



# ALBANY LAW SCHOOL

## GOVERNMENT LAW CENTER

### EXPLAINER

## Immigrants and Public Benefits: What Must States And Localities Provide? (And When Do They Have a Choice?)

by Ava Ayers\*

Immigration law is often thought of as a federal issue, and indeed the federal government has exclusive power over who enters the country and on what terms they can remain. But the day-to-day life of noncitizens is regulated both by the federal government and by its state and local counterparts.

One of the many controversies related to immigration is over immigrants' access to public benefits. In 1996, the Welfare Reform Act dramatically limited lawful immigrants' access to public benefits, causing almost a million noncitizens to lose access to benefits.<sup>1</sup> But the controversy has continued from that time to today. Recent proposals by the Trump administration would significantly increase the number of noncitizens (and their children) who become deportable because they use public benefits.<sup>2</sup>

Meanwhile, few people understand exactly what benefits noncitizens can receive. This Explainer gives an overview of the laws governing *state and local governments'* provision of public benefits to noncitizens.

By “public benefits,” we mean not only traditional public benefits like welfare and housing assistance, but all of the affirmative goods that governments offer to the citizens, from professional licenses to Medicaid to education assistance to government contracts and grants.

The Constitution requires states and localities to treat noncitizens just like citizens (with a few exceptions, discussed below). But federal statutes sometimes require states to treat the two groups differently. So state and local governments have to navigate a tricky path between the rock of Equal Protection and the hard place of federal preemption.

This Explainer first discusses the requirements of Equal Protection, and then explains how federal statutes sometimes limit the benefits states and localities can give to noncitizens.

## RESOURCES

This explainer deals with state and local benefits. For background on the *federal* public benefits available to noncitizens, see Congressional Research Service, “Noncitizen Eligibility for Federal Public Assistance,” available at

<https://www.everycrsreport.com/reports/RL33809.html>

## I. When Equal Protection Requires Benefits

In general, the *federal* government is allowed to treat citizens and noncitizens differently.<sup>3</sup> But when the law or policy in question comes from the government of a *state or locality*, noncitizens have a constitutional right to be treated like citizens.<sup>4</sup>

Under a long line of Supreme Court cases, states and localities that distinguish between citizens and noncitizens are subject to “strict scrutiny,” meaning that in order to comply with the Constitution, the law or policy that treats noncitizens differently must “further[] a compelling state interest by the least restrictive means practically available.”<sup>5</sup> This is the same level of scrutiny that applies to racially discriminatory laws.

Hardly any state law or policy can survive strict scrutiny; in practice, strict scrutiny means the law is virtually certain to be struck down.

So the Constitution treats state discrimination against noncitizens with the same suspicion reserved for racial discrimination. But in the case of noncitizens, there are some important

exceptions—cases in which states are allowed to treat noncitizens differently.

***Differential treatment of noncitizens in public employment.*** One important exception to the rule that states and localities cannot treat noncitizens differently is known as the “political function” doctrine. Under this doctrine, state governments are free to limit certain kinds of public employment to citizens, including jobs like public-school teachers and police officers.<sup>6</sup> The Supreme Court has not applied this exception to local governments, but it seems likely it would extend to them.

***Differential treatment of the unlawfully present.*** A second exception is for noncitizens who are unlawfully present. While the Supreme Court has never explicitly held that state and localities can deny benefits and services to undocumented people, courts have interpreted this to be an implication of the Court’s decision in *Plyler v. Doe*.<sup>7</sup> (This Explainer uses the word “undocumented” and the phrase “unlawfully present” interchangeably.)

