Equal Protection: Immigrants' Access to Healthcare and Welfare Benefits

Mel Cousins
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DR. MEL COUSINS*

Introduction

The adoption of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (hereinafter “PRWORA”) led to considerable litigation over immigrants’ rights to welfare benefits and access to health care.1 The approaches adopted by different courts (both federal and state) diverged significantly based on the various statutory schemes involved as well as distinct approaches to equal protection. However, no “on point” cases have reached the United States Supreme Court, so the “correct” approach remains unclear.

Following the fiscal crisis of 2008, several states moved for increased exclusion of certain immigrants residing in the country legally from state healthcare or welfare schemes. Decisions regarding such increased exclusion are currently under challenge in both the federal and state courts, including Connecticut, Hawai‘i, Maine,

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1. See Alvarino v. Wing, 690 N.Y.S.2d 262 (App. Div. 1999); Cid v. S.D. Dep’t of Soc. Servs., 598 N.W.2d 887 (S.D. 1999); see also Aliessa ex rel. Fayad v. Novello, 96 N.Y.2d 418 (2001); see also Kurti v. Maricopa Cnty., 33 P.3d 499 (Ariz. Ct. App. 2001); see also Doe v. Commr of Transitional Assistance, 773 N.E.2d 404 (Mass. 2002); Teytelman v. Wing, 773 N.Y.S.2d 801 (Sup. Ct. 2003); Avila v. Biedess, 78 P.3d 280 (Ariz. 2003); see also Soskin v. Reinertson, 353 F.3d 1242 (10th Cir. 2004); see also Ehrlich v. Perez, 908 A.2d 1220 (Md. 2006); see also Khrapunskiy v. Doar, 909 N.E.2d 70 (N.Y. 2009). The cases here focus here on equal protection issues arising under both federal and state constitutions. In a number of cases additional arguments were made in relation to specific state constitutional provisions, but these are not discussed in this Article.
Massachusetts, New Jersey, and Washington. Such challenges are now in front of the Courts of Appeals in both the First and Ninth Circuits.

In the past, 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 healthcare scheme (with federal funding) and that the law under challenge did not satisfy that requirement. On the other, the Connecticut Supreme Court has held that a decision to abolish a state health care scheme for immigrants not entitled under the state-federal Medicaid scheme did not involve any discrimination, because no comparable citizen was being provided with state benefits.

This Article discusses recent cases and analyzes potential resolutions of such issues consistent with equal protection law. Part I outlines the legal context, including the relevant Supreme Court case law and the provisions of PRWORA. Part II briefly outlines the facts and outcomes of four of the most significant cases, which highlights the differing approaches adopted by the courts. Part III sets out an analytical approach to the issues; and Part IV summarizes the findings and conclusions set forth in this Article.

I. Immigrants’ Access to Welfare and Equal Protection

A. Legal Context

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that “[n]o State shall deny to any person within its jurisdiction the equal protection of the laws.”


4. Hong Pham, 16 A.3d at 646; see also Pimentel, 670 F.3d 1096; see also Bruns v Mayhew, 750 F.3d 61 (1st. Cir. 2014).

5. U.S. CONST. amend. XIV, § 1. The term “person” in the context of the Fourteenth Amendment includes lawfully admitted resident immigrants, as well as citizens of the
The framework for equal protection analysis is laid out in many Supreme Court decisions. To prevail on an equal protection claim, a plaintiff first must establish that the State affords different treatment to similarly situated groups of individuals. Second, where different treatment is demonstrated, the court must examine whether such treatment is consistent with a governmental interest. The Supreme Court 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 classification must be reasonably related to a legitimate government interest. The second tier of scrutiny applied by the court to review legislative classifications is known as heightened, or intermediate, scrutiny, but applies only in a very limited number of cases (e.g. gender) and is not generally relevant in 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 (though by no means all) legislation reviewed under strict scrutiny by the federal courts is 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 legally authorized immigrants and social security is reasonably clear. First, strict scrutiny applies to State action in relation to immigrants. In *Graham v Richardson*, a unanimous Supreme Court ruled that some state statutes were in breach of the Equal Protection Clause of the Fourteenth Amendment and also encroached upon the exclusive federal power over the entrance and 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.


residence of immigrants. The aforementioned statutes included those of Arizona and Pennsylvania, which denied welfare benefits to resident undocumented immigrants or to immigrants who had not resided in the United States for a specified number of years.

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

Third, under what is known as the “uniform-rule doctrine,” state discrimination is subject only to rational basis review when a state’s action merely implements a uniform federal rule that discriminates on the basis of their immigration status. However, the Supreme Court has yet to clarify what qualifies as a “uniform rule” and consideration of this issue in the lower courts is limited. In Graham, 9

9. Graham, 403 U.S. at 376, 382-83.
10. Id. at 367-70. Presumably as PRWORA has specifically authorized states to treat immigrants differently, recent challenges have not relied on the Supremacy Clause aspect of Graham.
12. Plyler, 457 U.S. at 219 n.19 (stating “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”).
13. For consideration of whether the “uniform rule” applied in the welfare context pre-PRWORA see Sudomir v. McMahon, 767 F.2d 1456 (9th Cir. 1985) (holding that that the Aid to Families with Dependent Children program, which “require[d] states not only to grant benefits to eligible aliens but also to deny benefits to aliens who do not satisfy the
the Supreme Court stated that:

Congress does not have the power to authorize the individual States to violate the Equal Protection Clause. Under Art. I, s 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.14

Some interpret this to mean that Congress cannot authorize the states to adopt different positions regarding to access to welfare, suggesting that the provisions of PRWORA might be unconstitutional.15 However, leaving aside the point that the statement was in dicta, as the Third Circuit pointed out in Soskin v. Reinertson, the basic proposition is “almost tautological.”16 Congress, of course, cannot authorize states to breach the Constitution, and the Supreme Court applied this principle in Saenz v. Roe.17 However, given Congress’ plenary power in relation to immigration issues,18 there is nothing to suggest that Congress cannot authorize the states to treat immigrants differently regarding their access to welfare benefits, so long as such treatment is not inconsistent with a uniform rule of naturalization.

