NOTES

DENYING UNDOCUMENTED IMMIGRANTS ACCESS TO MEDICAID: A DENIAL OF THEIR EQUAL PROTECTION RIGHTS?

I. INTRODUCTION

Astrid Quiceno was an indigent undocumented[1] immigrant who suffered from end-stage renal failure caused by lupus, an autoimmune disease.[2] She required long-term kidney dialysis to remain alive, but received such care for only seven months, at which point her application for Medicaid was denied. As an undocumented immigrant, she was only entitled to emergency medical services,[3] and ongoing dialysis treatment, while life-sustaining, did not qualify as emergency care.[4] Astrid appealed the denial but died while the court's decision was pending.[5] The Superior Court of Connecticut upheld the administrative decision to deny Medicaid coverage, writing that "[t]he fatal consequences of the discontinuance of such ongoing care does not transform into emergency medical condition care."[6] This is just one example of the 1996 welfare reform law's impact on undocumented immigrants.

In 1996, President Bill Clinton passed into law one of the most comprehensive welfare reform bills in America's history,[7] saying it was "an historic opportunity to end welfare as we know it and transform our broken welfare system by promoting the fundamental values of work, responsibility, and family."[8] This legislation, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA, or "the Act"), proved controversial because of the strict

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[1] "Undocumented" and "illegal" aliens refer to the same group of individuals: those who "enter[ ] a country at the wrong time or place, elude[ ] an examination by officials, obtain[ ] entry by fraud, or enter[ ] into a sham marriage to evade immigration laws. BLACK'S LAW DICTIONARY 79 (8th ed. 2004). While such individuals may be in the country in contravention of America's immigration laws, the term "illegal alien" has a negative connotation that this author would like to avoid, and so all such individuals are referred to as "undocumented immigrants." To be clear, this term does not include asylees, parolees, or refugees.

[2] Quiceno v. Dep't of Soc. Serv., 728 A.2d 553, 554 (Conn. Super. Ct. 1999).

[3] *Id.*

[4] *Id.*

[5] *Id.* at 554 n.1.

[6] *Id.* at 555.

[7] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

[8] Statement on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 2 PUB. PAPERS 1328 (August 22, 1996), *available at* http://www.clintonfoundation.org/legacy/082296-presidential-statement-on-welfare-reform-bill.htm.

requirements imposed upon individuals to become and remain eligible for welfare benefits.[9] While the restrictions placed on legal immigrants[10] were widely considered to be unnecessarily harsh,[11] the denial of almost all welfare benefits, such as non-emergency Medicaid, to undocumented immigrants received little, if any, attention. This Note argues that PRWORA violates undocumented immigrants' equal protection rights by denying them Medicaid eligibility based on their immigration status.

Undocumented immigrants constitute one of the most vulnerable classes in America. On average, they have less money than other immigrants and Americans,[12] live in substandard conditions,[13] enter the country through means that pose harm to their health,[14] have jobs that are hazardous to their health,[15] have

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[9] *See, e.g.*, Ellen Winn, *Understanding* How *Change Occurs: Implementation Research in the TANF Era*, THE FORUM: RES. F. ON CHILD, FAM., & NEW FEDERALISM, Nov. 1999, at 1, 2, *available at* http://www.researchforum.org/media/forum23.pdf ("The passage of PWRORA generated a great deal of controversy, most of which focused on several substantive provisions, such as time limits and work requirements."); Merri Rosenberg, *Welfare Reform Spurs Worry About Effects*, N.Y. TIMES, Mar. 16, 1997, at 13WC.

[10] 8 U.S.C. § 1611(a) (2000) stipulates that only "qualified aliens" are eligible for Federal public benefits. "Qualified alien" is defined in 8 U.S.C. § 1641 and is quite detailed. Generally speaking a "qualified alien" is one who was either lawfully admitted, granted asylum, paroled, or whose deportation is withheld because of threat to life or freedom. 8 U.S.C. § 1641(b) (2000).

[11] The Balanced Budget Act of 1997 reflected this by reinstating some of the Supplemental Security Income (SSI) coverage and Medicaid eligibility for immigrants who entered the country before PRWORA was signed into law. Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251; *see also* Recent Legislation, *Welfare Reform*, 110 HARV. L. REV. 1191, 1192-95 (1997) (challenging the constitutionality of PRWORA as it applied to legal immigrants).

[12] Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 17 (2006) (noting that "[a]lmost sixty-six percent of unauthorized workers earn less than twice the minimum wage and are categorized as low-wage workers" and that "[i]n 2003, the average *family* income for undocumented immigrants was $27,400.103, . . .notably lower than average family income levels for legal immigrants ($47,800) and U.S.-born families ($47,700).").

[13] Theodore C. Chan et al., *Survey of Illegal Immigrants Seen in an Emergency Department,* 164(3) W. J. MED. 212, 215 (1996) ("[U]ndocumented persons often live in environmental conditions that promote the spread of infectious and communicable diseases such as tuberculosis.").

[14] The United States Government Accountability Office reported that between 1995 and 2005 the number of border-crossing deaths almost doubled even though "there was not a corresponding increase in the number of illegal entries." U.S. GOV'T ACCOUNTABILITY OFFICE, ILLEGAL IMMIGRATION: BORDER-CROSSING DEATHS HAVE DOUBLED SINCE 1995; BORDER PATROL'S EFFORTS TO PREVENT DEATHS HAVE NOT BEEN FULLY EVALUATED 1 (2006), *available at* http://www.gao.gov/new.items/d06770.pdf. Causes of death included traffic accidents, excessive exposure to heat or cold, drowning, homicide, suicide, and Border Patrol shootings. *Id.* at 59.

no health insurance,[16] and have virtually no political clout.[17] The total effect of these characteristics is poor health with little, if any, financial means with which to obtain treatment. With the passage of the 1996 welfare reform laws, uninsured undocumented immigrants have little choice but to wait until their medical conditions turn into emergencies, at which point hospitals may treat them with Medicaid funds.[18] States are not permitted to treat undocumented immigrants prior to emergency unless they pass an affirmative law to that effect,[19] and under no circumstances may they use federal Medicaid funds for such treatment.[20] Thus, PRWORA substantially limits the states' ability to provide health care to undocumented immigrants in a manner which aligns with the states' public health goals and financial capabilities. While public health professionals were quick to highlight the likely detrimental health effects for both undocumented individuals and society at large,[21] there has not been any constitutional analysis of whether PRWORA's restrictions on undocumented

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[15] *See* Rebecca Smith et al., *Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 598-600 (2004) (reporting that undocumented workers are overrepresented in dangerous industries).

[16] Andrea B. Staiti et al., *Stretching the Safety Net to Serve Undocumented Immigrants: Community Responses to Health* Needs, ISSUE BRIEF NO. 104, CENTER FOR STUDYING HEALTH SYSTEM CHANGE, Feb. 2006, at 1, 1 *available at* http://www.hschange.com/CONTENT/818/818.pdf ("Because most undocumented immigrants lack health insurance, they primarily rely on safety net providers for care."); HENRY J. KAISER FAMILY FOUNDATION, FIVE BASIC FACTS ABOUT IMMIGRANTS AND THEIR HEALTH CARE 1 (2008), *available at* http://www.kff.org/medicaid/upload/7761.pdf, (reporting that 15% of undocumented immigrants are insured, compared to 47% of legal immigrants).

[17] *See infra* Part (IV)(A)(2)(b).

[18] 8 U.S.C. § 1611(b)(1)(A) (2000) has an exemption for emergency treatment, which is governed by the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395d(2000).

[19] 8 U.S.C. § 1621(d) (2000).

[20] National Conference of State Legislatures, The Immigrant Policy Project: Medical Assistance & Health Benefits (1997), http://www.ncsl.org/programs/immig/MedIB.htm, ("States may not use Medicaid funds for public health immunizations or for testing and treatment of symptoms of communicable diseases . . . for 'not qualified' aliens.").