Importantly, there are difficult questions about exactly who counts as unlawfully present for these purposes. Clearly within the category are people who cross the border without permission. Then there are people who enter the country lawfully but overstay their visas. (Each year, roughly two-thirds of newly unlawfully present noncitizens have overstayed their visas.)<sup>8</sup>

There are other noncitizens who, although lawfully present, commit a crime that makes them deportable, and it is far from clear how this group would be regarded under the Equal Protection Clause. Still other noncitizens are temporarily without lawful status, but have a right to remain in the

country and are simply waiting for their paperwork to be processed. (For example, someone whose fiancé is a U.S. citizen might be between statuses while they wait for their green card to be issued.) It is not clear which of these groups might be denied state or local benefits without triggering strict scrutiny.

## RESOURCES

A useful guide to the various immigration statuses from the American Immigration Council is available here:

<https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works-fact-sheet>

Another useful guide, from the Immigrant Defense Project, is online here:

<https://www.immigrantdefenseproject.org/wp-content/uploads/IDP-Immigration-Status-101-Guide-FINAL1.pdf>

***Differential treatment of noncitizens in temporary status.*** A third possible exception to the rule against treating noncitizens differently should be approached with great caution. According to some courts, “rational basis” scrutiny—a very forgiving standard of review—applies to state laws that distinguish between citizens and those noncitizens in temporary status.<sup>9</sup> In other words, states may deny benefits and services to people in temporary status (e.g., people with student visas, temporary work visas, and similar statuses), even though they must not discriminate against noncitizens with permanent status (i.e., green-card holders).

This exception for temporarily present noncitizens has been adopted by two federal

appellate courts. But it has been rejected by the Second Circuit, which covers New York, Vermont and Connecticut.<sup>10</sup> This creates a “circuit split” that will likely be resolved by the U.S. Supreme Court at some point in the future.

The exception for temporarily present noncitizens has also been rejected in the strongest terms by the New York Court of Appeals in *Aliessa v. Novello*, 96 N.Y.2d 418 (2001). The Court applied strict scrutiny to state laws that apply differential treatment to lawfully present noncitizens—not just those with green cards, but also temporarily present noncitizens, and even “aliens of whom the INS is aware, but has no plans to deport.”<sup>11</sup>

This latter category—noncitizens who are deportable, but whose deportations are being stayed as a matter of federal prosecutorial discretion—is the most temporary and tenuous of all immigration statuses. If New York law applies strict scrutiny to these noncitizens, then the only group that can be treated differently from citizens in New York is noncitizens who have no explicit or implicit authorization to remain in the country.

## RESOURCES

For a very useful guide to state policies on public benefits for noncitizens, see the Pew Charitable Trust’s “Mapping Public Benefits for Immigrants in the States” (2014):

<http://www.pewtrusts.org/~media/assets/2014/09/mappingpublicbenefitsforimmigrantinthestatesfinal.pdf>

The holding of *Aliessa* was based not only on the U.S. Constitution but also on the New

York State Constitution.<sup>12</sup> This means that even if the Supreme Court were to allow state discrimination against temporarily present noncitizens temporary visitors, the New York ruling would stand.

*Aliessa* also held that differential treatment of noncitizens is unconstitutional under a separate provision of the state constitution: article XVII, § 1, which provides:

“The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.”

The court held that this provision forbids the state from imposing an “eligibility condition having nothing to do with need.”<sup>13</sup>

Interestingly, no subsequent case has analyzed whether the same constitutional prohibition would forbid denying essential benefits to undocumented people. But it is reasonable to expect a judicial challenge to any state or local policies that deny benefits to undocumented people, because a requirement that denies benefits on grounds of undocumented status would be an “eligibility condition having nothing to do with need.”

In sum, the basic rule governing noncitizens’ benefits is that state and local governments in New York cannot treat noncitizens differently from citizens unless the noncitizens are unlawfully present, or unless the political-function exception applies.

