

## PUBLIC BENEFITS AND FEDERAL AUTHORIZATION FOR ALIENAGE DISCRIMINATION BY THE STATES

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When Congress enacted sweeping new restrictions on alien access to public benefits in 1996, it not only imposed such restrictions directly on various federal programs but also authorized the states to restrict alien access to state benefits and to certain designated federal benefits, including Medicaid and welfare.<sup>1</sup> The 1996 welfare legislation also prohibits states from providing “any State or local public benefit” to unauthorized immigrants unless the state subsequently enacts a law that “affirmatively provides for such eligibility.”<sup>2</sup> These provisions authorize the states to decide whether the aliens in question should have access to public benefits.

The U.S. Supreme Court has applied a lenient standard of review to federal laws that discriminate against aliens.<sup>3</sup> In *Mathews v. Diaz*, the Court held that Congress could restrict alien access to federal medical insurance.<sup>4</sup> This deferential review of federal laws, however, contrasts sharply with the strict scrutiny that the Court has applied to state laws that discriminate against aliens in the distribution of public benefits.<sup>5</sup> In *Graham v. Richardson*, the Court held that states violated the U.S. Constitution by discriminating against aliens in the distribution of welfare benefits.<sup>6</sup> The *Graham* Court

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1. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 402(b), 412, 110 Stat. 2105, 2264–65, 2269–70 (codified at 8 U.S.C. § 1612(b), 1622 (Supp. II 1994)).

2. See *id.* § 411, 110 Stat. at 2268-69 (codified at 8 U.S.C. § 1621 (Supp. II 1994)).

3. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.12, at 792 (6th ed. 2000) (“[A]lienage classifications created by federal law will be subjected to only the rational basis standard of review.”).

4. 426 U.S. 67 (1976).

5. NOWAK & ROTUNDA, *supra* note 3, at 791 (“[W]hen state . . . laws classify persons on the basis of United States citizenship for the purpose of distributing economic benefits . . . , the law will be subjected to strict judicial scrutiny.”).

6. 403 U.S. 365 (1971).

offered two alternative rationales for its holding, striking down the laws in question not only as discrimination in violation of the Equal Protection Clause but also as state laws preempted by federal policies.<sup>7</sup> The question posed by the 1996 welfare legislation under these precedents is whether state discrimination against aliens in the distribution of public benefits should still be subject to strict scrutiny when this discrimination is explicitly authorized by Congress. Some commentators have argued in favor of strict scrutiny, based on the theory that Congress cannot devolve its power to discriminate against aliens to the states.<sup>8</sup> In *Aliessa v. Novello*, the Court of Appeals of New York recently agreed, applying strict scrutiny and striking down a New York law discriminating against aliens in the distribution of Medicaid benefits despite federal authorization for such discrimination.<sup>9</sup>

In this essay, I offer a skeptical view of the “nondevolvability principle,” which would apply strict scrutiny to restrictions imposed by the states on alien access to public benefits even when such restrictions are explicitly authorized by Congress.<sup>10</sup> My analysis of this claim takes the holdings in *Graham* and *Diaz* as given. Within those constraints, I raise some questions regarding the policy rationales commonly advanced in favor of a rule of nondevolvability.

Nondevolvability would prevent the federal government from authorizing discrimination by the states under circumstances in which the U.S. Constitution would prevent the states from discriminating under their own authority. Why should we, as a policy matter, want to prevent the federal government from authorizing states to discriminate against aliens in the allocation of public benefits? The *Graham* Court declared that “Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.”<sup>11</sup> We may regard this declaration as dictum, given that the *Graham* Court held that Congress had not authorized the discrimination at issue in that case.<sup>12</sup> In any event, this declaration begs the question: why should we think that the states are still violating the Equal Protection Clause when they act with federal authori-

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7. *Id.* at 370–80.

8. See, e.g., Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591 (1994); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

9. 754 N.E.2d 1085, 1098–99 (N.Y. 2001).

