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Federalism and the Disappearing Equal Protection Rights of Immigrants

Kevin R. Johnson
University of California Davis

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Abstract

Jenny-Brooke Condon's article The Preempting of Equal Protection for Immigrants? *analyzes important issues surrounding the constitutional rights of immigrants. Professor Condon in essence contends that the current legislative, executive, and scholarly focus on the distribution of immigration power between the state and federal governments has undermined the Equal Protection rights of legal immigrants in the United States. Despite the contentious national debates over immigration reform, immigrants' rights have generally been of secondary concern in contemporary immigration scholarship, which is now dominated by analysis of immigration federalism.*

Professor Condon undoubtedly is correct that we should not lose sight of the rights of immigrants through a myopic focus on federalism concerns. Courts should be vigilant to protect noncitizens from the excesses of all governmental exercises of power, including discrimination against immigrants by the federal government.

This essay identifies two areas for future inquiry that build on The Preempting of Equal Protection for Immigrants? *First, Professor Condon questions the arbitrary line-drawing between the standards of review of state and federal alienage classifications. But, she herself draws a questionable line by advocating for greater protection of the constitutional rights of legal immigrants, while stopping short of calling for the extension*

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* Dean and Mabie-Apallas Professor of Public Interest Law and Chicana/o Studies, University of California at Davis School of Law; A.B., University of California, Berkeley; J.D., Harvard University. Thanks to Jenny-Brooke Condon for her provocative article and thoughtful comments on this response. UC Davis law student Gina Verraster provided helpful research and editorial assistance.

of rights to undocumented immigrants. However, all immigrants are disenfranchised, lack direct political power, and frequently suffer the disfavor of the majority in the political process. That status militates in favor of strict scrutiny review of laws targeting undocumented as well as lawful immigrants.

Second, if Professor Condon's call for greater attention to the Equal Protection rights of noncitizens is taken seriously, we must examine the continuing vitality of the plenary power doctrine. That exceptional doctrine shields from judicial review invidious classifications under the U.S. immigration laws, including discrimination that would be patently unconstitutional if applied to U.S. citizens; those laws historically have discriminated against noncitizens who are racial minorities, poor, disabled, women, political dissidents, and others. Dismantling what is known as "immigration exceptionalism" has long puzzled immigration law scholars. Professor Condon reminds us of the need to reconsider the constitutional immunity for immigrant admissions and removal criteria.

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I. Introduction

Jenny-Brooke Condon's article *The Preempting of Equal Protection for Immigrants?*[1] thoughtfully analyzes important issues surrounding the constitutional rights of immigrants. Professor Condon contends that the current legislative, executive, and scholarly focus on the distribution of immigration power between the state and federal governments has undermined the Equal Protection rights of legal immigrants in the United States.[2] Despite the contentious national debates over immigration reform, immigrants' rights have generally been of secondary concern in contemporary immigration scholarship, which today is dominated by analysis of immigration federalism.[3]

In an era in which the Supreme Court has moved toward greater consistency in Equal Protection doctrine,[4] Professor Condon examines a jarring incongruence in the Court's alienage jurisprudence. The Court has required strict scrutiny review of

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1. Jenny-Brooke Condon, *The Preempting of Equal Protection for Immigrants?*, 73 WASH. & LEE L. REV. 77 (2016).

2. *See id.* at 160–63 (arguing that Equal Protection jurisprudence with respect to immigrants' rights needs "realignment").

3. *See, e.g.*, Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601 (2013); Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577 (2012); Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703 (2013); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557 (2008). However, there are exceptions. *See, e.g.*, Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367 (2013) (contending that the rights of noncitizens often are lost in court decisions that focus on federalism and administrative law doctrines); Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879 (2015) (analyzing how modern due process doctrine has expanded the rights of immigrants).

4. *See, e.g.*, Adarand Constr., Inc. v. Peña, 515 U.S. 200, 227 (1995) (holding that strict scrutiny applies to all racial classifications, including those employed in programs designed to remedy past discrimination); *see also* Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After* Adarand Constructors, Inc. v. Peña, 76 OR. L. REV. 425, 429 (1997) (contending that the Supreme Court's decision in *Adarand* militates in favor of meaningful judicial review of federal alienage classifications).

state-based discrimination against lawful immigrants.[5] In stark contrast, the Court has exercised extremely deferential review of *federal* alienage classifications.[6]