## RESOURCES

The New York State Department of Health has a guide explaining which immigration statuses it considers eligible for Medicaid benefits:

[https://www.health.ny.gov/health\\_care/medicaid/publications/docs/gis/08ma009att.pdf](https://www.health.ny.gov/health_care/medicaid/publications/docs/gis/08ma009att.pdf)

There is, in effect, one final exception to the requirement of equal treatment for noncitizens—an exception so complex it will be analyzed in the three separate sections that form the rest of this Explainer. Congress can, and does, create laws that *require* states to treat noncitizens differently, or that purport to give states *discretion* to treat them differently. And, on occasion, Congress requires equal treatment. All of these provisions give rise to constitutional questions that have yet to be definitively resolved.

## II. When Congress Prohibits Benefits

Although the Equal Protection Clause generally requires that state and local governments treat noncitizens equally, several federal statutes demand differential treatment of noncitizens.

### ***Section 1621: Noncitizens in Certain Marginal Statuses Are Generally Ineligible for Subfederal Benefits.***

The most important statute restricting state and local rights to offer benefits and services to noncitizens is 8 U.S.C. § 1621. This statute limits state and local governments’ right to provide a wide variety of government benefits, contracts, and licenses, including:

any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds.<sup>14</sup>

The statute also applies to “any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit.”<sup>15</sup>

Noncitizens cannot receive any of these benefits or licenses unless their immigration status is specifically listed in § 1621(a).<sup>16</sup> (There are exceptions for some emergency health-care benefits.<sup>17</sup>)

Who is barred from benefits by § 1621? Undocumented people are not among the groups listed as eligible, so they are ineligible for all of the enumerated benefits. Section 1621 also denies benefits to people who are *not* unlawfully present, including people in the following classifications:

- Temporary Protected Status.<sup>18</sup>
- Deferred Action for Childhood Arrivals (DACA).<sup>19</sup>
- Forms of “deferred action” other than DACA. (Although DACA is the highest-profile form of deferred action, deferred action has been granted since the 1970s, when it was referred to as “nonpriority” status.)<sup>20</sup>
- Deferred Enforced Departure.<sup>21</sup>
- Citizens of nations party to the Compact of Free Association Agreements (Palau, Micronesia, and the Marshall Islands).<sup>22</sup>

The upshot of § 1621 is that states can offer to noncitizens with green cards, student visas, or other listed statuses all of the benefits listed in § 1621, including things

like welfare, Medicaid, professional licenses, government contracts, or unemployment benefits. But states cannot offer these benefits to noncitizens in Temporary Protected Status, DACA beneficiaries, or undocumented people.

However, there is an important exception under which states can choose to provide benefits to any of the ineligible groups. Under § 1621(d), states can override the ineligibility, and provide benefits, “through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.”

Several states have exercised this prerogative. For example, California and Florida passed statutes to make DACA recipients eligible for admission to the bar.<sup>23</sup>

Section 1621 seems to allow states to override the ineligibility only if the state *legislature* acts. But courts in New York State have held that the judicial branch, too, can exercise that authority. The theory these courts adopted is that states have a sovereign right to decide which branch of their government makes any given decision. Thus, although § 1621(d) seems to require a decision by the state legislature, states are free to delegate that decision to another part of their government.<sup>24</sup>

Other cases in New York and elsewhere have followed the precedent set by *Vargas*.<sup>25</sup> And the New York State Education Department, acting on the same theory, issued regulations admitting noncitizens to professional licensure, invoking the authority embraced by *Vargas*.<sup>26</sup>

## RESOURCES

The federal government has issued a guide for state or local agencies trying to interpret immigration documents. It's part of the "SAVE" (Systematic Alien Verification for Entitlements) system, a resource for agencies that administer benefits:

<https://save.uscis.gov/web/media/resources/Contents/SAVEGuideCommonlyusedImmigrationDocs.pdf>

For information about the limitations of the SAVE system, see:

<https://www.americanimmigrationcouncil.org/research/systematic-alien-verification-entitlements-save-program-fact-sheet>

Another important feature of § 1621 is that it does not require state or localities to verify immigration status before offering any of the listed benefits. Another section, 8 U.S.C. § 1624, authorizes states to confirm eligibility, but does not require it.<sup>27</sup> Thus, while states and localities are in theory barred from offering listed benefits to undocumented people, they are free to ask no questions about immigration status when people apply.