B. Personal Responsibility and Work Opportunity Reconciliation Act

In principle the governing legal position seems reasonably clear. However, the adoption of PRWORA19 considerably complicated the
position. In PRWORA Congress made the following “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 proven wholly incapable of assuring that individual aliens do not burden the public benefits system.

(5) It is a compelling governmental 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 governmental 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 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.²⁰

In brief, and there are considerable exceptions, PRWORA divides immigrants into two classes: qualified and unqualified. A “Qualified aliens” are generally those lawfully admitted to the United States for permanent residence and those admitted pursuant to certain statutes. Any immigrant not considered to be a “qualified alien” is a “nonqualified alien,” which includes undocumented immigrants. “Nonqualified aliens” are ineligible for federal public assistance, including, with certain exceptions, federal Medicaid benefits.

Their length of residency in the United States further divides “qualified aliens.” Any “qualified alien” who has resided in the United States for five or more years is eligible for federal public assistance. Immigrants who have resided in the United States for fewer than five years are generally ineligible for receipt of federal public assistance (hereinafter referred to as “ineligible immigrants”). Federal law thus requires states deny federal Medicaid coverage to otherwise “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.” However, PRWORA goes on to provide that “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.”

Therefore, and critically for the purpose of this Article, PRWORA has barred certain groups of immigrants from entitlement to federal welfare. Additionally, while authorizing states to determine eligibility of authorized immigrants for state benefits, PRWORA has permitted states to bar or otherwise restrict entitlement to state benefits to immigrants up to the same extent that federal benefits are so limited. PRWORA’s impact is demonstrated by states that acted

22. Id.
23. Id.
29. 8 U.S.C. § 1624(a) (1996); see also § 1624(b) (requiring that 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).
on the limitations authorized in the statute leading to a ‘first wave’ of litigation. These cases led to a very divided outcome amongst the courts. For example, some courts ruled that no equal protection violation took place because there was no comparable class in receipt of benefits; other courts ruled that rational basis review applied as the state laws “reflect national policy that Congress has the constitutional power to enact” while others applied strict scrutiny on the basis that immigration status was involved. The fiscal crisis of 2008 subsequently led to further state action within a number of states. These states, which previously provided benefits to qualified but ineligible immigrants, moved to restrict entitlement. This led to the current wave of litigation.

II. Recent and Ongoing Cases

As noted in the introduction of this Article, there has been litigation involving at least six states concerning the welfare rights of immigrants. The facts and findings of four of the more important of these cases are briefly set out using a broadly standard approach. Analysis of these decisions is reserved for Part III below.

A. Hong Pham


33. Soksin, 353 F.3d at 1255.

34. See Aliensa ex rel. Fayad, 754 N.E.2d at 1094; see also Ehrlich v. Perez, 908 A.2d 1220 (Md. 2006).

35. Hong Pham, 16 A.3d 635; see also Pimentel, 670 F.3d at 1106 (adopting an approach similar to the Connecticut Supreme Court’s in Hong Pham and concluded that “strict
i. The Scheme at Issue

The case of Hong Pham concerned a challenge by qualified but ineligible immigrants to the termination of certain state-funded medical assistance under the Connecticut state medical assistance for non-citizens program (hereinafter “SMANC”). In 1997 and in response to PRWORA, Connecticut, created SMANC; a state-funded program that afforded medical coverage exclusively to qualified immigrants who otherwise were categorically eligible for federal Medicaid, but were barred from participating in federal Medicaid due to the federal five year rule. However, in response to budget concerns in 2009, the legislature substantially eliminated SMANC and effectively terminated publicly funded medical assistance for most recipients.

ii. Equality Analysis

The defendants, conflating the issues of situation and differential treatment, argued that the termination of SMANC did not discriminate against immigrants in favor of similarly situated citizens because only non-citizen immigrants and not citizens, were ever 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 immigrants because that program did not benefit citizens as opposed to non-citizen immigrants. The court referenced the fact that the United States Supreme Court had previously found that discrimination based on immigration status in state programs that favored citizens over non-citizen immigrants on the basis of an individual’s citizenship status. In contrast, the court here concluded that:

scrutiny was not merited in these circumstances because Pimentel has not pointed to similarly situated individuals who have been treated differently by the State.”); see also Bruns, 70 F.3d at 70 (holding that the appellants were not similarly situated).

36. Hong Pham, 16 A.3d at 637-39.
37. Id. at 638-39.
38. Id.
39. Hong Pham, 16 A.3d at 643.
40. Id. at 644.
41. Id. at 646.
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.\textsuperscript{42}

The court rejected the plaintiff’s argument that the State provided a benefit to citizens that it did not provide to certain immigrants insofar as the State continued to participate in federal Medicaid, which provided assistance to citizens.\textsuperscript{43} First, the court concluded that this argument improperly compared the treatment of immigrants 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.\textsuperscript{44} 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.\textsuperscript{45}

Second, and assuming that one could compare the treatment of immigrants under SMANC with the treatment of citizens under Medicaid, the court ruled that any difference in treatment was not based on alienage. The court characterized the plaintiffs’ argument as such:

\begin{quote}
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,
\end{quote}

\begin{enumerate}
\item Id. at 648-49 (citation omitted).
\item Id. at 647.
\item Id. at 646.
\item Id. at 649-50 (citations omitted).
\end{enumerate}
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.46

However, the court took the view that:

[T]he 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.47

It has not been argued that such classification was irrational and, therefore, the court ruled that it did not violate the Equal Protection Clause.48 The court went on to state 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.49

Therefore, the court rejected the challenge.50

46. Id. at 658.
47. Id. at 659.
48. Id. at 661.
49. Hong Pham, 16 A.3d at 661
50. Id.; see also id. at 662 (rejecting plaintiff’s 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
B. Finch

In *Finch v. Commonwealth Health Insurance Connector Authority*, 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 state constitutional provisions do not appear to apply a higher or different standard than those to be found in the Federal Constitution.

i. The Scheme at Issue

*Finch* concerned an amendment to the Commonwealth Care Health Insurance Program (hereinafter “Commonwealth Care”), which is a premium assistance program enacted in 2006. Enrollees in Commonwealth Care “pay a portion of their health insurance premium based on a sliding scale with the remainder paid by the defendant Commonwealth Health Insurance Connector Authority.” In response to budgetary concerns, 2009 legislation amended the scheme to exclude immigrants 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.”

ii. Equality Analysis

The case came to the Massachusetts Supreme Judicial Court with four questions from the lower county court, which essentially concerned the level of scrutiny to be applied to the exclusion of immigrants from Commonwealth Care. It does not appear to have

of an individual’s categorical eligibility for federal Medicaid).

