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Rethinking Preemption for Purposes of Aliens and Public Benefits

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RETHINKING PREEMPTION FOR PURPOSES OF ALIENS AND PUBLIC BENEFITS

Evangeline G. Abriel*

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INTRODUCTION

The recent passing of Proposition 187 by California and the similar proposals being considered by other states and by Congress call for a renewed inquiry into the limits we place on public benefits¹ for aliens. This

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1. The term "public benefits" is used broadly here to include all types of services provided by the state and federal governments to individuals. This includes, in particular, social services; income replacement programs such as Aid to Families with Dependent Children (AFDC), Supplemental Security Income, and General Assistance; nutritional programs such as food stamps, WIC, CFSP, school breakfasts and lunches; medical treatment; and public education.

Article contends that both state and federal limitations on alien eligibility for public benefits should be subject to meaningful constitutional review, and that in order to achieve this objective, alien eligibility for public benefits should not fall within the federal preemption of immigration law.

This Article first summarizes the provisions of Proposition 187 and of the federal proposals that would curtail public benefits to aliens. It goes on to describe the current framework of public benefits for aliens, under which aliens lawfully residing in the country have been eligible for many types of state and federal benefits and services. This Article then describes the shift in this framework caused by the broad limitations on public benefits for aliens currently being proposed both by states and by the federal government.

This Article concludes that reliance on a preemption² argument to challenge state measures limiting aliens' access to public benefits may be successful under a long line of Supreme Court cases, but the preemption argument will win a battle, not the war. This is because congressional proposals such as the Personal Responsibility Act indicate that the federal government is as interested as state governments in limiting aliens' access to public benefits. Congress's unusually broad authority in areas involving aliens leads both to a wide-reaching preemption of state legislation and to the plenary power doctrine, that is the relaxed standard of review given to federal legislation. The current proposals by Congress, if they become law, would be subject to only limited judicial review under the current understanding of the plenary power doctrine.³

Federal preemption of immigration is so tightly interwoven with the plenary power doctrine that the federal government's broad authority to act and the limited judicial review applied to its actions concerning aliens are a

2. The term "preemption" as used here refers to the federal government's preemption of legislation concerning immigration. See *infra* text accompanying notes 63-70.

3. The plenary power doctrine holds that Congress has virtually unlimited power to regulate the admission, exclusion, and deportation of aliens from the United States and that Congress' actions in these areas are subject to only very limited judicial review. See *infra* text accompanying notes 91-94.

de facto corollary of a finding that states are preempted from also acting in this area. Thus, by relying upon an argument that the federal government has preempted all legislation regarding at least lawful aliens in the United States, challengers of Proposition 187 and similar state proposals effectively acquiesce in a very restrictive review of any federal legislation regarding aliens and public benefits. This Article contends that removing public benefits and services from the area over which Congress enjoys preemption should result both in greater freedom for states to legislate in some areas affecting aliens while maintaining aliens' rights to the equal protection of the laws, and in enhanced review of federal legislation dealing with aliens and public benefits.

A. An Overview of California Proposition 187

Through Proposition 187 the people of California declare that they have suffered and are suffering economic hardship as a result of illegal aliens, that they have a right to the protection of their government from persons entering the country unlawfully, and that they, therefore, declare a system to prevent illegal aliens in the United States from receiving benefits or public services in the State of California.⁴ Proposition 187 provides that public services and benefits, including public social services, publicly-funded health care benefits (with the exception of emergency medical care), public elementary and secondary education, and public postsecondary education are to be provided only to U.S. citizens, lawful permanent resident aliens, and aliens lawfully admitted for a temporary period of time.⁵

In addition to its provisions curtailing public benefits for aliens, Proposition 187 includes criminal provisions and reporting and notice require-

4. Proposition 187: Illegal Aliens—Ineligibility for Public Services—Verification and Reporting, § 1, 1994 Cal. Adv. Legis. Serv. B-39, B-39 (Deering).

5. *Id.* § 5 (codified at CAL. WELF. & INST. CODE § 10001.5) (public social services); *id.* § 6 (codified at CAL. HEALTH & SAFETY CODE § 130) (publicly-funded medical care); *id.* § 7 (codified at CAL. EDUC. CODE § 48215) (public elementary and secondary education); *id.* § 8 (codified at CAL. EDUC. CODE § 66010.8) (public postsecondary education).

ments. Sections 2 and 3 make the manufacture, distribution, and use of false documents to conceal true immigration status a felony.⁶ Section 4 requires California law enforcement agencies to cooperate with the INS, to notify individuals who appear to be in illegal immigration status that they must either obtain legal status or leave the United States, and to inform the California Attorney General and the INS of the individuals' apparently illegal status.⁷ Sections 5, 6, and 7 require social service agencies, schools, and medical care providers to verify immigration status and report these findings to the INS.⁸

Proposition 187 was passed on November 8, 1994.⁹ Temporary restraining orders were issued shortly after the passing of the bill, however, and final decisions in those cases have not been made as of this writing.¹⁰

B. The Current Status of Public Benefits for Aliens Under Federal Law

The federal government has been fairly generous in providing public benefits to aliens. The wide variety of public benefits and services provided by the federal government includes cash, voucher, and in-kind assistance programs such as AFDC,¹¹ Supplemental Security Income,¹² food

6. *Id.* §§ 2-3 (codified at CAL. PENAL CODE §§ 113-114).

7. *Id.* § 4 (codified at CAL. PENAL CODE § 834(b)).

8. *Id.* §§ 5-7.

9. *California Anti-Immigrant Ballot Measure Passes But Is Enjoined*, IMMIGRANTS' RTS. UPDATE, Dec. 12, 1994, at 7.

10. Eight lawsuits were filed on November 9, 1994, seeking to enjoin implementation of Proposition 187. Some were consolidated—three in San Francisco, where a court issued temporary restraining order blocking the education-related sections of the proposition until trial, set for June 1995; four in Los Angeles, where courts enjoined all sections of the proposition except the two increasing criminal penalties for use of fraudulent documents; and one filed in federal court in Sacramento. IMMIGRANTS' RTS. UPDATE, Dec. 12, 1994 at 7; *Preliminary Injunction Issued in Prop 187 Challenge*, IMMIGRANTS' RTS. UPDATE, Jan. 23, 1995, at 6; *Prop 187 Education Injunction Extended*, IMMIGRANTS' RTS. UPDATE, Feb. 22, 1995, at 5; see also *California Says Yes to Anti-Immigrant Measure, But Courts Say No (Temporarily)*, 71 INTERPRETER RELEASES 1511 (1994); B. Drummond Ayres Jr., *Court Blocks New Rule on Immigration*, N.Y. TIMES, Nov. 17, 1994, at A16.

11. Aid to Families with Dependent Children (AFDC) provides cash assistance to children deprived of parental support or care because one or both of their parents is absent, incapacitated, deceased, or unemployed. Social Security Act, tit. IV-A, 42 U.S.C. §§ 601-617 (1988 & Supp. V 1993); see also HOUSE COMM. ON WAYS AND MEANS, 103D CONG., 2D SESS., OVERVIEW OF ENTITLEMENT PROGRAMS, 1994 GREEN BOOK 324 (1994) [hereinafter GREEN BOOK]; NATIONAL IMMIGRATION LAW CTR., GUIDE TO ALIEN ELIGIBILITY FOR FEDERAL PROGRAMS 32 (3d ed. 1994) [hereinafter GUIDE TO ALIEN ELIGIBILITY].

12. The Supplemental Security Income (SSI) program provides monthly cash payments to needy aged, blind, and disabled persons. 42 U.S.C. §§ 1381-1383d (1988 & Supp. V 1993); 20 C.F.R. § 416.101 (1994); see also GREEN BOOK, *supra* note 11, at 207; GUIDE TO ALIEN ELIGIBILITY, *supra* note 11, at 34.

stamps,¹³ public housing,¹⁴ Medicaid,¹⁵ and Medicare.¹⁶ Currently, eligibility for most of these programs is limited to persons who are U.S. citizens, lawful permanent resident aliens, lawful temporary residents, refugees or asylees, or aliens permanently residing under color of law (PRUCOL).¹⁷ Other important federal benefit programs contain no restrictions based on immigration status.¹⁸ These include certain emergency medical treatment;¹⁹ maternal and child health services;²⁰ alcohol, drug abuse, and

13. The food stamp program provides coupons (food stamps), redeemable for specified types of food items, to low-income households. 7 U.S.C. §§ 2011-2032 (1994); 7 C.F.R. § 271.1(a) (1995); see also GREEN BOOK, *supra* note 11, at 757; GUIDE TO ALIEN ELIGIBILITY, *supra* note 11, at 42.

14. A number of federal programs provide housing assistance for lower-income households in the form of subsidized conventional or scattered site housing, rent supplements, and government-insured or assisted loans for new housing or rehabilitation of existing housing. See 42 U.S.C. § 1437; see also GREEN BOOK, *supra* note 11, at 814; GUIDE TO ALIEN ELIGIBILITY, *supra* note 11, at 56.

15. The Medicaid program pays practitioners and providers for covered medical services to categorically needy and medically needy persons. Social Security Act, tit. XIX, 42 U.S.C. §§ 1396-1396v (1988 & Supp. V 1993); see also GREEN BOOK, *supra* note 11, at 783; GUIDE TO ALIEN ELIGIBILITY, *supra* note 11, at 38.

16. Medicare provides covered medical treatment and services for persons aged sixty-five and older and, after a two-year waiting period, for persons under sixty-five who receive Social Security disability benefits, and for disabled railroad retirement system annuitants. Social Security Act, tit. XVIII, 42 U.S.C. §§ 1395-1395ccc (1988 & Supp. V 1993); 42 C.F.R. 405.301-.2472 (1994); see also GREEN BOOK, *supra* note 11, at 123; GUIDE TO ALIEN ELIGIBILITY, *supra* note 11, at 40.

