Equal protection, immigrants and access to health care and welfare benefits

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The introduction of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) led to considerable litigation on the rights of immigrants to welfare benefits and access to health care.\(^1\) There was considerable divergence between the approaches adopted by the different courts (both federal and State) based, in part, on the different statutory schemes involved but also on different approaches to equal protection. However, none of the cases reached the Supreme Court so the ‘correct’ approach remained unclarified. Perhaps inspired by the fiscal crisis of 2008, several States have again excluded certain legal immigrants from the scope of State health care or welfare schemes and these decisions are currently under challenge in the courts. At the time of writing, there are at least six recent or ongoing challenges in Connecticut, Hawaii, Massachusetts, New Jersey and Washington.\(^2\) Again, courts have come to very different conclusions as to the issues involved. On the one hand, the Massachusetts Supreme Judicial Court has held that strict scrutiny applies to the exclusion of immigrants from a State health care scheme (with federal funding) and that the law under challenge did not satisfy that requirement.\(^3\) On the other, the Connecticut Supreme Court has held that a decision to abolish a State health scheme for immigrants not entitled under the State-federal Medicaid scheme did not involve any discrimination (as no comparable citizen was being provided with State benefits).\(^4\) This note discusses the recent cases and considers how the issues should be analyzed consistent with equal protection law.

Part 2 outlines briefly the facts and outcomes of the five recent (or ongoing) cases. Part 3 sets out an approach to analysis of the issues and part 4 concludes. We begin, however, with a discussion of the background to this issue (part 1).

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\(^4\) Hong Pham v. Starkowski, 16 A.3d 635, 648 (Conn. 2011).
1. Immigrants’ access to welfare and equal protection

Legal context
The equal protection clause of the Fourteenth Amendment to the United States constitution provides that

No State shall deny to any person within its jurisdiction the equal protection of the laws.\(^5\)

The framework for equal protection analysis has been set out in many decisions of the Supreme Court. To prevail on an equal protection claim, the plaintiff first must establish that the State is affording different treatment to similarly situated groups of individuals. Second, where different treatment is shown, the court must examine whether this treatment is consistent with a government interest. The Supreme Court has developed a three-tiered approach to examine all such legislative classifications. Under the first tier of scrutiny, known as the rational relationship test (or rational basis review), the courts will uphold as long as the classification is reasonably related to a legitimate government interest. The second tier of scrutiny used by the Court to review legislative classifications is known as heightened, or intermediate, scrutiny\(^6\) but applies only in a very limited number of cases (e.g. gender) and is not generally relevant to immigration cases. Finally, in the highest level of scrutiny, known as strict scrutiny, the courts will strike down any legislative classification that is not necessary to fulfill a compelling or overriding government objective. Most legislation reviewed by the federal courts under strict scrutiny has been invalidated, because very few classifications are necessary to support a compelling government objective.

The general legal context for the consideration of equal protection claims concerning legal immigrants (‘aliens’) and social security is reasonably clear. First, strict scrutiny applies to State action in relation to aliens.\(^7\) In *Graham v Richardson* a unanimous Supreme Court ruled that State statutes, like the Arizona and Pennsylvania statutes involved in that case, which denied welfare benefits to resident aliens or to aliens who have not resided in the United States for a specified number of years were in breach of the equal protection clause of the

\(^5\) U.S. Const., amend. XIV, § 1. The term ‘person’ in the context of the Fourteenth Amendment includes lawfully admitted resident aliens, as well as citizens of the United States, and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside.

\(^6\) The classification must be substantially related to an important governmental interest.

Fourteenth Amendment and also encroached upon the exclusive federal power over the entrance and residence of aliens.\(^8\)

Second, however, only rational basis review applies to federal action in relation to alienage because Congress has broad power over immigration and naturalization issues.\(^9\) In Mathews v. Diaz, the (again unanimous) Court rejected a challenge to federal Medicare legislation which denied eligibility to aliens unless they had been admitted for permanent residence and also have resided in the United States for at least five years.

Third, under what is known as the ‘uniform-rule doctrine’, State discrimination is subject to only rational basis review when a State’s action merely implements a uniform federal rule which discriminates on the basis of alienage.\(^10\) However, the Supreme Court has yet to clarify what qualifies as a ‘uniform rule’ and there has been limited consideration of this issue in the lower courts.\(^11\) The Supreme Court in Graham said that Congress does not have the power to authorize the individual States to violate the Equal Protection Clause. Under Art. I, 8, cl. 4, of the Constitution, Congress’ power is to ‘establish an uniform Rule of Naturalization.’ A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity.\(^12\)

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\(^8\) Presumably as PRWORA has specifically authorized states to treat immigrants differently (see below), recent challenges have not relied on the Supremacy Clause aspect of Graham.

\(^9\) Mathews v. Diaz, 426 U.S. 67, 77-87 (1976). Exclusion of immigrants has subsequently been routinely upheld under rational basis review. See, e.g., Abreu v. Callahan, 971 F. Supp. 799 (S.D.N.Y. 1997); Kiev v. Glickman, 991 F. Supp. 1090, 1100 (D. Minn. 1998); Rodriguez v. United States, 169 F.3d 1342, 1347-1348 (11th Cir. 1999); Chicago v. Shalala, 189 F.3d 598, 605 (7th Cir. 1999), cert. denied, 529 U.S. 1036 (2000); (food stamps). One of the very rare successful challenges was Lewis v. Grinker, 111 F.Supp.2d 142 (E.D.N.Y. 2000) in which the District Court ruled that the denial of prenatal care to unqualified aliens was unconstitutional applying heightened scrutiny under the Supreme Court’s reasoning in Plyler v. Doe, 457 U.S. 202 (1982). However, this was largely overturned on appeal in Lewis v. Thompson, 252 F.3d 567, 583-584 (2d Cir. 2001) although that court did hold that the citizen children of the unqualified aliens must be accorded automatic eligibility to Medicaid on terms as favorable as those available to the children of citizen mothers (also applying heightened scrutiny). See D. J. Deterding, A Deference Based Dilemma: The Implication of Lewis v. Thompson For Access to Non-Emergency Health Benefits For Undocumented Alien Children, 52 St. Louis U. L.J. 951 (2008), and M. E. Kenney, Note, A Pitfall of Judicial Deference: Equal Protection of the Laws Fails. Women in Lewis v. Thompson, 68 Brook. L. Rev. 525 (2002). See also Aleman v. Glickman, 217 F.3d 1191, 1198-1199 (9th Cir. 2000) in which the Court concluded that conclude that, in determining a resident alien’s eligibility for food stamps, PRWORA did not irrationally differentiate between marriages that end in divorce and those that end in death.