Although deviating from the review standard for state alienage classifications as well as conventional Equal Protection doctrine, deference to federal alienage classifications is consistent with a line of cases originating in the late eighteenth century. Those decisions established the extraordinary "plenary power" doctrine; the Supreme Court has proclaimed that, because Congress and the Executive Branch possess "plenary power" over immigration, federal immigration laws are effectively immune from ordinary judicial review of their constitutionality.[7] In creating that doctrine, the Court upheld racial discrimination in a series of laws designed to exclude and deport Chinese immigrants from the United States. Despite the intervening constitutional revolution of the twentieth century, the Supreme Court has yet to overrule, or significantly limit, its plenary power decisions.[8]

Professor Condon reviews several developments that have allowed the application of the deferential standard of review applicable to *federal* alienage classifications to shield *state* classifications from constitutional review. Her rights-focused approach forcefully responds to the thrust of much major immigration impact litigation and the trend of congressional and federal delegation of immigration authority to the states, as well

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5. *See infra* notes 18–25 and accompanying text (noting justifications for strict scrutiny of alienage classifications).

6. *See infra* notes 26–37 and accompanying text (questioning the Supreme Court's failure to subject federal alienage classifications to strict scrutiny).

7. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698 (1893) (upholding a law targeting Chinese immigrants for deportation); Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889) (rejecting constitutional challenges to law requiring the exclusion of Chinese noncitizens from the United States). For capsule summaries of the plenary power doctrine, see Kevin R. Johnson, *Minorities, Immigrant and Otherwise*, 118 YALE L.J. POCKET PART 77 (Oct. 2008); Michael Kagan, *Plenary Power is Dead! Long Live Plenary Power!*, 114 MICH. L. REV FIRST IMPRESSIONS 21 (2015).

8. *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5–6 (1998) ("[T]he plenary power doctrine is said to make racial discrimination in the immigration context lawful per se."); Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853 (1987) (criticizing the Supreme Court decisions upholding the discriminatory Chinese exclusion laws).

as the trajectory of contemporary immigration scholarship.[9] Professor Condon specifically contends that the reliance on federal preemption doctrine to displace state immigration enforcement laws has undermined the constitutional rights of immigrants.[10] In consistently finding that federal power trumps state power over immigration, courts have effectively placed greater authority over the rights of immigrants in the hands of the federal government, which has few legal constraints on how it treats immigrants. Moreover, express congressional delegation of authority to the states to deny public benefits to immigrants in 1996 welfare reform legislation,[11] has removed discriminatory state laws from strict scrutiny review, with discrimination against lawful immigrants tolerated, and arguably encouraged, by a deferential review standard applicable to federal alienage classifications.[12] The overall result is the dilution of the constitutional rights of immigrants.

Professor Condon cautions us to not lose sight of the rights of immigrants through a myopic focus on federalism concerns. Courts should be vigilant to protect noncitizens from the excesses of all governmental exercises of power, including those of the federal government.

This essay identifies two areas for future inquiry that build on *The Preempting of Equal Protection for Immigrants?* First, Professor Condon questions the arbitrary line-drawing between the standards of review of state and federal alienage classifications. But, she herself draws a questionable line by advocating greater protection of the constitutional rights of *legal* immigrants, while stopping short of calling for the extension of rights to *undocumented* immigrants. However, all immigrants, legal and unauthorized, are disenfranchised, lack direct political

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9. *See infra* Part III (arguing that the federal preemption doctrine at times has failed to adequately protect the rights of immigrants).

10. *See* Condon, *supra* note 1, at 125–28 (summarizing cases in which the Supreme Court employed federal preemption doctrine in reviewing laws affecting immigrants).

11. *See infra* note 51 and accompanying text (noting that the Executive Branch has aggressively enforced the criminal removal provisions of the immigration laws, only to have the Supreme Court reject a number of those efforts).

12. *See* Condon, *supra* note 1, at 129–50 (making this point).

power, and frequently suffer the disfavor of the majority in the political process. That insularity favors strict scrutiny review of laws targeting undocumented as well as lawful immigrants.[13]

Second, if Professor Condon's call for greater attention to the Equal Protection rights of noncitizens is taken seriously, we must examine the continuing vitality of the much-criticized plenary power doctrine. That exceptional doctrine shields from meaningful judicial review invidious classifications under the U.S. immigration laws, including discrimination that would be patently unconstitutional if applied to U.S. citizens; those laws historically have discriminated against noncitizens who are racial minorities, poor, disabled, women, political dissidents, and others.[14] Dismantling what is known as "immigration exceptionalism"[15] long has perplexed immigration law scholars.[16] It deserves our utmost attention.

II. An Unjustifiable Equal Protection Dichotomy?

Professor Condon directs attention to a glaring dichotomy in the Supreme Court's Equal Protection jurisprudence concerning the review of alienage classifications. It was not established by antiquated decisions. but instead is the product of two cases decided just a few years ago.[17]

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13. *See infra* Part IV.A. (discussing the need to protect the rights of undocumented immigrants).