10. Wishnie, *supra* note 8, at 558.

11. 403 U.S. at 382.

12. See *id.* at 380–83.

zation?<sup>13</sup> In *Diaz*, after all, the Court indicated that the federal government itself has broad powers to discriminate against aliens.<sup>14</sup>

The *Diaz* Court placed the “responsibility for regulating the relationship between the United States and our alien visitors” with “the political branches of the Federal Government.”<sup>15</sup> Because “these matters may implicate our relations with foreign powers,” they are “more appropriate to either the Legislature or the Executive than to the Judiciary.”<sup>16</sup> If these considerations allow the federal government to invoke objectives sufficient to overcome equality-based objections and thus justify discrimination against aliens, then perhaps Congress should be able to invoke the same goals on behalf of its authorization for states to discriminate, as suggested by William Cohen.<sup>17</sup> If the result in *Diaz* flows from judicial deference to the decisions of the political branches on matters dealing with foreigners, then why should courts interfere with the decision by Congress that it would serve federal objectives to allow states to discriminate in the ways authorized by the 1996 welfare legislation?

## I.

### UNIFORMITY AND THE RIGHT TO INTERSTATE TRAVEL

The *Graham* Court suggested that the problem with such an authorization is that it would allow for divergent state policies, contrary to the requirement of “an uniform Rule of Naturalization” in

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13. There are other contexts in which Congress may authorize state laws that would be unconstitutional in the absence of such authorization. *See, e.g.*, *North-east Bancorp, Inc. v. Bd. of Governors*, 472 U.S. 159, 174 (1985) (“When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.”); Wishnie, *supra* note 8, at 539–41 (discussing foreign affairs); *id.* at 546–47 (discussing the regulation of foreign commerce); *id.* at 561 (discussing Native American jurisprudence under the Equal Protection Clause).

14. *Mathews v. Diaz*, 426 U.S. 67, 81 (1971). These powers distinguish restrictions on alien access to public benefits from the California welfare law struck down by the Court in *Saenz v. Roe*, 526 U.S. 489 (1999). The *Saenz* Court held that the Fourteenth Amendment prevented either the federal government or a state government from enacting the residency requirement at issue in that case. *Id.* at 507–08.

15. *Diaz*, 426 U.S. at 81.

16. *Id.*

17. William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 420–21 (1983).

the U.S. Constitution.<sup>18</sup> The Court of Appeals of New York recently adopted this same reasoning in *Aliessa*.<sup>19</sup> The federal power to regulate immigration and the relationship between the United States and foreigners, however, does not derive from the Naturalization Clause alone.<sup>20</sup> Thus, even if we agree that we need uniformity in rules of *naturalization*, it does not follow that uniformity is required in other matters pertaining to aliens. In particular, it does not follow that rules regarding alien access to public benefits or even immigration matters must also be uniform across different states.

In fact, immigration consequences frequently turn on divergent state laws. A few examples are sufficient to illustrate the point. For a marriage to serve as the basis for an immigration visa, for example, the marriage must be valid under state law.<sup>21</sup> We find other examples in the inadmissibility or deportability grounds based on convictions for crimes involving “moral turpitude.”<sup>22</sup> First, immigration consequences may turn on the maximum sentence that may be imposed for the crime.<sup>23</sup> Thus, aliens convicted for the same crime of moral turpitude may face different immigration consequences because the states in which they committed the crimes may impose different maximum sentences for such crimes. Second, for a conviction to be for a crime of “moral turpitude” and thus be a basis for inadmissibility or deportability, the nature of the crime, as defined by the statute, must involve moral turpitude.<sup>24</sup> Thus, aliens that commit the same act in different states may face different immigration consequences because the states in which they commit the crime may convict them under laws that define the crime differently. In effect, our immigration laws delegate some authority to the states to determine which crimes trigger deportation or exclusion from the United States.