[21] *See, e.g.*, Julia Field Costich, *Legislating a Public Health Nightmare: The Anti-Immigrant Provisions of the 'Contract with America' Congress*, 90 KY L.J. 1043, (2001-2002); Jeffrey T. Kullgren, *Restrictions on Undocumented Immigrants' Access to Health Services: The Public Health Implications of Welfare Reform*, 93 AM. J. PUB. HEALTH 1630 (2003); Mee Moua et al., *Immigrant Health: Legal Tools/Legal Barriers*, 30 J. L., MED. & ETHICS 189, 190-91 (2002); SHAWN FREMSTAD AND LAURA COX, KAISER COMMISSION ON MEDICAID AND THE UNINSURED, COVERING NEW AMERICANS: A REVIEW OF FEDERAL AND STATE POLICIES RELATED TO IMMIGRANTS' ELIGIBILITY AND ACCESS TO PUBLICLY FUNDED HEALTH INSURANCE 15 (2004) ("The public health concerns [of Medicaid and SCHIP eligibility restrictions] include not only concerns about the adverse impact of the restrictions on immigrants themselves, but also on the public in general.").

immigrants' access to certain benefits impinge upon their equal protection rights.

Section II of this Note provides an overview of the Medicaid program and how PRWORA's express limitation on Medicaid access affects undocumented immigrants. Section III discusses prior case law examining the denial of welfare benefits to legal and undocumented immigrants. This section shows that the problem presented in this Note, the denial of federal welfare benefits to undocumented immigrants, has never been squarely addressed in a court of law. Section IV goes through a step-by-step analysis of the equal protection claim. This section first argues that undocumented immigrants should be seen as a quasi-suspect class and that Medicaid should be seen as an "important" governmental right, the combination of which should lead a court to use heightened scrutiny, as opposed to rational basis review, in considering this constitutional question. This section then argues that while the government's goal of deterring illegal immigration is unquestionably legitimate, prohibiting Medicaid access as a means to realize that goal does not withstand heightened constitutional scrutiny. Section IV further argues that PRWORA should not be seen as "immigration legislation," which has traditionally been accorded great deference by the courts, because its principal purpose and effect is to limit federal welfare expenditures, not to discourage illegal immigration. This Note concludes that PRWORA violates undocumented immigrants' equal protection rights.

II. Overview of Medicaid and the Personal Responsibility and Work Opportunity Reconciliation Act's Impact on Undocumented Immigrants

A. *Medicaid Overview*

Medicaid[22] is a "co-operative federal/state cost-sharing program designed to enable participating states to furnish medical assistance to persons whose income and resources are insufficient to meet the costs of necessary medical care and services."[23] Medicaid offers state governments the opportunity to use federal funds to defer the high costs of health care, but only so long as the state abides by the Medicaid statute's requirements regarding which individuals and which services a state may and may not cover.[24] The Federal Medicaid statute created four distinct groups of eligibility: mandatory categorically needy (individuals whom states must cover),[25] categorically needy (various groups that

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[22] Medicaid was established in the Social Security Act of 1965, 42 U.S.C. §§ 1396-1396(v) (2000).

[23] DeJesus v. Perales, 770 F.2d 316, 318 (2d Cir. 1985).

[24] 42 U.S.C. § 1396a(a)(10) (2000); *see also* Harris v. McRae, 448 U.S. 297 (1980) ("Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX.").

[25] 42 U.S.C. § 1396a(a)(10)(A)(i) (2000).

states have the option of covering),[26] optional medically needy (certain individuals who fail to meet the income requirements whom the state may nonetheless choose to cover),[27] or ineligible (state is prohibited from covering these individuals).[28] Every individual, depending on his or her unique characteristics such as age, income, disability, and number of children, falls into one of these four categories. The effect of PRWORA was to remove a state's discretion as to whether it would provide Medicaid coverage to undocumented immigrants and to permanently and without exception classify them as "ineligible."

B. *PRWORA's Impact on Undocumented Immigrants' Access to Health Care*

PRWORA severely restricts immigrants' access to health care by narrowly defining the subset of immigrants eligible to receive public benefits. The Act classifies aliens as either "qualified" or "unqualified" for federal public benefits,[29] and adopts a narrow definition of "qualified" aliens that excludes those permanently residing under color of law (PRUCOL aliens), recent immigrants, and undocumented immigrants.[30] Unlike the first two groups, undocumented immigrants were never eligible for Medicaid, and in fact the U.S. Department of Health and Human Services had already issued a regulation at the time PRWORA was promulgated denying undocumented immigrants Medicaid access.[31]

Despite this, PRWORA had a palpable effect by limiting the provision of medical services provided to undocumented immigrants. Before the Act was passed, "publicly-funded health care providers and practitioners customarily provided necessary health services regardless of immigration status."[32] According to one scholar, the Supreme Court's holding in *Plyler v. Doe*[33] made public health providers assume that public benefits such as health care were meant to be provided to all immigrants, including those who were undocumented.[34] PRWORA's specific prohibition against providing non-emergency health services with Medicaid funds naturally changed such assumptions and practices.

Under PRWORA, states must provide undocumented immigrants with

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[26] *Id.* § 1396a(a)(10)(A)(ii).

[27] *Id.* § 1396a(a)(10)(C).

[28] For greater detail on eligibility, see U.S. Dep't of Health & Human Services, Centers for Medicare and Medicaid Services, Medicaid Eligibility, http://www.cms.hhs.gov/MedicaidEligibility/02_AreYouEligible_.asp#TopOfPage (last visited Mar. 23, 2007).

[29] 8 U.S.C. § 1611(a) (2000).

[30] *Id.* § 1641.

[31] See Medicaid Program; Eligibility of Aliens for Medicaid, 55 Fed. Reg. 36813-01 (September 7, 1990).

[32] Costich, *supra* note 21, at 1047.

[33] Plyler v. Doe, 457 U.S. 202 (1982).

[34] Costich, *supra* note 21, at 1047.

(1) emergency medical aid,[35] (2) immunizations,[36] and (3) testing and treatment of symptoms of communicable diseases,[37] but states may only use Medicaid funds for emergency medical aid.[38] If states wish to provide any other health care services, such as preventive care, prenatal care, or treatment for chronic diseases, their legislatures must first pass laws to affirmatively allow such treatment, even though the services must still be provided through local and state funds.[39] To date, no states have passed such laws.[40] This change especially affected undocumented immigrant children, who, prior to PRWORA, had been provided with state-funded non-emergency care in several states.[41]

The ultimate result of PRWORA is that uninsured undocumented immigrants are almost entirely denied access to health care unless they are able to cover the costs themselves. Of the approximately seven million[42] to ten million[43] undocumented immigrants currently living in the U.S., the majority are uninsured[44] and at high risk for illness and injury.[45] Denying such a large number of high-risk people access to necessary medical care does more than raise constitutional equal protection concerns—it creates a "public health nightmare"[46] by, amongst other things, increasing the public's chance of exposure to infectious diseases (such as tuberculosis) and placing serious financial burdens on health care providers.[47]

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[35] 8 U.S.C. § 1611(b)(1)(A) (2000).

[36] *Id.* § 1611(b)(1)(C).

[37] *Id.*

[38] National Conference of State Legislatures, *supra* note 20 ("States may not use Medicaid funds for public health immunizations or for testing and treatment of symptoms of communicable diseases . . . for 'not qualified' aliens.").

[39] 8 U.S.C. § 1621(d) (2000).

[40] *See* KAISER FAMILY FOUNDATION, *supra* note 16, at 6 (noting that the only federal health coverage program states have opted to use to cover undocumented immigrants is SCHIP for prenatal care) (citing FREMSTAD & COX, *supra* note 21).