17. The following programs limit eligibility for aliens to lawful permanent residents and PRUCOL aliens: Aid to Families with Dependent Children (AFDC), Supplemental Security Income (SSI), and Medicaid services (except for emergency Medicaid). Aliens are eligible for food stamps if they are lawful permanent residents, refugees, asylees, parolees, lawful temporary residents, aliens granted withholding of deportation, or aliens granted Family Unity status. GUIDE TO ALIEN ELIGIBILITY, *supra* note 11, at 32-61; see also Charles Wheeler, *Alien Eligibility for Public Benefits; Parts I and II*, IMMIGRATION BRIEFINGS (Nov. and Dec. 1988). Public housing assistance is limited to U.S. citizens, lawful permanent residents, refugees, asylees, conditional entrants, and parolees. 42 U.S.C. § 1436a (1988); see also *Flurry of Restrictionist Proposals Introduced*, IMMIGRANTS' RTS. UPDATE, Jan. 23, 1995, at 4-5 (noting that President Clinton and Democrats have proposed reducing the categories of lawful immigrants able to obtain federal benefits by eliminating the PRUCOL ("permanently residing in the U.S. under color of law") category); HUD Finalizes Alien Bar for Many Housing Assistance Projects, 72 INTERPRETER RELEASES 558 (1995).

18. For an exhaustive listing of federal benefit programs, current eligibility requirements based on immigration status, and treatment under the Personal Responsibility Act, see NATIONAL IMMIGRATION LAW CTR., SUMMARY OF IMMIGRATION PROVISIONS OF THE PERSONAL RESPONSIBILITY ACT (PRA) (on file with author). The author thanks Linton Joaquin of the National Immigration Law Center for providing her with this excellent paper.

19. Regardless of immigration status, aliens eligible for Medicaid services except for their alien status can receive emergency services. Social Security Act, tit. XIX, 42 U.S.C. §§ 1396b(v) (1988); see *Medicaid: Medical Assistance for Families, the Elderly, and Disabled*, in GUIDE TO ALIEN ELIGIBILITY, *supra* note 11, at 38.

20. See 42 U.S.C. §§ 701-709 (1988 & Supp. V 1993).

mental health services;²¹ immunizations against vaccine-preventable diseases;²² migrant health care;²³ the WIC program;²⁴ and school breakfast and lunch programs.²⁵

There are also several forms of public benefits provided by the federal government and specifically directed either towards aliens or to reimburse states for costs incurred for aliens within their boundaries. Under some of these programs, the United States provides assistance to refugees both overseas²⁶ and after admission to the United States.²⁷ The federal government also provides funding for shelter care and related child welfare services to alien minors detained by the Immigration and Naturalization Service.²⁸ Under several federal laws, the Attorney General is required to

21. See *id.* §§ 300x-300x-9 (1988 & Supp. V 1993).

22. See *id.* § 247b(j) (1988 & Supp. V 1993).

23. See *id.* § 254b (1988 & Supp. V 1993).

24. See *id.* §§ 1786-1789 (1988 & Supp. V 1993). The WIC (Women, Infants, and Children) program provides supplemental food, nutrition counselling, and referrals to health care for pregnant women, new mothers, infants, and children under the age of five. See *GUIDE TO ALIEN ELIGIBILITY*, *supra* note 11, at 46; *The Special Supplemental Food Program for Women, Infants, and Children (WIC)*, in *GREEN BOOK*, *supra* note 11, at 814.

25. See National School Lunch Act, 42 U.S.C. §§ 1751-1769h (1988 & Supp. V 1993); Child Nutrition Act of 1966, sec. 4, 42 U.S.C. §§ 1771-1790 (1988 & Supp. V 1993); see also *Child Nutrition Programs: School, Child Care, and Summer Food Programs*, in *GUIDE TO ALIEN ELIGIBILITY*, *supra* note 11, at 44.

26. Under H.R. 4426, signed into law on August 23, 1994, see Pub. L. No. 103-306, 108 Stat. 1608 (1994), Congress set aside \$671 million for the State Department's Migration and Refugee Assistance account, which helps refugees overseas, \$50 million for the State Department's Emergency Refugee and Migration Assistance fund, and \$6 million for refugees in the United States, that will be added to the Targeted Assistance Discretionary Grants Program administered by the Department of Health and Human Services' Office of Refugee Resettlement. *Congress Approves Legislation Funding Overseas Refugee Programs*, 71 *INTERPRETER RELEASES* 1289, 1289-90 (1994); see also *President Authorizes Transportation for Certain Minor, Elderly, and Ill Refugees*, 72 *INTERPRETER RELEASES* 9 (1995).

27. See *supra* note 26 (noting the provision of \$6 million under Pub. L. No. 103-306, 108 Stat. 1608 (1994)); see also *Congress Approves Legislation Funding Overseas Refugee Programs*, *supra* note 26, at 1290. The Department of Health and Human Services' Office of Refugee Resettlement provides refugee program services to all refugees who have been resettled in the United States, over 1.6 million since 1975. Refugees are eligible to receive these services until they become U.S. citizens. *ORR Proposes New Rule Clarifying and Amending Certain Refugee Policies*, 71 *INTERPRETER RELEASES* 1188 (1994).

28. *INS Announces Funding for Unaccompanied Minors Shelter Program*, 72 *INTERPRETER RELEASES* 66 (1995).

reimburse states for their costs in jailing undocumented aliens.²⁹ States and localities are to be reimbursed in an "immigration emergency."³⁰ In addition, in anticipation of the impact on states caused by the legalization of large numbers of aliens under the amnesty provisions of the Immigration Reform and Control Act of 1986,³¹ Congress created a State Legalization Impact Assistance Grant program to reimburse states for their increased costs.³²

There are both direct and indirect barriers under federal law to the obtaining of public benefits by aliens. Aside from the alien eligibility requirements contained in the public benefit statutory provisions themselves, direct barriers include Congress's determination that aliens admitted for lawful temporary residence under the Immigration Reform and Control Act of 1986³³ are barred from receiving certain public benefits for five years

29. Section 501 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, requires the Attorney General to reimburse states for their costs in jailing undocumented aliens. Title VIII of the FY 1995 appropriations act for the Department of Commerce, Justice, and State, the judiciary, and related agencies, see Pub. L. No. 103-317, 108 Stat. 1724, 1777, (1994), allocated \$130 million to reimburse states for the costs of incarcerating undocumented aliens. In addition, Title II of the Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796, 1823-24, (1994), authorizes reimbursement to state and local governments for the incarceration costs of undocumented criminal aliens. *Comment Period Reopened for State Criminal Alien Assistance Program*, 71 INTERPRETER RELEASES 1687 (1994).

30. Immigration Act of 1990, Pub. L. No. 101-649, § 705(b), 104 Stat. 4978, 5087 (codified at 8 U.S.C. § 1101, note). This section provides that reimbursement take place in three circumstances: (1) when an INS district director certifies that the number of asylum applications filed in the district exceeds by at least 1,000 the number of such applications filed in the preceding calendar quarter; (2) whenever the lives, property, safety, or welfare of the residents of a state or locality are endangered; and (3) in other circumstances as determined by the Attorney General. See *Justice Dept. Proposes Immigration Emergency Fund Regulations*, 70 INTERPRETER RELEASES 1501, 1502 (1993).

31. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394.

32. See *id.* § 204, 100 Stat. at 3405; see *HHS Proposes Reallocating SLIAG Funds*, 71 INTERPRETER RELEASES 934 (1994).

33. Act of November 6, 1986, Pub. L. No. 99-603, 100 Stat. 3359.

after they obtain lawful permanent residence.³⁴ The Immigration and Nationality Act also specifically provides that aliens granted Temporary Protected Status³⁵ are not considered to be permanently residing in the United States under color of law.³⁶ This results in their ineligibility for certain public benefits, including Supplemental Security Income.³⁷

The principal type of indirect barrier to aliens' access to public benefits is "deeming." For purposes of determining the alien applicants' eligibility for certain public benefits, the income of persons who "sponsored," or completed forms known as affidavits of support or similar documents in support of the alien's entry into the United States, is attributed, or "deemed," to the alien for a certain period of time after the alien's entry.³⁸ The effect of deeming is that if the sponsor's income and resources together with the alien's income and resources exceed the eligibility limit for the public benefit in question, the alien will be found ineligible.

The affidavits of support which give rise to deeming are not legally enforceable pledges of support,³⁹ although several state courts have suggested that the affidavit of support creates a moral rather than a legal obligation.⁴⁰ Congress previously rejected proposed legislation that would have made the affidavits legally binding obligations.⁴¹ The U.S. Commis-

34. 8 U.S.C. § 1255a(h) (1994). The benefits for which legalized aliens are temporarily ineligible under this section include Aid to Families with Dependent Children (AFDC) and similar programs of financial assistance, medical assistance under state plans approved under Title XIX of the Social Security Act, and food stamps. There are exemptions provided for assistance other than AFDC furnished to aged, blind, or disabled aliens.

35. 8 U.S.C. § 1254a (1994).

36. 8 U.S.C. § 1254a(f) (1994).

37. 20 C.F.R. § 416.1619 (1994).

38. For example, in determining alien eligibility for Supplemental Security Income, the income and resources of any person who sponsored an alien's entry into the United States by executing an affidavit of support or similar agreement and the income and resources of the sponsor's spouse are deemed to be the income and resources of the alien for a period of three years after the alien's entry into the United States. 42 U.S.C. 1382j(a) (1988). Similar deeming provisions are used in determining alien eligibility for food stamps, 7 U.S.C. § 201s(f) (1994), and for AFDC, 42 U.S.C. § 615 (1988). For a discussion of deeming and its effects, see John W. Guendelsberger, *Equal Protection and Resident Alien Access to Public Benefits in France and the United States*, 67 TUL. L. REV. 669, 722-24 (1993); see also *Flurry of Restrictionist Proposals Introduced*, IMMIGRANTS' RTS. UPDATE, Jan. 23, 1995, at 4-5 (noting that President Clinton has proposed that the deeming period for AFDC and food stamps be extended from three to five years).

39. *Barannikova v. Town of Greenwich*, 643 A.2d 251, 257 (Conn. 1994).

40. *State ex rel. Attorney Gen. v. Binder*, 96 N.W.2d 140 (Mich. 1959); *County of San Diego v. Vilorio*, 80 Cal. Rptr. 869 (Cal. Ct. App. 1969); *Department of Mental Hygiene v. Renel*, 173 N.Y.S.2d 231 (App. Term 1958), *aff'd*, 159 N.E.2d 678 (N.Y. 1959).