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18. U.S. CONST. art. I, § 8, cl. 4; see *Graham v. Richardson*, 403 U.S. 365, 382 (1971). Others have also invoked this clause in arguing that the U.S. Constitution prevents Congress from authorizing states to adopt divergent rules on alien eligibility for public benefits. See Carrasco, *supra* note 8, at 631–38; Wishnie, *supra* note 8, at 566.

19. *Aliessa v. Novello*, 754 N.E.2d 1085, 1098 (N.Y. 2001).

20. See Wishnie, *supra* note 8, at 532 (identifying various sources of the immigration power, including the Naturalization Clause, the Foreign Affairs Clauses, and the Foreign Commerce Clause).

21. See, e.g., *United States v. Sacco*, 428 F.2d 264, 270 (9th Cir. 1970), *cert. denied*, 400 U.S. 903 (1970).

22. See 8 U.S.C.A. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i)(II) (West 1994).

23. See *id.* §§ 1182(a)(2)(A)(ii)(II), 1227(a)(2)(A)(i)(II).

24. See, e.g., *Goldestein v. INS*, 8 F.3d 645, 648–49 (9th Cir. 1993).

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Our immigration policies may apply to aliens differently depending upon the state in which they married or in which they committed a crime. Thus, there is nothing unusual about Congress deciding that, as a matter of federal immigration policy, we should allow the states to determine some specified aspects of that policy. The states are not entrusted with immigration policy in the absence of such federal invitation. Even with federal authorization, as when states decide which crimes to punish severely enough to trigger deportation, states may make their divergent decisions without immigration consequences in mind. Nevertheless, we leave it to Congress to decide whether this state role and the discretion it allows for the adoption of divergent policies serves federal policies regarding the treatment of aliens.

Furthermore, even before 1996, states could adopt divergent policies regarding unauthorized immigrants. In *De Canas v. Bica*, the U.S. Supreme Court upheld a California law that prohibited the employment of unauthorized immigrants.<sup>25</sup> Rejecting a claim that this law was preempted under federal law, the Court reasoned that although the federal government had enacted no such prohibition, this state law was consistent with federal policy regarding these immigrants.<sup>26</sup> Similarly, states could adopt divergent policies regarding the eligibility of unauthorized immigrants for state programs for the needy.<sup>27</sup>

These observations raise the question: what is so important about a policy of uniformity regarding alien access to public benefits? The *Graham* Court suggested an answer to this question. The Court suggested that variation among the states on this question would interfere with the right of indigent aliens to move across state borders and to choose to live in another state. An indigent alien unable to work would be unable to live where he or she could not “secure the necessities of life” because of denial of public assistance.<sup>28</sup>

The problem with the *Graham* rationale, however, is that it proves too much. A state could impose precisely the same economic burden on the alien by failing to provide this public assistance to citizens and aliens alike. Suppose a state chooses to have no state welfare program at all. Unless the Court is prepared to declare that the U.S. Constitution requires all states to enact welfare

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25. 424 U.S. 351 (1976).

26. *See id.* at 361–62.

27. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Court did not compel states to provide such access outside the context of public education.

28. *Graham v. Richardson*, 403 U.S. 365, 380 (1971).

programs, it cannot ensure that an indigent alien actually enjoys “the right . . . to live where he chooses” as imagined in *Graham*.<sup>29</sup> Indeed, the indigent alien could not enjoy the right suggested in *Graham* unless we require all states not only to provide public assistance but also to do so using precisely the same eligibility criteria. Otherwise, there will be some indigent aliens unable to move into states that impose more stringent eligibility criteria. If we do not consider it unconstitutional for states to adopt divergent welfare policies in general, then why should we regard it as problematic if they adopt divergent welfare policies regarding aliens in particular?