[41] Cindy Chang, Note, *Health Care for Undocumented Immigrant Children: Special Members of an Underclass*, 83 WASH. U. L.Q. 1271, 1275 (2005) (citations omitted).

[42] Terry Frieden, *INS: 7 Million Illegal Immigrants in United States*, CNN, Feb.1, 2003, http://www.cnn.com/2003/US/01/31/illegal.immigration.

[43] Staiti et al., *supra* note 16, at 1 (citing statistic from the Pew Hispanic Center).

[44] *See supra* note 16 and accompanying text.

[45] *See* Moua, *supra* note 21, at 190-91 (noting that Mexican and Latin American immigrants are often forced to work in hazardous occupations, generally have not received immunizations against serious diseases, may bring communicable diseases into the U.S., and engage in risky life-style behaviors). *See also supra* notes 13-15 and accompanying text.

[46] *See* Costich, *supra* note 21, at 1043.

[47] *See* Kullgren, *supra* note 21, at 1631-32 (providing a list of six ways that "the restrictions jeopardize public health").

III. No Controlling Case Law: A Look at *Mathews*, *Plyler*, *Rodriguez*, and *Lewis*

This Note addresses the narrow question of whether federal legislation violates undocumented immigrants' equal protection rights by denying them Medicaid eligibility based on immigration status. This issue has not yet been addressed by the judiciary, but two Supreme Court cases, *Mathews v. Diaz*[48] and *Plyler v. Doe*,[49] provide a framework for how to analyze undocumented immigrants' rights with regard to welfare benefits. PRWORA's constitutionality has also been challenged twice in the past decade by unqualified aliens. In both of those circuit court cases, *Rodriguez v. United States*[50] and *Lewis v. Thompson*,[51] its constitutionality was upheld. Despite *prima facie* similarity, material differences exist between the issues addressed in *Rodriguez* and *Lewis* and the situation raised in this Note, thus rendering the rationales used to justify the resolution of those cases inapplicable. The following sections provide a brief overview of the relevant case law.

A. Mathews v. Diaz

In the 1976 case of *Mathews v. Diaz*, the Supreme Court had its first opportunity to consider the constitutionality of federal legislation denying public benefits to immigrants.[52] The plaintiff legal aliens argued that the five year residency requirement for aliens to be eligible for Medicare violated their due process rights.[53] The Court framed the legal issue before it as "not whether discrimination between aliens and citizens is permissible; rather, it is whether statutory discrimination *within the class of aliens*—allowing benefits to some aliens but not to others—is permissible."[54] The Supreme Court rejected the plaintiffs' claims, reasoning that because Congress enjoys plenary "power over immigration and naturalization,"[55] the judiciary should avoid involving itself in "matters [that] may implicate our relations with foreign powers."[56]

One significant difference between *Mathews* and the question raised in this Note is that *Mathews* deals with classifications between categories of *legal* immigrants. When the Supreme Court considered the equal protection rights of

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[48] 426 U.S. 67 (1976).

[49] 457 U.S. 202 (1982).

[50] 169 F.3d 1342 (11th Cir. 1999).

[51] 252 F.3d 567 (2d Cir. 2001).

[52] Mathews v. Diaz, 426 U.S. 67 (1976). In 1971 the Supreme Court decided *Graham v. Richardson*, which involved a constitutional claim against *state* welfare laws that created classifications based on alienage. The Court held that the residency requirement violated the equal protection clause. Graham v. Richardson, 403 U.S. 365 (1971).

[53] *Mathews*, 426 U.S. at 69.

[54] *Id.* at 80 (emphasis added).

[55] *Id.* at 79-80.

[56] *Id.* at 81.

undocumented immigrants a few years later in *Plyler v. Doe*, the Court made it clear that undocumented immigrants are not a "class" of aliens.[57] Therefore, the holding in *Mathews* does not control classifications based on undocumented status. Nonetheless, *Mathews* stands for the important proposition that the federal government (as opposed to the states)[58] receives substantial deference when it passes immigration legislation. In Section IV, this Note rejects the contention that Congress's decision to deny Medicaid access to undocumented immigrants can accurately be characterized as "immigration legislation."

B. Plyler v. Doe

Just a few years after the *Mathews* decision, the Supreme Court, in *Plyler v. Doe*, held that a Texas law violated the Fourteenth Amendment's Equal Protection Clause[59] by denying undocumented children the free public education provided to citizens and documented aliens.[60] The Court held that while undocumented immigrants are not a suspect class and education is not a fundamental right, the extreme deference given during rational review was not appropriate,[61] and therefore Texas was required to prove that the legislation furthered a "substantial" state interest.[62] The Court justified this heightened scrutiny by relying on the relative powerlessness of children over their illegal presence in the country[63] and the fundamental importance of education for the children themselves and society at large.[64]

Plyler demonstrates the Supreme Court's willingness to use the Equal Protection Clause to protect undocumented immigrants' access to certain publicly funded programs. However, the Court intentionally kept its holding narrow, tailoring it to the specific facts of the case.[65] It therefore remains unclear to what extent adult undocumented immigrants and other government services would also warrant heightened scrutiny. Furthermore, *Plyler* deals with state, not federal, legislation. As *Mathews* illustrates, and as Powell notes in his concurrence in *Plyler*, "[t]he Court has traditionally shown great deference to fed-

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[57] Plyler v. Doe, 457 U.S. 202 (1982).

[58] *See supra* note 52 and accompanying text.

[59] U.S. CONST. amend. XIV § 1.

[60] *Plyler*, 457 U.S. at 202.

[61] *Id.* at 217-18, n. 16. Erwin Chemerinsky, one of the foremost Constitutional Law scholars, explains that while the Court did not "expressly articulate a level of scrutiny," the Court "made it clear that it was using more than rational basis review." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 747 (2d ed. 2002).

[62] *Plyler*, 457 U.S. at 230.

[63] *Id.* at 220 (citing Trimble v. Gordon, 430 U.S. 762, 770 (1977) ("The children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status.").

[64] *Plyler*, 457 U.S. at 221-22.

[65] *Id.* at 229-30. The Court emphasizes that its holding applies if the *state* is denying "innocent children the free public education that it offers to other children residing within its borders."

eral authority over immigration and to federal classifications based upon alienage."[66]

C. Rodriguez v. United States *and* Lewis v. Thompson

These two cases both question the constitutionality of PRWORA as it applies to unqualified aliens, but neither do so from the perspective of undocumented immigrants. In *Rodriguez v. United States*, the legal immigrant plaintiffs challenged the constitutionality of PRWORA for creating distinctions ("qualified" and "unqualified") between aliens in determining eligibility for Social Security Income and food stamps.[67] The plaintiffs claimed that the statute violated their equal protection rights because not all legal aliens were included as "qualified."[68] The question presented in this case was essentially the same as that presented in *Mathews*: is discrimination within a class of aliens permissible? Indeed, the court explicitly relied on *Mathews* to deny the plaintiffs' claims.[69] Since *Rodriguez* did not consider the constitutionality of permanently denying undocumented immigrants access to Medicaid, but instead considered the constitutionality of making distinctions between classes of legal aliens with regards to temporary restrictions on their governmental benefits, the case does not resolve the question of whether heightened scrutiny is warranted for undocumented immigrants challenging PRWORA on equal protection grounds.

In *Lewis v. Thompson*, the plaintiffs were undocumented immigrants who challenged PRWORA's constitutionality on equal protection grounds because the statute denied them prenatal care.[70] Interestingly, the plaintiffs in this case claimed that their rights as "unqualified alien pregnant women" were violated, and they predicated their argument for heightened scrutiny on the harm posed to the children they were bearing.[71] Therefore, although the plaintiff women were in fact undocumented immigrants, they did not rely upon that status for their equal protection challenge, but instead relied on their "pregnant" status to position themselves as a special class of "unqualified" aliens deserving of heightened scrutiny. The court rejected the plaintiffs' arguments for heightened scrutiny, finding that the plaintiffs misinterpreted prior precedent and that they could not rely upon the harm posed to their children to receive heightened scrutiny for themselves.[72] The court found PRWORA to survive rational re-

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[66] *Id.* at 238 n.1.