14. *See generally* KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS (2004) (analyzing the history of discrimination against various minorities under the U.S. immigration laws and their enforcement); Michele Goodwin & Erwin Chemerinsky, *No Immunity: Race, Class, and Civil Liberties in Times of Health Crisis: On Immunity: An Inoculation*, 129 HARV. L. REV. 956, 965–76 (2016) (summarizing the racial and class impacts of health exclusions in the U.S. immigration laws).

15. *See generally* Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361 (1999); Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965 (2013).

16. For sources discussing the plenary power doctrine, see generally T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY (2002); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION (1996).

17. *See* Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 603–05 (1994) (contending that congressional delegation to the states of the power to

In *Graham v. Richardson*,[18] the Supreme Court in 1971 addressed a challenge to state laws restricting the eligibility of certain lawful permanent residents for public benefit programs. It unanimously held that:

> [T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority (see United States v. Carolene Products Co., 304 U.S. 144, 152–53, n.4 (1938)) for whom such heightened judicial solicitude is appropriate.[19]

Consistent with modern Equal Protection doctrine, the Court classified lawful immigrants as a "suspect class" and subjected state laws that discriminate against them to strict scrutiny; such laws can be upheld only if justified by a compelling governmental interest. In applying that exacting standard of judicial review, the Court not surprisingly invalidated state restrictions on benefit receipt by lawful permanent residents.[20]

General Equal Protection jurisprudence favors strict scrutiny review of laws that discriminate against discrete and insular minorities, including immigrants.[21] Lawfully disenfranchised, lawful permanent residents lack direct political power.[22] Political

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deny benefits to immigrants is unconstitutional); Romero, *supra* note 4, at 430–38 (examining the disjunction in Supreme Court decisions between judicial review of state and federal alienage classifications).

18. 403 U.S. 365 (1971).

19. *Id.* at 371–72 (emphasis added) (footnotes omitted).

20. *See id.* at 376. For skepticism about the Court's adoption of strict scrutiny review in *Graham v. Richardson*, see Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 722–23 (1996).

21. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 161–62 (1980) (contending that immigrants constitute a discrete and insular minority and, consequently, that laws that discriminate against them should be subject to strict scrutiny); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 981 (2002) ("When one adds to . . . the ignoble history of anti-immigrant sentiment among the voting citizenry, usually laced with racial animus, aliens are a group particularly warranting judicial protection."); Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1383–84 (2007) ("Executives that seek to harness the benefits of deference in court would . . . be well advised to avoid blatant discrimination on the basis of alienage.").

22. *See* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage,* 141 U. PA. L. REV.

disempowerment was the rationale offered by the Supreme Court in the famous *Carolene Products* footnote four for strict scrutiny review of laws disadvantaging "discrete and insular minorities."

Due to their political powerlessness and insularity in American society, immigrants historically have been the subject of the wrath of the political process in the United States, including a great many punitive laws.[23] To make matters worse, a majority, although far from all, immigrants are people of color.[24] As a result, the immigration laws arguably have been employed at various times as a proxy for race and a means to discriminate against racial minorities.[25] The specter of racial discrimination, accomplished through the reliance on alienage classifications, renders many immigrants as a discrete and insular minority in two distinct respects, thus strongly favoring strict scrutiny review of laws that discriminate against them.

In 1976, the Supreme Court in *Mathews v. Diaz*[26] unanimously articulated the polar opposite of strict scrutiny

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1391, 1391–94 (1993) (questioning the near-universal disenfranchisement of lawful permanent residents); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1092 (1977) (to the same effect). Although immigrants indirectly exercise political power separate and apart from the ballot box, their inability to vote significantly constrains those efforts. *See* JOHN TIRMAN, DREAM CHASERS: IMMIGRATION AND THE AMERICAN BACKLASH 91–109 (2015) (discussing the emergence of the undocumented college students known as DREAMers as a potent force in American politics); Daniel Kanstroom, *"Alien" Litigation as Polity-Participation: The Positive Power of a "Voteless Class of Litigants",* 21 WM. & MARY BILL RTS. J. 399, 400, 439 (2012) (analyzing the use of litigation as a political tool by immigrant rights activists)

23. *See generally* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (4th ed. 2002) (documenting the events culminating in congressional passage of a restrictive national origins quotas system in 1924); JOHNSON, *supra* note 14 (analyzing the history of discrimination against various minority groups in the U.S. immigration laws).

24. *See* Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and the Civil Rights Law in the New Millennium*, 49 UCLA L. REV. 1481, 1491–1510 (2002) (explaining how immigration from Mexico has changed the racial composition of the U.S. population).

