legal alien, the law is subject to strict scrutiny.²⁸³ If, however, the law discriminates against an ille-

275. *Id.*

276. *Id.* (quoting *New York v. Soto-Lopez*, 476 U.S. 898, 904 (1986)).

277. *Id.* at 984-85 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969)).

278. *See id.* at 984-95.

279. 8 U.S.C. §§ 1101-1503 (1995).

280. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

281. *See id.*

282. *See* NOWAK & ROTUNDA, *supra* note 103, at 742.

283. *See id.*

gal alien, it is subject to rational basis.²⁸⁴ A higher standard of “rational basis plus” is applied if the illegal alien is a child being deprived of a quasi-fundamental right.²⁸⁵

a. legal aliens

Because of the strict scrutiny standard that must be satisfied as part of an equal protection analysis, it is unlikely that states will be able to pass laws that deny benefits to legal aliens.²⁸⁶ To classify persons on the basis of United States citizenship, “the state must demonstrate a compelling purpose for treating aliens in a less favorable manner than citizens.”²⁸⁷ In addition, the state must use the least restrictive means of achieving its compelling interest.²⁸⁸

States will likely try to justify denying benefits to legal aliens on the theory that they have a compelling interest in saving money and in preserving state resources for United States citizens.²⁸⁹ As in *Roe v. Anderson*, the states will argue that the overriding purpose of the legislation is to limit state welfare expenditures. For instance, California spends a significant amount of money each year supporting legal aliens through state benefits and welfare programs.²⁹⁰ “The number of immigrants receiving state welfare assistance has risen significantly in recent years.”²⁹¹ States will argue that citizens do not want to spend money supporting those who are not United States citizens.²⁹² “By allowing immigrants to compete with citizens for welfare, [the states] allow non-citizens to take advantage disproportionately of scarce welfare resources while ignoring [their] own citizens, minorities, and urban poor.”²⁹³ Aliens should not be allowed into the country if they are merely going to deplete state resources.

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

285. See *id.* at 230.

286. See NOWAK & ROTUNDA, *supra* note 103, at 742.

287. *Id.*

288. See *id.*

289. See David Broder, *Clinton Works Both Sides of Welfare and Immigration Issues*, DENVER POST, Apr. 10, 1997, at B-07 (“[T]he cutoff of benefits to legal immigrants was fueled by a desire for budgetary savings (an estimated \$22 billion in six years) . . .”).

290. See Lamar Smith, *Immigration and Welfare Reform*, USA TODAY, Mar. 1997, at 30 (“21% of immigrant households currently receive welfare, compared to 14% of native households.”).

291. *Id.*

292. See *id.* (“Americans are willing to help those who need it, but have grown increasingly tired of subsidizing non-citizens . . .”).

293. *Id.*

Advocates for the rights of legal aliens will likely argue that the state's interest is not compelling and furthermore that the means of achieving the purpose is not the least restrictive. First, in most cases, the noncitizen who is a lawful resident is subject to the same federal and state taxation as the resident citizen.²⁹⁴ Legal aliens contribute to the work force and pay their taxes, as do citizens.²⁹⁵ The United States legally admits the aliens and now states propose to deprive them of the basic tools for survival through this legislation—services providing food, shelter, emergency medical care, prenatal care, and more. In denying these benefits states hope to save money; however, the long term effects might ultimately prove to be more costly.²⁹⁶ Therefore, the purpose behind the legislation is not compelling.

Second, denying state benefits in order to save economic resources is not the least restrictive means of achieving this state purpose. If the states cannot handle the influx of legal immigrants, the federal government should limit the number of legal immigrants admitted to this country. Depriving immigrants of essential state benefits does not deter them from entering the country if they are being legally admitted by the federal government. Recent federal legislation attempts to deter legal aliens from sponsoring family members to legally join them in the United States.²⁹⁷ The legislation achieves this goal by making the families financially responsible for them. There are other means by which to prevent legal immigrants from burdening state resources.²⁹⁸ Therefore, the states will have a

294. *See id.*

295. *See* Broder, *supra* note 289, at B-07.

As for the welfare bill provisions ending benefits for legal aliens, Vice President Al Gore told the California legislature last month that it was 'harsh and unfair to tell 4 million people in California who work here, pay taxes here, maybe even serve in the military here that you are not going to receive the helping hand that everyone else who is legally living here is entitled to.'

Id.

296. *See* Sabin Russell, *Bill Blocks Medi-Cal for Noncitizens*, S.F. CHRON., June 24, 1996, at A1 (stating that county emergency rooms will be swamped with immigrants seeking care that they cannot receive at clinics and an eruption of communicable diseases and vaccine-preventable diseases will occur).