\(^10\) Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982) (‘if the Federal Government has, by uniform rule, prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction’).

\(^11\) See Sudomir v. McMahon, 767 F.2d 1456 (9th Cir. 1985) for a consideration of whether the ‘uniform rule’ applied in the welfare context pre-PRWORA. There the Ninth Circuit held that the Aid to Families with Dependent Children program which required States ‘not only to grant benefits to eligible aliens but also to deny benefits to aliens who do not satisfy [the legal requirement]’ had created a uniform eligibility rule (emphasis in the original). The more recent case law is discussed below. See also Monmouth Medical Center v. Hau Kwok, 183 N.J.Super. 494, 444 A.2d 610 (1982) (pre-Plyler) which, in effect applied a uniform rule approach.

Some have interpreted this as meaning that Congress cannot authorize the States to adopt different positions in relation to access to welfare (suggesting that the provisions of PRWORA might be unconstitutional. However, and leaving aside the point that the statement was in dicta, as the Third Circuit in Soskin pointed out, the basic proposition is ‘almost tautological’.\(^{13}\) It is, of course, the case that Congress cannot authorize States to breach the Constitution and the Supreme Court has applied this principle in Saenz v Roe.\(^{14}\) However, given Congress’ plenary power in relation to immigration issues, there is nothing to suggest that Congress cannot authorize the States to treat immigrants differently as regards access to welfare benefits so long as such treatment is not inconsistent with a uniform rule of naturalization.

**Personal Responsibility and Work Opportunity Reconciliation Act**

In principle the governing legal position seems reasonably clear. However, the adoption of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)\(^ {15}\) considerably complicated the position. In PRWORA Congress made several statements concerning national policy with respect to welfare and immigration:

1. Self-sufficiency has been a basic principle of United States immigration law since this country’s earliest immigration statutes.
2. It continues to be the immigration policy of the United States that—
   - (A) aliens within the Nation’s borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and
   - (B) the availability of public benefits not constitute an incentive for immigration to the United States.
3. Despite the principle of self-sufficiency, aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates.
4. Current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable of assuring that individual aliens not burden the public benefits system.
5. It is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy.
6. It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.
7. With respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits in this chapter, a State that chooses to

\(^{13}\) Soskin v. Reinertson, 353 F.3d 1242, 1254 (10th Cir. 2004).

\(^{14}\) Saenz v. Roe, 526 U.S. 489 (1999) which specifically cited the same statement from Shapiro.

\(^{15}\) For ease of reference, the legislation is referred to as PRWORA although some of the current consolidated provisions were added in separate legislation.
follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.\textsuperscript{16}

In brief (and there are considerable exceptions), PRWORA divided aliens into two classes: qualified and unqualified.\textsuperscript{17} Qualified aliens are generally those aliens lawfully admitted to the United States for permanent residence and those admitted pursuant to certain statutes.\textsuperscript{18} Any alien not considered a qualified alien is a nonqualified alien, which includes illegal aliens.\textsuperscript{19} Non-qualified aliens are ineligible for federal public assistance, including federal Medicaid, subject to certain exceptions.\textsuperscript{20} However, the group of qualified aliens is further subdivided depending on the length of residency in the United States. Any qualified alien who has resided in the United States for five or more years is eligible for federal public assistance.\textsuperscript{21} Aliens who have resided in the United States for fewer than five years, however, are generally ineligible for receipt of federal public assistance (this group is described here as ‘ineligible’ aliens).\textsuperscript{22} Federal law thus requires states to deny federal Medicaid coverage to qualified aliens who are barred from participating by the five year rule.

PRWORA specifically provides that ‘a State is authorized to determine the eligibility for any State public benefits of an alien who is a qualified alien’.\textsuperscript{23} However, PRWORA goes on to provide that

\begin{quote}
  a State or political subdivision of a State is authorized to prohibit or otherwise limit or restrict the eligibility of aliens or classes of aliens for programs of general cash public assistance furnished under the law of the State or a political subdivision of a State.\textsuperscript{24}
\end{quote}

Therefore, and critically for the purposes of this note, PRWORA barred certain groups of aliens from entitlement to federal welfare and, while authorizing States to determine eligibility of legal aliens for State benefits, authorized States to bar (or otherwise restrict) entitlement to State benefits to aliens (up to the same extent that federal benefits are so limited). The impact of PRWORA was that some States acted on the limitations authorized in the statute\textsuperscript{25} leading to a ‘first wave’ of litigation.\textsuperscript{26} These case led to a very divided outcome

\textsuperscript{16} 8 U.S.C. § 1601.

\textsuperscript{17} See 8 U.S.C. § 1641(b) (2006) (defining ‘qualified alien’).

\textsuperscript{18} 8 U.S.C. § 1641(b) (2006).


\textsuperscript{20} 8 U.S.C. § 1611(a) and (b) (2006).


\textsuperscript{23} 8 U.S.C. §§ 1622(a) (my emphasis).

\textsuperscript{24} 8 U.S.C. §§ 1624. However, any prohibitions, limitations, or restrictions imposed by a State or political subdivision of a State must not be more restrictive than the prohibitions, limitations, or restrictions imposed under comparable Federal programs.

\textsuperscript{25} On State response, see W. Zimmermann and K. C. Tumlin, Patchwork Policies: State Assistance for Immigrants under Welfare Reform, Unban Institute (1999) and on its impact see J.F. Costich, Legislating a
amongst the courts with, for example, some courts ruling that no equal protection violation had occurred as there was no comparable class in receipt of benefits;\(^{27}\) others that rational basis review applied as the State laws ‘reflect national policy that Congress has the constitutional power to enact’;\(^{28}\) while others applied strict scrutiny on the basis that alienage was involved.\(^{29}\) The fiscal crisis of 2008-09 has led to further State action with a number of States which had continued to provide benefits to qualified but ineligible aliens now acting to restrict entitlement. This has led to the current wave of litigation.

2. **Recent and ongoing cases**

As noted above there are at least 6 recent or ongoing cases before State and federal courts in which legislation concerning the welfare rights of aliens has been challenged. We set out briefly the facts and findings of these cases using a broadly standard approach. Analysis of these decisions is reserved for section 3 below.

**Hong Pham**\(^{30}\)

*The scheme at issue*

The case concerned a challenge by qualified but ineligible aliens to the termination of certain State funded medical assistance under the Connecticut state medical assistance for non-citizens program (SMANC). In response to PRWORA, Connecticut, in 1997, created SMANC, a State funded program that afforded medical coverage exclusively to qualified aliens who otherwise were categorically eligible for federal Medicaid but who were barred from participating in federal Medicaid because of the federal five year rule.\(^{31}\) However, in

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\(^{27}\) Khrapunskiy v. Door, 12 NY 3d 478, 909 N.E.2d 70, 77 (N.Y. 2009).