41. *Minino v. Perales*, 589 N.E.2d 385 (N.Y. 1992).

sion on Immigration Reform has recommended that they be made enforceable.⁴²

Yet another barrier to an alien's receipt of public benefits is the exclusion and deportation consequences of receiving public benefits. An alien is excludable, that is, ineligible for admission to the United States, if he appears likely to become a public charge.⁴³ An alien who becomes a public charge within five years after his date of entry, from causes not affirmatively shown to have arisen since entry, is deportable.⁴⁴

Thus, in general, the current system of federal public benefits allows needy permanent residents and other aliens residing permanently in the United States under color of law to receive public benefits, with some exceptions and barriers. This system would change to the detriment of aliens under the proposals currently under consideration in Congress.

I. THE PERSONAL RESPONSIBILITY ACT AND ITS LIMITATIONS ON ALIEN ENTITLEMENT TO PUBLIC BENEFITS

The United States Congress also is considering proposals to limit public benefits and services to aliens, in connection with broad changes to welfare programs in general. In March of 1995, the House of Representatives approved the "Personal Responsibility Act of 1995," summarized as "an act to restore the American family, reduce illegitimacy, control welfare spending, and reduce welfare dependence."⁴⁵ This bill would replace fed-

42. U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY; A REPORT TO CONGRESS 24 (1994).

43. 8 U.S.C. § 1182(a)(4) (1994). In order to determine whether a person is likely to become a public charge, the Immigration and Nationalization Service uses a totality of the circumstances test, under which it considers the following factors: whether the alien has received public assistance, his or her age, capacity to earn a living, health, family situation, work history, affidavits of support, and physical and mental condition. *In re A*, 19 I. & N. Dec. 867 (1988). There are exceptions for refugees and asylees. 8 U.S.C. § 1159(c) (1994). In addition, the legalization provisions of the Immigration and Nationality Act provided that an alien was not ineligible for temporary lawful permanent resident status under the public charge exclusion ground if he demonstrated a history of employment evincing self-support without reliance on public cash assistance. *Id.* § 1160(c)(2)(C) (1994).

44. 8 U.S.C. § 1251(a)(5) (1994).

45. H.R. 4, 104th Cong., 1st Sess. (1995); see *GOP Advances Plan to Remake Welfare System*, N.Y. TIMES, Jan. 10, 1995, at A1; *GOP Would Deny Legal Immigrants Many U.S. Benefits*, WASH. POST, Dec. 24, 1994, at A1; *House Passes Sweeping Welfare Reform Measure with Grim Immigration Consequences*, 72 INTERPRETER RELEASES 453 (1995); *House Passes Sweeping Welfare Reform Measure; Senate Gears Up for Action*, 72 INTERPRETER RELEASES 584 (1995); *New Republican Congress Convenes, with Immigration High on the Agenda*, 72 INTERPRETER RELEASES 58, 62 (1995); *Subcommittee Approves Bill Banning Immigrants from 35 Programs*, IMMIGRANTS' RTS. UPDATE, Feb. 22, 1995, at 4; *Welfare Bill Would Deny Benefits to Millions, Report Says*, WASH. POST, Nov.

eral programs with lump-sum payments, sometimes called "block grants," to states for use in providing public benefits, subject to restrictions imposed under the Act.⁴⁶ One of the restrictions imposed is upon the provision of public benefits to aliens, set forth in Title IV of the bill.

The bill notes that "self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," but that, despite this principle, aliens have been applying for and receiving public benefits from federal, state, and local governments at increasing rates. The bill finds that "it is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant" and that "it is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits."⁴⁷ Under Section 403(a) of the Personal Responsibility Act, immigrants, or permanent residents, would be ineligible for Supplemental Security Income under Title XVI of the Social Security Act, temporary assistance for needy families (the program of block grants to states for temporary assistance for needy families set out in Title I of the Personal Responsibility Act), Social Services block grants (the program of block grants to states for social services under Title XIX of the Social Security Act), Medicaid under Title XIX of the Social Security Act, and food stamps.⁴⁸

The bill provides some exceptions. Immigrants would not be ineligible for non-cash, in-kind emergency assistance, including emergency medical services.⁴⁹ In addition, refugees,⁵⁰ long-term, elderly permanent residents,⁵¹ honorably discharged veterans, persons on active duty in the U.S. armed forces and their spouses and unmarried dependent children,⁵² and

23, 1994, at A14; see also MARK GREENBERG, *CONTRACT WITH DISASTER: THE IMPACT ON STATES OF THE PERSONAL RESPONSIBILITY ACT* v, 20, 21 (1994).

46. H.R. 4; see Robert Pear, *House Backs Bill Undoing Decades of Welfare Policy*, N.Y. TIMES, Mar. 25, 1995, at A1; *GOP Advances Plan to Remake Welfare System*, N.Y. TIMES, Jan. 10, 1995, at A1.

47. H.R. 4, § 400.

48. *Id.* § 403(a).

49. *Id.* § 403(b)(4).

50. Refugees admitted under Section 207 of the Immigration and Nationality Act, 8 U.S.C. § 1157 (1994), are not ineligible under the Personal Responsibility Act for the first five years after their arrival in the United States. H.R. 4, § 403(b)(1).

51. Aliens who are permanent residents, over seventy-five years of age, and who have resided in the United States for at least five years are not ineligible for public benefits under the Personal Responsibility Act. H.R. 4, § 403(b)(2).

52. *Id.* § 403(b)(3).

disabled permanent residents⁵³ would remain eligible for benefits as would aliens granted asylum⁵⁴ or withholding of deportation.⁵⁵ Even for these exempted aliens, however, the alien's income and resources are deemed to include the income and resources of any person who executed an affidavit of support for the alien and the sponsor's spouse.⁵⁶ This deeming provision applies until the alien achieves United States citizenship.⁵⁷

The bill also provides a transition period for current beneficiaries. Under this provision, aliens who are lawfully residing in any state or territory or possession of the United States and are eligible for public benefit programs on the date of enactment of the Act are not ineligible for benefits until one year after the date of enactment.⁵⁸

In addition to making immigrants ineligible for the five programs listed in the bill, the Personal Responsibility Act also authorizes states to limit immigrant eligibility for state and local means-tested public benefits programs.⁵⁹

The Personal Responsibility Act specifically addresses illegal aliens. Aliens not legally present in the United States are ineligible for any federal or state means-tested public benefits program under the Act, with the exception of non-cash, in-kind emergency assistance, including emergency medical services.⁶⁰

The Personal Responsibility Act also puts teeth into the affidavits of support submitted on behalf of entering immigrants. Under the bill, an

53. Aliens who are permanent residents and are unable because of physical or developmental disability or mental impairment (including Alzheimer's disease) to comply with the requirements for naturalization under Section 312(a) of the Immigration and Nationality Act, 8 U.S.C. § 1423(a) (1994), are not ineligible for benefits under the Personal Responsibility Act. H.R. 4, § 403(B)(6).

54. H.R. 4, §§ 402(b)(2) (federal programs), 412(B)(2) (state and local programs). An alien physically present in the United States or at the border or port of entry may be granted asylum if the Attorney General determines that he is a refugee under 8 U.S.C. § 1101(a)(42)(A) (1994), that is, if he establishes that he has been persecuted or has a well-founded fear of persecution in his country on account of his race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. § 1158(a) (1994).

55. H.R. 4, §§ 402(b)(2) (federal programs), 412(b)(2) (state and local programs). The Attorney General is authorized to withhold the deportation of any alien to a country if the Attorney General determines that the alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion, if the alien does not fall within certain specified grounds of ineligibility. 8 U.S.C. § 1253(h) (1994).

56. H.R. 4, § 421(a).

57. *Id.* § 421(B).

58. *Id.* § 403(B)(5).

59. *Id.* § 413(a).

60. *Id.* §§ 401 (federal programs), 411 (state programs).

affidavit of support must be executed as a contract which is legally enforceable against the sponsor by the federal government and the states.⁶¹

The Personal Responsibility Act incorporates some and rejects other recommendations of the influential U.S. Commission on Immigration Reform concerning public benefits for aliens. The Commission recommended against any broad, categorical denial of public benefits to legal immigrants and stated that "the safety net provided by needs-tested programs should be available to those whom we have affirmatively accepted as legal immigrants into our communities," but also recommended deportation for sustained use of public benefits, making affidavits of support executed by sponsors of immigrants legally enforceable, and the establishment of statutory categories of aliens according to their eligibility for work and benefits.⁶²

Thus, if the Personal Responsibility Act becomes law, public benefits for aliens would be severely restricted. The following two sections of this Article review the respective authority of the federal and state governments to legislate concerning aliens and the results of constitutional review of past federal and state alien legislation.

A. The Federal Power Over Immigration and the Restricted Authority of the States to Legislate Concerning Aliens

Immigration legislation is entrusted to the federal government, rather than to the states.⁶³ The federal authority over immigration emanates from various sources: the naturalization power granted to Congress under Article I, Section 8, Clause 4 of the Constitution,⁶⁴ the Commerce Clause, Article I, Section 8, Clause 3,⁶⁵ a view of immigration as closely

61. *Id.* § 422.

62. U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 42; see also *Commission on Immigration Reform Releases Report*, 71 INTERPRETER RELEASES 1345 (1994).

63. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948); *Truax v. Raich*, 239 U.S. 33, 42 (1915); see Gerald R. Neuman, *The Lost Century of Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1896 (1993), for a description of American immigration law prior to clear federal preemption of the field ("Immigration law prior to 1875 was a complex hybrid of state federal policy.")

64. See, e.g., *Toll v. Moreno*, 458 U.S. 1, 10 (1982); *Plyler v. Doe*, 457 U.S. 202, 225 (1982).

65. See, e.g., *Toll*, 458 U.S. at 10; Neuman, *supra* note 63, at 1886.

interwoven with foreign relations,⁶⁶ the war power, the “maintenance of a republican form of government,”⁶⁷ and a belief that the power to admit or forbid entry to foreigners is inherent in sovereignty and essential to self-preservation.⁶⁸ The principal reasons advanced for federal preemption are the need for uniformity in immigration laws⁶⁹ and the federal government’s superior ability and authority to deal with foreign nations.⁷⁰

Since aliens residing in this country live in the physical jurisdiction of states, it is not surprising that states frequently have enacted legislation which impacts upon aliens and raises the issue of conflict with the federal power over immigration. This legislation is of two general types.⁷¹ The first is state legislation which imposes controls or regulations upon aliens.⁷² If legislation of this nature constitutes a regulation of immigration, it is preempted by the federal immigration authority.⁷³ The second, more frequent, sort of state legislation discriminates against aliens for pur-

66. See Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 46 VA. J. INT’L L. 121, 134–45 (1994).

67. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952). Cases containing similar language include *Plyler*, 457 U.S. at 225, *Kleindienst v. Mandel*, 408 U.S. 753, 765–67 (1972), and *Fong Yue Ting v. United States*, 149 U.S. 698, 711–713 (1893). See also Neuman, *supra* note 63, at 1833, 1897.

68. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

69. Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1632–33 (1992) (recounting state attempts in the 19th century to limit or impose requirements on immigration). But see Spiro, *supra* note 66, at 161–71, arguing that, due to increased direct exchanges between foreign governments and individual states of the United States, foreign governments now distinguish between the actions of the United States as a nation and the actions of its individual states. Professor Spiro argues that this development renders obsolete an important basis for federal preemption of immigration law, that is, the need for the country to speak with one voice in the international arena. *Id.*

70. See Neuman, *supra* note 63, at 1897 (“There are practical reasons why immigration can be more effectively regulated by the federal government, with its overseas diplomatic establishments and its near-exclusive authority to enter into agreements with foreign nations. There are also reasons why the unit of government that includes the diplomatic establishment would be more sensitive to the rights of aliens than would the average state.”) (citations omitted).

71. Spiro, *supra* note 66, at 130.

72. E.g., *Hines v. Davidowitz*, 312 U.S. 52 (1940) (striking down Pennsylvania alien registration statute); see also *De Canas v. Bica*, 424 U.S. 351 (1976) (California statute prohibiting employment of aliens not authorized to work, where such employment would negatively impact resident workers, was not a regulation of immigration preempted by federal authority).

73. *De Canas*, 424 U.S. at 355.

poses of employment,⁷⁴ public licenses and permits,⁷⁵ professional licensing,⁷⁶ education,⁷⁷ and public benefits and services.⁷⁸ This sort of legislation has been examined both for conflict with federal supremacy in the area of immigration and for compliance with the Fourteenth Amendment.⁷⁹

Federal authority in the area of immigration and aliens is characterized by an unusual confluence of the Supremacy Clause and Equal Protection Clauses. The Supreme Court, starting from the premise that states may not "add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States,"⁸⁰ has determined that state laws which discriminate against aliens merely because of their alienage conflict with overriding national policies "in an area constitutionally entrusted to the Federal Government."⁸¹ In other words, allowing states to discriminate against aliens would in effect allow the states to burden or overrule the federal decision to admit resident aliens.⁸² Thus, state regulations not congressionally sanctioned which

74. *Sugarman v. Dougall*, 413 U.S. 634 (1973) (New York civil service provision limiting permanent positions to U.S. citizens violated Fourteenth Amendment); *Truax v. Raich*, 239 U.S. 33 (1915) (Arizona statute limiting percentage of aliens an entity might employ was preempted by federal law and violated Fourteenth Amendment).

75. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (California statute barring issuance of commercial fishing licenses to persons ineligible to citizenship held invalid because preempted by federal immigration authority and because violated equal protection under the Fourteenth Amendment).

76. *Bernal v. Fainter*, 467 U.S. 216 (1984) (Texas prohibition on aliens becoming notaries struck down as violative of equal protection); *In re Griffiths*, 413 U.S. 717 (1973) (Connecticut's denial of permission to Dutch law school graduate to take Connecticut bar struck down as violative of equal protection).

77. *Toll v. Moreno*, 458 U.S. 1 (1982) (Maryland statute denying in-state university tuition to non-immigrants violated Supremacy Clause); *Plyler v. Doe*, 457 U.S. 202 (1982) (Texas statute prohibiting undocumented children from attending public school without payment of tuition violated Equal Protection Clause).

78. *Graham v. Richardson*, 403 U.S. 365 (1971) (Arizona residency requirement for alien eligibility for welfare struck down as violative of Supremacy Clause and Equal Protection Clause).

79. *Toll*, 458 U.S. 1; *Plyler*, 457 U.S. at 202; *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Graham*, 403 U.S. 365 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); *Truax v. Raich*, 239 U.S. 33 (1915).

80. *Graham*, 403 U.S. at 378 (quoting *Takahashi*, 334 U.S. at 419).

81. *Id.*

82. David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1072 (1979).

discriminate against aliens lawfully admitted to the country are impermissible if they impose additional burdens not contemplated by Congress.⁸³ This prohibition on discrimination against aliens by states, while it is a form of equal protection, does not necessarily emanate directly from the Fourteenth Amendment. It can also be understood as granting aliens equal protection because the federal government has decided that they should be so treated, rather than because the Fourteenth Amendment explicitly requires it.⁸⁴

The Supreme Court strengthened the equal protection portion of this preemption/equal protection confluence in *Graham v. Richardson* by designating aliens "a discrete and insular minority," thereby triggering the Equal Protection Clause of the Fourteenth Amendment and strict scrutiny of laws that discriminate against aliens.⁸⁵ Later cases repeat that classifications based on alienage are inherently suspect, at least where lawful permanent

83. *Toll*, 458 U.S. at 12–13 (reading *Takahashi* and *Graham* together to stand for this broad principle); see also *Truax*, 239 U.S. at 42 ("The assertion [by a state] of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to an assertion of the right to deny them entrance or abode, for in ordinary cases they cannot live where they cannot work.").

84. *Levi*, *supra* note 82, at 1072; Gerald Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 315 ("Perhaps the principal of equal privileges for citizens and aliens is a creature of federal law and is imposed on the states by the Supremacy Clause. Calling alienage a suspect classification may be just another way of saying that federal law implicitly requires the states except in cases of special need to accord resident aliens the same treatment as citizens."); see also *Plyler v. Doe*, 457 U.S. 202, 238 n.1 (1982) (Powell, J., concurring) ("Indeed, even equal protection analysis in this area is based to a large extent on an underlying theme of pre-emption and exclusive federal power over immigration.").

85. *Graham*, 403 U.S. at 372; see also T. Alexander Aleinikoff, *Citizenship, Aliens, Membership and the Constitution*, 7 CONST. COMM. 9, 23–24 (1990). The reasons for treating aliens as a suspect class are summarized in Justice Blackmun's concurring opinion in *Toll v. Moreno*:

By labeling aliens a "discrete and insular' minority," the Court did something more than provide a historical description of their political standing. That label also reflected the Court's considered conclusion that for most legislative purposes there simply are no meaningful differences between resident aliens and citizens, so that aliens and citizens are "persons similarly circumstanced" who must "be treated alike." At the same time, both common experience and the unhappy history reflected in our cases, demonstrate that aliens often have been the victims of irrational discrimination.

458 U.S. 1, 20 (1982) (Blackman, J., concurring) (citations omitted).

residents are concerned, and are therefore subject to strict scrutiny, whether or not a fundamental right is impaired.⁸⁶

Not all the Supreme Court cases dealing with state legislation concerning aliens and public benefits use this confluence of preemption and equal protection. Some cases employ only preemption theories,⁸⁷ while others rest upon equal protection under the Fourteenth Amendment.⁸⁸ Still other cases treat the two arguments as alternative bases for a decision striking down state legislation classifying aliens for purposes of public benefits.⁸⁹

86. *Bernal v. Fainter*, 467 U.S. 216, 219 (1984); *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977); *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973); see Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 *HAMLIN L. REV.* 51, 74 n.114 (1985) (citing lower federal and state court decisions which, between 1971 and 1977, applied strict scrutiny to alienage classifications and "dramatically transfigured the range of public and private opportunities available to resident aliens").

Justice Rehnquist has advocated the overruling of the line of decisions recognizing aliens as a suspect class in cases involving certain state legislation. *Toll*, 458 U.S. at 38-42 (Rehnquist, J., dissenting); *Nyquist*, 432 U.S. 1, at 27-30 (Rehnquist, J., dissenting); *Sugarman*, 413 U.S. at 649-57 (Rehnquist, J., dissenting).

The Court has recognized a "political function" exception to the rule that alienage discrimination triggers strict scrutiny when the employment position is "intimately related to the process of democratic self-government." *Bernal*, 467 U.S. at 220. In such cases, legislation is reviewed under a rational basis test. *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982) (upholding citizenship requirement for probation officers); *Ambach v. Norwick*, 441 U.S. 68, 80-81 (1979) (upholding requirement that public school teachers must be citizens or aliens who have declared an intent to become citizens); *Foley v. Connelie*, 435 U.S. 291, 300 (1978) (upholding citizenship requirement for policemen.); see also Note, *Recent Developments in the Law: Immigration Policy and the Rights of Aliens*, 96 *HARV. L. REV.* 1286, 1409-10 (1983) [hereinafter *Recent Developments*] (noting that a decision was made by the Supreme Court to create the political function doctrine as an exception to strict scrutiny rather than to characterize the restriction of political function to citizens as a compelling state interest. The commentator argues that even if states have very strong interests in excluding aliens from the political process, such interests do not call for an exception to the application of strict scrutiny; if the state interest is sufficiently compelling, the state action will not be invalidated.). *But see* Koh, *supra*, at 63-66 (noting that *Sugarman*, 413 U.S. 634 (1973), authorized a limited exception to strict scrutiny for cases in which alienage would be a relevant basis for classification and arguing that characterizing the restriction of political functions to citizens as a compelling state interest would have been inappropriate).

87. See, e.g., *Toll*, 458 U.S. 1, which speaks in terms of preemption and mentions neither equal protection nor the Fourteenth Amendment in determining state restrictions on non-immigrants.

88. E.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (Texas statute prohibiting education for undocumented alien children unless they paid tuition violative of equal protection under the Fourteenth Amendment, under intermediate scrutiny; the statute was not preempted by federal law; the legislation did not impose burdens in addition to those imposed by Congress, because Congress had not admitted the children); *Bernal*, 467 U.S. 216.

89. *Graham*, 403 U.S. at 376; *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); *Truax v. Reich*, 239 U.S. 33, 39-43 (1915); see also Koh, *supra* note 86, at 101; Rosberg, *supra* note 84, at 316.

Commentators have noted that preemption and equal protection play complementary roles in the review of state legislation concerning alien eligibility for public benefits and services. Preemption defines the respective roles of the federal and state governments in enacting legislation concerning aliens, but equal protection determines whether the action is permissible,⁹⁰ albeit using different standards depending on whether state or federal action is involved.