52. Reliance on the state constitution appears to have been a tactical one in order to choose the state rather than federal judicial forum.
53. *Finch I*, 946 N.E.2d at 1265.
54. *Id.*
55. *Finch I*, 946 N.E.2d at 1267.
57. *Finch I*, 946 N.E.2d at 1265-66. 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. *Id.* at 1272. *Contra* at 1288-93 (Duffy, J. dissenting).
been argued that different treatment did not arise (presumably because of the structure of the Massachusetts scheme, which covered both citizens and non-citizen immigrants). As under federal law, “[w]here a statute either burdens the exercise of a fundamental right protected by [the] [s]tate [c]onstitution, or discriminates on the basis of a suspect classification, the statute is subject to strict judicial scrutiny” under Massachusetts law. As the Finch court pointed out, the standard of review applicable to the statute depended on whether the federal or state government’s actions were under review. The court determined that PRWORA did not require states to apply federal eligibility requirements “but instead merely declares that Federal policy will not be thwarted if States decide to discriminate against qualified aliens.” 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 protection law therefore requires that [the challenged law] be reviewed under strict scrutiny.

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. The first being that “in applying the standard of strict scrutiny the

58. The status of Comm’r of Transitional Assistance is unclear in the light of Finch I. 773 N.E.2d 404; 946 N.E.2d 1261. 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 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.” 946 N.E.2d at 1275.
59. Finch I, 946 N.E.2d at 1273.
60. Id. at 1276.
61. Id. at 1277.
62. Id.
64. Id. at 973-74.
court is required to consider the statute’s actual purpose, rather than relying on a hypothetical justification.” 65 Here, the court found that “exclusively fiscal concerns, which the Commonwealth conceded [were] not on their own adequate to survive strict scrutiny, motivated the legislative enactment.” 66 Second, the strict scrutiny doctrine requires a state “to ensure that legislation is narrowly tailored to further a compelling interest.” 67 The court found that the Commonwealth had not “compl[ied] 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.” 68

C. Guaman 69

i. The Scheme at Issue

The case concerned a 2010 decision terminating the enrollment of certain immigrants residing in the country legally who were enrolled in the New Jersey FamilyCare Program (hereinafter “FamilyCare”), “a state-funded Medicaid program offering subsidized health insurance to qualifying low-income adults and children.” 70 In contrast to some other state Medicaid programs, New Jersey elected to offer FamilyCare benefits to qualified immigrants otherwise ineligible for federal Medicaid because of the five-year bar. 71 However, in 2010, in the light of an “unprecedented financial crisis” the State decided to terminate the enrollment of immigrants with less than five years lawful residence in the USA and not to allow such enrollment in the future. 72

ii. Equality Analysis

In Guaman I, the Superior Court of New Jersey 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 ha[d] suffered, or [would]
suffer, adverse consequences because of the changes to FamilyCare.” Similarly to Finch, in Guaman the court appears to accept that immigrants were in fact treated differently than citizens. Therefore, the court had to decide whether strict or rational basis scrutiny was appropriate. The court stated that “[d]etermining whether or not PRWORA provides a ‘uniform rule’ is an elusive, and ultimately unsatisfying, exercise.”

However, having reviewed the relevant case law, and following Soskin v. Reinertson, the court concluded that rational basis review should be applied. The court stated that “[t]he 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 plaintiffs were therefore unlikely to succeed in their claim, the court refused an injunction.

The court reached the same conclusion regarding the equal protection challenge arising under the New Jersey Constitution. New Jersey courts “have rejected the federal three-tier analysis (strict scrutiny, intermediate scrutiny, [and] rational basis), and [instead] 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, courts have “weigh[ed] the same factors and often produce the same result.” Here, the court concluded that the means selected by the State for 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,” as well as New Jersey’s interest in providing subsidized health insurance within the

73. Guaman v. Velez (Guaman I), 23 A.3d at 466 (using the phrase “alien subclass”).
74. Id.
75. Soskin, 353 F.3d 1242.
76. Guaman I, 23 A.3d at 468.
77. Id. at 468 (citing Plyler, 457 U.S. at 226).
78. Id. at 469.
79. Id. at 468-69 (finding that, although the New Jersey Constitution does not contain explicit equal protection language, the concept is implicit in article I, section 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.).
80. Guaman I, 23 A.3d at 469.
limits of the appropriations as set forth in the enabling act.\textsuperscript{82} The court therefore concluded that, even under the more flexible state standard of review, the plaintiffs were unlikely to succeed.