## II.

### ANTIDISCRIMINATION PRINCIPLES AND THE INTERESTS OF ALIENS

The *Graham* rationale calls for uniform welfare policies among the states, but the *Graham* holding calls for uniform treatment of citizens and aliens in state welfare programs. These are two different types of uniformity, and there is no necessary logical connection between the two. The poor fit between the policy rationale and the holding indicates that a different policy concern actually animates the Court’s holding.<sup>30</sup> A rule barring discrimination against aliens is more plausibly explained as an expression of the “antidiscrimination and anticaste principles” cited by Michael Wishnie in support of a rule of nondevolvability.<sup>31</sup> If we seek to derive an antidiscrimination rationale for nondevolvability from *Graham*, however, we run into two problems posed by the Court’s subsequent decision in *Diaz*.

The first problem is a matter of logic. If *Diaz* qualifies the antidiscrimination principle such that discrimination by the federal government deserves deference from the courts, then why not extend this deference when the federal government has expressly authorized the discrimination in question? It would seem that the

29. *Id.* at 379.

30. Perhaps perceiving such problems with the right to travel as described in *Graham*, 403 U.S. at 380, the Court in *Saenz v. Roe* recast the “right to travel” at stake in state laws regarding welfare benefits as “the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State.” 526 U.S. 489, 502 (1999). The *Saenz* Court struck down California’s discrimination against newly arrived citizens in that case, relying on the privileges and immunities clauses of the U.S. Constitution. *Id.* at 501, 503 (citing U.S. CONST. art. IV, § 2; U.S. CONST. amend. XIV, § 1). Aliens, however, cannot invoke the right described in *Saenz*, because those clauses protect only the privileges and immunities of citizens. See NOWAK & ROTUNDA, *supra* note 3, at 988.

31. Wishnie, *supra* note 8, at 553.

same policies that support deference in *Diaz* would apply to discrimination by a state that occurs with the explicit prior approval of Congress.

The second problem is a matter of consequences. Does a rule of nondevolvability actually serve the antidiscrimination principle? What would be the consequences of a constitutional rule applying strict scrutiny despite federal authorization for states to discriminate against aliens in public entitlement programs? As long as *Diaz* gives the federal government a free hand in discriminating against aliens, there is no presumption that a rule of nondevolvability would serve antidiscrimination or anticaste principles. As the *Graham* Court suggested, a nondevolvability rule would promote uniformity in welfare policies regarding alien access nationwide. As already discussed, however, the link between nationwide uniformity and the antidiscrimination principle is questionable. Thus, if antidiscrimination is the real concern here, then the policy rationale is still insufficient to justify a constitutional rule of nondevolvability.

In any case in which the federal government authorizes states to adopt divergent policies regarding alien access to public benefits, we can presume that there exists some political support for excluding aliens from these programs and some political support for including aliens. Peter Spiro has suggested that “state-level authority will allow those states harboring intense anti-alien sentiment to act on those sentiments at the state level, thus diminishing any interest on their part to seek national legislation to similarly restrictionist ends.”<sup>32</sup> Whether or not this “steam-valve federalism” story outlined by Spiro is likely to describe reality,<sup>33</sup> it should be apparent that a constitutional rule applying strict scrutiny to divergent state policies despite federal authorization would have uncertain consequences. Given this constitutional constraint, the federal government may sometimes respond with a uniform rule granting alien access, but it may sometimes respond with a uniform rule barring alien access. That is, if we insist on nondevolvability, then we may well get uniform discrimination as a result. What reason do we have for thinking that a rule of nondevolvability will lead to uniform access rather than uniform exclusion?

Rather than creating “laboratories of bigotry against immigrants,” to use Wishnie’s phrase,<sup>34</sup> we might just as plausibly view

32. Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1627 (1997).

33. *Id.* at 1630. Wishnie challenges Spiro’s claim as a matter of history. See Wishnie, *supra* note 8, at 555–58.