Through the application of preemption and equal protection theories, the courts have closely reviewed state legislation discriminating on the basis of alienage. The heightened scrutiny employed by the courts to review state restrictions on aliens is in marked contrast to the deference accorded federal restrictions on aliens. That deference emanates from the federal preemption of immigration law and its companion, the plenary power doctrine.

II. THE PLENARY POWER DOCTRINE AND THE SUPREME COURT'S REVIEW OF FEDERAL LEGISLATION LIMITING THE ACCESS OF ALIENS TO PUBLIC BENEFITS

Although it is not obvious that federal preemption in a certain realm of law carries with it the power to legislate in that area virtually free from constitutional constraint, that is the case with immigration law. The plenary power doctrine, simply stated, holds that Congress has virtually unlimited power to regulate the admission, exclusion, and deportation of aliens from the United States.⁹¹ The doctrine requires judicial deference to

90. Linda S. Bosniak, *Immigrants, Preemption and Equality*, 35 VA. J. INT'L L. 179, 189 (1994) ("We can no longer confine ourselves to inquiring . . . how to properly allocate the power to regulate immigration as between the states and the federal government. Instead, we also have to concern ourselves with the nature of the power whose allocation is under dispute."); Koh, *supra* note 86, at 98-101 ("While telling us *which level* of government has the final say in regulating the activities of resident aliens, [a pure preemption theory] tells us nothing about *what rules* that level of government must follow when conducting its regulation."); *Recent Developments*, *supra* note 86, at 1418 ("Preemption explains only how state and local action is proscribed by federal action, not how federal action itself should be judged.").

91. Professor Charles D. Weisselberg defines the plenary power doctrine as "a collection of several separate but related principles: first, that the immigration authority is reposed in the federal government and not the states; second, that the authority is allocated in some fashion between the executive and legislative departments of the federal government; and, third, that the judicial branch has an extremely limited role in reviewing the executive's immigration decisions if, indeed, the judiciary may review those decisions at all." Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PENN. L. REV. 933, 939 (1995).

The doctrine was first set forth in the Chinese Exclusion Case (*Chae Chan Ping v. United States*), 130 U.S. 581 (1889), in which the Court upheld laws excluding Chinese laborers from

"[t]he power of Congress to exclude aliens altogether from the United States or to prescribe the terms and conditions upon which they may come to this country."⁹²

The plenary power doctrine continues to be applied. For example, in 1977, the Court relied upon the doctrine to uphold the INA's definition of child to include an illegitimate child as regards the mother, but not as regards the father.⁹³ The Court's firm language made clear the extent of the plenary power doctrine:

At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. Our cases "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."⁹⁴

Because legislation dealing with lawfully admitted aliens' access to public benefits has been included within the federal preemption of immigration law, the plenary power doctrine has been applied in reviewing federal measures limiting public benefits for lawfully admitted aliens. In *Mathews v. Diaz*,⁹⁵ for example, the Court upheld a federal statute restricting eligi-

the United States, stating that the proposition that the United States could exclude aliens from its territory was not open to controversy. *Id.* at 603. The Court equated the political power to exclude aliens with preservation of national security and independence from foreign encroachment. *Id.* at 604. The doctrine was extended to deportation in another Chinese immigrant's case, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), where the Court stated that "[t]he right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country." *Id.* at 707.

92. *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

93. *Fiallo v. Bell*, 430 U.S. 787 (1977).

94. *Id.* at 792 (citations omitted). Nonetheless, the Court has at least once expressed reluctance to employ the doctrine:

In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, . . . much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. . . .

But the slate is not clean.

Galvan v. Press, 347 U.S. 522, 530-31 (1954); see Louis Henkin, *Immigration and the Constitution: A Clean Slate*, 35 VA. J. INT'L L. 333, 333 (1994) ("I suggest that it is time to clean the constitutional slate.").

95. 426 U.S. 67 (1976).

bility for Medicare to citizens and aliens who had been permanent residents for five years. In doing so, the Court noted that "Congress regularly makes rules . . . that would be unacceptable if applied to citizens."⁹⁶

Despite the plenary power doctrine's precept that Congressional action regulating aliens is reviewed with judicial deference,⁹⁷ the Supreme Court has sometimes applied a higher level of scrutiny. In *Wong Wing v. United States*,⁹⁸ the Court struck down a statute providing that any Chinese citizen judged to be in the United States illegally was to be imprisoned at hard labor for a period not exceeding one year, without a trial, and thereafter removed from the United States. In *Mathews v. Diaz*, despite the Court's upholding of the statute in question, the Court noted that statutes involving aliens' rights are reviewed for rationality when challenged as discriminatory.⁹⁹ Procedural due process issues in deportation hearings have also enjoyed some higher review by the Supreme Court.¹⁰⁰ Some scholars see in these decisions a tempering of the plenary power of doctrine and an increased willingness on the judiciary's part to scrutinize federal legislation concerning aliens.¹⁰¹

This Article contends that there should be more meaningful review of federal legislation limiting public benefits and services for aliens than is possible under the plenary power doctrine. The optimum method for en-

96. *Id.* at 80.

97. *Fiallo v. Bell*, 430 U.S. 787 (1977); *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

98. 163 U.S. 228 (1896).

99. *Mathews*, 426 U.S. at 83.

100. *Landon v. Plasencia*, 459 U.S. 21 (1982); *Woodby v. Immigration & Nationalization Serv.*, 385 U.S. 276 (1966); *Rosenberg v. Fleuti*, 374 U.S. 449 (1963); see *Motomura*, *supra* note 69. Lower court decisions striking down federal legislation in the area of immigration law on procedural due process grounds include *Kellman v. District Director, INS*, 750 F. Supp. 625 (S.D.N.Y. 1990), *Probert v. INS*, 750 F. Supp. 252 (E.D. Mich. 1990), and *Leader v. Blackman*, 744 F. Supp. 500 (S.D.N.Y. 1990), all finding unconstitutional Section 7343 of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified at 8 U.S.C. § 1252(a)(2)) (requiring detention of alien aggravated felons without bond pending deportation or exclusion proceedings, regardless of their status as lawful permanent residents).

101. See, e.g., Steven S. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256 (noting that federal statutes in the aliens' rights area are reviewed for rationality); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition* 187, 35 VA. J. INT'L L. 201, 205, 210 (1994) (speaking of a "slow erosion" of the plenary power doctrine and noting the contrast between the rationality review applied in *Diaz* and the "total judicial deference" applied in cases such as *Fiallo v. Bell*, dealing with issues more directly related to exclusion and expulsion of aliens); Rosberg, *supra* note 84, at 284 (stating that the statute in *Mathews* was upheld under "an astonishingly lenient version of the rational-basis test"). But see T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 865 (1991) (noting that the plenary power cases have been reaffirmed and even extended in the 20th century).

surely such review would be a decoupling of the plenary power doctrine and federal immigration preemption where alien eligibility for public benefits is concerned. Given such a decoupling, federal legislation curtailing public benefits for aliens would be subject to ordinary constitutional review.¹⁰² A number of eminent scholars have called for the repeal of the plenary power doctrine without significant success,¹⁰³ however, and it would be difficult to argue more persuasively than they have. What I advocate in this article—the removal of legislation dealing with public benefits and services for aliens from the umbrella of federal preemption—is therefore a second-best solution.

A. Application of Supreme Court Jurisprudence on State Limitation of Public Benefits for Aliens to Proposition 187

Proposition 187's provisions fall into two broad categories. The first of these categories consists of provisions classifying individuals in terms of immigration status, requiring the providers of services and benefits to ascertain the immigration status of applicants, and requiring those providers to report persons suspected of being in illegal status to the state and to the Immigration and Naturalization Service. The second category of provisions prohibits the provision of public benefits and services to undocumented aliens.

Under existing Supreme Court jurisprudence, the results of review of Proposition 187 will depend upon which portion of the legislation is being reviewed. This section of this Article attempts to predict the judicial response to challenges to the different portions of Proposition 187 under preemption and equal protection arguments.

1. Proposition 187's Notice and Reporting Requirements

Under this first category of provisions, California classifies persons according to immigration status and imposes notice and reporting requirements. If these provisions are found to establish a regulation of immigra-

102. See Neuman, *supra* note 63, at 1898 (decrying the Supreme Court's "refusal to engage in a more differentiated exercise of judicial review, reserving extraordinary deference for those occasions that justify it").

103. See Aleinikoff, *supra* note 85, at 9; Aleinikoff, *supra* note 101, at 865; Guendelsberger, *supra* note 38, at 669; Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); Legomsky, *supra* note 101, at 255; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); Rosberg, *supra* note 84, at 275.

tion, they should be found preempted by the federal immigration authority.¹⁰⁴

Proposition 187 sets out three groups of individuals who are eligible for state public benefits, services, medical care, and education. Those groups are: U.S. citizens, aliens lawfully admitted as permanent residents, and aliens lawfully admitted for a temporary period of time.¹⁰⁵ Persons not falling within those groups are ineligible for the benefits restricted in the legislation.

This category of provisions also imposes extensive notice and reporting requirements. Section 4 requires all law enforcement agencies to cooperate fully with the INS regarding any person who is arrested if he or she is *suspected* of being in the U.S. in violation of federal immigration laws.¹⁰⁶ Proposition 187 also requires law enforcement agencies to attempt to verify the legal status of arrestees, notify the person of his or her apparent status as an alien present in the U.S. in violation of the federal immigration laws, and inform him or her that he or she must either obtain legal status or leave the U.S.¹⁰⁷ The agencies must also notify the California Attorney General and the INS of the person's apparently illegal status.¹⁰⁸

Proposition 187 also imposes notice and reporting requirements upon entities providing public benefits and services. Under Section 5, public entities which determine *or reasonably suspect* that an applicant for public social services is an alien present in violation of federal law must notify the person in writing of his or her apparently illegal immigration status and that he must either obtain legal status or leave the United States.¹⁰⁹ The entity must also notify the State Director of Social Services, the Attorney General of California, and the INS of the apparently illegal status.¹¹⁰ Section 6 provides similar notification and reporting requirements for public health care facilities.¹¹¹

The most onerous reporting and notice requirements are found under Section 7.¹¹² This section excludes from public education aliens who are not lawfully admitted for permanent residence or otherwise authorized

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

105. Proposition 187: *Illegal Aliens—Ineligibility for Public Services—Verification and Reporting*, §§ 5–7, 1994 Cal. Adv. Legis. Serv. B-39, B-40–B-42 (Deering).