In \textit{Guaman II},\textsuperscript{83} a majority of the Appellate Division of the Superior Court of New Jersey followed the approach that the differently constituted Division adopted on the hearing for a preliminary injunction.\textsuperscript{84} The court thus concluded that the State’s action was consistent with both the federal and state constitutions.\textsuperscript{85} As in the earlier ruling, the court appeared to assume that the appellants were similarly situated and treated differently, but held, following \textit{Soskin v. Reinertson},\textsuperscript{86} that this this treatment was subject only to rational review rather than strict scrutiny and that it satisfied this level of review.\textsuperscript{87} The court relied largely on its ruling in \textit{Guaman I}, but also added some additional consideration of the “uniform” federal approach.\textsuperscript{88} The court noted that Congress had found that “when a state chooses to follow Congress’s lead on this issue, by denying public benefits to legal aliens who have been in this country less than five years, it is furthering a very important national immigration policy.”\textsuperscript{89}

The issue, the court said, was “whether this statement of national policy, viewed pragmatically in light of the overall structure of Medicaid, is sufficiently ‘uniform’ to constitutionally authorize states to follow Congress’s policy choice.”\textsuperscript{90} The court accepted that Congress could have prohibited the states from providing health benefits to legal aliens, as a matter of national immigration policy.\textsuperscript{91} The question to address was whether Congress might “create a national immigration policy, one aspect of which allows the States some leeway in its implementation.”\textsuperscript{92}

The court raised an interesting point, which does not appear to have been previously considered:

\begin{itemize}
  \item \textsuperscript{82} \textit{Guaman I}, 23 A.3d at 466 (emphasis removed).
  \item \textsuperscript{84} \textit{Id.} at 933.
  \item \textsuperscript{85} The majority shortly disposed of the arguments under the State constitution. \textit{Id.} at 935-36. \textit{Contra} at 944-59 (Harris, J. dissenting).
  \item \textsuperscript{86} \textit{Soskin}, 353 F.3d 1242.
  \item \textsuperscript{87} \textit{Guaman II}, 74 A.3d at 935.
  \item \textsuperscript{88} \textit{Id.} at 934-35.
  \item \textsuperscript{89} \textit{Id.} at 941.
  \item \textsuperscript{90} \textit{Id.}
  \item \textsuperscript{91} \textit{Id.} at 934 (citing \textit{Pyler}, 457 U.S. at 219 n.19 (1982)).
  \item \textsuperscript{92} \textit{Guaman II}, 74 A.3d at 941.
\end{itemize}
Federal Medicaid law requires the States to provide emergency healthcare to indigent persons, regardless of their immigration status or whether they otherwise qualify for any other form of Medicaid assistance. Because the Federal Medicaid law requires the States to provide emergency medical care ‘to all individuals in need of such services,’ cutting Federal Medicaid funding for legal aliens does not address the State-level fiscal problem posed by uninsured persons seeking urgently-needed health care [sic] in hospital emergency rooms. Our Legislature recognized . . . that reducing healthcare coverage for low-income persons results in increased expenditures for charity care in hospital emergency rooms. Consequently, as a practical matter, states can either fund healthcare for the poor on the ‘front end’ by providing them with some form of subsidized healthcare coverage, or pay on the ‘back end’ in increased costs for hospital charity care. That choice may be driven by a state’s current economic situation, e.g., whether it can afford to ‘front load’ healthcare costs or whether it prefers to bear higher costs in the future when its budget situation may be less dire.  

The court speculated that “this paradigm [might] explain why Congress left the States some discretion to fund healthcare coverage for non-qualifying aliens” and that this did not undermine the uniformity of the policy.  

Judge Harris, preferring the approach in cases such as Finch,95 dissented and argued that PRWORA did not constitute a uniform rule.96 Interestingly, he went on to consider whether the law would satisfy strict scrutiny.97 The State advanced mainly fiscal and budgetary justifications which the dissent correctly rejected.98 Judge Harris also rejected the argument that the exclusion of noncitizens was validated by PRWORA’s statement that “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.”99

93. Guaman II, 74 A.3d at 941-42 (citation omitted).
94. Id. at 942.
95. Finch I, 946 N.E.2d 1262.
96. Guaman II, 74 A.3d at 953-54.
97. Id. at 944-58.
98. Id. at 955.
99. Id. at 946.
He argued that:

[İ]t is highly doubtful that Congress’s instruction to the courts to find a compelling interest in this particular species of fiscal motivation would withstand review under a separation of powers analysis . . . The Constitution grants Congress the power to regulate the details of immigration, not the power to decide when and where its laws are subject to a particular scope of review. The former power is reflective of the constitutional recognition that certain matters requiring political judgments are best left to the political branches.100

D. Korab v Fink101

i. The Scheme at Issue

The case involved non-pregnant citizens, ages nineteen or older, originating from countries with Compacts of Free Association (hereinafter “COFA”)102 with the United States who lawfully resided in Hawai’i (COFA Residents).103 Up to 1996, COFA Residents were entitled to federal Medicaid benefits.104 After the enactment of PRWORA, they were no longer so entitled.105 However, the State of Hawai’i decided to continue to provide the same medical benefits to COFA Residents, using state funds only.106 Yet, unlike other states, Hawai’i 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.107 However, in 2010, the state established a new (and much more limited) Basic Health Hawai’i (hereinafter “BHH”) program “exclusively for COFA Residents and legal permanent residents who have lived in the United States for less than five years.”108 COFA Residents were disenrolled from what the

100. Guaman II, 74 A.3d at 957 (citations omitted).
101. Korab v. Fink (Korab IV), 748 F.3d 875 (9th Cir. 2014).
103. Korab IV, 748 F.3d at 877.
104. Id; see also 8 U.S.C. § 1601 (1996).
105. Korab IV, 748 F.3d at 878.
106. Id. at 880.
107. Id.
108. Id. at 877.
district court described as the Old Programs, and enrolled in BHH.\textsuperscript{[109]}

\textit{ii. Equality Analysis}

\textit{Korab v. Fink} was an appeal of the district court’s decision in \textit{Korab v. Koller}\textsuperscript{[110]} to grant a preliminary injunction after applying strict scrutiny to the exclusion of the COFA residents.\textsuperscript{[111]} The Ninth Circuit vacated this ruling and remanded the case to the lower court.\textsuperscript{[112]} Circuit Judge McKeown, writing for the court,\textsuperscript{[113]} concluded that:

The basic flaw in the [appellants’] proposition is that Korab is excluded from the more comprehensive Medicaid benefits, which include federal funds, as a consequence of congressional action. Congress has plenary power to regulate immigration and the conditions on which aliens remain in the United States, and Congress has authorized states to do exactly what Hawai‘i has done here — determine the eligibility for, and terms of, state benefits for aliens in the narrow third category, with regard to whom Congress expressly gave states limited discretion. Hawai‘i has no constitutional obligation to fill the gap left by Congress’s withdrawal of federal funding for COFA Residents.\textsuperscript{[114]}