[67] Rodriguez v. U.S., 169 F.3d 1342 (11th Cir. 1999).

[68] *Id.* at 1343.

[69] *Id.* at 1347 ("the plaintiffs offer six arguments in support of their position that *Mathews* . . . does not control . . . . We find none of them persuasive.").

[70] Lewis v. Thompson, 252 F.3d 567 (2d Cir. 2001).

[71] *Id.* at 582 ("Plaintiffs contend[ ] a heightened level of scrutiny is appropriate to the extent that the Plaintiffs are asserting the harm to the children they will bear.").

[72] *Id.* at 583.

view.[73]

These four cases together show that, while the federal government gets significant discretion from the courts in distinguishing between classes of legal immigrants, it is unclear whether such deference is always appropriate for classifications that impact undocumented immigrants. It is necessary to consider the equal protection rights of undocumented immigrants as distinct from those of other "unqualified" aliens. Unlike other unqualified immigrants, undocumented immigrants will not transition into "qualified" status through the passage of time and therefore are potentially permanently denied gaining Medicaid eligibility. The unique situation of undocumented immigrants in the U.S. warrants separate consideration of their equal protection rights.

IV. EQUAL PROTECTION ANALYSIS: HEIGHTENED SCRUTINY IS WARRANTED BECAUSE ALIENS ARE A QUASI-SUSPECT CLASS AND MEDICAID IS AN "IMPORTANT" RIGHT

The purpose of the equal protection clause is to prevent the government from engaging in invidious discrimination and to protect fundamental rights.[74] A court reviewing the constitutionality of government action has the task of determining whether either of these goals is defeated. A court may use three possible standards of review: rational basis review, intermediate review, or strict scrutiny.[75] Under rational basis review, the challenger has the burden of proof, and the legislation will be upheld as long as the government can point to any conceivable legitimate purpose.[76] Intermediate review is less deferential, and the government must show that its legislation "serve[s] *important* governmental objectives and must be *substantially related* to achievement of those objectives" for the law to be upheld.[77] The most stringent level of review is strict scrutiny, where the government must prove that the legislation's classifications are "*necessary* to further a *compelling* governmental interest."[78]

To prevail on an equal protection claim for the denial of Medicaid eligibility, undocumented immigrants must prove that the legislature's classification differentiating them under the law is not sufficiently justified by its purpose, or, alternatively, that Medicaid is a fundamental (or an "important") right and the

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[73] *Id.* at 583-84.

[74] CHEMERINSKY, *supra* note 61, at 648-49 ("Usually equal protection is used to analyze government actions that draw a distinction among people based on specific characteristics . . . Sometimes, though, equal protection is used if the government discriminates among people as to the exercise of a fundamental right.").

[75] *See infra* notes 76-78.

[76] *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 488-489 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

[77] Craig v. Boren, 429 U.S. 190, 197 (1976) (emphasis added).

[78] Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (emphasis added).

government's purpose in denying them that right is not sufficiently justified. If a court reviews PRWORA under rational basis review, undocumented immigrants would have the burden of proving there was no conceivable basis for Congress to believe that denying undocumented immigrants access to Medicaid deters illegal immigration. It is highly unlikely the courts would accept such a claim under the extreme deference accorded by rational review. Therefore, it is crucial for undocumented immigrants to convince the court that classifications affecting undocumented immigrants deserve heightened scrutiny, especially when an important right, such as access to Medicaid, is denied.

In 1971, the Supreme Court in *Graham v. Richardson*[79] established strict scrutiny for classifications based on alienage, holding that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."[80] However, *Mathews* created an exception to that rule when it held that classifications between legal aliens deserved greater deference when made by the federal government because of its mandate to control immigration.[81] A second exception to this rule was established in *Plyler* when the Court explicitly held that undocumented immigrants are only entitled to rational review, showing that they are not a "class" of aliens and do not fall under *Graham*'s rule.[82] Thus, undocumented status appears to work both for and against undocumented immigrants as a class with regard to the standard of review for equal protection analysis: Case law holding that federal distinctions between classes of aliens receive rational review[83] does not apply to undocumented immigrants since they are not considered a "class" of aliens,[84] yet for the same reason (not being a "class") undocumented immigrants only receive rational review under *Plyler*.[85]

This section argues that *Plyler*[86] erred in maintaining that undocumented immigrants should be denied heightened scrutiny. There are two arguments that this decision was in error: (1) the Court's rationales for denying heightened scrutiny (voluntary and illegal nature of class) are flawed and should not strip an otherwise eligible class of heightened judicial review, and (2) undocumented immigrants fit the criteria of being a "discrete and insular" minority.[87] This section also draws parallels between Medicaid and education to show that under *Plyler*'s analysis, Medicaid, while not a fundamental right, is also not "merely some governmental 'benefit' indistinguishable from other forms of so-

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[79] 403 U.S. 365 (1971).

[80] *Id.* at 372 (citations omitted).

[81] Mathews v. Diaz, 426 U.S. 67 (1976).

[82] Plyler v. Doe, 457 U.S. 202 (1982).

[83] *Mathews*, 426 U.S. at 69.

[84] *Plyler*, 457 U.S. at 202.

[85] *Id.*

[86] *Id.*

[87] United States v. Carolene Products Co., 304 U.S. 144, 152, n.4 (1938).

cial welfare legislation."[88] This section completes the equal protection analysis by showing that PRWORA fails heightened scrutiny because there is not enough evidence to establish a substantial relationship between limiting welfare benefits and deterring illegal immigration.

A. *Undocumented Immigrants Deserve Heightened Scrutiny*

1. Undocumented Immigrants' "Voluntary Nature" and Illegal Status Should Not Necessarily Deny Them Heightened Judicial Review

In *Plyler*, the Supreme Court rejects the notion that undocumented aliens could be a suspect class without much deliberation on the issue, and in fact relegates the entire discussion to a footnote.[89] The important language in the footnote states:

> We reject the claim that "illegal aliens" are a "suspect class." No case in which we have attempted to find a suspect class . . . has addressed the status of persons unlawfully in our country. Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the *product of voluntary action*. Indeed, entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a "constitutional irrelevancy."[90]

The Court's rationale for denying strict scrutiny is straightforward and unambiguous: entry into the class is voluntary and is a crime.[91] Nonetheless, the Court applied heightened scrutiny in *Plyler* in part because children have no control over their undocumented status.[92] Therefore, the Supreme Court, even while putting forth what appears to be a *per se* rule about the level of review owed to undocumented immigrants, fails to apply that rule. Furthermore, it appears that the Court's exception for "involuntary" illegal status could swallow the rule. It is not difficult to imagine other scenarios where undocumented immigrants' undocumented status may not be "voluntary."

First, and as the Court itself acknowledges, those same undocumented children protected by *Plyler* may grow up and become undocumented adults who live and work in the U.S.[93] At what point do these individuals become culpable for their undocumented status? While the plaintiffs in *Plyler* were only in middle school, the ruling appears to apply to all public schools.[94] Some of those students may be eighteen years old or older, so the distinction cannot be based on reaching the age of majority. Females are also a particularly vulnerable

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[88] *Plyler*, 457 U.S. at 221.

[89] *Id.* at 219.

[90] *Id.* at n.19 (emphasis added).

[91] *Id.*

[92] *Id.*

[93] *Id.* at 222 n.20, 226 n.35.