106. *Id.* § 4 (codified at CAL. PENAL CODE § 834b(a)).

107. *Id.* (codified at CAL. PENAL CODE § 834b(b)(1)–(2)).

108. *Id.* (codified at CAL. PENAL CODE § 834b(3)).

109. *Id.* § 5 (codified at CAL. WELF. & INST. CODE § 10001.5(c)).

110. *Id.*

111. *Id.* § 6 (codified at CAL. HEALTH & SAFETY CODE § 130).

112. *Id.* § 7 (codified at CAL. EDUC. CODE § 48215).

under federal law to be present in the United States.¹¹³ It also requires each school district to verify the legal status of each child enrolling or enrolled in the school district *and to verify the legal status of each parent or guardian* of each child.¹¹⁴ The school district must provide information to the State Superintendent of Public Instruction, the Attorney General of California, and the INS regarding any enrollee, pupil, parent or guardian *determined or reasonably suspected* to be in violation of federal immigration laws.¹¹⁵ The district must also provide notice to the parent or legal guardian of the enrollee or pupil.¹¹⁶ Pupils must leave the school ninety calendar days after the date of the notice unless legal status is established.¹¹⁷

Proposition 187 also imposes criminal penalties. Under Sections 2 and 3 of the Proposition, the manufacture, distribution, and sale of false citizenship or resident alien documents are felonies.¹¹⁸

These classification, notice, reporting, and criminal penalty provisions do appear to constitute an immigration regulation which is preempted by federal law.¹¹⁹ First, Proposition 187 constructs its own alien classification comprised of three categories: U.S. citizen, aliens lawfully admitted as permanent residents, and aliens lawfully admitted for a temporary period of time.¹²⁰ Persons who do not fall within those three categories are classi-

113. *Id.* § 7(a).

114. *Id.* § 7(b)-(d).

115. *Id.* § 7(e).

116. *Id.*

117. *Id.* § 7(f).

118. *Id.* §§ 2-3 (codified at CAL. PENAL CODE §§ 113, 114).

119. *De Canas v. Bica*, 424 U.S. 351, 355 (1976). In *De Canas*, the Supreme Court found that the statute in question, a California law prohibiting employers from knowingly hiring illegal aliens if that employment would adversely affect lawful resident workers, had not been preempted by the federal government because neither the plain language nor the legislative history of the Immigration and Nationality Act indicated that the federal government intended to preempt the states' ability to regulate the employment of their residents. "[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power, whether latent or exercised." *Id.* at 355. The Court also found that this statute did not have a direct impact on immigration and therefore did not unconstitutionally encroach on the power to regulate immigration.

[S]tanding alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration. . . . [E]ven if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve.

Id. at 355-56; see also *Plyler v. Doe*, 457 U.S. 202, 225 ("As we recognized in *De Canas v. Bica*, the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.") (citations omitted); *Recent Developments*, *supra* note 86, at 1448 (suggesting that *De Canas v. Bica* is a sub silentio attempt to define a more expensive state role in controlling illegal immigration).

120. §§ 5-7, 1994 Cal. Adv. Legis. Serv. at B-40-B-42.

fied as illegal aliens. This classification does not correspond to the complex system of classification under the Immigration and Nationality Act,¹²¹ which includes permanent residents, temporary residents, refugees, asylees, and persons granted withholding of deportation, among others. Some of those persons, although present in the United States for a temporary period of time, were not lawfully admitted and would not fall within the categories of lawful aliens set out in Proposition 187. Thus, California includes within its classification of "illegal alien" many aliens who would not be considered illegal under the federal immigration laws.

Second, Proposition 187 imposes upon employees of schools and providers of public services, benefits, and medical care the obligations to determine which persons have valid immigration status under the federal immigration laws, to provide authoritative notice to persons deemed not to be in valid status that they must depart the United States, and to report persons suspected of being in invalid status to the INS. It has been contended that these provisions are in direct conflict with 8 U.S.C. § 1252(b), which provides that the deportation procedure outlined therein shall be the "sole and exclusive procedure for determining the deportability of an alien."¹²² Allowing states to make the sorts of determinations required under Proposition 187, particularly using classifications different from those used in the federal immigration laws, would create the very problems federal preemption of immigration law seeks to avoid: inconsistent and possibly inaccurate interpretation and application of the federal immigration laws¹²³ and the potential for international incident.¹²⁴

Congress has manifested its intent to legislate in the area of designation of categories of aliens and in providing a system for determining aliens' eligibility to enter and remain in this country, set forth in the Immigration and Nationality Act. The notice and reporting requirements of Proposition 187 set up immigration classification, notice, and reporting requirements

121. See *Gregorio T. v. Wilson*, No. 94-7652 MRP (C.D. Cal. filed 1994) on the docket of the United States District Court for the Central District of California, Civil Rights Complaint for Declaratory and Injunctive Relief and Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order. The author thanks the National Immigration Law Center for providing her with a copy of these documents.

122. *Id.*

123. *Plyler v. Doe*, 457 U.S. 202, 226 (1982); see also Gilbert P. Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 BOSTON UNIV. L. REV. 592, 637-38 (1994).

124. Professor Spiro contends that, because state officials may be less sensitive to the possible repercussions of mishandling foreign nationals in an enforcement context, there is a potential for international incident if states are afforded latitude in immigration control. Spiro, *supra* note 66, at 159.

which are in conflict with the Immigration and Nationality Act. These provisions should be found preempted by federal law.

2. Proposition 187's Prohibition of Public Benefits and Services to Undocumented Aliens

Proposition 187 prohibits the provision of public benefits and services, medical care, and public education to persons who are not U.S. citizens, aliens lawfully admitted as permanent resident aliens, or aliens lawfully admitted for a temporary period of time. Both preemption and equal protection arguments have been raised in challenges to these provisions.¹²⁵

A prohibition of benefits to undocumented aliens need not be preempted by federal law. In general, states have only limited authority to legislate in the area of aliens lawfully within the United States, since almost all matters concerning lawful aliens are entrusted to the federal government. The federal government has preempted legislation which appears to discriminate between lawful aliens and citizens, because such discrimination intrudes upon the federal immigration authority by adding to the burdens Congress has seen fit to impose upon aliens entering the country. This reasoning has not been applied when the aliens in question are illegally in the country, since those aliens were not admitted under Congress's laws.¹²⁶ In addition, the Court has held that the states have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.¹²⁷

Because Proposition 187 does not merely prohibit benefits to undocumented aliens, but rather defines particular categories of aliens (aliens lawfully admitted for permanent residence and aliens lawfully admitted for a temporary period of time), it sets up a separate immigration scheme which is in conflict with the Immigration and Nationality Act and should be preempted on that basis. The close connection between Proposition 187's definition of eligible aliens and its prohibition on benefits for other

125. See *Gregorio T. v. Wilson*, No. 94-7652 MRP (C.D. Cal. filed 1994) on the docket of the United States District Court for the Central District of California, Civil Rights Complaint for Declaratory and Injunctive Relief and Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order; *League of United Latin Am. Citizens v. Wilson*, No. 94-7569 MRP (C.D. Cal. filed 1994) on the docket of the United States District Court for the Central District of California, Ex Parte Application for Temporary Restraining Order and Order to Show Cause: Re Preliminary Injunctions, Supporting Memorandum, Exhibits, and Declaration of Counsel. The author thanks the National Immigration Law Center for providing her with copies of these documents.

126. *Plyler v. Doe*, 457 U.S. 202, 225 (1982); *De Canas v. Bica*, 424 U.S. 351, 361 (1976).

127. *Plyler*, 457 U.S. at 225; *De Canas*, 424 U.S. at 361.

aliens may cause the prohibition itself to be preempted, as well as the definition of eligible aliens. Were it not for the close connection between the California classification of persons eligible for benefits and the prohibition on the benefits, however, it is likely that the prohibition of benefits would not be deemed preempted and would instead be reviewed only for constitutionality under the Equal Protection Clause of the Fourteenth Amendment.

The results of review of Proposition 187's prohibition of public benefits to certain aliens under the Equal Protection Clause will depend on the level of scrutiny applied to the legislation. Courts apply the highest level of scrutiny, "strict scrutiny," when the statute under review involves a suspect classification or a fundamental right.¹²⁸ Statutes to which strict scrutiny is applied must be narrowly drawn to accomplish a compelling government interest.¹²⁹ Courts apply a much more lenient scrutiny to statutes which involve no suspect classifications and rights which are not important ones. Courts subject such statutes to "rational basis" review; the statute withstands review if the means used are rationally related to a legitimate public purpose.¹³⁰ A third level of scrutiny (intermediate scrutiny) is applied to statutes which, while not involving a fundamental right or suspect classification, still restrict important or substantial benefits. Such statutes must fairly be viewed as furthering a substantial state interest in order to withstand judicial review.¹³¹

The principal decision of the Supreme Court applying an equal protection analysis to a state statute directed towards undocumented aliens is *Plyler v. Doe*,¹³² and that decision will almost certainly be considered in constitutional review of Proposition 187. In *Plyler*, the Court considered a Texas statute prohibiting free public education to undocumented children. Those children were admitted to public schools only upon payment of tuition. The Court specifically found that illegal aliens were not a suspect classification¹³³ and went on to find that, although education was an important state benefit, it was not a fundamental right.¹³⁴ The Court therefore reviewed the Texas legislation under intermediate scrutiny to determine whether the legislation might fairly be viewed as furthering a

128. *Plyler*, 457 U.S. at 216-17.

129. *Id.* at 217.

130. *Id.* at 216.

131. *Id.* at 217.

132. 457 U.S. 202 (1982).

133. *Id.* at 225.

134. *Id.* at 221.

substantial interest,¹³⁵ rather than under the strict scrutiny applied to aliens lawfully in the country under *Graham v. Richardson*.¹³⁶

Texas advanced four interests which it claimed justified the legislation. First, it contended that the preservation of the state's limited resources for the use of its lawful residents justified the legislation in question.¹³⁷ The Court stated in response that a concern for the preservation of resources cannot alone justify the classification used in *Plyler* to allocate those resources.¹³⁸ In response to Texas's assertion of the need to protect itself from an influx of illegal immigrants, the Court found that charging tuition to undocumented alien children was a "ludicrously ineffectual attempt to stem the tide of illegal immigration."¹³⁹ Texas next claimed that exclusion of undocumented alien children from schooling would increase the quality of public education. The Court found that the record did not support such a conclusion.¹⁴⁰ Finally, in response to Texas's claim that undocumented children were less likely to remain within Texas boundaries and put their education to productive social or political use within the state, the Court found that, even assuming such an interest is legitimate, it was impossibly difficult to quantify.¹⁴¹

Under *Plyler*, undocumented aliens are not a suspect classification, and the alienage of the population towards which Proposition 187 is directed will therefore not result in strict scrutiny of the statute. The benefits impacted by the legislation, however, may be important enough to require intermediate scrutiny of the legislation.