The court expressed some doubt that Korab had shown a difference in treatment, stating:

At this stage of the proceedings, we harbor serious doubts that Korab has carried his initial burden to establish a claim of disparity vis-a-vis the state’s actions. Under Medicaid, citizens and eligible aliens are covered under a plan funded by both federal and state funds. By contrast, Basic Health Hawai‘i is funded solely by the state. Here, however, Korab has not claimed that COFA Residents are receiving less per

\begin{footnotesize}
\textsuperscript{109} Id.
\textsuperscript{111} \textit{Korab IV}, 748 F.3d at 877-78.
\textsuperscript{112} Id. at 888.
\textsuperscript{113} Judge Bybee stated that he “concur[red] in full in Judge McKeown’s thoughtful opinion for the court.” Id. However, as we will see, his own opinion contains views quote contrary to those of Judge McKeown. For the purposes of this note, Judge McKeown’s opinion is taken as a majority opinion and we do not consider the implications or appropriateness of Judge Bybee’s rather disingenuous approach.
\textsuperscript{114} Id. at 878.
\end{footnotesize}
capita state funding than citizens or qualified aliens. Nor has Korab offered any evidence that the state’s average expenditures on behalf of COFA Residents in Basic Health Hawai’i are less than the amount the state contributes for citizens and qualified aliens eligible for Medicaid. On this record, Hawai’i ‘does nothing more than refuse to expend State monies to restore the Federal funds lost by Congress’s constitutional exercise of its plenary power.’

However, the court decided that it was not necessary to resolve the issue given that it dismissed the case on other grounds. Accordingly, it proceeded on the assumption that there was a difference in treatment and considered whether strict scrutiny (as the district court has ruled) or rational basis applied.

The Court followed the approach adopted by the Tenth Circuit in Soskin. This Court ruled that:

Considering the Welfare Reform Act as a whole, it establishes a uniform federal structure for providing welfare benefits to distinct classes of aliens. The entire benefit scheme flows from these classifications, and a state’s limited discretion to implement a plan for a specified category of aliens does not defeat or undermine uniformity. In arguing to the contrary, the dissent ignores that ‘a state’s exercise of discretion can also effectuate national policy.’

The court concluded that “Hawai’i’s discretionary decision to deny coverage to COFA Residents effectuates Congress’s uniform national policy on the treatment of aliens in the welfare context.” The “logical corollary” to the Congressional policy was that “where the federal program is constitutional, as it is here, states cannot be forced to replace the federal funding Congress has removed.”

In a lengthy concurring opinion, Judge Bybee argued for

115. Korab IV, 748 F.3d at 886 n.8 (citations omitted). It is interesting that the Korab court makes very limited reference to its own decision in Pimentel, which could have been relied on to support a finding of a lack of disparate treatment. For the dissent’s criticism of this approach see below.
116. Id. at 887.
117. Id.
118. Soskin, 353 F.3d at 1255.
119. Korab IV, 748 F.3d at 884.
120. Id. at 885.
121. Id.
122. Id. at 886.
the adoption of a preemption-based approach to alienage classifications, rather than the application of equal protection analysis. This approach is not considered in detail here because it does not represent the law as it currently stands and the argument is fundamentally flawed. Litigants are entitled to argue that a particular law is preempted or in breach of the equal protection guarantee. Of course, no issue of preemption arose in *Korab IV*, and thus no such argument was advanced. Judge Bybee’s argument is not for a choice between pre-emption and equal protection analysis, but rather for not applying equal protection in relation to immigration issues. But, as Judge Bybee acknowledged “[f]or over a century, the [United States] Supreme Court has recognized that aliens are ‘persons’ entitled to the protection of the Fifth and Fourteenth Amendments.”

The preemption approach would involve denying immigrants the right to equal protection. Judge Bybee denies this by stating that:

> Nothing I have said here should diminish in any way the fact that aliens are “persons” entitled to the protection of the Fourteenth Amendment and the Due Process Clause — including its equal protection component — of the Fifth Amendment. But the tension evident in the Court’s post-*Graham* cases is a consequence of the Court’s efforts to reconcile the Equal Protection Clause with a recognition that there are common law and constitutional distinctions between the rights of citizens and the rights of aliens visiting or residing in the United States.

If this means anything, it can only imply a “separate but equal” protection guarantee for noncitizens which would also appear to conflict with long established precedent.

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123. *Id.* at 896 (Bybee, J., concurring).
124. *Id.* at 882.
125. *See Korab IV,* 748 F.3d 875.
126. *Id.* at 888 n.11.
127. As Judge McKeown noted, “Judge Bybee’s preemption analysis—that the Hawai’i welfare program is not expressly or impliedly preempted nor does it violate Congress’s dormant immigration power—sidesteps the ultimate constitutional question raised by Korab and briefed by both parties: namely, whether Hawai’i’s action violates the Equal Protection Clause.” *Id.*
128. *Id.* at 889 (Bybee, J., concurring) (citing *Wong Wing v. United States,* 163 U.S. 228, 237 (1896); *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886); *Graham,* 403 U.S. at 371).
129. *Korab IV,* 748 F.3d at 901 n.8 (Bybee, J., concurring).
In his relatively brief comments on the law as it stands, Judge Bybee’s concurrence claims that “it is unlikely that Hawai‘i’s scheme can muster constitutional scrutiny.” Following Graham, he argued that the district court was correct to apply strict scrutiny. The budgetary reasons for which the law was adopted had never been accepted as justifying discrimination subject to heightened judicial scrutiny. The alternative argument that Hawai‘i was following a “compelling government interest” was, he opined, “not likely a sufficient justification.” In conclusion, Judge Bybee took the view that “if we looked exclusively to equal protection principles, I think it is likely that Hawai‘i’s law would fall.”