[94] *Id.* at 230-31.

class whose illegal presence in the U.S. may be largely involuntary. The State Department estimated that in 2003 between 14,500 and 17,500 women were trafficked into the U.S.,[95] primarily for sexual exploitation,[96] and therefore few, if any, of these women had any control over their immigration status.[97] Furthermore, women whose husbands decide to immigrate illegally may not have any voice in the decision-making process and little choice but to follow their husbands, even if the women realize they will be in the U.S. illegally.[98] Coercion resulting from misogynistic family dynamics can hardly be considered "voluntary." Other "involuntary" groups may include the mentally incompetent, the elderly, and those denied refugee status who fear returning to their home countries. Recognizing that much undocumented immigration is the result of some type economic or financial coercion, one scholar has noted that "[u]ndocumented workers are better characterized as economic refugees, rather than opportunists."[99]

A slightly more attenuated argument against the Court's emphasis on a suspect class's "involuntary" character is that even supposing entry into the class of undocumented immigrants is considered entirely voluntary, that voluntary aspect would not strip heightened review from other suspect or quasi-suspect classifications. For example, a man who has gender-reassignment surgery to become a woman could hardly be denied heightened review if the person subsequently encounters gender discrimination. Similarly, if a bi-racial or bi-ethnic individual chose to identify exclusively as one race or ethnicity and suffered discrimination as a direct result of that choice, a court would be unlikely to

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[95] GRAEME NEWMAN, U.S. DEPARTMENT OF JUSTICE & OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, *The Exploitation of Trafficked Women* 5 (2005), *available at* http://www.cops.usdoj.gov/mime/open.pdf?Item=1699.

[96] *Id.* at 2 (stating that "some 70% of internationally trafficked women end up in the sex trade . . . ."). Upon being asked which issue was missing from the illegal immigration debate, a U.N. immigration expert responded "[m]ore talk about human trafficking, particularly of women and children. It's an abhorrent, growing problem." *The View From Both Sides*, NEWSWEEK, Dec. 31, 2007.

[97] *See* AMY O'NEILL RICHARD, CENTER FOR THE STUDY OF INTELLIGENCE, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime* 5-9 (1999), *available at* https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/trafficking.pdf

[98] One of the few studies on female migration found that "women almost always followed other family members, either the husband or a parent; only a tiny minority initiated migration independently." Marcela Cerrutti & Douglas S. Massey, *On the Auspices of Female Migration From Mexico to the United States*, 38(2) DEMOGRAPHY 187, 187 (2001). This study also noted that "[e]thnographic research suggests a key power difference by gender. Within the family, men precede wives in migration . . . because the latter have been excluded from decision making; thus they are left feeling vulnerable and fearing infidelity, abandonment, or widowhood." *Id.* at 188 (internal citations omitted).

[99] Neil A. Friedman, *Human Rights Approach to the Labor Rights of Undocumented Workers*. 74 CAL. L. REV. 1715, 1718 (1986).

deny heightened review. While undocumented immigrants as a class differ from gender, racial, and ethnic classifications because the group as a whole is supposedly defined by this "voluntary" nature, the point is that the judiciary should not endorse the view that one can invite invidious discrimination against him or herself.

Furthermore, while the Court correctly noted that undocumented immigrants break the law as soon as they cross the U.S. border,[100] it is also true that the violation they have committed is of a very different nature than most others. In 1986, one author commented that "[l]ax enforcement of immigration laws suggests a thinly veiled policy of encouraging illegal immigration."[101] This criticism held true when *Plyler* was decided and continues to hold true today.[102] In *Plyler*, the Court noted that U.S. policies have resulted in a "large number of employed illegal aliens . . . whose presence is tolerated, whose employment is perhaps even welcomed. . . ."[103] A recent study by the Center for Immigration Studies found that undocumented alien workers "account for up to 56 percent of the net increase in civilian employment during the past five years . . .".[104] Another study found that undocumented Latino adults immigrate to the United States primarily to find work.[105] These statistics show that there is ample work for undocumented immigrants who manage to enter the country.[106] Furthermore, in 2003, only 186,151 of the several million undocumented immigrants living the United States were formally removed.[107] Thus, while undocumented immigrants do in fact break the law by living in the United States, one cannot ignore the fact that this violation is permitted, and indeed encouraged, by the

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[100] Plyler v. Doe, 457 U.S. 202, 215 (1982).

[101] Friedman, *supra* note 99, at 1720.

[102] *See* Megan L. Capasso, Note, *An Attempt at a "12-Step Program": President Bush's Comprehensive Strategy to* Rehabilitate *California and Mexico's Addiction to Illegal Immigration: Does It Strike the Correct Societal Balance?*, 34 W. ST. U. L. REV. 87, 95-96 (2006) (providing an overview of the extent to which immigration laws are not enforced).

[103] Plyler v. Doe, 457 U.S. 219 n. 18 (1982) (quoting Doe v. Plyler, 458 F. Supp. 569, 585 (E.D. Tex. 1978)). The Court also explicitly blamed the government for the significant presence of undocumented immigrants in the United States by writing: "Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial 'shadow population' of illegal migrants . . . ." *Id.* at 218-19.

[104] Stephan Dinan, *Study Finds No Harm in Immigrant Workers; Conflicting Report Cites Effects on Natives*, WASH. TIMES, Aug. 11, 2006, at A4.

[105] Mark L. Berk et al., *Health Care Use Among Undocumented Latino Immigrants*, 19 HEALTH AFFAIRS, Jul.-Aug. 2000, at 51, 51.

[106] The mere availability of work for undocumented immigrants should not be construed to mean that workers are given such benefits as health insurance or that they are paid enough to cover the costs of needed health care. *See supra* notes 12 and 16.

[107] OFFICE OF IMMIGRATION STUDIES, 2003 YEARBOOK OF IMMIGRATION STATISTICS 158 (2004), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2003/2003Yearbook.pdf (This number includes "deportations, exclusions, and removals.").

government.[108] While enforcement measures have increased over the past few years,[109] the ongoing debate[110] over whether undocumented immigrants are needed belies the idea that the United States is sending a clear message to would-be undocumented immigrants.

2. Undocumented Immigrants Qualify as a "Discrete and Insular" Minority

In 1938 the Supreme Court, in a footnote, created suspect classifications, creating greater judicial scrutiny for legislation affecting "discrete and insular minorities."[111] Since this ruling, three classifications have been considered inherently suspect because they involve "discrete and insular" minorities: nationality, race, and alienage.[112] In 1973, while analyzing classifications based on gender, the Supreme Court, in *Frontiero v. Richarson*, put forth four factors to

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[108] There are many examples which illustrate just how impotent and superficial U.S. immigration laws can be. One example is a 1998 incident in which the Immigration and Naturalization Service (INS) agreed, at the behest of two federal lawmakers, "not to interfere again with this year's harvest" by conducting raids on Georgia farms to find and deport undocumented workers. *See* Marcus Stern, *A Semi-Tough Policy on Illegal Workers; Congress Looks Out for the Employers*, WASH. POST, July 5, 1998, at C2. Another example is President Bush's 2006 Secure Fence Act, which "authorizes the construction of hundreds of miles of additional fencing along our southern border" as well as "more vehicle barriers, checkpoints and lighting to help prevent people from entering our country illegally." Office of the Press Secretary, *President Bush Signs Secure Fence Act*, Oct. 26, 2006, http://www.whitehouse.gov/news/releases/2006/10/20061026.html. This bill has been criticized as ineffective by the National Border Patrol Council and by a former special agent with the INS, and, more tellingly, there is insufficient funding to implement the Act. *See* CNN.com, *Bush OKs 700-mile border fence*, Oct. 26, 2006, http://edition.cnn.com/2006/POLITICS/10/26/border.fence.