25. *See generally* Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 2 UC IRVINE L. REV. 313 (2012) (analyzing the racially disparate impacts of the enforcement of state immigration enforcement laws as well as the potential positive impacts on Latina/o immigrants and their families of the passage of comprehensive immigration reform).

26. 426 U.S. 67 (1976).

review of discrimination in the review of an alienage classification in a *federal* health benefit program:

> In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry. The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is "invidious."[27]

In a footnote, the Court explained that

> [a]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. *Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference*.[28]

In applying an extremely deferential review standard, the Court not surprisingly upheld a congressional restriction on the eligibility of lawful permanent residents for federal benefits.

The toothless standard of review applied by the Supreme Court in *Mathews v. Diaz* to a federal alienage classification is a far cry from the strict scrutiny review of state alienage classifications adopted in *Graham v. Richardson*. However, the political process defect that results in suspect classification status and strict scrutiny review of state alienage classifications in *Graham* applies with equal force to alienage classifications in the federal laws. As the Court emphasized without qualification, "[a]liens as a class are a prime example of a 'discrete and insular' minority."[29] The inconsistency of the judicial review standards thus is difficult to justify as a matter of constitutional law.[30]

The deferential approach of *Mathews v. Diaz*, along with the justification offered by the Supreme Court, unquestionably

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27. *Id.* at 79–80.

28. *Id.* at 81 n.17 (emphasis added) (citations omitted).

29. *Graham v. Richardson*, 403 U.S. at 372.

30. *See* Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 FORDHAM L. REV. 155, 173–86 (2014) (analyzing the Supreme Court's inconsistent approaches to constitutional review of state and federal alienage classifications).

sounds of the plenary power doctrine, which has historically immunized from judicial review the judgments of Congress about which immigrants to admit into, as well as to deport from, the United States.[31] However, *Mathews v. Diaz* applied the doctrine to the review of a federal law that discriminates against immigrants lawfully admitted to—and physically present in—the United States, not noncitizens seeking entry into, or facing removal from, the country.[32]

To an immigration law professor, it is striking that Professor Condon discusses *Mathews v. Diaz* but does not analyze in any detail the fact that it is firmly rooted in the plenary power doctrine.[33] Immigration professors regularly cite *Mathews v. Diaz* as the modern reaffirmation, if not problematic extension, of that extraordinary doctrine.[34]

In *Mathews v. Diaz*, the Supreme Court need not have invoked the plenary power doctrine. It instead could have ruled that lawful permanent residents physically present in the United States deserve full Equal Protection rights, including strict scrutiny review of federal alienage classifications. That would have mirrored the review standard applicable to state alienage classifications under *Graham v. Richardson*,[35] a congruence that would be generally consistent with the thrust of modern Equal Protection doctrine.[36] In so doing, the Court need not have

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31. *See supra* notes 7–8 and accompanying text (discussing the roots of the plenary power doctrine).

32. *See* Soucek, *supra* note 30, at 199 ("The problem in *Diaz* is that the alienage-based Medicare restrictions at issue in that case were not, in any obvious way, part of immigration law at all.").

33. *See* Condon, *supra* note 1, at 100 n.96 (citing scholarship analyzing the influence of the plenary power doctrine on the Court's holding in *Mathews v. Diaz*).

34. *See, e.g.*, Allison Brownell Tirres, *Mercy in Immigration Law*, 2013 BYU L. REV. 1563, 1599 (analyzing *Mathews v. Diaz*).

35. *Cf.* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding that the Fifth Amendment prohibits racial segregation by the federal government, just as the Equal Protection Clause of the Fourteenth Amendment bars racial discrimination by the states); Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 542 (1977) (analyzing the Equal Protection guarantee applicable to the federal government).

36. *See supra* note 4 and accompanying text (citing sources discussing the Court's contemporary Equal Protection jurisprudence). Hiroshi Motomura sketches an Equal Protection model incorporating *Graham v. Richardson* and *Mathews v. Diaz* in Hiroshi Motomura, *Immigration and Alienage, Federalism*

resolved the question of the appropriate constitutional review of the provisions governing the admission of noncitizens to, or deportation from, the United States.[37]

III. The Failure of Federal Preemption Doctrine to Protect Immigrant Rights

In challenges to a virtual plethora of recent state immigration enforcement laws fueled by public concern with undocumented immigration,[38] litigants have relied primarily on the Supremacy Clause[39] and federal preemption doctrine, not the Equal Protection Clause of the Fourteenth Amendment. Even if the true hope was to protect the rights of immigrants, the legal question directly presented in those cases involved the boundary between state and federal power over immigration regulation. Although understanding that preemption doctrine frequently has proven successful as a litigation strategy, Professor Condon observes that it has not always ensured adequate protection of the rights of immigrants.[40]

"In recent years, both the United States Supreme Court's jurisprudence addressed to immigrants' treatment by the states and an extensive scholarly literature, have focused heavily on immigration federalism."[41] A leading example is the Supreme

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and Proposition 187, 35 VA. J. INT'L L. 201, 205–14 (1994).