\(^{28}\) Soskin v. Reinertson, 353 F.3d 1242, 1255 (10th Cir. 2004).


\(^{30}\) Hong Pham v. Starkowski, 16 A.3d 635, 648 (Conn. 2011).

\(^{31}\) Medicaid is a cooperative federal-state program that provides for federal financial assistance (in the form of matching funds) to states that elect to provide medical services for persons in need. While each State has significant discretion in designing its own Medicaid programs, they are subject to the approval of the United
response to budget concerns in 2009, the legislature substantially eliminated SMANC and effectively terminated publicly funded medical assistance for most recipients.32

*Equality analysis*

The defendants (conflating the issues of situation and differential treatment) argued that the termination of SMANC did not discriminate against aliens in favor of similarly situated citizens because only aliens, and not citizens, ever were eligible for SMANC. The Connecticut supreme court agreed concluding that, in substantially eliminating SMANC, the State did not draw a classification on the basis of alienage because that program does not benefit citizens as opposed to aliens. The court referred to the fact that the US Supreme Court had found discrimination based on alienage in State programs that favored citizens over aliens on the basis of an individual’s citizenship status.33 In contrast, the court concluded that

Because only aliens, and not citizens, ever have benefited from SMANC, and because no citizens presently receive assistance under the program, the state is not providing a benefit to citizens that it is withholding from the class members and is not treating aliens disparately as compared to citizens. We therefore conclude that [the law challenged] does not discriminate against aliens in favor of similarly situated citizens and, therefore, does not create a classification based on alienage.

The court rejected the plaintiff’s argument that the State was providing a benefit to citizens that it does not provide to certain aliens insofar as the State continued to participate in federal Medicaid, which provided assistance to citizens. First, the court concluded that this argument improperly compared the treatment of aliens within a program funded and administered exclusively by the State to the treatment of citizens within a separate, federal-State cooperative program governed by federal law and funded in substantial part by the federal government. The court held that

The equal protection clause requires only that the state treat individuals in a manner similar to that which the state treats other similarly situated individuals. Courts examining claims similar to those advanced in the present case have held that the equal protection clause does not require the state to treat individuals in a manner similar to how others are treated in a different program governed by a different government.

Second, and assuming that one could compare the treatment of aliens under SMANC with the treatment of citizens under Medicaid, the court ruled that any difference in treatment was on the basis of alienage. The court characterized the plaintiffs’ argument as being that

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32 State law also provided for a separate, state medical assistance program, commonly referred to as SAGA-medical, which provides coverage for certain categories of indigent individuals who do not meet the categorical eligibility requirements for federal Medicaid. However, the plaintiffs in *Hong Pham* were ineligible for SAGA-medical because they were categorically eligible for federal Medicaid notwithstanding the federal five year rule.

33 As, for example, in *Graham v Richardson*, 403 U.S. 365 itself.
when the federal government rendered the class members ineligible for federal Medicaid through the passage of the Welfare Reform Act, the equal protection clause required, and still requires, the state to provide a level of assistance to the class members that is equivalent to the level of assistance that citizens continue to receive under federal Medicaid.

However, the court took the view that

the state's decision to participate in federal Medicaid does not draw a classification based on alienage but, instead, draws a classification based on an individual's eligibility for federal Medicaid. This classification is not based on any suspect classification such as alienage because it applies to both aliens and citizens alike, according to the eligibility requirements established by the federal, rather than state, government.

It has not been argued that such classification was irrational and, therefore, the court ruled that it did not violate the equal protection clause. The court went to argue that

If the state's decision to cover only those eligible for federal Medicaid does not violate the equal protection clause, then the equal protection clause does not require the state to enact separate, state-only programs to provide an equivalent level of assistance to those who are ineligible for federal Medicaid as federal Medicaid provides to those individuals who are eligible for that program. For this reason, the equal protection clause did not, and still does not, require the state to enact the SMANC program or an equivalent program to fill the void created by the federal government. If the equal protection clause did not require the state to enact SMANC, then the state’s decision to eliminate that program or to reduce its scope does not violate the constitutional rights of those formerly eligible for assistance under the program because the provision of public assistance does not establish a right to continue receiving assistance.

Therefore, the court rejected the challenge.34

Finch35

In Finch, the Supreme Judicial Court of Massachusetts came to a very different conclusion on the issues before it. Although the case concerned the equal protection provisions of the Massachusetts Constitution, these do not appear to have applied a higher (or different) standard to those to be found in the federal constitution.36

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34 The court also rejected the challenge to the amendments to SAGA-medical on the basis that the law did not classify on the basis of alienage but on the basis of an individual's categorical eligibility for federal Medicaid.


36 Reliance on the State constitution appears to have been a tactical one in order to choose the State rather than federal judicial forum.
The scheme at issue

Finch concerned an amendment to the Commonwealth Care Health Insurance Program (Commonwealth Care) which is a premium assistance program, enacted in 2006, in which enrollees pay a portion of their health insurance premium based on a sliding scale with the remainder paid by the Commonwealth Health Insurance Connector Authority. In response to budgetary concerns, 2009 legislation amended the scheme to exclude aliens who were federally ineligible under PRWORA (who were to be provided with reduced care under an alternative scheme). The scheme is partially funded by federal funds provided through a Medicaid ‘demonstration project’. 37

Equality analysis

A single judge of the superior court referred four questions to the full court which essentially concerned the level of scrutiny to be applied to the exclusion of aliens from Commonwealth Care. 38 It does not appear to have been argued that different treatment did not arise (presumably because of the structure of the Massachusetts scheme which covered both citizens and aliens). 39 As under federal law, where a statute either burdens the exercise of a fundamental right protected by the State Constitution, or discriminates on the basis of a suspect classification, the statute is subject to strict judicial scrutiny under Massachusetts law. 40 As the court pointed out the standard of review applicable to the statute depended on whether the federal or State government’s actions were under review. 41 The court argued that PRWORA did not require that States apply federal eligibility requirements ‘but instead merely declares that Federal policy will not be thwarted if States decide to discriminate against qualified aliens.’ 42 The court concluded:

Where the State is left with a range of options including discriminatory and nondiscriminatory policies, its selection amongst those options must be reviewed under the standards applicable to the State and not those applicable to Congress. Settled equal


38 One question concerned whether the protection against discrimination on the basis of ‘national origin,’ as enumerated in art. 106 of the Amendments to the Massachusetts Constitution, include protection against discrimination on the basis of alienage. The court, perhaps surprisingly, held that it did not. See contra, the dissenting opinion of Duffly J.