297. *See* Fred Alvarez, *Bill Threatens Immigrant Health Care*, L.A. TIMES, June 25, 1996, at B1. The proposed legislation requires legal immigrants to include the income of their sponsors along with their own when signing up for Medi-Cal health care coverage. The legislation is intended to ensure that the costs are not borne by any government agency. *See id.*

298. *See* Jonathon C. Dunlap, *The Absent Federal Partner*, SPECTRUM: J. STATE GOVERNMENT, Jan. 1994, at 6. The federal government could decrease the number of immigrants it allows to enter the country legally, and increase its

difficult time satisfying the strict scrutiny standard. If analyzed upon this basis, Congress cannot authorize the states to discriminate against legal aliens through such legislation because it violates principles of equal protection.

b. illegal aliens

Recent state legislation denying illegal immigrants access to education and various benefits can also be effectively challenged based upon equal protection principles.²⁹⁹ In order to enact laws discriminating against illegal immigrants, states must satisfy the rational basis standard of review—a legitimate state interest must be rationally related to the means chosen to achieve the interest.³⁰⁰ The Supreme Court held in *Plyler v. Doe*, however, that states cannot deprive undocumented immigrant children access to education.³⁰¹ The Court used a heightened standard of review, “rational basis plus,” to invalidate legislation denying the right to education: an important state interest must be substantially related to the means of achieving the interest.³⁰²

Discrimination by states against illegal aliens may violate equal protection depending on the type of benefit being denied. Legislation denying illegal immigrant children access to public education is unconstitutional based on the holding in *Plyler v. Doe*.³⁰³ United States Representative Elton Gallegly has attempted to overturn the holding in *Plyler* by enacting state legislation which deprives illegal immigrant children of the right to education.³⁰⁴

States will argue that laws depriving illegal immigrants of governmental benefits meet the rational basis standard of review and are therefore valid. First, the state’s legitimate interest is in retaining government benefits for its citizens. Money should not be spent in support of those who are living in our country illegally. Second,

financial support for state and local governments who bear a disproportionate share of the responsibility. *See id.* “Governor Pete Wilson has called for the federal government to reimburse California \$1.4 billion for the mandated social, health and correctional services the state has provided to undocumented and documented immigrants.” *Id.*

299. *See* 142 CONG. REC. H2475 (daily ed. Mar. 20, 1996) (statement of Rep. Gallegly).

300. *See Plyler*, 457 U.S. at 216.

301. *See id.* at 230.

302. *See id.*

303. *See id.*

304. *See* 142 CONG. REC. H2475 (daily ed. Mar. 20, 1996) (statement of Rep. Gallegly).

states will contend that withholding these benefits is a means that is rationally related to achieving this purpose. By denying illegal aliens governmental benefits, state resources could be saved and used to support legal citizens. California spends millions of dollars a year supporting illegal immigrants through welfare and governmental services.³⁰⁵ States will argue that depriving illegal aliens of governmental benefits will save the states significant amounts of money per year.

Advocates for the rights of illegal immigrants will argue, however, that state legislation denying benefits does not satisfy the rational basis test even though the state's legitimate interest in preserving resources is a solid argument. It is a valid purpose for a state to want to maintain its money to support its own citizens and to deny help to those who are here illegally. Therefore, states will most likely satisfy the first prong of the rational basis test—a legitimate interest.

However, the means of achieving this purpose—the denial of governmental benefits to illegal aliens—is not rationally related to the state interest in saving money and resources. First, the amount of money that the illegal alien work force saves the state is probably more than the overall cost to the state in providing them benefits.³⁰⁶ Significant numbers of illegals are employed throughout the state for low wages. They work as day laborers, farm workers, restaurant employees, domestic workers, and provide essential services for much lower wages than employing legal citizens.³⁰⁷ If the illegal immigrant work force disappears, the cost to the state of California

305. See Dunlap, *supra* note 298, at 6. In Los Angeles, it was estimated that the net state and local costs of providing education, and public health and welfare was around \$400 million. See *id.*

306. See Meg Rottmand & Valerie Seckler, *Employing Illegal Aliens Is a Way of Life in California*, FOOTWEAR NEWS, May 7, 1984, at 1. The following proportions of illegals use public services: free medical 5%; unemployment insurance 4%; food stamps 1%; welfare payments 1% and child schooling 4%. See *id.* "Practically no illegals receive the costliest service of all—Social Security—but 77% of illegal workers pay Social Security taxes, and 73% had [f]ederal income withheld." *Id.*

307. See *id.* "If we didn't have illegal aliens, car washes, hotels, restaurants, and most manufacturers would shut down." *Id.*

In one case, 2,154 illegal aliens were removed from jobs, and the California State Human Resources Agency tried without success to fill the jobs with U.S. citizens. Among the reasons given for the failure were low wage rates, job categories that were not appealing to local residents, job difficulty and the long hours demanded by the employers.