37. *See infra* Part IV.B. (considering the appropriate scope of constitutional review of the immigration laws).

38. *See* Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/ (last visited July 2, 2016) (analyzing critically Donald Trump's derogatory comments about Mexican immigrants and characterizing them as criminals) (on file with the Washington and Lee Law Review); *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/ (last visited July 2, 2016) (reprinting speech in which Trump announced that he would run for President) (on file with the Washington and Lee Law Review).

39. U.S. CONST. art. VI, para. 2.

40. *See* Condon, *supra* note 1, at 125–28.

41. *Id.* at 80 (footnote omitted).

Court's 2012 decision in *Arizona v. United States*,[42] which invalidated on federal preemption grounds core provisions of Arizona's S.B. 1070, a state immigration enforcement law that many commentators feared would increase discrimination against Latina/os by state and local law enforcement officers.

Dutifully following the lead of *Arizona v. United States*, the lower courts regularly employ federal preemption doctrine to invalidate central provisions of state immigration enforcement laws.[43] In large part, that focus results from the fact that litigants have frequently relied on preemption as a litigation strategy. Preemption challenges avoid the doctrinal impediments to Equal Protection claims, including the uncertainty of the standard of constitutional review given that the Supreme Court has not consistently applied strict scrutiny review to alienage discrimination as called for by *Graham v. Richardson*.[44] In addition, the discriminatory intent required to establish a violation of the Equal Protection Clause serves as a formidable barrier to constitutional challenges to state immigration enforcement laws.[45]

Professor Condon expresses skepticism about the focus on federal preemption, rather than the constitutional rights of

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42. 132 S. Ct. 2492 (2012); *see* Chamber of Commerce v. Whiting, 563 U.S. 582, 600 (2011) (holding that an Arizona law allowing for the revocation of the licenses of business that employ undocumented immigrants was not preempted by federal immigration law).

43. *See, e.g.*, United States v. South Carolina, 720 F.3d 518 (4th Cir. 2013); United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012); Ga. Latino Alliance for Human Rights v. Georgia, 691 F.3d 1250 (11th Cir. 2012).

44. *See* Condon, *supra* note 1, at 91–98 (analyzing the exceptions created by the Supreme Court to *Graham v. Richardson*'s strict scrutiny review of state alienage classifications).

45. *See* Washington v. Davis, 426 U.S. 229, 240–42 (1976) (holding that, to prevail on an Equal Protection claim, a plaintiff must establish a "discriminatory intent" by a state actor); *see, e.g.*, United States v. Armstrong, 517 U.S. 456, 470 (1996) (finding that, despite overwhelming statistical evidence of racially disparate impacts on African-Americans of crack cocaine prosecutions, plaintiffs had failed to establish an Equal Protection claim); McCleskey v. Kemp, 481 U.S. 279, 298–99 (1987) (same in death penalty case). The barriers to Equal Protection challenges make litigation likely to put an end to only the most egregious patterns and practices of discrimination. *See, e.g.*, Melendres v. Arpaio, 784 F.3d 1254, 1257 (9th Cir. 2015) (affirming in large part an injunction designed to end a pattern and practice of discrimination against Latina/os by a local law enforcement agency).

immigrants, in contemporary challenges to state immigration enforcement laws.[46] In her view, this approach "elevat[es] deference to the federal government's power to set immigration policy over a previously established constitutional commitment [in cases like *Graham v. Richardson*] to immigrants' equal treatment by the states."[47] The fundamental concern shared by, among others, Harold Koh,[48] is that the undue focus on federalism sacrifices the Equal Protection rights of noncitizens.

Professor Condon specifically questions the propriety of weak Equal Protection rights for immigrants with respect to the federal government but strong rights with respect to the states.[49] Although anti-immigrant sentiment arguably is voiced more forcefully at the state and local levels than on the national scene, it unquestionably exists at the federal level. Indeed, the disfavor of certain groups of lawful immigrants in the national political process can be seen in many contemporary acts of Congress. Congress, for example, in 1996 welfare reform legislation authorized the states to deny benefits to lawful immigrants.[50] Similarly, 1996 immigration reform legislation and other laws have greatly expanded the removal grounds for lawful permanent residents convicted of crimes.[51] As one influential commentator

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46. *See* Condon, *supra* note 1, at 125–28.