34. Wishnie, *supra* note 8, at 553.

federal authorization of divergent state policies as creating laboratories of *generosity* toward immigrants. If we had bound Congress with a constitutional constraint of uniformity in the political atmosphere of 1996, then Congress might have excluded immigrants from Medicaid or welfare rather than leaving the question of immigrant access up to the states. If required to impose a uniform rule nationwide with respect to unauthorized immigrants, Congress might well have barred access to state programs for such immigrants nationwide without providing states the option of granting access through subsequent legislation.

Thus, those who seek to promote the interests of immigrants have no principled basis for promoting a rule of nondevolvability. It might serve the interests of immigrants excluded by particular state laws adopted pursuant to the 1996 welfare legislation to have these laws struck down now, but the constitutional rule we establish in doing so may come back to haunt us later. A constitutional rule of nondevolvability like that adopted by the *Aliessa* court would not be result-oriented: it would not distinguish between instances in which immigration politics would favor uniform inclusion of immigrants and instances that favor uniform exclusion. We would be stuck with a rule of nondevolvability even when it backfires and cuts against the interests of immigrants.

Perhaps the connection between a rule of nondevolvability and the antidiscrimination principle exists not as a matter of principle but as a matter of empirical prediction. Critics of devolution feared that states authorized to exclude immigrants from their welfare programs would seek to encourage indigent aliens to move to other states by restricting their access to public benefits, leading to a “race to the bottom” that would precipitate widespread discrimination against aliens. I do not seek here to answer the question of whether we should expect such a race to the bottom.<sup>35</sup> We should note, however, that the answer to this question does not necessarily have the implications commonly supposed for a rule of nondevolvability.<sup>36</sup>

Suppose it were established that states engage in a race to the bottom when authorized to discriminate against aliens in welfare programs, as many predicted would be the result of the 1996 wel-

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35. Spiro argues that the risk of such a race is small. See Spiro, *supra* note 32, at 1639–46. States have in fact been reluctant to use the invitation in the 1996 welfare legislation to restrict alien access to public benefits. See Wishnie, *supra* note 8, at 515–18.

36. Spiro suggests that a “race to the bottom . . . would militate strongly against devolving such authorities in the first place.” Spiro, *supra* note 32, at 1639.

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fare legislation. Once this phenomenon has become apparent, we would expect Congress to anticipate this when it contemplates legislation authorizing states to discriminate against aliens in such programs. Indeed, given widespread predictions of such a race to the bottom, we might infer that Congress expected this when it acted in 1996. If Congress anticipates widespread discrimination as a result of its legislation, then we can infer that Congress would have approved of these expected consequences. Therefore, any Congress voting to authorize discrimination by the states would be a Congress inclined to exclude aliens from many public benefits. Given such a Congress, a constitutional rule of nondevolvability would be likely to result in a federal rule excluding aliens from the public benefits in question nationwide. Thus, if federal authorization for discrimination by the states is understood to allow a race to the bottom, then a rule inhibiting or blocking such authorization will cut against the interests of immigrants and in favor of broader discrimination against them through uniform federal legislation.

On the other hand, if Congress expects very little discrimination to result from such authorization, then we can infer that a Congress voting in favor of authorization under these circumstances would be inclined to include aliens in the programs in question. A constitutional rule discouraging authorization for divergent state policies in such cases would be likely to cut in favor of immigrants because such a Congress would probably vote to include aliens in the programs nationwide. In either case, a constitutional rule of nondevolvability would tend to have a limited effect, whether against or in favor of the interests of immigrants, because we can assume that Congress would adopt the rule (whether excluding or including aliens) that most closely approximates the consequences expected to flow from federal authorization for divergent state policies.