**Higher-Education Benefits.** There is one more situation in which states are forbidden to offer benefits to non-citizens: States cannot offer higher-education benefits to undocumented people unless those benefits are also available to citizens.<sup>28</sup>

Currently, the District of Columbia and twenty states (including New York) allow undocumented students to pay in-state tuition.<sup>29</sup> Three states (Alabama, Georgia, and South Carolina) bar undocumented

students from enrolling in some or all higher-educational institutions.<sup>30</sup> Many state legislatures have pending bills that would expand or limit in-state tuition for undocumented students.<sup>31</sup>

### III. When Congress Gives States a Choice

As we've seen, Congress sometimes tries to prohibit states from offering benefits to noncitizens. There are other statutes in which Congress purports to give states a choice.

***Section 1622: For Most Noncitizens, Congress Purports to Give States Discretion Over Which Benefits to Offer.***

What about the noncitizens who *are* eligible for state and local benefits under § 1621? This group includes "nonimmigrants" (temporary visa-holders, like people with student visas, work visas, tourist visas, or other short-term visas); certain "parolees" (a very tenuous status that has nothing to do with criminal parole); and "qualified aliens" (a group that includes green-card holders, asylees and refugees, and others).<sup>32</sup> In short, it includes many of the most common immigration statuses.

Noncitizens in this large group are covered by 8 U.S.C. § 1622, which says that states are "authorized to determine the eligibility for any State public benefits" of anyone with these benefits.<sup>33</sup>

Some courts have interpreted this to mean that the federal government has given states the freedom to decide whether to grant benefits to people in this group.<sup>34</sup>

But other courts, including the New York Court of Appeals, have found that whenever

states have a choice, the Equal Protection Clause applies—and requires equal treatment of noncitizens.<sup>35</sup> Congress may want states to have discretion, but, in the words of the Supreme Court, “Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.”<sup>36</sup>

**Cash Assistance.** Congress attempted the same strategy for general cash public assistance. 8 U.S.C. § 1624 provides that states and localities are “authorized to prohibit or otherwise limit or restrict the eligibility of aliens or classes of aliens for programs of general cash public assistance,” as long as the state scheme is not more restrictive than the parallel federal benefits scheme. The same questions arise: does Congress have the power to authorize behavior by states that would otherwise violate immigrants’ right to equal protection?

#### IV. When Congress Requires Benefits

***Section 1622(b) requires benefits for Permanent Residents, Refugees, and Asylees After a Certain Amount of Time.***

As discussed above, Congress generally wanted states to have the discretion to choose whether to offer benefits to most lawfully present noncitizens. But, as always, there’s an important exception.

Under § 1622(b), states are *required* to offer public benefits to legal permanent residents (“LPRs,” i.e., green-card holders), asylees, and refugees after specified periods of time. For refugees, it’s five years after entry into the U.S.; for asylees, 5 years after the grant

of asylum; and for green-card holders, it’s 40 quarters of work.<sup>37</sup>

State are also required to offer benefits to noncitizens in active military service, veterans, and their children.<sup>38</sup>

#### ***Does Congress Have the Power to Require Benefits?***

Congress’s attempts to require that states offer certain benefits, create a complicated constitutional issue. First, does Congress have the constitutional power to impose such a requirement? And, second, if Congress has no power to impose such a requirement, does equal protection require states to offer benefits anyway?

In general, Congress cannot “commandeer” the states—that is, force them to implement a federal regulatory program. Congress has no power to commandeer states’ executive officials or legislative processes.<sup>39</sup> “[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”<sup>40</sup>

This principle might seem to prevent Congress from requiring states to give any particular benefits to noncitizens. But Congress has traditionally been given great deference in the realm of immigration policy. And even if Congress can’t constitutionally require benefits, there remains the Equal Protection Clause, which will require benefits in most situations. The difficult question, again, will be what happens when Congress requires, by statute, the provision of benefits in an area where the Equal Protection Clause would not require them.