47. *Id.* at 77 (footnote omitted).

48. *See* Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51, 98–99 (1985) (stating that federal preemption doctrine "effectively subordinates fourteenth amendment equal protection doctrine governing discrimination against resident aliens to the vagaries of federal immigration policy.").

49. *See* Condon, *supra* note 1, at 98–102.

50. *See id.* at 121–23; Gregory T. Rosenberg, *Alienating Aliens: Equal Protection Violations in the Structures of State Public-Benefit Schemes*, 16 U. PA. J. CONST. L. 1417, 1425 (2014) ("[The Personal Responsibility and Works Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996)]'s most significant change with respect to aliens and public benefits was the delegation to the states of the authority to restrict or expand alien [benefit] eligibility.").

51. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009. The Executive Branch has aggressively enforced the criminal removal provisions of the immigration laws, only to have the Supreme Court reject a number of removal orders. *See, e.g.*, Mellouli v. Lynch, 135 S. Ct. 1980, 1983 (2015) (setting aside a removal order based on a drug paraphernalia conviction); Moncrieffe v. Holder 133 S. Ct. 1678, 1693-94 (2013) (same for conviction of possession of a small amount of marijuana).

succinctly observed, the 1996 reforms, which greatly restricted judicial review of removal and other orders, constituted "the most radical reform of immigration law in decades—or perhaps ever."[52]

Professor Condon notes that "the assumption that the federal government is more protective of immigrant rights than the states over-simplifies the complex nature of federal immigration regulation and, in many instances, is simply inaccurate."[53] As is the case for state laws, federal law can be rather unforgiving toward immigrants, even ones lawfully in the United States. That development can be explained by the fact that, in both instances, immigrants are discrete and insular minorities and are legally prevented from full participation in the political process.

Professor Condon observes that

> [a]lthough [the] interplay between federalism and equality has long existed in the equal protection jurisprudence involving immigrants, in the recent cases . . . federal immigration policy has played a more disruptive role, transforming equal protection doctrine involving state alienage classification into a preemption-like inquiry that privileges Congressional policy choices.[54]

In instances in which Congress has permitted discrimination by the states against immigrants, the end result has been to shift the review standard from rigorous strict scrutiny review of *Graham v. Richardson* to the highly deferential approach of *Mathews v. Diaz*. As Professor Condon puts it, "[t]he rights-enhancing theory of federalism treats congressional policy as a gatekeeper to Fourteenth Amendment rights, allowing Congress to decide who has claims to such rights."[55]

To illustrate her point that Congress has delegated power to the states to discriminate, Professor Condon analyzes the court of appeals decision in *Soskin v. Reinertson*,[56] and other cases challenging congressional authorization of state denial of public benefits to lawful immigrants.[57] She understands the delegation

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52. PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS 143 (1998).

53. Condon, *supra* note 1, at 120 (footnote omitted).

54. *Id.* at 84 (footnote omitted).

55. *Id.* at 118 (footnote omitted).

56. 353 F.3d 1242 (10th Cir. 2004) (rejecting a challenge to a Colorado law that denied healthcare benefits to lawful permanent residents).

57. *See* Condon, *supra* note 1, at 103–04 (discussing, inter alia, Korab v.

as diluting the constitutional protections for immigrants; in effect, Congress has encouraged the states to deny benefits to immigrants lawfully admitted into the United States, a result that *Graham v. Richardson* condemned. As Professor Condon states, "[t]he supplanting of Fourteenth Amendment antidiscrimination norms with a doctrine disproportionately focused on congressional policy undermines *Graham*'s promise of equal treatment by the states. Or, more simply, *it signals a preempting of equal protection for immigrants*."[58]

Similarly, with the support and encouragement of Congress, the Executive Branch has enlisted state and local governments in the enforcement of the U.S. immigration laws, particularly with respect to immigrants who encounter the criminal justice system.[59] State and local governments have increasingly resisted full cooperation with the immigration enforcement fervor of the U.S. government.[60]

Professor Condon correctly contends that federal preemption of state law provides limited, indirect, and incomplete protections of the rights of immigrants. For example, in *Arizona v. United States*,[61] the Supreme Court upheld Section 2(B) of Arizona's S.B. 1070, which requires local police to inquire about the immigration status of persons who they reasonably suspect are in the country in violation of the U.S. immigration laws.[62] Section 2(B)

Fink, 748 F.3d 875 (9th Cir. 2014)). Other commentators also have questioned the constitutionality of congressional efforts to allow the states to deny public benefits to immigrants. *See, e.g.*, Carrasco, *supra* note 17, at 603–05; Mel Cousins, *Equal Protection: Immigrants' Access to Healthcare and Welfare Benefits*, 12 HAST. RACE & POVERTY L.J. 21 (2015); David Wurzburg, *Legalized Discrimination? Not in My State: State-Court Challenges to the Discriminatory Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 21 GEO. J. POVERTY L. & POL'Y 251 (2014).