In any event, it would be a coincidence if a constitutional rule of nondevolvability were to cut in favor of equal treatment for aliens on average, because there is no connection in principle between such a rule and antidiscrimination principles. There may be many proposed rules that might reduce discrimination against aliens as an incidental matter, but this speculative effect would not provide a convincing reason to adopt such rules. We have reason to applaud a constitutional rule of nondevolvability as a matter of principle only if we actually value uniformity itself, not if we value antidiscrimination or anticaste principles, and not if we are motivated by a concern for the welfare of immigrants. Uniformity and nondevolvability per se strike no blow for any of those causes. The

only way to ensure that we uphold the antidiscrimination principle in the context of public benefits is to overturn *Diaz* itself.<sup>37</sup> As long as we take *Diaz* seriously, however, antidiscrimination principles provide no sound rationale for a constitutional rule of nondevolability.

### III. NONDELEGATION CONCERNS

Gilbert Paul Carrasco has also suggested that federal authorization for the states to discriminate against aliens in the distribution of federal benefits represents a delegation by Congress of a nondelegable legislative power.<sup>38</sup> Noting that the nondelegation doctrine has “fallen into desuetude,”<sup>39</sup> he nevertheless urges a revival of the doctrine. In particular, he claims that federal authorization for discrimination by the states impermissibly delegates the power vested exclusively in Congress by the Naturalization Clause.<sup>40</sup>

This claim is questionable on a number of grounds. First, the Naturalization Clause is not the sole source of federal power to discriminate against aliens in public benefits.<sup>41</sup> Second, the federal government is not delegating an exclusively federal power when it authorizes the states to discriminate against aliens. After all, even without federal authorization, states may discriminate against aliens, subject to judicial review under a rational basis test in some contexts, but subject to strict judicial scrutiny in other contexts, including public benefits.<sup>42</sup> Thus, even under *Graham*, the states enjoy *some* power to discriminate against aliens, even with respect to public benefits. That is, the states and the federal government have concurrent powers to discriminate against aliens in public benefits, albeit with stricter judicial scrutiny normally applied to the states, such that the states bear a heavier burden in justifying such discrimination.

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37. Even overruling *Diaz* would not necessarily serve the interests of aliens. To the extent that the courts make it difficult for Congress and the states to exclude immigrants from public benefits, Congress may respond by imposing more severe restrictions on the immigration of indigent aliens, excluding aliens who would have been better off if allowed to immigrate subject to the condition that they not accept the public benefits in question. Application of the antidiscrimination principle to public benefits alone will have uncertain effects on the welfare of aliens as long as Congress retains its plenary power over immigration policies.

38. See Carrasco, *supra* note 8, at 626–31.

39. *Id.* at 629.

40. *Id.* at 630–31.

41. See Wishnie, *supra* note 8, at 532.

42. See NOWAK & ROTUNDA, *supra* note 3, at 791–92.

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Viewed in this light, the issue is not really whether Congress may delegate or devolve the federal power to regulate relations with aliens, but rather whether federal authorization granted in the exercise of that plenary power should affect the degree of scrutiny that courts apply to a state exercising its own concurrent power to discriminate against aliens. Given the degree of judicial deference accorded to the decisions made by the political branches of the federal government on these matters, it seems logical that authorization by these branches should imply similar deference for state laws enacted with prior federal approval.

The U.S. Supreme Court in *Washington v. Yakima Indian Nation* applied such deferential review to a state law pertaining to Native Americans that had been authorized by federal statute but challenged under the Equal Protection Clause.<sup>43</sup> Noting that the state “was legislating under explicit authority granted by Congress,” which authorized the state law “in the exercise of its plenary power over Indian affairs,” the Court subjected the state law to the same rationality review that would have been applied to federal legislation “singling out tribal Indians, legislation that might otherwise be constitutionally offensive,” rather than the stricter scrutiny usually applied to state laws on the subject.<sup>44</sup> Given the obvious analogy to the federal government’s plenary power over relations with aliens, lower New York courts cited *Yakima Indian Nation* to uphold state restrictions on alien access to public benefits authorized by the 1996 welfare legislation before the Court of Appeals of New York reversed in *Aliessa*.<sup>45</sup> The Court of Appeals of New York reversed, however, without discussing *Yakima Indian Nation*.<sup>46</sup>

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43. 439 U.S. 463, 500–01 (1979).