In New York State, equal protection clearly requires the provision of benefits for

lawfully present aliens; nationally, the issue remains to be definitively resolved.

## **Conclusion**

States and localities have a complicated set of questions to navigate when they make decisions about noncitizens and benefits and services. Sometimes the Equal Protection Clause requires the provision of benefits; sometimes Congress purports to require their denial.

In other areas, federal statutes appear to give states a choice, or to require the provision of benefits, which creates complicated constitutional questions. States, localities, and courts are likely to continue to struggle with these issues for years to come.



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## Endnotes

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<sup>1</sup> On the Welfare Reform Act, see <https://www.migrationpolicy.org/article/immigrants-and-welfare-use>.

<sup>2</sup> On the proposals to make noncitizens deportable for using public benefits, see <https://www.vox.com/2018/2/8/16993172/trump-regulation-immigrants-benefits-public-charge>.

<sup>3</sup> The federal power to offer different benefits to citizens and noncitizens was affirmed in *Mathews v. Diaz*, 426 U.S. 67 (1976).

<sup>4</sup> States' obligation to treat citizens and noncitizens equally was established in *Graham v. Richardson*, 403 U.S. 365 (1971).

<sup>5</sup> This definition of strict scrutiny is from *Bernal v. Fainter*, 467 U.S. 216, 227 (1984).

<sup>6</sup> Cases on the political-function exception to strict scrutiny for state laws excluding immigrants include *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding citizenship requirement for probation officers); *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding citizenship requirement for public-school teachers); *Foley v. Connelie*, 435 U.S. 291 (1978) (upholding citizenship requirement for police officers); and *Sugarman v. Dougall*, 413 U.S. 634 (1973) (striking down a citizenship requirement for civil-service positions because it was not sufficiently related to sovereign functions of government).

<sup>7</sup> The Supreme Court appeared to suggest that rational-basis scrutiny applies to state laws that excluded undocumented people in *Plyler v. Doe*, 457 U.S. 202 (1982), although the holding of that case was that states must provide an education to undocumented schoolchildren. See *Dandamudi v. Tisch*, 686 F.3d 66, 74 (2d Cir. 2012) (interpreting *Plyler* to allow differential treatment of unauthorized immigrants). Full disclosure: the author of this Explainer wrote the brief and presented the oral argument to the Second Circuit in *Dandamudi*.

<sup>8</sup> For statistics on the number of unauthorized immigrants who overstay their visas, see the Center for Migration Studies, <http://cmsny.org/publications/jmhs-visa-overstays-border-wall/>.

<sup>9</sup> For decisions applying rational-basis scrutiny to noncitizens with temporary visa, see *League of United Latin Am. Citizens (LULAC) v. Bredesen*, 500 F.3d 523, 531–34, 536–37 (6th Cir. 2007); *LeClerc v. Webb*, 419 F.3d 405, 415 (5th Cir. 2005), *reh'g en banc denied*, 444 F.3d 428 (2006).

<sup>10</sup> The Second Circuit rejected an argument that states can deny benefits to temporarily present noncitizens in *Dandamudi v. Tisch*, 686 F.3d 66, 74 (2d Cir. 2012).

<sup>11</sup> For the New York Court of Appeals's explanation of exactly who receives strict scrutiny, see *Aliessa v. Novello*, 96 N.Y.2d 418 (2001), holding that the state law in question violates the "Equal Protection Clauses of the United States and New York State Constitutions insofar as it denies State Medicaid to otherwise eligible PRUCOLs and lawfully admitted permanent residents based on their status as aliens," *id.* at 436, and then compare its definition of "PRUCOL" in footnote 2.

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<sup>12</sup> *Aliessa* makes clear that its holding is based on the New York State Equal Protection Clause. *See* 96 N.Y.2d at 436.