58. Condon, *supra* note 1, at 142 (emphasis added).

59. *See* Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W.L. REV. 993, 1010–25 (2016) (summarizing increased state and local involvement in federal immigration enforcement).

60. *See, e.g.*, Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006); Rose Cuison Villazor, *What Is a "Sanctuary"?*, 61 SMU L. REV. 133 (2008).

61. 132 S. Ct. 2492 (2012).

62. *Id.* at 2507–10.

contributed to fears of increased racial profiling of Latina/os by state and local law enforcement agencies.[63] Although it invalidated other provisions of the Arizona law, the Court found that Section 2(B) was not preempted by federal law. Emphasizing the primacy of federal power over immigration, the U.S. government did not fashion the legal challenge to S.B. 1070 as one about the violation of the rights of noncitizens. Consequently, the litigants, and ultimately the Supreme Court, avoided any direct claim based on the rights of immigrants. The rights of immigrants ultimately were buried in a case that legally became one about federal versus state power over immigration.[64]

IV. The Questions Raised by Professor Condon's Line-Drawing

Although Professor Condon's article focuses on the rights of lawful immigrants, her analysis implicates important questions about the rights of undocumented and prospective immigrants.

A. No Protection for the Most Vulnerable Immigrants

Professor Condon's article is limited to the Equal Protection rights of lawful immigrants, not the rights of undocumented immigrants.[65] Although recognizing that the rights of all immigrants are related, she nonetheless states that the rights of the undocumented are "beyond the scope of the Article."[66]

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63. *See*, *e.g.*, Kristina M. Campbell, *(Un)Reasonable Suspicion: Racial Profiling in Immigration Enforcement After* Arizona v. United States, 3 WAKE FOREST J.L. & POL'Y 367 (2013); Marjorie Cohn, *Racial Profiling Legalized in Arizona*, 1 COLUM. J. RACE & L. 168 (2012); David A. Selden, Julie A. Pace & Heidi Nunn-Gilman, *Placing S.B. 1070 and Racial Profiling into Context, and What S.B. 1070 Reveals About the Legislative Process in Arizona*, 43 ARIZ. ST. L.J. 523 (2011).

64. *See* Heeren, *supra* note 3, at 374 (contending that frequent judicial reliance on federalism and administrative law principles has deflected attention from the rights of immigrants).

65. *See* Condon, *supra* note 1, at 82 n.15, 123 n.186. I have taken a similar approach in advocating for the extension of the right to counsel to lawful permanent residents, but not undocumented immigrants, in removal proceedings. *See* Kevin R. Johnson, *An Immigration* Gideon *for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013).

66. Condon, *supra* note 1, at 123 n.186.

As Professor Condon acknowledges,[67] the Supreme Court's decision in *Plyler v. Doe*,[68] recognized Equal Protection rights for undocumented children. In that landmark case, the Court held that the Fourteenth Amendment barred the states from excluding undocumented children from the Texas public schools. It, however, did so without finding that undocumented immigrants were a suspect class and thus that the Texas law was subject to strict scrutiny.[69] Nonetheless, by protecting the rights of undocumented immigrants, *Plyler v. Doe* might serve as the touchstone for the possible expansion of the rights of undocumented immigrants.[70]

Importantly, all immigrants, not only lawful ones, are disenfranchised discrete and insular minorities who cannot be expected to be adequately protected by the political process. The modern debate over immigration exemplifies how political majorities may demonize and punish undocumented immigrants, who are extremely unpopular among certain segments of American society.[71]

Modern examples of antipathy directed toward undocumented immigrants are commonplace. Consider the passage in recent years of stringent immigration enforcement laws in circumstances strongly suggesting anti-Latina/o, anti-immigrant animus, in Alabama, Arizona, Georgia, and South Carolina, among other states.[72] Donald Trump's vilification of Mexican immigrants, as well as the calls for expansion of the wall on the U.S./Mexico border and a mass deportation campaign

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67. *See id.* at 121–23.

68. 457 U.S. 202 (1982). *See generally* MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYLER V. DOE* AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN (2012) (analyzing the factual and litigation history of *Plyler v. Doe* and the impacts of the Supreme Court decision).

69. *See Plyler v. Doe*, 457 U.S. at 219–20, ("[L]egislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.").