[109] Nina Bernstein, *Immigrants Go From Farms to Jails, and a Climate of Fear Settles in*, N.Y. TIMES, Dec. 24, 2006, at 21 ("The number of people deported from the U.S. rose more than 75 percent from fiscal years 2000 to 2006. Many of these removals stemmed from stricter enforcement against illegal workers.").

[110] President Bush's proposed guest worker program highlights the tension between American's desire to stop illegal immigration and the reality of needing undocumented immigrants to sustain the economy. For an in-depth analysis of Bush's proposal and related issues, see Capasso, *supra* note 102. *See also* Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1609 (2005) (noting that reaction to Bush's guest worker proposal "was swift, and criticism fell across a broad spectrum, ranging from the claim that the program launched a 'new era of indentured servants' to condemnation of the program as a 'reward' to 'illegal aliens.'") (citations omitted).

[111] United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

[112] Graham v. Richardson, 403 U.S. 365, 372 (1971) (noting that race and nationality have been established as inherently suspect classifications and stating—for the first time—that aliens are a "prime example" of such a "discrete and insular" minority deserving of heightened scrutiny).

guide whether a particular class of people should qualify as "discrete and insular."[113] These factors are: (1) whether there is a history of discrimination or disparaging stereotypes,[114] (2) whether the class is currently subject to discrimination or disparaging stereotypes,[115] (3) whether the class is politically powerless,[116] and (4) whether the class is characterized by an "immutable characteristic determined solely by the accident of birth."[117] A few years after this decision, the Supreme Court created an "intermediate" standard of review,[118] currently used for classifications based on gender[119] and illegitimacy.[120] This Note argues that undocumented immigrants, evaluated on their unique characteristics as a class distinct from immigrants in general, sufficiently satisfy these four *Frontiero* factors and therefore deserve some measure of heightened scrutiny, whether it be intermediate or strict.

(a) *Discrimination and Stereotyping: Past and Present*

One would be hard-pressed to argue that there is no history of discrimination against and stereotyping of undocumented immigrants in the United States or that such biases do not continue into the present. Simply because undocumented immigrants are "illegal" does not mean they cannot be unfairly discriminated against or that demonstrably false stereotypes of them do not exist. Their "illegal" status does not affect this analysis beyond the extent to which it differentiates them as a class distinct from "legal" aliens. Naturally, Congress should be able to create laws in furtherance of its goal to reduce the number of undocumented immigrants residing in the country. Once an undocumented immigrant on American soil, however, he or she is entitled to the very same due process and equal protection rights as any American citizen, and if the evidence shows that undocumented immigrants are subject to disparaging stereotypes then they deserve the full protection of the U.S. judicial system.[121]

One of the most enduring stereotypes of undocumented immigrants (as op-

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[113] Frontiero v. Richardson, 411 U.S. 677, 684-86 (1973).

[114] *Id.* at 684.

[115] *Id.* at 686.

[116] *Id.* at 686 n.17.

[117] *Id.* at 686.

[118] Craig v. Boren, 429 U.S. 190, 218 (1976).

[119] Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

[120] Clark v. Jeter, 486 U.S. 456, 461 (1988).

[121] As the Supreme Court noted in *Mathews v. Diaz*, "The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." Mathews v. Diaz, 426 U.S. 67, 77(1976) (citations omitted). The Supreme Court reiterated this view in *Plyler v. Doe* when it wrote: "Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." Plyler v. Doe, 457 U.S. 202, 210 (1982) (citations omitted).

posed to stereotypes of the various ethnicities of the individuals in this larger group) is that they drain resources while contributing little, if anything, to the U.S. economy.[122] However, undocumented immigrants pay *billions* of dollars in federal and state taxes.[123] To start with the obvious, undocumented immigrants buy goods, rent and buy homes, and travel in cars— all of which indicate that they pay sales taxes, property taxes, and tolls.[124] In addition to paying those taxes, the Social Security Administration reported that approximately three quarters of undocumented immigrants submit payroll taxes and that they contribute to up $7 billion in Social Security funds and $1.5 billion in Medicare taxes each year.[125]

Another enduring stereotype is that undocumented immigrants come to the United States to take advantage of publicly funded resources,[126] however, *availability of employment* is what draws the greatest number of undocumented

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[122] *See* Dana Blanton, Fox News Polls, *04/04/06 FOX Poll: Views on Illegal Immigration, Bush Job Rating Down*, Apr. 7, 2006, http://www.foxnews.com/story/0,2933,190857,00.html (noting that 65% of respondents believe that illegal immigrants "cost the country" because they don't pay taxes and use public services); R.G. Ratcliffe, *Illegal Workers the Talk of Texas*, HOUSTON CHRONICLE, Jan. 4, 2007, *available at* http://www.chron.com/disp/story.mpl/front/4440332.html; 10news.com; *Report: Illegal Immigration Could Cost Taxpayers Trillions*, August 2, 2006, http://www.10news.com/news/9620142/detail.html; South Carolina General Assembly, Senate Resolution (Apr. 6, 2006), *available at* http://www.scstatehouse.net/sess116_2005-2006/bills/1325.htm ("Whereas, illegal aliens drain the state's valuable resources which should be reserved for those persons legally present in the State.").

[123] "[E]ach year undocumented immigrants add billions of dollars in sales, excise, property, income, and payroll taxes, including Social Security, Medicare and unemployment taxes, to federal, state and local coffers." Lipman, *supra* note 12, at 5 (citations omitted); *see also* Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security with Billions*, N.Y. TIMES, Apr. 5, 2005, at A1; ORE. CTR. FOR PUB. POLICY, ISSUE BRIEF: UNDOCUMENTED WORKERS ARE TAXPAYERS, TOO (2006), http://www.ocpp.org/cgi-bin/display.cgi?page=issue060401immig (reporting that "[u]ndocumented immigrants contribute annually to Oregon between $66 million and $77 million in property taxes, state income taxes, and excise taxes.").

[124] *See* Elaine Sciolino, *Living Illegally in New York Is Said to Be Easy for Aliens*, N.Y. TIMES, Aug. 7, 1984, at A1 (noting that undocumented immigrants are able to do things like rent apartments and buy cars on credit by using false documentation, legal residents' names, or by simply hoping that the government does not notice). The Wall Street Journal recently reported that Bank of America is making this process even easier by offering credit cards to customers without Social Security numbers and credit histories. Miriam Jordan & Valerie Bauerlein, *Bank of America Casts Wider Net for Hispanics*, WALL ST. J., Feb. 13, 2007, at A1. The INS has also admitted that Individual Taxpayer Identification Numbers have been used for "unintended purposes, such as opening bank accounts, applying for driver licenses and renting apartments." Elena Gaona, *Illegal Immigrants Paying Taxes as Example of Good Citizenship*, SAN DIEGO UNION-TRIB., Apr. 15, 2004, at A1, *available at* http://www.signonsandiego.com/uniontrib/20040415/news_1n15taxes.html.

[125] Porter, *supra* note 123, at A1.

[126] RANDOLPH CAPPS AND MICHAEL E. FIX, URBAN INSTITUTE, *Undocumented Immi-*

immigrants to this country.[127] While this Note will discuss this stereotype in great depth when refuting the government's claim that reducing public benefits will deter undocumented immigrants, it is worth noting now that the number one reason, by far, that undocumented immigrants are drawn to this country is the availability of employment.[128]

There is also a pervasive fear that undocumented immigrants raise crime rates and cause the U.S. to become a less safe place to live.[129] Consider these words by U.S. Congressman Steve King on the impact of undocumented immigrants:

> The lives of 12 U.S. citizens would be saved who otherwise die a violent death at the hands of murderous illegal aliens each day. Another 13 Americans would survive who are otherwise killed each day by uninsured drunk driving illegals. Our hospital emergency rooms would not be flooded with everything from gunshot wounds, to anchor babies, to imported diseases to hangnails, giving American citizens the day off from standing in line behind illegals. Eight American children would not suffer the horror as a victim of a sex crime.[130]

Representative King does not provide a source for these statistics nor does he explain how they were derived, but they are especially interesting considering the 2006 testimony to the U.S. Senate Judiciary Committee that "[p]ublic fears about immigrant criminality have usually not been born out by research."[131] According to this testimony, in 1989 the Immigration and Naturalization Service (INS) was unable to report on the percentage of incarcerated criminals who were undocumented immigrants, and the problem of unusable data continues today.[132]

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grants: Myths and Reality, Nov. 1, 1995, *available at* http://www.urban.org/url.cfm?ID=900898 (last visited March 28, 2007).