<sup>13</sup> For discussion of the right to aid and care of the needy as applied to immigrants, *see Aliessa*, 96 N.Y.2d at 429.

<sup>14</sup> 8 U.S.C. § 1621(c)(1)(A).

<sup>15</sup> *Id.* § 1621(c)(1)(B).

<sup>16</sup> The enumerated statuses eligible for benefits under § 1621 are “a qualified alien (as defined in section 431 [8 USCS § 1641]);” “a nonimmigrant under the Immigration and Nationality Act” and “an alien who is paroled into the United States under section 212(d)(5) of such Act [8 USCS § 1182(d)(5)] for less than one year.” By using the term “qualified alien,” which is defined in USC 1641, section 1621(a) confers eligibility on several sub-categories of aliens: legal permanent residents; asylees and refugees; aliens whose deportation is withheld under 8 U.S.C. § 1251(b)(3) [see 8 CFR § 208.16]; aliens granted “conditional entry” under 8 USC § 1153(a)(7) before 1980; and aliens who are “Cuban and Haitian entrants” under 8 USC § 1522 (note); and certain battered aliens. Also eligible are aliens whose deportation is withheld under § 243(h) of the Immigration and Nationality Act, but this is a small category, because this form of relief has been unavailable since 1997.

<sup>17</sup> *Id.* § 1621(b).

<sup>18</sup> On Temporary Protected Status, *see* <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status>.

<sup>19</sup> On DACA, *see* <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca>

<sup>20</sup> *See* Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42 (1976-77); for a more recent history, *see* Shoba Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L. J. 244 (2010).

<sup>21</sup> <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/deferred-enforced-departure>

<sup>22</sup> *See* info on the Compact of Free Association Agreements here:

[http://www.uscis.gov/sites/default/files/files/pressrelease/Micronesia\\_MarshallIsIFS.pdf](http://www.uscis.gov/sites/default/files/files/pressrelease/Micronesia_MarshallIsIFS.pdf)

<sup>23</sup> For statutes making DACA recipients eligible for bar admission, *see* H.R. 755, § 454.021, 2014 Leg., Reg. Sess. (Fla. 2014); and *In re Garcia*, 58 Cal. 4th 440 (2014). *See also* Wendi Adelson, *Lawfully Present Lawyers*, 18 CHAP. L. REV. 387, 399 (2015).

<sup>24</sup> Note: the theory adopted in *Vargas* (that state sovereignty prevents Congress from dictating the use of state legislatures for decisions about immigrants’ benefits) was presented to the Second Department in an amicus brief that was signed by the author of this Explainer. For an elaboration of the theory and its implications for other areas of law, *see* Andrew B. Ayers, *Federalism and the Right to Decide Who Decides*, VILLANOVA L. REV. (forthcoming 2018).

<sup>25</sup> Courts have followed *Vargas* by admitting DACA recipients to the bar in New York’s Third Department, Pennsylvania, and New Jersey. *See* *Matter of Anonymous*, 152 A.D.3d 1046 (3d Dep’t 2017); *See* ACLU Pennsylvania, “Pennsylvania Admits DACA Recipient to the Bar,” available at

<https://www.aclupa.org/news/2017/12/19/pennsylvania-admits-daca-recipient-bar->; see also Memorandum of Law in Support of Application of Parthiv Patel (Letter to Pa. Bd. of Law Examiners, Feb. 21, 2017), available at [https://www.aclupa.org/download\\_file/view\\_inline/3179/1106/](https://www.aclupa.org/download_file/view_inline/3179/1106/); See ACLU, DACA Recipient Sworn In As Lawyer By NJ AG (Jan. 24, 2018), <https://www.aclu.org/news/daca-recipient-sworn-lawyer-nj-ag>.