Section 5 of Proposition 187 precludes provision of social services and benefits to persons understood to be "illegal aliens."¹⁴² In *Graham v. Richardson*,¹⁴³ the Court employed strict scrutiny to the legislation in question (a fifteen-year residence in order to establish eligibility for general assistance). That level of scrutiny was applied, however, because of the lawful alien status of the affected population, rather than because of the importance of the benefit affected. The immigration status of the aliens to whom Proposition 187 is directed will place them outside the category of

135. *Id.* at 224.

136. 403 U.S. 365 (1971).

137. *Plyler*, 457 U.S. at 227.

138. *Id.*

139. *Id.* at 228.

140. *Id.* at 229-30.

141. *Id.*

142. Proposition 187: Illegal Aliens—Ineligibility for Public Services—Verification and Reporting, § 5, 1994 Cal. Adv. Legis. Serv. B-39, B-40 (codified at CAL. WELF. & INST. CODE § 10001.5).

143. 403 U.S. 365 (1971).

suspect classification for purposes of the Fourteenth Amendment's equal protection guarantees. The Court may therefore relegate them, like the alien children in *Plyler*, to an intermediate level of scrutiny or, more likely, as in *Decanas v. Bica*,¹⁴⁴ to rational basis review.

Section 7 of Proposition 187 prohibits public education for aliens other than U.S. citizens, lawful permanent residents, and aliens lawfully admitted for a temporary period of time. Education has already been determined under *Plyler* to be an important state benefit, sufficient to require an intermediate level of scrutiny. Moreover, Proposition 187 is slightly more onerous than the Texas legislation because, where the Texas legislation burdened illegal alien children by requiring them to pay tuition in order to attend public school, Proposition 187 simply denies public education altogether after a transition period. The additional burden imposed by Proposition 187—the denial of all public education to children who are currently illegally in the country—may possibly result in review under a standard more enhanced than intermediate scrutiny.

The Supreme Court has not ruled upon state legislation similar to the medical care provisions of Proposition 187. Those provisions prohibit public agencies from providing medical care, other than emergency care, to persons who are not citizens, lawful permanent residents, or aliens lawfully admitted for a temporary period of time. These provisions, however, have an effect on the public similar in magnitude to the burdening of public education reviewed in *Plyler v. Doe*. As in *Plyler*, the affected aliens include children and other particularly disadvantaged persons such as the elderly and the ill. And, as in *Plyler*, there are public welfare concerns which will undoubtedly be taken into consideration.¹⁴⁵ The creation of a large population of persons who will not seek medical treatment, whether out of fear or financial inability, could easily create a public health problem of major significance. These factors—the weak political position of the affected persons¹⁴⁶—may well cause reviewing courts to apply at least the intermediate scrutiny used in *Plyler v. Doe*.

144. 424 U.S. 351 (1976).

145. "In determining the rationality of [the Texas statute limiting free public education to U.S. citizens and lawful permanent residents], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims." *Plyler v. Doe*, 457 U.S. 202, 223–24 (1982).

146. "Certain groups . . . have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Plyler*, 457 U.S. at 217 n.14 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)); see also *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

Reviewing courts will examine California's purpose in enacting Proposition 187 to determine whether that purpose is sufficiently strong to enable the statute to withstand constitutional review. California's stated reason for the legislation—economic hardship caused by the presence of illegal aliens—is similar to the economic justification advanced by Texas in *Plyler*. It is likely that Proposition 187's prohibition on public education and medical care will be reviewed under intermediate scrutiny. If so, reviewing courts should find that economic necessity, as in *Plyler*, is not a substantial state interest which would justify discrimination between undocumented aliens and other persons. The prohibition on education will result in a lifetime hardship upon a discrete class of children who are not accountable for their disabling status, as well as detriment to the nation caused by the creation of an uneducated underclass. The prohibition on medical care may result in public health risks, as well as irremediable physical and mental impairment and even death caused by the failure or inability to obtain medical treatment. When weighed against these severe results, a justification of saving money should not be viewed as substantial.

If reviewing courts determine that the benefits prohibited by Proposition 187 are not important ones so as to require intermediate scrutiny, they will be reviewed under the lower scrutiny of the rational relationship test. That test has not proved difficult to meet.¹⁴⁷ The Supreme Court has also indicated that state legislation, consistent with federal immigration policy, to protect the state's economy and its ability to provide governmental services from the deterrent effects of a massive influx of illegal immigrants would survive rational basis review.¹⁴⁸

Even if the state purpose in enacting the legislation is a substantial or a legitimate one, the means used by the state to accomplish its goal must be "fairly viewed as furthering" that purpose, for purposes of intermediate scrutiny, or rationally related to the purpose, for purposes of the rational basis test. If the state interest involved were cooperation with the federal government, a reviewing court could very well find that excluding undocu-

147. *Mathews v. Graham*, 426 U.S. 67 (1976); see Aleinikoff, *supra* note 101, at 865.

148. *Plyler v. Doe*, 457 U.S. 202, 227 n.23 (1982) (citing *De Canas v. Bica*, 424 U.S. 351 (1976)); see also *id.* at 249-51 (Burger, C.J., dissenting) (same proposition: "It is significant that the federal government has seen fit to exclude illegal aliens from numerous social welfare programs. . . . Although these exclusions do not conclusively demonstrate the constitutionality of the State's use of the same classification for comparable purposes, at the very least they tend to support the rationality of excluding illegal alien residents of a state from such programs so as to preserve the state's finite revenues for the benefit of lawful residents.").

mented aliens from schools, social services, and medical care is a “ludicrously ineffectual attempt to stem the tide of illegal immigration.”¹⁴⁹

B. A Call for Rethinking Preemption in the Context of Aliens and Public Benefits

As suggested in the preceding sections of this Article, the framework of public benefits for aliens in the United States has consisted in the past of relatively generous federal legislation combined with close scrutiny of state legislation attempting to curtail public benefits for aliens. The juxtaposition of preemption and equal protection was conducive to providing benefits to aliens: The federal government included at least permanent residents in most of its public benefit programs, so that the issue of the plenary power doctrine as applied to federal limitations on public benefits for aliens was not often raised and aliens were protected against most state efforts to curtail public benefits for aliens.

This framework is shifting. For perhaps the first time we are confronted with broad, serious limitations on public benefits and services for aliens by both states and the federal government. The federal proposals are very severe, perhaps even more so than Proposition 187, because they would deny public benefits, not only to undocumented aliens, but also to permanent residents. And one of the principal bases enunciated in the past for the striking of state legislation limiting public benefits for aliens—preemption of immigration law by the federal government—may very likely ensure a decision that the federal proposals, if enacted, are constitutional. This is because of the close link between the plenary power doctrine and federal preemption of immigration law; immigration law is largely preempted by the federal government, and Congress’s enactments concerning aliens, because of Congress’s sole power to legislate in the area, are given great deference under the plenary power doctrine.

With this shifting of the old framework of public benefits for aliens, we should reconsider the constitutional analysis under which we have considered legislation curtailing benefits to aliens in the past. In particular, we should reconsider the extent to which the federal preemption of immigration law allows federal legislation limiting public benefits for aliens to be reviewed under the relaxed standard of the plenary power doctrine. The removal of alien eligibility for public benefits from the preempted area and the plenary power doctrine should result in enhanced review of the

149. *Id.* at 228.

Personal Responsibility Act for compliance with the equal protection element of the Fifth Amendment.¹⁵⁰

Legislation concerning alien eligibility for public benefits should not fall under the federal preemption of immigration law. Public benefits are not closely related to the reasons advanced for federal preemption of immigration law, that is, the Naturalization Clause, the perception of immigration as connected to foreign policy, and the inherent power to protect our borders.¹⁵¹ Thus, the reasons for exclusive federal authority in the

150. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (discrimination may be so unjustifiable as to violate due process under the Fifth Amendment).

Two well-respected commentators have suggested that state legislation discriminating against aliens not be reviewed solely under preemption theories. Professor Harold Hongju Koh has written that he prefers an equal protection approach to aliens' rights over a preemption approach, because "it answers, in a way that preemption reasoning does not, the moral and philosophical claims that resident aliens make against their state governments." Koh, *supra* note 86, at 99. Professor Koh also believes, however, that federal preemption has a role within an equal protection theory of aliens' rights. In that role, preemption arguments would narrow the range of legitimate state motives which could be invoked to justify an alienage classification. *Id.* at 102.

Professor Spiro also advocates that states not be preempted from all legislation regarding aliens, but for reasons other than those expressed in this article. Professor Spiro argues that the main basis for federal supremacy in the area of immigration—the need for a unified national policy of international relations—no longer exists. He believes that state-level regulation of some matters concerning aliens may have various benefits. For example, state regulation of issues such as public benefits may result in a more equitable distribution of the costs of undocumented aliens among the states, by encouraging undocumented aliens to relocate. This relocation might in turn dilute anti-immigrant political pressures and result in a "more durable foundation for a more consistently benign federal posture towards aliens, their admission, and their legal status." In addition, state regulation such as Proposition 187 allows states to "let off steam" without involving the whole country; if Proposition 187 is struck down by the courts, California may have the political power to compel the passing of similar legislation on a federal level. Spiro, *supra* note 66, at 172-74.

Other commentators have advocated that review of state legislation discriminating against aliens should be done under preemption alone, rather than under equal protection. Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1060-65 (1979); Levi, *supra* note 82.