70. Commentators, however, have criticized the decision. *See*, *e.g.*, Dennis J. Hutchinson, *More Substantive Equal Protection? A Note on* Plyler v. Doe, 1982 S. CT. REV. 167, 184 (1982) ("*Plyler* cut a remarkably messy path through other areas of the Court's jurisprudence.").

71. *See*, *e.g.*, *supra* note 38 and accompanying text (discussing Donald Trump's derogatory comments about immigrants from Mexico).

72. *See supra* note 43 (citing cases).

targeting Mexican immigrants modeled after the infamous "Operation Wetback,"[73] helped build support for his presidential campaign.[74]

In sum, Professor Condon leaves it to future scholars to analyze the Equal Protection rights of undocumented immigrants, whose vulnerable legal status has increasingly been recognized in public policy debates and executive actions.[75] The Deferred Action for Childhood Arrivals (DACA) program, and its proposed expansion, are among the most well-known contemporary efforts to provide limited legal protections to undocumented immigrants.[76]

B. Prospective Immigrants and the Plenary Power Doctrine

As discussed previously,[77] Professor Condon's approach to the constitutional review of laws discriminating against lawful immigrants implicates the modern vitality of the much-maligned, but still intact, plenary power doctrine. One could imagine Equal Protection doctrine that applies to all immigrants, just as it does to U.S. citizens, within the territory of the United States. Persons outside our borders and seeking entry into the country arguably are beyond the full scope of the Equal Protection

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73. *See* Yanan Wang, *"Humane" 1950s Model for Deportation, "Operation Wetback," was Anything But*, WASH. POST (Nov. 11, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/09/30/donald-trumps-humane-1950s-model-for-deportation-operation-wetback-was-anything-but/ (last visited July 2, 2016) (describing critically Donald Trump's deportation plan) (on file with the Washington and Lee Law Review). *See generally* JUAN RAMON GARCÍA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (1980) (documenting the history and impacts of "Operation Wetback").

74. *See supra* note 38 and accompanying text.

75. *See* Karen Nelson Moore, *Aliens and the Constitution*, 88 NYU L. REV. 801, 810–23 (2013) (analyzing the varying Equal Protection rights for different groups of noncitizens).

76. *See* United States v. Texas, 2016 U.S. LEXIS 4057 (Supreme Court, June 23, 2016) (affirming by an equally divided Court the entry of a preliminary injunction barring the implementation of President Obama's expanded deferred action programs); American Dream Act Coalition v. Brewer, 818 F.3d 901, 906 (9th Cir. 2016) (describing the Deferred Action for Childhood Arrivals (DACA) program).

77. *Supra* notes 31–37 and accompanying text.

guarantee.[78] One possibility is for more limited judicial review akin to rational basis review of classifications in the U.S. immigration laws, a standard that the Supreme Court at times has applied in reviewing the immigration laws.[79]

Professor Condon carefully analyzes one aspect of the overall immigrants' rights equation—the Equal Protection rights of lawful immigrants physically present in the United States. Future scholars hopefully will return to the question of the constitutional rights of noncitizens seeking admission into the United States as well as undocumented immigrants.

V. Conclusion

Recent years have seen federalism claims dominate immigration litigation implicating the rights of immigrants. Congress and the Executive Branch also have delegated immigration authority—and the power to discriminate against immigrants—to the states. In *The Preempting of Equal Protection for Immigrants?*, Professor Jenny-Brooke Condon questions the focus on federalism concerns as opposed to the constitutional rights of immigrants. She powerfully contends that federalism analysis should not displace the constitutional rights of immigrants. Professor Condon's call for a return to Equal Protection fundamentals—and a focus on protecting the rights of noncitizens lawfully in the United States—is refreshing, timely, and powerful.

In the future, the courts must reconsider their role in protecting vulnerable undocumented and lawful immigrants in our communities as well as noncitizens seeking admission into

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78. *Cf.* United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990) (holding that the Fourth Amendment does not apply to searches and seizures of noncitizens by U.S. law enforcement officers outside the United States).

79. *See*, *e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) (acknowledging "the limited scope of judicial inquiry into immigration legislation"); Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (requiring that the Attorney General provide a "facially legitimate and bona fide" reason for denying entry into the United States of a noncitizen for a temporary visit); *see also* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1839 n.31 (1993) (noting that the test articulated by the Supreme Court in *Kleindienst v. Mandel* "appears roughly equivalent to the rational basis test").

the United States. Scholars must consider whether the lines drawn by the courts between noncitizens with rights and those without, are defensible as a matter of constitutional law. By re-focusing attention on noncitizen rights Professor Condon has moved us forward in that all-important task.