<sup>26</sup> For New York regulations admitting teachers to licensure under the *Vargas* authority, see 8 N.Y.C.R.R. § 80-1.3 (for teacher licensure, “pursuant to 8 USC § 1621(d), no otherwise qualified alien shall be precluded from obtaining a professional license under this Title if any individual is not unlawfully present in the United States, including but not limited to applicants granted deferred Action for Childhood Arrivals relief or similar relief from deportation 8 NYCRR § 80-1.3”); 8 N.Y.C.R.R. § 59.4 (same language applied to other professions); 2016-10 N.Y. St. Reg. 19 (Mar. 9, 2016; Volume 38, Issue 10) (proposed regulation); 2016-22 N.Y. St. Reg. 23, 25 (final rule and response to comments) (“While the *Vargas* decision is based on an intrusion on the role of the judiciary over bar admissions in violation of the Supremacy Clause, we believe that the Court’s reasoning applies equally to the adoption of regulations having the force and effect of law by an administrative agency that is part of the executive branch of New York government, another one of the three coequal branches of government under the New York Constitution.”). <http://www.nysed.gov/news/2016/board-regents-permanently-adopts-regulations-allow-daca-recipients-apply-teacher>. For more on the process leading to these changes, see Janet M. Calvo, *Professional Licensing and Teacher Certification for Non-Citizens: Federalism, Equal Protection and a State’s Socioeconomic Interests*, COL. J. RACE & LAW (forthcoming).

<sup>27</sup> 8 U.S.C. § 1625.

<sup>28</sup> 8 U.S.C. § 1623.

<sup>29</sup> On in-state tuition for undocumented students, see the National Immigration Law Center’s table at <https://www.nilc.org/issues/education/eduaccess toolkit/eduaccess toolkit2/#maps>. See also the National Conference of State Legislatures’ excellent overview at <http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx>.

<sup>30</sup> For states that bar enrollment to undocumented students, see the National Immigration Law Center’s table at <https://www.nilc.org/issues/education/eduaccess toolkit/eduaccess toolkit2/#maps>.

<sup>31</sup> On pending bills that would expand or limit in-state tuition for undocumented students, see this overview by National Association of Student Personnel Administrators (NASPA): <https://www.naspa.org/rpi/posts/in-state-tuition-for-undocumented-students-2017-state-level-analysis>.

<sup>32</sup> 8 U.S.C. § 1621(a); for the definition of “qualified alien,” see 8 U.S.C. § 1641.

<sup>33</sup> 8 U.S.C. § 1622(a).

<sup>34</sup> See, e.g., *Korab v. Fink*, 797 F.3d 572, 582 (9th Cir. 2014).

<sup>35</sup> The New York Court of Appeals applied strict scrutiny to a denial of benefits in spite of § 1622’s grant of discretion in *Aliessa*, discussed above. Note, however, that *this* interpretation could in theory be overruled by the U.S. Supreme Court, even though the state court has held that the state Equal Protection Clause requires treating noncitizens equally. Valid federal statutes preempt state constitutional provisions. If the Supreme Court were to hold that Congress has the power to promulgate a statute that gives states the discretion to treat immigrants differently, that statute would preempt the state constitution. Thus, the Court could effectively nullify *Aliessa* by revisiting its statement that “Congress

does not have the power to authorize the individual States to violate the Equal Protection Clause.”  
*Graham v. Richardson*, 403 U.S. 365, 382 (1971)

<sup>36</sup> *Graham v. Richardson*, 403 U.S. 365, 382 (1971) (“Although the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization, Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.”).

<sup>37</sup> On benefits for green-card holders, refugees, and asylees after specified periods of time, see 8 U.S.C. § 1622(b).

<sup>38</sup> On benefits for servicemembers, veterans, and their children, see 8 U.S.C. § 1622(b)(3).

<sup>39</sup> On commandeering, see *Printz v. United States*, 521 U.S. 898, 933 (1997) (executive officials); *New York v. United States*, 505 U.S. 144, 161-66 (1992) (legislative processes).

<sup>40</sup> *New York*, 505 U.S. at 162.