[127] *See infra* notes 194-198.

[128] *Id.*

[129] For an overview of both sides, and a critical look at the claim that immigrants raise crime rates, see Eyal Press, *Do Immigrants Make Us Safer?* N.Y. TIMES, Dec. 3, 2006, § 6 (Magazine), at 20.

[130] Steve King, Biting the Hand That Feeds You, http://www.house.gov/apps/list/hearing/ia05_king/col_20060505_bite.html (last visited Apr. 5, 2007). Note that Rep. King is also now the ranking member of the House Judiciary Immigration Subcommittee. *See King Named Ranking Member of Immigration Subcommittee*, Jan. 7, 2007, http://www.house.gov/apps/list/press/ia05_king/PRImmigRankingMember011707.html.

[131] *Examining the Need for Comprehensive Immigration Reform, Part II: Testimony Before the United States Senate Committee on the Judiciary*, 109th Cong. (2006) (testimony of Dr. William F. McDonald, Professor of Sociology and Anthropology, and Co-Director, Institute of Criminal Law and Procedure, Georgetown University Law Center), *available at* http://judiciary.senate.gov/print_testimony.cfm?id=1989&wit_id=5534. Dr. McDonald continued to say that these findings should be the same for illegal immigrants.

[132] *Id.*

There is also strong evidence that personal economic concerns (that is, individual concern about the loss of job opportunities as opposed to concern about the greater economic health of the country) and xenophobia drive the negative public perception of undocumented immigrants more than any data on the actual effect undocumented immigrants have on society.[133] Given the pervasiveness and seriousness of these stereotypes, undocumented immigrants are surely in need of judicial protection against legislation that may embody such invidious discrimination. Undocumented immigrants therefore deserve the heightened scrutiny afforded to discrete and insular minorities.

(b) *Politically Powerless*

As the Supreme Court remarked in *San Antonio Independent School District v. Rodriguez*, certain groups have been historically "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[134] No plausible argument exists that undocumented immigrants hold any power in the political process. As an obvious starting point, undocumented immigrants have no voting rights.[135] Their powerlessness is further exacerbated by the very nature of their situation. For example, attempts to protect themselves from exploitation by employers require revealing their undocumented status and risking deportation.[136] The need to remain unnoticed, combined with undocumented immigrants' generally low incomes,[137] certainly contribute to the absence of advocacy groups lobbying for their rights. Undocumented immigrants are indeed a "shadow population"[138] with no political voice in the United States, and certainly with less political power today than any other suspect or quasi-suspect class.

(c) *Immutable Characteristic*

When the *Plyler* Court denied undocumented immigrants suspect status, it

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[133] Peter Burns & James G. Gimpel, *Economic Insecurity, Prejudicial Stereotypes, and Public Opinion on Immigration Policy*, 115 POL. SCI. Q. 201, 222-23 (2000) ("The results presented here suggest that attitudes on immigration policy are highly contingent upon stereotypical beliefs about the work ethic and intelligence of other groups, especially among whites.").

[134] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

[135] *See* Mathews v. Diaz, 426 U.S. 67, 78 n.12 (1976) (noting that the Constitution only protects the right of citizens to vote).

[136] *See, e.g.*, Sure-Tan, Inc. v. Nat'l Labor Relations Bd., 467 U.S. 883, 886 (1984) (Employer "report[ed] to the Immigration and Naturalization Service (INS) certain employees known to be undocumented aliens in retaliation for their engaging in union activity, thereby causing their immediate departure from the United States.").

[137] *See* Lipman, *supra* note 12 and accompanying text.

[138] Plyler v. Doe, 457 U.S. 202, 218 (1982).

focused heavily on the "immutability" factor.[139] As constitutional law scholar Erwin Chemerinsky explains in his treatise, the rationale for using immutability to determine whether heightened scrutiny applies is basic fairness.[140] He writes that "it would be unfair to penalize a person for characteristics that the person did not choose and that the individual cannot change."[141] Section IV(A)(1) of this Note critically examined the notion that undocumented immigrants, as a class, are marked by "voluntariness," but the argument still remains that undocumented immigrants fail the "immutability" test because their status can be altered either by a change in legislation or through obtaining the proper documentation. While it is true that undocumented status is not an immutable characteristic, this is hardly fatal to the argument in favor of heightened scrutiny. Legal aliens, for instance, voluntarily enter the suspect class of "aliens," and they have the option of removing themselves from this class by applying for citizenship or leaving the country. Nonetheless, alienage is still considered a "prime example" of a suspect class.[142] Whether or not a classification is marked by immutability is clearly not determinative of whether it qualifies as a "discrete and insular" minority.

Considering that undocumented immigrants are subject to greater discrimination and have less political power than their legal counterparts, it is difficult to see why they should not be granted heightened scrutiny. Treating undocumented immigrants as a suspect class and providing heightened judicial review is entirely in keeping with the purpose of the equal protection clause—providing extra protection for vulnerable populations. Laws which bear a legitimate relationship to the goal of preventing illegal immigration and deporting undocumented immigrants will easily withstand judicial review, but Congress cannot be given *carte blanche* to use undocumented immigrants as pawns in the political process.

B. *Restricting Access to Needed Health Care Should Prompt Intermediate Scrutiny*

While the Constitution explicitly creates only a few individually protected rights, the Supreme Court has nonetheless found some rights to be so important, or "fundamental," to individual liberty that the government may not infringe upon those rights without passing strict scrutiny from the courts.[143] For

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[139] *Id.* at 220 ("Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action.").

[140] CHEMERINSKY, *supra* note 61, at 646.

[141] *Id.*

[142] Graham v. Richardson, 403 U.S. 365, 372 (1971).

[143] CHEMERINSKY, *supra* note 61, at 764 ("If a right is deemed fundamental, the government usually will be able to prevail only if it meets strict scrutiny; but if the right is not fundamental, generally only the rational basis test is applied."). *See also* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966) ("We have long been mindful that where

the courts to uphold government action under strict scrutiny, the government must prove that it is limiting the right for a legitimate governmental purpose and that it employed the least restrictive means of achieving that goal.[144] When the right is *not* fundamental, the court employs rational basis review, under which government action is almost always upheld because the court generally looks for any conceivable underlying purpose to sustain the questioned action.[145] While not as well established as intermediate scrutiny for quasi-suspect classifications, courts may also use heightened scrutiny when the interest at stake is not fundamental, but is nonetheless "important."[146] This use of intermediate scrutiny for non-fundamental rights was first introduced by the Supreme Court in *Plyler* where it found education to be less than a fundamental right but more than "merely some governmental 'benefit.'"[147] Combined with the unique situation of the plaintiffs, this finding prompted the *Plyler* court to apply heightened scrutiny.[148] While such an approach to non-fundamental rights is not common, there is further precedent in various state and federal opinions.[149]

Supreme Court precedent in *Memorial Hospital v. Maricopa County*[150] and in *Plyler*[151] shows that access to needed healthcare, like education, is sufficiently important to merit heightened scrutiny, particularly when withheld from suspect or quasi-suspect classes, because deprivation of these services places significant burdens on both the affected individuals and society at large. The Court in *Plyler* focused on two different effects of denying education: the impact on the society and the impact on the children themselves.[152] The Court wrote: "[i]n determining the rationality of § 21.031 [the statute at issue in this

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fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

[144] CHEMERINSKY, *supra* note 61. at 767.