Thus, this concurring opinion appeared rather to agree with Judge Clifton’s dissent. Judge Clifton first criticized the majority’s suggestion that Plaintiffs failed to establish a disparity in treatment. He argued that this was incorrect, first, because it treated Medicaid as if it consisted of two separate programs, one federal and one state, because the program is partially funded by the federal government. But that is not how Medicaid actually works. In Hawai‘i, as in most states, there is a single plan, administered by the state. The federal government reimburses the state for a significant portion of the cost, and the plan must comply with federal requirements, but it is a state plan. Beneficiaries are not covered by two separate federal and state plans, but rather by one single plan administered by the state.

Second and “more importantly” he argued that the majority approach

[R]uns afoul of bedrock equal protection doctrine dating
back at least to Brown v. Board of Education. The majority opinion would allow a state to treat a class of aliens differently as long as the state’s financial outlay for Plaintiffs and other members of the suspect class is the same, on a per capita basis, as the state’s expenditures for the rest of the population. But that does not change the fact that Hawai’i has treated aliens differently by placing COFA Residents in a program with reduced benefits. That action constitutes disparate treatment in violation of the Equal Protection Clause. The disparate treatment is not immunized because the per capita expenditures might be the same. ‘Separate but equal’ is not permitted.

Turning to the appropriate level of scrutiny, the dissent argued that it was Hawai’i and not the federal government that had made the decision to differentiate and, therefore, strict scrutiny applied. Similar to the dissent in Guaman II, Judge Clifton did not accept that PROWRA’s discretion constituted a “uniform rule” thereby avoiding strict scrutiny.

III. 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 healthcare and welfare programs. Such conclusions range from findings that no disparity in treatment occurred; to application of rational basis review upholding the exclusion; to application of strict scrutiny finding exclusion to be unconstitutional. This mirrors the divided jurisprudence in earlier cases.

i. Differences in Scheme Structure

There are factual differences between the schemes considered in

141. Korab IV, 748 F.3d at 903 (Clifton, J., dissenting).
142. Korab IV, 748 F.3d at 904.
144. Korab IV, 748 F.3d at 908 (Clifton, J., dissenting). He appeared to assume that the law would not satisfy strict scrutiny, presumably on the basis of the district court’s decision in that case but did not specifically discuss the issues.
145. See Hong Pham, 16 A.3d at 662; Pimentel, 670 F.3d at 1110.
146. See Korab IV, 748 F.3d at 878 Guaman II, 74 A.3d at 944.
147. See Finch I, 946 N.E.2d at 1280.
148. See supra note 1.
these as well as earlier cases. To date, cases where separate programs were established\(^{149}\) are more likely to be upheld than cases that resulted in the exclusion of immigrants from a uniform program.\(^{150}\) 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. For example, the court in *Guaman* upheld the exclusion of immigrants from a uniform scheme.\(^{151}\) However, it is difficult to determine whether the “Old Programs” for COFA Residents in *Korab* should be classified as the continuation of a uniform scheme (but with state funding only) or the administrative establishment of a new immigrant-only scheme.\(^{152}\) As a matter of principle, it seems undesirable that the outcome of such challenges should be determined by whether a state chose to keep immigrants with legal status within a uniform scheme (at least for a period of time) or established a separate immigrant-only scheme. After all, if it is correct that states were not required to establish a separate scheme and, therefore, such scheme should now only be subject to rational basis review (if it is subject to review at all), it should be equally correct that states did not have to keep immigrants in their uniform schemes. If this is the case, why should states now be strictly scrutinized for excluding them?

\[\text{ii. Equal Protection Analysis}\]

Much of the difficulty of these cases stems from the dichotomous standard applied to immigration status distinctions by the Supreme Court, whereby the states are reviewed strictly, but great deference is shown to the federal government. Coupled with the fact that the highest court has yet to clarify the standard for reviewing state decisions influenced but not mandated by federal law, the root of the difficulty amongst these cases is inherently clear.\(^ {153}\) However, it is

\(^{149}\) See *Hong Pham*, 16 A.3d at 642; *Pimentel*, 670 F.3d at 1107.

\(^{150}\) See *Finch I*, 946 N.E.2d at 1280.

\(^{151}\) See *Guaman I*, 23 A.3d. at 469.

\(^{152}\) This is not to say that the different structures of state-federal cooperation are irrelevant. Clearly the Food Stamp Act provides for a program in which the federal role is more dominant than in Medicaid.

\(^{153}\) Of course, behind this issue lies one of the fundamental weaknesses in United States 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 explicitly developing a ‘Third Strand’ of review look to be unfounded: See Julie A. Nice, *The Emerging Third Strand in Equal
also submitted that part of the difficulty with the issue is that the courts have not generally applied the (rather clear) framework for equal protection analysis developed by the United States Supreme Court, or else they have not done so correctly. As set out in Part I.A of this Article, to prevail on an equal protection claim, a plaintiff first must establish that the State is affording disparate treatment to similarly situated groups of individuals. Second, where different treatment is demonstrated, the court must examine whether this treatment is consistent with a governmental interest. This analysis will either involve rational basis review where federal action is involved or strict scrutiny where state action is implicated.

iii. Similarly Situated?

    First, we must ask whether immigrants with legal status are similarly situated to citizens and other longer-term resident immigrants covered by the program in question. It is one of the basic principles of Aristotelian equality that like should be treated alike. Although this issue is occasionally conflated with the question of different treatment, it does not appear to be specifically addressed by the recent court decisions. However, it would be difficult to argue that the immigrants with legal status are not similarly situated for the purpose of such actions. In these cases, the plaintiffs are legal residents of the United States of America and, by definition, meet the other need-based criteria for qualification. The only distinguishing factor for such plaintiffs is a lack of citizenship or duration of legal residence, and this is precisely the issue being challenged. To hold that these immigrants 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 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

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154. See supra Part I.
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 impugned law is to perpetuate disadvantage or negative stereotypes about that group.156

However, in the case of immigrants with legal status, 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.

iv. Different Treatment?