151. Rosberg, *supra* note 84, at 328 ("The reasons for extraordinary deference to the political branches on immigration matters do not seem to have any force here. When the government distinguishes between citizens and aliens with respect to welfare benefits or federal employment, the Court can scrutinize the legislation without fear of enmeshing itself in the complex process of formulating immigration policy."); see also Aleinikoff, *supra* note 101, at 869-70 ("It should be apparent that some statutes burdening aliens are based on considerations other than a policy judgment regarding the number and classes of aliens who may enter or remain in the United States."); Legomsky, *supra* note 101, at 256; Neuman, *supra* note 63, at 1897 (describing American immigration law prior to 1876 as a time when "the issues of crime, poverty and disease among immigrants were treated as matters of legitimate local concern" and commenting that "[t]o the extent that immigration regulation today turns on these issues (which is substantial), the equation of immigration with foreign policy is a fiction"); Levi, *supra* note 82, at 1085-86; *Recent Developments*, *supra* note 86, at 1421-23 (federal review of discrimination against resident aliens does not ordinarily require courts to formulate foreign policy or intrude on areas of diplomatic sensitivity). See also Chief Justice Rehnquist's argument that a state should not be preempted

designation of which aliens may enter the United States, the length of their stay, the conditions under which they may be deported, and the requirements for naturalization do not apply to the determination of which public benefits are available to aliens.

The argument that federal legislation concerning public benefits for aliens should not be included within the federal preemption of immigration law may seem wishful thinking at this point. The Supreme Court stated quite plainly in *Mathews v. Diaz*, in upholding a federal statute denying Medicare eligibility for aliens who are not permanent residents who have resided in the United States for at least five years,¹⁵² that Congress's "routine and normally legitimate" power over naturalization policy encompasses determining eligibility for welfare benefits.¹⁵³ Yet the severity of the Personal Responsibility Act warrants rethinking of the level of review applied to federal action concerning aliens and public benefits. The bill denies public benefits to permanent residents, a group for whom the Court has indicated special concern because of its ties to the United States. Aliens can be viewed as members of the American community: they pay taxes; they serve in the armed forces; and they develop ties and loyalties that are not significantly different, and may not be different at all, from those of a citizen.¹⁵⁴ The significant public health and policy consequences of the federal proposals, in particular the severe curtailment on health care, may also provide an impetus to review legislation resulting from the federal proposals under a higher standard.¹⁵⁵

from legislating in areas of education. *Toll*, 458 U.S. at 25 (Rehnquist, J., dissenting). The Chief Justice also suggests, however, that review of such legislation should be done under something less than strict scrutiny. *Id.* at 41, 47. *But see* Spiro, *supra* note 66, at 158 n.147 (noting Mexico's displeasure with Proposition 187).

Some scholars distinguish between "immigration law," covering areas related to the admission, deportation, and naturalization of aliens, and "immigrant" or "alienage" law, covering other areas relating to the legal status of aliens, such as access to public education, welfare benefits, and government employment. *See* Bosniak, *supra* note 90, at 186 n.25; Motomura, *supra* note 101, at 202.

152. *Mathews v. Diaz*, 426 U.S. 67, 70 (1976).

153. *Id.* at 85.

154. *Sugarman v. Dougall*, 413 U.S. 634, 645 (1973); *Graham v. Richardson*, 403 U.S. 365, 376 (1971); *Aleinikoff*, *supra* note 85, at 23; *Rosberg*, *supra* note 84, at 327.

155. *See* *Rosberg*, *supra* note 84, at 286-88 ("It might be that restrained review is appropriate in *Diaz* because of the relative unimportance of the right or opportunity denied to aliens by virtue of the statutory classification."); *see also* LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1611 (2d ed. 1988) (The Court has not always referred to the importance of the interest at stake when heightening its level of scrutiny, but it is hard to believe that importance was not at least a factor in the close look taken by the Court where governmental deprivation affected the interest of the individual in receiving such substantial benefits as food stamps.).

There is concern that removing alien eligibility for public benefits from the area of federal preemption of immigration law may be detrimental to aliens. Preemption has protected aliens lawfully within this country against state limitation of public benefits, since limiting a lawfully admitted alien's rights to public benefits has been viewed as a burden additional to those imposed by Congress.¹⁵⁶ This burdening is more directly an equal protection problem, however. Federal preemption is not essential to protect aliens, at least permanent resident aliens, in this context, given the extension of equal protection to them.¹⁵⁷ Determining that a state's limitations discriminate against aliens in relation to citizens is a much more direct way of relieving additional burdens on aliens, and the Court has clearly used this basis to find state limitations on public benefits for aliens unconstitutional.¹⁵⁸

There is also concern that if federal preemption is not applied to state legislation, aliens will be left vulnerable to an unenthusiastic application of equal protection under the Fourteenth Amendment and possible reversal of cases like *Plyler* and *Mathews*.¹⁵⁹ This is certainly a legitimate concern, and there are hints in *Plyler* itself that if federal policy were to indicate approval, state restrictions of public benefits for aliens might be upheld.¹⁶⁰ There are several reasons, however, why despite the validity of this concern, preemption no longer appears to be a reliable protection for aliens in the area of public benefits.

By analogy, the Court refused to designate public education as a fundamental right in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), where the educational problems involved did not include a total ban on public education. In *Plyler v. Doe*, 457 U.S. 202 (1982), however, where Texas attempted to refuse public education to all illegal alien children unless they paid tuition, the Court, while still declining to view education as a fundamental right, took action to strike down the statute.

156. See, e.g., *Toll v. Moreno*, 458 U.S. 1, 12-13 (1982); *Graham*, 403 U.S. at 378; see also *supra* text accompanying notes 80-84.

157. *Bernal v. Fainter*, 467 U.S. 216 (1984); *Graham*, 403 U.S. at 376.

158. See, e.g., *Graham*, 403 U.S. 365; *Plyler*, 457 U.S. 202.

159. The author thanks Professor Kevin Johnson for his insight on this point. See Bosniak, *supra* note 90, at 193 ("[F]ew observers expect *Plyler* to survive the coming legal battles over Proposition 187 given the judiciary's change in personnel over the past decade." Professor Bosniak notes that *Plyler* was a 5 to 4 decision and that, of the majority, only Justice Stevens remains on the bench.); Spiro, *supra* note 66, at 153 (suggesting that the reviewing under equal protection of statutes discriminating against aliens may "here be at its end").

160. *Plyler*, 457 U.S. at 225-26 ("In other contexts, undocumented status, coupled with some articulable federal policy, might enhance state authority with respect to the treatment of undocumented aliens."); see also *id.* at 243 (Burger, C.J., dissenting) ("In a sense, the Court's opinion rests on such a unique confluence of theories and rationales that it will likely stand for little beyond the results in those particular cases.").

First, aliens now are faced with both state and federal proposals to restrict their access to benefits, and, of the two, the federal proposals appear more severe. Under the current linkage of federal preemption of immigration and the plenary power doctrine, almost any federal legislation curtailing public benefits for aliens will likely withstand constitutional review. Removing public benefits from the area preempted by the federal government should result in enhanced review of federal legislation under the Fifth Amendment.

Secondly, the version of the Personal Responsibility Act passed by the House in March 1995, would impact not only federal but state programs, since it authorizes states to limit public benefits for legal aliens¹⁶¹ and prohibits extension of state benefits to aliens unlawfully in the country¹⁶² and to non-immigrants.¹⁶³ Although there are arguments against the constitutionality of these provisions,¹⁶⁴ the deference accorded federal legislation over aliens under the plenary power doctrine strengthens the likelihood that they will withstand judicial review. Thus, the presence of federal preemption in the area of public benefits may also very likely result in federal requirements that states also curtail public benefits to aliens. Thirdly, jurisprudence indicates that state legislation which, like Proposition 187, is directed against illegal aliens, will not be found preempted by federal law, assuming the legislation does not constitute a regulation of immigration under *De Canas v. Bica*. The federal government has preempted legislation which appears to discriminate between lawfully admitted aliens and citizens because such discrimination intrudes upon federal immigration authority by adding to the burdens Congress has seen fit to impose upon aliens entering

161. H.R. 4, 104th Cong., 1st Sess., § 413 (1995).

162. *Id.* § 411.

163. *Id.* § 412.

164. Professor Gilbert Carrasco analyzes similar provisions in the Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (codified at 8 U.S.C. § 1255a(h)(1)(B) (1994)), which authorize states to withhold public benefits to legalized aliens for five years after their obtaining temporary resident status. Professor Carrasco argues that such provisions are unconstitutional for several reasons. First, state legislation passed pursuant to the federal authorization would not be able to withstand strict scrutiny under the Fourteenth Amendment. Second, Congress is prohibited from abridging aliens' equal protection rights under a theory of inverse preemption and under the "ratchet theory" (Congress may not authorize states to violate the Fourteenth Amendment, either through its power under Section 5 of the Fourteenth Amendment or under any other constitutional authority). Third, Congress may not delegate authority to the states to legislate in the immigration field because that authority is non-delegable. Fourth, legislation by states in the area of immigration law would create an unconstitutionally heterogeneous immigration law, impermissible under the Naturalization Clause. Gilbert P. Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 597, 622 (1994).

the country. Such reasoning does not apply where the aliens in question are illegally in the country.¹⁶⁵

Relinquishing preemption as a protection for aliens' rights does not mean that there are no defenses to state action discriminating against aliens. Under *Plyler* and *DeCanas*, state and federal public benefits for undocumented aliens, outside of public education and emergency services, may be lost for the present, but there is the possibility that state constitutions and law may maintain the provision of public services and benefits for needy aliens lawfully in this country. Proposition 187, touted as draconian, does not attempt to deny benefits to aliens lawfully residing in the United States. States have assumed the role of guardian of individual rights in areas outside the immigration field.¹⁶⁶ Perhaps it is not too much to hope that states will assume a similar role regarding lawful aliens.

CONCLUSION

The combination of state restrictions on public benefits for undocumented aliens and the current federal proposals to limit public benefits for almost all aliens has created a fundamental change in our historic framework of alien eligibility for public benefits. The federal government, once the guardian of those benefits, is now considering proposals which will severely curtail them. Given this shift, a more extensive constitutional review of federal legislation than that currently available under federal preemption of immigration law and the plenary power doctrine is needed. To accomplish this goal, public benefits should be removed from the preempted area. This will allow states more freedom to legislate in the area of public benefits, subject to the Equal Protection Clause of the Fourteenth Amendment, and will require more extensive constitutional responsibility of Congress when it legislates concerning aliens and public benefits.

165. *Plyler v. Doe*, 457 U.S. 202, 225 (1982) ("As we recognized in *De Canas v. Bica*, the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.") (citation omitted); *De Canas v. Bica*, 424 U.S. 351 (1976).

166. See William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986); Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law into the Breach Once More*, 21 N.M. L. REV. 219 (1991).