39 The status of Doe v. Comm’r of Transitional Assistance, 773 N.E.2d 404 (Mass. 2002) is unclear in the light of Finch. In the earlier case, the court ruled that a durational residence requirement, which only applied to immigrants, involved different treatment on the basis of residence rather than alienage. The facts in Finch are distinguishable but, while the Finch court did not overrule Doe, its approach is clearly different and the court did say (at 671) that the Doe court ‘did not bridge the analytical gap between congressional action “dictating how States are to regulate and legislate issues relating to aliens” and the State’s responsibilities where Congress enacts a noncompulsory rule and the Commonwealth voluntarily “adopt[s] those national policies and guidelines.”’

40 At 668-669.

41 At 672.

42 At 674.
protection law therefore requires that [the challenged law] be reviewed under strict scrutiny.\textsuperscript{43}

In subsequently considering the application of strict scrutiny to the law in question, the court concluded that it failed this test. Under strict scrutiny, the Attorney General argued that the law did not violate the equal protection provision of the Massachusetts Constitution, because it advanced the compelling interest of furthering the national immigration policies expressed by Congress in PRWORA. The court rejected this justification for two reasons. First, in applying the standard of strict scrutiny the court is required to consider the statute's actual purpose, rather than relying on a hypothetical justification. Here, the court found that exclusively fiscal concerns, which it was conceded are not, on their own, adequate to survive strict scrutiny, motivated the legislative enactment. Second, the strict scrutiny doctrine requires a State, to ensure that legislation is narrowly tailored to further a compelling interest. The court found that the Commonwealth had not complied with those requirements, and that the policies and findings of fact expressed by Congress in PRWORA did not furnish a compelling interest for discrimination by the Commonwealth in its entirely State-run program.\textsuperscript{44}

\textit{Pimentel}\textsuperscript{45}

\textbf{The scheme at issue}

The Food Stamp Act of 1964, established a State-administered, federal food assistance program, currently called the Supplemental Nutrition Assistance Program (SNAP), for qualifying low-income households.\textsuperscript{46} The Washington Food Assistance Program for Legal Immigrants (FAP) established a food assistance program for legal immigrants, which exclusively benefitted Washington resident aliens who became ineligible for federal food stamps following the enactment of PRWORA. The Food Stamp Act, as amended, allows States to issue food benefits to federally ineligible legal aliens food benefits but such benefits are to be wholly funded by the State itself.\textsuperscript{47} In response to PRWORA and exercising this option, Washington enacted FAP in 1997 to continue providing SNAP-ineligible legal immigrants with State-funded food benefits.\textsuperscript{48} In December 2010, the State eliminated FAP due to budget cuts (effective February 2011).

\textsuperscript{43} At 674.
\textsuperscript{44} \textit{Finch} 461 Mass. at 234.
\textsuperscript{45} \textit{Pimentel} v Dreyfus, No. 11-35237, (9th. Cir. Feb. 29, 2012). The case also concerned an unsuccessful due process challenge to the termination of benefits which is not considered here.
\textsuperscript{46} 7 U.S.C. § 2011 et seq. The federal government sets out the rules for this scheme and provides the vast bulk of the funding. State participation is voluntary and participating States must administer the scheme and contribute 50% of administration costs.
\textsuperscript{47} \textit{Pimentel} at 2209.
\textsuperscript{48} It appears that, in practice, both federal and state schemes were operated together under the Washington Basic Food Program.
Equality analysis

The district court had issued a preliminary injunction preventing the termination of State food assistance, having concluded that the plaintiff had been discriminated against and was likely to succeed in her equal protection challenge (applying strict scrutiny of the basis that PRWORA did not apply a uniform rule). On appeal, the Ninth Circuit did not agree and reversed the order below.

The Ninth Circuit adopted an approach similar to the Connecticut supreme court in Hong Pham and concluded that ‘strict scrutiny was not merited in these circumstances because Pimentel has not pointed to similarly situated individuals who have been treated differently by the State.’ FAP applied only to federally ineligible legal immigrants. Thus there were no similarly situated individuals as a foundation for an equal protection claim. The court suggested that the enactment of FAP might have merited strict scrutiny review but not to its elimination. The court rejected the argument that the payment of benefits under the federal scheme was relevant to the comparison holding that the two schemes were ‘two separately administered programs funded by two distinct sovereigns’. The court therefore concluded that the termination of FAP did ‘not constitute discrimination, much less alienage-based discrimination’. It was not necessary for the court to consider whether PRWORA enacted a uniform rule.

Korab

In Korab a preliminary injunction has been granted in relation to one group of litigants (Korab II) and refused in relation to another (Korab III). The grant of injunction is currently under appeal to the Ninth Circuit.

The scheme at issue

The case involved two classes of plaintiffs: (i) non-pregnant citizens, age nineteen or older, of countries with Comacts of Free Association (COFA) with the United States who are lawfully residing in Hawaii (COFA Residents), and (ii) non-pregnant immigrants, age nineteen

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50 At 2219.
51 At 2221.
52 At 2223.
53 In fact, the court specifically stated that ‘[l]ight of our holding with respect to the absence of discrimination, we do not address the district court’s uniform rule analysis.’ (at fn. 10). However, it went on to say that ‘[t]hough the Welfare Reform Act did not establish a uniform rule with respect to state welfare programs, it did with respect to federally funded SNAP by imposing mandatory eligibility requirements on participating states.’ (at 2224). For a contrary view see Teytelman v. Wing, 773 N.Y.S.2d 801 (N.Y. Sup. Ct. 2003).
or older, who have been United States residents for less than five years (New Residents).
The COFA Residents claim was considered in *Korab I* and *II* while the New Residents claim
was considered in *Korab III*.

**COFA Residents** - Up to 1996, COFA Residents were entitled to federal Medicaid benefits.
After the enactment of PRWORA, they were no longer so entitled but the State of Hawaii
decided to continue to provide the same medical benefits to COFA Residents, using State
funds only. However, unlike other States, Hawaii did not establish a new legal program but
rather created a de facto State-funded medical assistance program by continuing to provide
medical assistance benefits to COFA Residents and paying for those benefits entirely with
State funds. However, in 2010, the State established a new (and much more limited) Basic
Health Hawaii (BHH) program for both COFA and New Residents. COFA Residents were
disenrolled from (what the court described as) the Old Programs and enrolled in BHH.\(^{57}\)

**New Residents** - The State did not, however, cover New Residents in the Old Programs after
1996. Instead, the Hawaii legislature appropriated funds for providers who would otherwise
have provided uncompensated care to New Residents in a program called Hawaii Immigrant
Health Initiative which provided primary care, preventative care, specialty care, prescription
drugs, Tuberculin testing and immunizations, and gynecological services, but not inpatient
care and emergency care. As of 2010, certain New Residents were also enrolled into BHH.