44. *Id.* at 501.

45. See *Alvarino v. Wing*, 690 N.Y.S.2d 262, 263 (N.Y. App. Div. 1999); *Aliessa v. Novello*, 712 N.Y.S.2d 96, 98–99 (N.Y. App. Div. 2000), *rev’d*, 754 N.E.2d 1085 (2001). The U.S. Supreme Court has described tribal classifications as “political rather than racial in nature,” based on membership in “quasi-sovereign tribal entities.” *Morton v. Mancari*, 417 U.S. 535, 553 n.24, 554 (1974). Tribal classifications are thus similar to alienage classifications, which are also “political” insofar as aliens are normally members of a foreign sovereign entity. Wishnie tries to distinguish *Yakima Indian Nation* by arguing that alienage classifications are more “racial” than tribal classifications, citing the analogy drawn by the *Graham* court between alienage and racial classifications. See Wishnie, *supra* note 8, at 564–65 (citing *Graham v. Richardson*, 403 U.S. 365, 372 (1971)). Tribal classifications, however, like racial classifications, may be based on prejudice or antipathy, and cannot be distinguished from alienage classifications on this basis.

46. Despite cases applying rationality review to uphold statutes over the objection of Native Americans, Wishnie argues that rationality review is only appropriate for legislation that *benefits* Native Americans. See Wishnie, *supra* note 8, at 562 &

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Even if the nondelegation doctrine itself is inapplicable to the 1996 welfare legislation, the policy concerns cited in support of the nondelegation doctrine may also support a rule inhibiting federal authorization for states to discriminate against aliens. Carrasco, for example, suggests that “forcing the elected representatives of Congress to make the most difficult policy choices” is a reason to revive the nondelegation doctrine.<sup>47</sup> The desire to make Congress more politically accountable and to prevent it from evading responsibility for policy choices, however, is quite general. Unless courts are prepared to apply the nondelegation doctrine broadly in other contexts, those who invoke nondelegation concerns bear the burden of explaining why these concerns are especially acute when Congress authorizes the states to restrict alien access to public benefits.

Once we seek a more specific reason to apply a rule of nondevolvability in this particular context, we run into many of the same problems that we encountered with the other proposed policy rationales for such a rule. For example, if the concern is that states will engage in a race to the bottom as they seek to encourage the indigent to reside in other states, then the argument seems to prove too much. This concern is not limited to the question of alien access to public benefits. One might expect such a race in any instance in which states are authorized to choose divergent welfare policies, whether the indigent are aliens or citizens.<sup>48</sup> If the claim is that questions regarding aliens in particular should be resolved nationwide by the federal government, we must explain why we have long allowed states to adopt divergent policies regarding unauthorized immigrants, including their access to public benefits.

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n.352. *But see* *Duro v. Reina*, 495 U.S. 676, 692 (1990) (noting “the Federal Government’s broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits”). Wishnie argues that these cases do not suggest that “rationality review is appropriate for federally authorized state welfare laws that discriminate *against* immigrants.” Wishnie, *supra* note 8, at 562. Even if the effect of federal authorization were constrained as Wishnie suggests, however, Congress could easily avoid this constraint by requiring the exclusion of aliens from public benefits in the absence of state legislation to the contrary. This default rule would imply that all state welfare laws would *benefit* aliens compared to the federally specified alternative of exclusion. It is hard to see what we would accomplish by requiring Congress to specify a discriminatory default rule in any legislation authorizing divergent state policies regarding alien access to public benefits. If anything, requiring this formality would seem to increase the likelihood that states will adopt discrimination against aliens by default. Such an effect hardly serves the antidiscrimination principles that Wishnie stresses.

47. Carrasco, *supra* note 8, at 628.

48. *See* Note, *Devolving Welfare Programs to the States: A Public Choice Perspective*, 109 HARV. L. REV. 1984, 1985 (1996).