Id.

would be significant.³⁰⁸ Illegal immigrants contribute greatly to the economy by providing inexpensive labor, and in most situations they pay state taxes and contribute to Social Security.³⁰⁹

Second, depriving illegal immigrants of essential governmental services will actually increase state costs in the long run.³¹⁰ If California denies undocumented aliens preventative health care, emergency medical services, and education, the state will be left with a population of sick, uneducated people who are unable to work and contribute to the economy. The burden on the state will be much greater than simply providing less expensive preventative services. For example, the cost of prenatal care to pregnant illegal women is most likely less expensive than the eventual cost to the state in caring for a sick child. The cost of providing emergency medical care is potentially less expensive than the cost to the state if the medical conditions worsen. In addition, if illegal aliens are denied health services, the cost to the state if disease spreads to the entire population will be enormous. In weighing the benefits that the illegal population provides in inexpensive labor with the costs of providing them with essential tools for survival, the deprivation of governmental services seems unfair, if not immoral.

Finally, illegal aliens are encouraged to remain in this country as a source of cheap labor. If the government did not want them here, they could simply deport them. The INS does not actively deport illegal aliens, although they know the areas where illegal aliens are highly populous.³¹¹ In addition, the government does not heavily prosecute owners of businesses for violating laws against the em-

308. See Dunlap, *supra* note 298, at 6 (“L.A. Mayor Richard Riordan has pointed out that if all the undocumented immigrants in Los Angeles were deported, the city’s economy would face a recession.”).

309. See Rottman & Seckler, *supra* note 306, at 1. “[Illegals] have social security and taxes taken out of their pay . . . [and] [t]hey will never be able to collect any of the benefits of these programs.” *Id.* “[T]hey also perform tasks that no one else is willing to do, and they don’t drain the unemployment or welfare systems.” *Id.*

310. See Dunlap, *supra* note 298, at 6. The denial of government services creates the potential for numerous social problems. If undocumented immigrants are not immunized from contagious diseases, whole communities can be affected. In addition, if they do not receive basic education, they are more vulnerable to the temptation of crime as a means of supporting themselves and their families. See *id.*

311. See Rottman & Seckler, *supra* note 306, at 1 (stating that the INS was more likely to participate in raids when business is up but leaves manufacturers alone when business is slow).

ployment of illegal aliens.³¹²

Courts should apply an equal protection approach to alienage discrimination instead of a federal statutory authorization or federalism analysis.³¹³ Alien residents lack access to the political process and are vulnerable to governmental denial of their concerns.³¹⁴ In addition, the presence of illegal aliens is tolerated as a source of inexpensive labor, but they are virtually defenseless against any abuse or exploitation imposed on them by the states' citizens and businesses.³¹⁵ Principles of federal statutory authorization and federalism are not directly responsive to this problem. Reliance on these doctrines allows Congress to decide how broadly aliens should be made vulnerable to discrimination and mistreatment by the states. This effectively extends the great judicial deference afforded the federal government in implementing immigration policy to the state and local governments, which may be reacting to feelings of nativism. An equal protection approach, however, ensures that the states do not assume undeserved broad discretion in discriminating against immigrants.

VI. CONCLUSION

Because of the distinction between the higher standard of judicial review applied to the states and the deferential standard afforded the federal government, an important legal question arises if Congress authorizes the states to discriminate against aliens. The three competing doctrinal bases behind alienage cases become critically important in determining Congress's ability to delegate authority. Federal statutory authorization and federalism allow the federal government to empower the states to act on its behalf with little challenge.

A problem arises, however, if Congress attempts to authorize the states to violate the Equal Protection Clause. If alienage cases are based upon principles of equal protection, Congress should be constrained in the same ways the states are based on the Fourteenth

312. See MICHAEL FIX & PAUL T. HILL, ENFORCING EMPLOYER SANCTIONS 106-11 (1990). The INS does not focus on the enforcement of employer sanctions. See *id.* at 73. Criminal sanctions are rarely brought and there are a small number of civil penalties. See *id.* at 106-11. When civil penalties are brought, "the Agency reduces the amount of the initial fine by an average of 59 per cent." *Id.* at 110.

313. See Neuman, *Aliens as Outlaws*, *supra* note 1, at 1439.

314. See *id.* at 1427-28.

315. See *Plyler v. Doe*, 457 U.S. 202, 219 n.18 (1982).

Amendment. Congress cannot empower the states to regulate immigration if the actions taken by the states would violate equal protection.

Equal protection is the preferred method of analysis because it is responsive to invidious classifications. Based upon the dynamics of nativism, states often take out their economic and social anxieties on immigrants through hostile legislation. An equal protection analysis would best protect immigrants from broad discretionary action by the states. The burden should be on the federal government to prevent aliens from unlawfully entering the United States initially, rather than to starve and kill them through deprivation of governmental benefits while expecting them to work as a shadow labor force.

The importance of humanity should be reflected within the sphere of governmental power. Government at all levels should strive to maintain a minimum level of benevolence towards immigrants. Our nation was founded on immigration—we were all once aliens to this land.

*Marisa Ann Tostado**

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