**Equality analysis**

Perhaps because the State had not established a separate scheme for COFA Residents, it
does not seem to have argued that the COFA Residents were not treated differently and
arguments turned around the basis for this difference in treatment and whether strict
scrutiny applied. The State argued that it simply followed the classifications created by the
PRWORA so that its actions in moving the COFA Residents to BHH should be subject to a
rational basis review. The court concluded that the classification was based on alienage and
considered whether PRWORA applied a ‘uniform rule’. Clearly PRWORA grants States
discretion in allocating benefits to aliens and the court concluded that

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\text{The issue therefore becomes whether this grant of discretion comports with the uniformity requirement.}^{58}\]

In *Sudomir* the court of appeals explained that a uniform rule exists where a federal statute
requires States both to grant benefits to eligible persons and to deny benefits to those who
are not eligible. The court concluded that

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\text{In contrast to the statute in *Sudomir*, the PRWORA does not dictate any particular state action as to COFA Residents, and instead gives states a choice as to whether they should be eligible for any state public benefits. This broad grant of discretion}^{58}
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\(^{57}\) On the limited scope of BHH, see *Korab I* at pp. 6-7. COFA Residents without an insurance plan, or individuals
under BHH who have used up their allotted patient visits, must use the State’s program for Medical Assistance
to Aliens and Refugees (MAAR) which covers only serious medical conditions posing a serious threat to bodily
health, and provides treatment in a hospital setting.

\(^{58}\) *Korab I* at p. 21.
creates neither a federal classification nor a uniform federal policy because the states can do as they please regarding these individuals ... .

Applying strict scrutiny, the court found that the State had failed to identify any particular State interest that was advanced by its decision to exclude COFA Residents from the Old Programs. The court recognized that BHH was created in response to the State’s budget crisis, but pointed out that the ‘justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens.’ Accordingly, the court granted a preliminary injunction reinstating COFA residents in the Old programs.

The case of the New Residents was considered in separate proceedings and the arguments and analysis largely followed that of the COFA Residents cases (unsurprisingly given that the same district judge heard all the cases). However, the State now argued that the court should follow the Connecticut Supreme Court decision in Hong Pham which had been given since the COFA proceedings. However, Judge Seabright found its reasoning unpersuasive and did not follow it. Nonetheless he did not grant an injunction in the case of the New Residents in part because class certification had not been sought and the plaintiffs had failed to give the court any idea as the true scope of the relief requested. In addition, he would have refused an injunction as, unlike the COFA Residents, the New Residents were not seeking to preserve the status quo (i.e. enrollment in the Old Programs) but rather a mandatory injunction ‘seeking something that New Residents never received before’, i.e. access to the same medical benefits that are provided to citizens through Medicaid, but funded through State funds only. Judge Seabright sounded somewhat unoptimistic about the view which the Ninth Circuit might take on the case:

Although the court finds that strict scrutiny applies to the State's decision to implement BHH for COFA residents and New Residents, the Ninth Circuit may disagree with the court's reasoning and join those courts applying rational basis review. For example, the Ninth Circuit might construe the classification as one based on Medicaid eligibility as opposed to alienage, and/or find that a court cannot compare the fully State-funded BHH to the federal-state programs provided through Medicaid. The Ninth Circuit could also hold that the uniformity requirement is more limited than as the court interprets based on Sudomir v. McMahon. In other words, it is an open question whether the Ninth Circuit will hold that strict scrutiny applies to Plaintiffs’ claims. The law is, quite clearly, murky.

Accordingly he found that the plaintiffs had not established that the law clearly favored their position.

59 At p. 23.
60 Citing Graham, 403 U.S. at 376
61 Korab II. This is currently under appeal to the Ninth Circuit.
62 Korab III.
63 Korab III at p. 9.
64 At p. 10. Given the attitude of the Pimentel panel to the appeal in that case, his doubts may well have been entirely justified.
Guaman

Guaman is, so far, also only at an early stage in the litigation with a preliminary injunction having been refused by the Superior Court of New Jersey, Appellate Division.

The scheme at issue

The case concerned a 2010 decision terminating the enrollment of certain legal aliens in the New Jersey FamilyCare Program (FamilyCare), a State-funded Medicaid program offering subsidized health insurance to qualifying low-income adults and children. In contrast to some other State Medicaid programs, New Jersey elected to offer FamilyCare benefits to qualified aliens otherwise ineligible for federal Medicaid because of the five-year bar. However, in 2010, in the light of an ‘unprecedented financial crisis’ the State decided to terminate the enrollment of aliens with less than five years lawful residence in the USA and not to allow such enrollment in the future.

Equality analysis

The court assumed, for purposes of deciding the motion for a preliminary injunction, that the plaintiffs were members of a class of similarly-situated lawful immigrant residents of New Jersey who have suffered, or would suffer, adverse consequences because of the changes to FamilyCare. As in Finch, it appears to have been accepted that aliens were being treated differently to citizens. Therefore, the court had to decide whether strict or rational basis scrutiny was appropriate.

The court said that

Determining whether or not PRWORA provides a ‘uniform rule’ is an elusive, and ultimately unsatisfying, exercise.

However, having reviewed the relevant case law, it concluded, following Soskin v. Reinertson, that rational basis review should be applied. The court argued that

The adoption of the federal five-year eligibility bar in the state program, while not mandated, mirrors federal objectives, corresponds to an identifiable congressional policy, and ‘operate[s] harmoniously’ within the federal program.

Concluding that the plaintiffs were, therefore, unlikely to succeed in the claim, the court refused an injunction.

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66 At 458.
67 At 459-60.
68 At 466.
69 353 F.3d 1242, 1244 (10th Cir. 2004).
70 At 468 citing Plyler, 457 U.S. at 226.
71 At 469.
It reached the same conclusion in relation to the equal protection challenge under the New Jersey constitution.\textsuperscript{72} New Jersey courts have rejected the federal three-tier analysis (strict scrutiny, intermediate scrutiny, rational basis), and employ a more flexible balancing test that considers three factors: (1) the nature of the right asserted; (2) the extent to which the statute intrudes upon that right; and (3) the public need for the intrusion. However, although the federal and State tests are different, they ‘weigh the same factors and often produce the same result.’\textsuperscript{73} Here, the court concluded that the means selected by the State of adopting the federal eligibility criteria for aliens bore a real and substantial relationship to PRWORA’s ‘compelling governmental interest of assuring that aliens be self reliant in accordance with national immigration policy,’ and New Jersey’s interest in providing subsidized health insurance within the limits of the appropriations as set forth in the enabling act.\textsuperscript{74} It, therefore, concluded that even under the more flexible State standard of review, the plaintiffs were unlikely to succeed.