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If the claim is that the states are more susceptible to xenophobic passions than the federal government, then the concern would appear to be the protection of aliens from discrimination, and the question again becomes whether a rule of nondevolvability would serve that objective. Even if it were clear that states are more inclined as a general matter to discriminate against aliens than the federal government is, we can presume that a Congress authorizing the states to discriminate would understand the consequences expected to flow from its authorization, and we can thus infer that such a Congress is itself inclined to discriminate against aliens. Therefore, a rule that would frustrate authorization for divergent state policies may well lead such a Congress to exclude aliens from welfare programs nationwide.

For example, to the extent that we generally expect foreign policy concerns to inhibit the federal government from discriminating against aliens, we would expect these pressures to apply also to the federal government's decision to authorize discrimination by the states or to repeal such an authorization. Therefore, a Congress that nevertheless authorizes discrimination by the states is likely to be a Congress that would otherwise choose discrimination itself. By the same token, a Congress that refuses to repeal an authorization to discriminate is likely to be a Congress that would refuse to repeal any discriminatory rule that it had itself imposed. A rule of nondevolvability only ensures that the federal response is uniform, not that it will be kind to aliens.

We may accuse Congress of avoiding difficult policy choices when it authorizes the states to make these choices instead, but we might also consider this response to be an appropriate compromise in the face of conflicting preferences. If Congress determines that the resolution of these matters need not be uniform nationwide, then it may be desirable to allow different sides to prevail in different states. Uniformity entails costs insofar as it prevents states from choosing policies tailored to local preferences. Congress might have thought it unfair to burden those states that have a disproportionate share of indigent immigrants. States, after all, have no power to regulate immigration, and *Graham* forces them to provide aliens access to public benefits on the same terms granted citizens. If required to impose a uniform rule nationwide, Congress could respond to these concerns with a nationwide rule of exclusion, imposed even on those states that would prefer to be more generous. But why should we prevent Congress from choosing the less restrictive alternative of giving states the option of generosity? It is not clear what we gain by foreclosing the possibility of a flexible com-

promise in which states can choose different responses to such issues. Thus, the rationale for a rule of nondevolvability remains obscure. Even if we perceive some value to having Congress bear the responsibility for such decisions alone rather than sharing this responsibility with the states, we must weigh this benefit against the costs of imposing a rigid uniform rule nationwide.

#### IV. CONCLUSION

A rule that is consistent with the deference given to the political branches in *Diaz* would defer to those branches when they choose to authorize divergent state policies. If the policy rationale for such deference is to give the political branches greater freedom in the conduct of our relations with foreigners, then this policy is undercut by applying strict scrutiny to the state policies authorized by those branches.<sup>49</sup> If the underlying purpose of this freedom is to enable the political branches of the federal government to use the treatment of aliens as a bargaining chip in international negotiations, for example, then judicially imposed constraints only curtail this freedom.<sup>50</sup> For the federal government to negotiate with foreign governments on these matters, it must retain control over alien access to public benefits. For this purpose, it is sufficient that the federal government maintain the exclusive powers to authorize discrimination by the states and to repeal that authorization. As long as this authorization is revocable, the federal government ultimately retains control over our relations with aliens, whether it discriminates against aliens directly or authorizes the states to discriminate. If the federal government is to maintain this control, a rule of nondevolvability is unnecessary. Thus, giving effect to federal authorization for the states to discriminate is more consistent with a theory that reconciles *Graham* and *Diaz* in a coherent way.

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49. See *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) ("Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution.").

50. The U.S. Supreme Court has suggested that if Congress or the President were to impose a citizenship requirement for federal service, "it would be justified by the national interest in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty negotiating purposes." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 105 (1976). We could say the same for authorization by Congress and the President for states to impose citizenship requirements for public benefits, which would also create such incentives or tokens with the prior blessing of the federal institutions with responsibility for foreign affairs.