The issue of differential treatment raises more serious issues. Are the plaintiffs being treated differently by the state?157 Again courts have tended to conflate questions of difference in treatment and the author of that treatment. It is submitted that immigrants with legal status who are, for example, excluded from general healthcare schemes and who are only entitled to reduced (if any) benefits are clearly treated differently. If the program were purely a federal one (or one administered only by a state), then 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.158 In the case of voluntary programs, the state could opt out of participation when faced with different treatment of immigrants or it could opt to provide state-funded benefits to immigrants.159 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 that is proximately responsible for the difference in treatment.160 Whether this difference is justified by federal policies is a question to be answered at a later stage in the analysis.161

157. 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.
158. Pimentel, 670 F.3d at 1109.
159. Id. at 1110.
160. Id. at 1099.
161. 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.
v. On what ground?

Assuming, as explained and argued above, that there is different treatment, some courts concluded that this is based on eligibility for federal benefits rather than immigration status. This argument is unsustainable given the federal eligibility requirement, which clearly impacts the plaintiffs based on their status. It might alternatively be argued that the difference in treatment is based on length of residency, as some immigrants are eligible for benefits. However, the length of residence requirement only applies to immigrants and discrimination within a certain category of immigrants, and is still discrimination on the basis of immigration status. Therefore, the different treatment at issue is based on immigration status, as some courts have found.

vi. Strict or rational scrutiny?

Assuming, as this Article has argued, that the difference in treatment is based on immigration status, Supreme Court precedent suggests strict scrutiny would apply unless PRWORA applies a uniform rule for states to follow. However, the Ninth and Tenth Circuits in Korab and Soskin have broadened the uniform rule approach to allow rational basis review where the rule is not inconsistent with a uniform approach. It is difficult to disagree with the Superior Court of New Jersey’s holding in Guaman I that the search for a uniform rule 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 (nor its rationale). The reference to a “uniform rule” presumably derives from the reference to a “uniform rule of naturalization” in the United

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.

162. Hong Pham, 16 A.3d at 662.
163. See Comm’r of Transitional Assistance, 773 N.E.2d 404.
165. See Hong Pham, 16 A.3d at 662.
166. Korab IV, 748 F.3d at 875; Soskin, 353 F.3d at 1255.
167. Guaman I, 23 A.3d at 466.
168. Id. (citing Plyler, 457 U.S. at 219 n. 19).
States Constitution. 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 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 abilities to meet the needs of immigrants, and 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 none of the courts in the recent cases 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 made its ruling 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. As we have seen, this nuanced approach was followed by the majority in Korab and Guaman. This is indeed a plausible legal interpretation and one that avoids the rigidity of the uniform rule doctrine. It does not, however, as yet find confirmation in a ruling of the Supreme Court.

To conclude on this point, it is difficult to see that PRWORA can be defended as applying a uniform rule. Indeed, there may be good policy arguments for the courts to move away from the “uniform

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169. U.S. Const. art. I. § 8, cl.4 (granting the United States Congress the power to establish a uniform rule of naturalization).
170. For a discussion see Price, supra note 31; Roger C. Hartley, Congressional Devolution of Immigration Policymaking: A Separation of Powers Critique, 2 Duke J. Const. & Pub. Pol’y 93 (2007). Nor is the purpose of the uniformity requirement in the Naturalization Clause undermined by the PRWORA’s grant of discretion to the States with respect to qualifications for Medicaid. See Soskin 353 F.3d at 1257.
171. See Aliessa ex rel. Fayad, 754 N.E.2d at 1098; Ehrlich, 908 A.2d at 1241; Pimentel, 670 F.3d at 1096; Finch v. Finch, 946 N.E.2d at 1277; Korab v. Koller (Korab I), No. 10-00483, 2010 WL 468824 at *24; Unthaksinkun, 2011 WL 4502050.
172. Soskin, 353 F.3d at 1255.
173. See Judge Clifton’s comments in Korab IV: “A federal ‘direction’ that points in two opposite ways is not a direction.” 748 F.3d at 909. In Pimentel, the Ninth Circuit stated that “the Welfare Reform Act did not establish a uniform rule with respect to state welfare programs.” 670 F.3d at 1109.
rule” doctrine as it concerns access to welfare benefits, and the Soskin and Korab approach of applying deferential scrutiny where the law at issue reflects Congressional policy in an area in which Congress has plenary powers is an attractive one. The recent decisions in Korab and Guaman certainly provide some additional jurisprudential support for this approach. However, it is unclear at this time whether this approach (yet) represents good law. If one takes the view that it does not, then strict scrutiny must apply.

vii. Applying strict scrutiny

Finally, let us consider the application of strict scrutiny. It is a well know precept that strict scrutiny is strict in principle but “fatal in fact” and such has been proven in the cases considered here, which applied heightened scrutiny (as in Finch). However, more generally, the United States Supreme Court has stated on a number of occasions that strict scrutiny should not be fatal. Indeed, empirical studies have indicated that strict scrutiny is not fatal in a significant percentage of cases at all federal levels.

Nonetheless, as discussed in Part II.B., in Finch (the only recent court to apply strict scrutiny in a detailed manner) the Supreme Judicial Court of Massachusetts found that strict scrutiny was not satisfied for two reasons. 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 by the court’s own account there are several

177. Finch II, 959 N.E.2d at 973.
178. Id. at 973-74.
179. Id. at 974.
180. Id. at 973.
references in the legislative record to PRWORA.\textsuperscript{181} 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.”\textsuperscript{182} While the court is correct to limit its inquiry 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.\textsuperscript{183} Surely its precise motive for doing so (whether it be budgetary pressure or a firm belief in the merits of self-sufficiency) is irrelevant.