\textit{Unthaksinkun}\textsuperscript{75}

\textit{Unthaksinkun} is also at an early stage of the litigation process but, in contrast to \textit{Guaman}, the federal district court has granted a preliminary injunction requiring the State authorities to reenroll the plaintiff class in the health scheme.

\textbf{The scheme at issue}

The case involves the Washington State Basic Health program which, since 1987, has subsidized private health insurance premiums for eligible Washington residents.\textsuperscript{76} The program was funded entirely by the State of Washington (‘the State’) until 2011, at which time the State began to receive significant federal funding for the program under what is known as a Medicaid demonstration waiver.\textsuperscript{77} In 2011, the State legislature adopted legislation limiting enrollment to Basic Health to those who qualify for subsidized Basic Health benefits and are either eligible for federal subsidy or licensed foster parents. As a result, the administration moved to disenroll persons whom it believed were no longer eligible.\textsuperscript{78} The Plaintiff in the case were all lawful permanent residents who were disenrolled

\textsuperscript{72} Although the New Jersey constitution does not contain explicit equal protection language, the State courts have held that the concept is implicit in Article I, paragraph 1, which provides that ‘[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.’ N.J. Const. art. I, ¶ 1.


\textsuperscript{74} N.J.S.A. 30:4J-16.

\textsuperscript{75} Unthaksinkun v. Porter, No. 11-CV-00588, (Wa. WD. Sep. 28, 2011).

\textsuperscript{76} Health Care Access Act of 1987, Chapter 70.47 RCW.

\textsuperscript{77} 42 U.S.C. § 1315. It appears from the judgment that federal funding will cover the costs of about 60,000 out of a total of 90,000 individuals insured with the State covering the remaining 30,000.

\textsuperscript{78} The case also involved a due process challenge to the termination procedures. The court concluded that the class had a property interest in Basic Health benefits and that the notice provided was likely insufficient.
from Basic Health because the administration lacked information concerning her immigration status.

Equality analysis

Again differential treatment was not disputed and the court turned to the level of review required. The State argued that it was distinguishing on the basis of federal eligibility rules that than alienage relying on Hong Pham. The court distinguished that case on its facts (as it applied to a stand-alone program for aliens) and held that Washington had discriminated on the basis of alienage. As regard whether PRWORA applied a uniform rule, the State argued that the court should follow Sudomir and hold that PRWORA established a uniform rule. However, the court concluded that, first, in adopting the PRWORA eligibility requirements for Basic Health, the State employed a State classification, not a federal classification. And, second, PRWORA did not create a uniform federal rule regarding State funded benefits programs. The court found that PRWORA, in contrast to the legislation at issue in Sudomir, grants States discretion to award benefits to those who are not federally-eligible. The State did not argue that it could satisfy strict scrutiny and, as the other requirements were satisfied, the court granted a preliminary injunction.

3. A framework for equal protection analysis

As we have seen the courts have come to radically different conclusions as to the compatibility of excluding legal immigrants from health care and welfare programs ranging from findings that no difference in treatment has occurred (Hong Pham, Pimentel); to application of rational basis review upholding the exclusion (Guaman); to application of strict scrutiny finding exclusion to be unconstitutional (Finch). This has mirrored the divided jurisprudence in earlier cases. Obviously there are factual differences between the schemes considered in these (and earlier) cases and, to date, cases where separate programs have been established (e.g. Hong Pham, Pimentel) are more likely to be upheld than cases where immigrants are now excluded from a uniform program (as in Finch). Nonetheless, and although courts on both sides of the divide have attempted to distinguish alternative approaches on their facts, it is submitted that different administrative structures are not (and should not necessarily be) determinative of the outcome. In Guaman, for example the exclusion of immigrants from a uniform scheme was upheld, while it is difficult to determine whether the ‘Old Programs’ for COFA Residents in Korab should be classed as the continuation of a uniform scheme (but with State funding only) or the administrative establishment of a new immigrant-only scheme. As a matter of principle, it seems undesirable that the outcome of challenges should be determined by whether a State chose to leave legal immigrants within a uniform scheme (at least for a period) or established a separate immigrant only scheme. After all, if it is correct that States did not have to establish a separate scheme and, therefore, such scheme should now only be subject to

79 Sudomir, 767 F.2d at 1466.

80 See fn 1.

81 This is not to say that the different structures of State-federal co-operation are irrelevant. Clearly the Food Stamp Act provides for a program in which the federal role is more dominant than in Medicaid.
rational basis review (if it is subject to review at all), it should be equally correct that States did not have to leave immigrants in their uniform schemes. If that is the case, why should they now be strictly scrutinized for excluding them?

Clearly much of the difficulty of these cases comes from the dichotomous standard which the Supreme Court has applied to alienage distinctions (whereby the States are reviewed strictly but great deference is shown to the federal government) and the fact that the highest court has yet to clarify the standard for reviewing State decisions influenced (but not mandated) by federal law. However, it is also submitted that part of the difficulty with the case is that the courts have not generally applied the (rather clear) framework for equal protection analysis which has been developed by the Supreme Court (or have not done so correctly).

Similarly situated?

First we must ask whether legal immigrants are similarly situated to citizens (and other longer-resident legal immigrants) covered by the program in question. It is, of course, one of the basic principles of Aristotelian equality that like should be treated alike. Although this issue has, on occasion, been conflated with the question of different treatment, it does not appear to have been specifically addressed by the recent court decisions. But it would be difficult to argue that the legal immigrants are not similarly situated for the purposes of these actions. In these cases, the plaintiffs are legally resident in the USA and, by definition, meet the other need-based criteria for qualification. Their only distinguishing factor is their lack of citizenship (or duration of legal residence) and this is precisely the issue which is being challenged. To hold that they are not similarly situated would be equivalent to ruling that women are not similarly situated to men in a gender-based challenge.

The Canadian Supreme Court has recently adopted a more flexible approach to equality jurisprudence holding that

... a formal analysis based on comparison between the claimant group and a ‘similarly situated’ group, does not assure a result that captures the wrong to which s. 15(1) [the equal protection clause of the Canadian Charter of Rights] is directed — the elimination from the law of measures that impose or perpetuate substantial inequality. What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the

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82 Of course, behind this issue lies one of the fundamental weakness in US equality jurisprudence, i.e. the dichotomous approach to scrutiny and the Court’s failure to utilize the intermediate standard of review (other than in an ad hoc and unacknowledged manner). Of course, calls for changes in this approach have gone unheeded and suggestions that the Court might be developing a ‘Third Strand’ of review look to be unfortunately unfounded: See J.A. Nice, The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes, 4 University of Illinois Law Review 1209 (1999).

83 See above part 1.

84 Though indeed, such an approach is not entirely absent from US equal protection jurisprudence: Geduldig v. Aiello, 417 U.S. 484 (1974)
impugned law is to perpetuate disadvantage or negative stereotypes about that group.\textsuperscript{85}

However, in the case of legal immigrants such a more contextual approach is not even required as it is clear that they are similarly situated to those covered by the programs at issue.

**Different treatment?**

The issue of differential treatment raises more serious issues. Are the plaintiffs being treated differently by the State?\textsuperscript{86} Again courts have tended to conflate questions of difference in treatment and the author of that treatment. It is submitted that legal immigrants who are, for example, excluded from general health care schemes and who are only entitled to much reduced (if any) benefits are clearly being treated differently by somebody. If the program was a purely federal one (or one only administered by the State), then clearly the State would not be responsible. But only the food benefit program at issue in *Pimentel* comes close and, even here, participation by the State is voluntary. In the case of voluntary programs the State could opt not to participate faced with different treatment of immigrants or it could opt to provide State-funded benefits to the immigrants. However, where a State opts to participate in a federal program and provides different treatment to immigrants as opposed to citizens, it is the State which is proximately responsible for the difference in treatment. Whether this difference is justified by federal policies is a question to be answered at a later stage in the analysis.\textsuperscript{87}

**On what ground?**

Assuming as we have argued that there is different treatment, it has been suggested by some courts (e.g. *Hong Pham*) that this is on the basis of eligibility for federal benefits rather than on the basis of alienage. This argument is unsustainable given the federal eligibility requirement which impacts on the plaintiffs is clearly their immigration status. It might alternatively be argued that the difference in treatment is based on length of residence as some immigrants are eligible for benefits.\textsuperscript{88} However, the length of residence requirement only applies to immigrants and discrimination within a category of aliens is still


\textsuperscript{86} If they are being treated differently by the Federal government, then the Fifth Amendment (rather than the Fourteenth) is engaged and, more importantly, the difference in treatment is subject only to rational basis review.

\textsuperscript{87} However, one issue which has yet to be considered by the courts is what different treatment involves. Obviously, from the point of view of the plaintiffs, different treatment involves not having access to the same range of benefits which are available to citizens. However, because of federal-state co-funding, it costs much more for a State to provide benefits to a non-eligible immigrant than it does to provide the same benefits to a person eligible for federal benefits. The potential argument that equal treatment is being provided where a State is spending a broadly equivalent amount on benefits for both citizens and non-citizens does not yet appear to have received detailed consideration by the courts.

\textsuperscript{88} Doe v. Comm’r of Transitional Assistance, 773 N.E.2d 404 (Mass. 2002).
discrimination on the basis of alienage. Therefore, the different treatment at issue is based on alienage (as a majority of courts have found).

**Strict or rational scrutiny?**

Assuming, as we have argued, that the difference in treatment is based on alienage, strict scrutiny will apply unless PRWORA applies a uniform rule for States to follow. It is difficult not to agree with the Superior Court of New Jersey (in Guaman) that consideration of this issue is ‘an elusive, and ultimately unsatisfying, exercise’. The basis for the ‘uniform rule’ doctrine is simply a footnote in Plyler and the Supreme Court has certainly not fleshed out what a uniform rule might consist of (or its rationale). The reference to a ‘uniform rule’ presumably derives from the reference to a ‘uniform rule of naturalization’ in the Constitution. 

And one can see that where Congress has mandated a particular action in the immigration field (which is subject to deferential review), States should not have to satisfy strict scrutiny in implementing that required action. However, while access to welfare benefits is clearly related to issues concerning immigration and naturalization, the policy issues underlying them are quite different. While it makes obvious sense to have a uniform rule as to naturalization, it is not necessarily good policy for Congress to require a uniform rule concerning welfare given the differential impact of immigration on States; their different ability to meet the needs of immigrants; and, indeed, their different policy options. Indeed, it is arguable that the flexible approach chosen by Congress in PRWORA is a much better policy option than a uniform rule.

Most courts which have considered the issue have concluded that PRWORA does not set out a uniform rule as it allows State discretion as to whether benefits should be granted. Indeed in none of the recent cases has a court held that PRWORA provides a uniform rule in relation to Medicaid. Although it is often presented as a case in which the ‘uniform rule’ doctrine was applied, a close reading of Soskin suggests that the Third Circuit decided that case on the basis that the laws in question ‘reflect[ed] national policy that Congress has the constitutional power to enact’ and were not inconsistent with a uniform rule of naturalization. This is indeed a plausible legal interpretation and one which avoids the rigidity of the uniform rule doctrine. It does not, however, as yet find conformation in a ruling of the Supreme Court.

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89 Nyquist v. Mauclet, 432 U.S. 1, 12 (1977). Thus it is unlike the habitual residence requirement (which applies to welfare benefits) in the UK which applies both to UK nationals and non-nationals (although nationals are, of course, more likely to satisfy the requirement).

90 Article I, section 8, clause 4 of the United States Constitution expressly gives the United States Congress the power to establish a uniform rule of naturalization.


To conclude on this point, it is difficult to see that PRWORA can be defended as applying a uniform rule. Indeed, they may be good policy arguments for the courts to move away from the ‘uniform rule’ doctrine as concerns access to welfare benefits and the Soskin approach of applying deferential scrutiny where the law at issue reflects Congressional policy in this area where Congress has plenary powers is an attractive one. However, it is not clear that this approach (yet) represents good law. If one takes the view that it does not, then strict scrutiny must apply.93

Applying strict scrutiny

Finally, let us consider the application of strict scrutiny. It is of course a well known precept that strict scrutiny is strict in principle but ‘fact in fact’. And, indeed, so it has proved in those cases considered here which have applied heightened scrutiny (as in Finch). However, more generally, the Supreme Court has reiterated on a number of occasions that strict scrutiny should not be fatal.94 And, indeed, empirical studies have indicated that strict scrutiny is not fatal in a significant percentage of cases at all federal levels.95 However, as discussed above, in Finch (the only recent court to apply strict scrutiny in a detailed manner) the Supreme Judicial Court found that the strict scrutiny was not satisfied for two reasons.96 First, the court found that exclusively fiscal concerns motivated the legislative enactment. Second, the court found that the Commonwealth had not shown that legislation was narrowly tailored to further a compelling interest. However, these findings are open to some criticism (although the outcome may have been correct on the facts).