As we have seen, PRWORA specifically provides that: “It is a compelling government interest to enact new rules for eligibility [for public assistance] . . . in order to assure that aliens be self-reliant in accordance with national immigration policy.”\textsuperscript{184} However, 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.\textsuperscript{185} 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.\textsuperscript{186}

Second, the court suggested that strict scrutiny would apply to the State’s application of national policy as set out in PRWORA.\textsuperscript{187} 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

\begin{itemize}
\item \textsuperscript{181} \textit{Id.} at 976-79.
\item \textsuperscript{182} 8 U.S.C. § 1601 (1996).
\item \textsuperscript{183} \textit{Finch II}, 959 N.E.2d at 976.
\item \textsuperscript{184} 8 U.S.C. § 1601(5) (1996).
\item \textsuperscript{185} \textit{Finch II}, 959 N.E.2d at 979 (claiming that “no published judicial opinion has ever endorsed national immigration policy as a compelling State interest for the purposes of strict scrutiny.”).
\item \textsuperscript{186} \textit{Korab IV}, 748 F.3d at 901 (Bybee, J., concurring) (citing \textit{J.A. Crosby Co.}, 488 U.S. at 504 in support of his opinion that states may not rely on the federal government rationale behind their policy choices and following federal policy was not a “compelling government [state] interest.”).
\item \textsuperscript{187} \textit{Finch II}, 959 N.E.2d at 980 (stating “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.”).  
\end{itemize}
the State applies them does not make them subject to strict scrutiny.\textsuperscript{188} Massachusetts cannot be expected to investigate whether or not the national policy statements are empirically correct.\textsuperscript{189}

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.\textsuperscript{190} It is not clear from the record that the legislature ever gave such consideration to alternative approaches, nor would it seem likely that strict scrutiny would have been satisfied in \textit{Korab IV}.

It should be noted that PRWORA specifically provides that “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.”\textsuperscript{191}

However, it seems unlikely that the courts would accept this attempt to insulate state choices from the usual level of heightened scrutiny. Judge Harris in \textit{Guaman II} (albeit in a dissenting judgment) specifically rejected this approach, but even the majority in that case conceded that Congress’ attempt was “insensitive to separation-of-powers concerns.”\textsuperscript{192}

Conclusion

We have seen that the issue of the compatibility of the exclusion of legal immigrants, from access to general healthcare and welfare benefits with the equal protection guarantee, has led to inconsistency amongst state and federal courts. While the only courts of appeals to consider the issue to date have upheld the laws challenged,\textsuperscript{193} the courts arrived at this outcome for somewhat different reasons, while lower courts have come to the opposite conclusion.\textsuperscript{194} Meanwhile,

\textsuperscript{188} \textit{Id.} at 979-80.
\textsuperscript{189} 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: N. Contracting, Inc. v. Illinois, 473 F.3d 715 (7th Cir. 2007); W. States Paving Co. Inc. v. Wash. State Dep’t of Transp., 407 F.3d 983 (9th Cir. 2005); Sherbrooke Turf, Inc. v. Minnesota Dep’t of Transp., 345 F.3d 964 (8th Cir. 2003).
\textsuperscript{190} \textit{Finch II}, 959 N.E.2d at 979 (citing Grutter v. Bollinger, 539 U.S. 306, 339 (2003)).
\textsuperscript{192} \textit{Guaman II} at 941 (Harris, J., dissenting).
\textsuperscript{193} \textit{Soskin}, 353 F.3d 1242; \textit{Pimentel}, 670 F.3d 1096; \textit{Korab IV}, 748 F.3d 875; \textit{Bruns}, 750 F.3d 61.
\textsuperscript{194} \textit{Unthaksinkun}, 2011 WL 4502050.
there has been a major difference of opinion amongst state courts as to the constitutionality of such laws.\textsuperscript{195} This Article has 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 either a failure by the courts to apply a clear equal protection framework to their analysis or their incorrect application of this framework.\textsuperscript{196} 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.

Many judges believe that it cannot be correct that states should be judged strictly for continuing to provide benefits to immigrants after PRWORA and then implementing the approach that they were encouraged to adopt by Congress by withdrawing these benefits.\textsuperscript{197} However, in order to avoid applying strict scrutiny with its possibly fatal impact on state action, some courts, such as the Connecticut Supreme Court in \textit{Hong Pham}\textsuperscript{198} and the First Circuit in \textit{Bruns},\textsuperscript{199} 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. If we adopt the view that immigrants who are denied access to health or welfare benefits, or who are provided with significantly limited benefits, are, in fact, treated differently, and if we assume that PRWORA does not create a uniform rule, what options are open to

\begin{itemize}
\item \textsuperscript{195} Compare \textit{Hong Pham}, 16 A.3d 635; \textit{Finch II}, 959 N.E.2d 970; and \textit{Guaman I}, 23 A.3d 451.
\item \textsuperscript{196} See \textit{Hong Pham}, 16 A.3d 635; see also \textit{Pimentel}, 670 F.3d 1096; \textit{Bruns}, 750 F.3d 61.
\item \textsuperscript{197} Even Judge Clifton acknowledged in his dissent that “there is something paradoxical and more than a little unfair in my conclusion that the State of Hawai’i has discriminated against COFA Residents. The state responded to an option given to it by Congress, albeit an option that I don’t think Congress had the power to give. Hawai’i provided full Medicaid benefits to COFA Residents for many years, entirely out of its own treasury, because the federal government declined to bear any part of that cost. Rather than terminate benefits completely in 2010, Hawai’i offered the BHH program to COFA Residents, again from its own pocket. The right of COFA Residents to come to Hawai’i in the first place derives from the Compacts of Free Association that were negotiated and entered into by the federal government. That a disproportionate share of COFA Residents, from Pacific island nations, come to Hawai’i as compared to the other forty-nine states is hardly a surprise, given basic geography. The decision by the state not to keep paying the full expense of Medicaid benefits for those aliens is not really a surprise, either. In a larger sense, it is the federal government, not the State of Hawai’i that should be deemed responsible.” \textit{Korab IV}, at 909.
\item \textsuperscript{198} \textit{Hong Pham}, 16 A.3d 635.
\item \textsuperscript{199} \textit{Bruns}, 750 F.3d 61.
\end{itemize}
those judges who intuitively feel that states should not be penalized for applying the wishes of Congress?

The first is to adopt the Soskin and Korab 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 consistent with a uniform rule of naturalization. However, this does disadvantage plaintiffs in that almost any and all such laws will be upheld.

An alternative approach more favorable to plaintiffs 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 a compelling state interest, and thus 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.”

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200. Soskin, 353 F.3d 1242.
201. Korab IV, 748 F.3d 875.
203. See supra Part I.A.