First, as to the legislative purpose, the Attorney General had argued that the amendment advanced the compelling interest of furthering the national immigration policies expressed by Congress in PRWORA. Even on the court’s own account, there are several references in the legislative record to PRWORA.97 Now the court may indeed be correct that the legislature was driven to adopt these measures for primarily budgetary reasons but, in doing so, it was still adopting Congressional policy. Indeed one might assume that PRWORA was deliberately designed to provide a financial incentive for States to comply with its ‘statements concerning national policy with respect to welfare and immigration’. While the court is correct to limit the enquiry to the actual (rather than hypothetical) rationale for the legislation, the fact remains that purpose of the Massachusetts legislature was to bring State law into line with Congressional policy. Surely its precise motive for doing so (whether it be budgetary pressure or a firm belief in the merits of self-sufficiency) is irrelevant.

Turning to the substantive justification for the law, it should be noted that PRWORA specifically provides that

93 If rational-basis review applies then it appears almost inevitable that laws will be upheld baring some rather exception facts. In many cases, plaintiffs do not even argue that the law cannot survive this level of review.
96 Finch v. Commonwealth Health Insurance Connector Authority, 461 Mass. 232 (2012), although that court referred to a number of Massachusetts cases which has satisfied strict scrutiny (at 243-44).
... a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy. 98

But the Massachusetts court took a rather fatal approach to its application of strict scrutiny. First, it declined to reach the question whether national immigration policy can ever serve as a compelling interest for the purposes of strict scrutiny. 99 Given the importance attached by the Supreme Court to Congressional authority in this area and the importance given by Congress to immigration policy (and PRWORA), it is difficult to see how or why national immigration policy should not constitute a compelling interest. Second, the court suggested that strict scrutiny would apply to the State’s application of national policy as set out in PRWORA. 100 Again, it is submitted that given Congress’ plenary authority in this area and the fact that these policy statements are set out in national legislation, they are subject only to rational review and the fact that the State applies them does not make them subject to strict scrutiny. Massachusetts cannot be expected to investigate whether or not the national policy statements are empirically correct. 101 However, the court’s finding that strict scrutiny was not satisfied may be justified on procedural grounds. Narrow tailoring requires ‘serious, good faith consideration’ of ‘workable’ non-discriminatory alternatives that will achieve the Legislature's goals. 102 It is not clear from the record that the legislature ever gave such consideration to alternative approaches.

4. Conclusion

We have seen that the issue of the compatibility of the exclusion of legal immigrants from access to general health care and welfare benefits with the equal protection guarantee has led to inconsistency amongst State and federal courts. While the only two courts of appeal to consider the issue to date have upheld the laws challenged, 103 the two courts arrived at

99 At 242-43 claiming that ‘no published judicial opinion has ever endorsed national immigration policy as a compelling State interest for the purposes of strict scrutiny.’
100 At 244 (‘...there was no legislative inquiry concerning the self-sufficiency of legal immigrants in Massachusetts. Nor did the Legislature ever evaluate whether withholding State subsidies for health insurance from legal immigrants is narrowly tailored to promote such self-sufficiency.)
101 Indeed the State’s analogy to race-based classifications in cooperative Federal-State transportation contracting appears correct. Here three courts of appeals, applying strict scrutiny, unanimously held that the States were entitled to rely on the compelling interest articulated by Congress, i.e. remedying past discrimination: Northern Contr., Inc. v. State, 473 F.3d 715, 717 (7th Cir. 2007); Western States Paving Co. v. Washington State Dep’t of Transp., 407 F.3d 983 (9th Cir. 2005), cert. denied sub nom. Vancouver v. Western States Paving Co., 546 U.S. 1170 (2006); Sherbrooke Turf, Inc. v. Minnesota Dep’t of Transp., 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004).
103 Soskin v. Reinertson, 353 F.3d 1242 (10th Cir. 2004) and Pimentel v Dreyfus, No. 11-35237, (9th. Cir. Feb. 29, 2012).
this outcome for different reasons, while lower courts have come to the opposite conclusion. Meanwhile there has been a major difference of opinion amongst State courts as to the constitutionality of such laws. I have argued that factual differences are insufficient to explain the different outcomes and that the cases to date reflect an undesirable lack of clarity about the correct legal approach. This is, in part, due to a failure by the courts to apply a clear legal equal protection framework to their analysis and/or their incorrect application of this framework. The difficulties arise in large part because of the dichotomous legal standards which apply to federal (rational-basis review) as opposed to State (strict scrutiny) and the feeling of some courts that while States are, in effect, applying a federal ‘mandate’, that mandate as expressed in PRWORA is insufficiently precise to satisfy the ‘uniform rule’ test.

Clearly many judges believe that it could not be correct that States should be judged strictly for continuing to provide benefits to immigrants after PRWORA and later implementing the approach which they are encouraged to adopt by Congress (by withdrawing these benefits). But, in order to avoid applying strict scrutiny (with its possibly fatal impact on State action) courts are incorrectly applying equal protection analysis to hold that no difference in treatment has occurred. This may create a dangerous precedent in other areas of equal protection jurisprudence. It we take the view that immigrants who are denied access to health or welfare benefits (or provided with significantly more limited benefits) are being treated differently and if we assume that PRWORA does not create a uniform rule, what options are open to those judges who intuitively feel that States should not be penalized for applying the wishes of Congress? This first is to adopt the Soskin approach of broadening the uniform rule doctrine so as to apply rational basis review where the laws in question ‘reflect national policy that Congress has the constitutional power to enact’ and are not inconsistent with a uniform rule of naturalization. However, this does have the disadvantage (from a plaintiff’s perspective) that almost any and all such laws will be upheld.

An alternative approach (certainly more attractive from a plaintiff’s point of view) would be to accept that PRWORA does not apply a uniform rule and that, therefore, strict scrutiny applies for the reasons set out in Graham. However, recognizing that strict scrutiny need not be fatal, courts should allow States to rely on following national immigration policy as being a compelling State interest and focus on whether the State can show that the approach adopted (and the procedures adopted to reach that outcome) represent ‘the least restrictive means available’.


106 See, for example, Hong Pham 16 A.3d at 646 (‘the equal protection clause does not require the state to enact separate, state-only programs to provide an equivalent level of assistance to those who are ineligible for federal Medicaid as federal Medicaid provides to those individuals who are eligible for that program’).