[145] Williamson v. Lee Optical, 348 U.S. 483, 487 (1955) (Emphasized the extreme deference that would be given to Congress under rational review and conjectured what the legislature "may have concluded").

[146] *See, e.g.*, J.W. v. City of Tacoma, Wash., 720 F.2d 1126, 1129 (9th Cir. 1983) (applying heightened review because right at stake, like education in *Plyler*, was "essential to individuals' full participation in society."); Washington v. Phelan, 671 P.2d 1212, 1215 (Wash. 1983) (In the challenged legislation, the right impinged upon was not fundamental and the class affected was not suspect, but the court found the right important enough and the class vulnerable enough to apply intermediate scrutiny). *See also* Heller v. Doe, 509 U.S. 312, 319 (1993) (noting that intermediate scrutiny *could* be appropriate where the class was "committed mentally retarded individuals" and their liberty rights were at stake).

[147] Plyler v. Doe, 457 U.S. 221 (1982).

[148] *Id.*

[149] *See supra* note 146 and accompanying text.

[150] Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974).

[151] *Plyler*, 457 U.S. at 202.

[152] *Id.* at 223-224.

case], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims."[153] Likewise, the Court should determine PRWORA's validity in light of the significant costs, financial and otherwise, it imposes on Americans in the long-term and in light of the life-long debilitating effects on those who are denied access to necessary healthcare.

1. Denying Medicaid Eligibility to Undocumented Immigrants Will Create Significant Social Costs

At first blush, the proposition that refusing to extend welfare benefits to undocumented immigrants actually harms society may seem absurd. Given the historically precarious position of Medicaid[154] and the seemingly futile attempts by Congress to limit Medicaid expenses, the idea of extending welfare benefits to individuals present in the country illegally seems even more outrageous. Indeed, one of the most frequent complaints about undocumented immigrants is that they are a "drain on resources."[155]

The response to these concerns is that whether or not the U.S provides undocumented immigrants with Medicaid access, it ultimately shoulders the financial and public health burden posed by those individuals. There is an overwhelming consensus in the public health field that failure to provide undocumented immigrants with access to needed health care threatens the health status of *all* American residents.[156] Further, in keeping with the *Plyler* Court's concern with creating "economically productive lives," there is inherent sense to the argument that healthy undocumented workers are of substantially more use to the U.S. economy than unhealthy workers.[157] Finally, having undocumented immigrants rely on the emergency services to which they are legally entitled is a significantly more expensive alternative to health care than earlier preventive or therapeutic care.[158] Not only is it more expensive to pro-

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[153] *Id.*

[154] BARRY R. FURROW ET AL., HEALTH LAW: CASES MATERIALS, AND PROBLEMS 772 (Thomson West 5th ed. 2004) ("[Medicaid] was created almost as an afterthought . . . and has always been controversial, always vulnerable. All aspects of the program, . . . even whether Medicaid should continue to exist at all as an entitlement program [ ] have been hotly contested over the past decade.").

[155] *See supra* note 122.

[156] *See, e.g.* Kullgren, *supra* note 21, at 1632 ("[L]imiting undocumented immigrants' access to health services weakens efforts to fight the spread of communicable diseases among the general population."); Costich, *supra* note 21, at 1044 ("Public health experts observe that denial of care to new and undocumented immigrants has predictable adverse health consequences for the rest of the population."); FREMSTAD & COX, *supra* note 21, at 15 ("The public health concerns [of Medicaid and SCHIP eligibility restrictions] include not only concerns about the adverse impact of the restrictions on immigrants themselves, but also on the public in general.").

[157] *Plyler*, 457 U.S. at 221.

[158] SUSAN STARR SERED AND RUSHIKA FERNANDOPULLE, UNINSURED IN AMERICA 12

vide emergency services, there can be long-term economic consequences of denying preventative care. For instance, the anticipated effect of denying pregnant undocumented women prenatal and preventive services is not "a decrease in the number of children born but [instead] a decrease in the relative number of *healthy* children born."[159] Since these children will be American citizens with full Medicaid access, the detrimental financial implication of not ensuring their optimum health is clear.

2. Undocumented Immigrants' Inability to Access Needed Healthcare Creates an "Enduring Disability"

In *Plyler*, the Supreme Court wrote that, "[i]lliteracy is an enduring disability"[160] and continued to explain that the costs of illiteracy to the individual were so severe that denying basic education based on cost or status was "most difficult to reconcile . . . with the framework of equality embodied in the Equal Protection Clause."[161] The Court concluded by reiterating its view from *Brown v. Board of Education* that "education is perhaps the most important function of state and local governments."[162] The same disabilities that concerned the court in *Plyler* and in *Brown*—"social, economic, intellectual, and psychological well-being;"[163] readiness for professional training; ability to adjust normally to the surrounding environment; and general ability to succeed in life[164]—remain relevant for evaluating the consequences of denying all non-emergency health care. The notion that providing basic health care to all people is just as necessary as providing a basic education derives from the Supreme Court's own language, recent legislative trends within states, and public opinion polls.[165] It is overwhelmingly clear that the U.S. recognizes the fundamental role that good health plays in enabling individuals to succeed in life, and it therefore places significant value on an individual's ability to access a minimum standard of healthcare.[166]

(Univ. of Cal. Press 2005) ("Emergency room visits typically cost about four times as much as treating the same problem in a regular office visit."). The New York Times reported on a growing trend of hospital systems to start offering free basic care for the uninsured because "[o]fficials decided that for many patients with chronic diseases, it would be cheaper to provide free preventive care than to absorb the high cost of repeated emergencies." Erik Eckholm, *Hospitals Try Free Basic Care for Uninsured*, N.Y. TIMES, October 25, 2005; *see also* Park, *supra* note 107 (arguing that "[p]roviding preventive care is economically efficient").

[159] Berk, *supra* note 105, at 61 (emphasis added).

[160] *Plyler*, 457 U.S. at 222.

[161] *Id.*

[162] *Id.* (citing Brown v. Board of Education, 247 U.S. 483, 493 (1954)).

[163] *Id.*

[164] *Id.* at 223.

[165] *See infra* Parts (IV)(B)(2)(a)-(b).

[166] It is worth noting that in many states Medicaid spending has surpassed spending on

(a) Memorial Hospital. v. Maricopa County*: The Supreme Court Highlights the Importance of Healthcare*

In *Maricopa County*,[167] decided approximately eight years before *Plyler*,[168] the Supreme Court considered the constitutionality of an Arizona statute that imposed a residency requirement on all individuals receiving free non-emergency medical care at the county's expense.[169] The Supreme Court invalidated the statute, holding that the classification violated the Equal Protection Clause because it impinged upon the fundamental right of interstate travel by denying newcomers' "basic necessities of life" without providing a compelling state interest.[170] This case is relevant for two reasons: (1) the Court's language illustrates judicial recognition of the importance in having access to non-emergency medical care,[171] and (2) the Court hints at the proposition that, while there is no right to free medical care, once it is provided to some groups, classifications denying access to other groups based on irrelevant criteria will be treated with suspicion.[172]

In light of the well-established view that welfare benefits, or "necessities of life," are not necessarily fundamental rights,[173] the Court's zeal in protecting indigent newcomers' access to health care is especially striking. In its opinion, the Court wrote that: "[I]t is at least clear that medical care is as much 'a basic necessity of life' to an indigent as welfare assistance. And governmental privileges or benefits necessary to basic sustenance have often been viewed as being of *greater constitutional significance* than less essential forms of governmental entitlements."[174] The Court also cited Nixon (quoting Mahatma Ghandi) as saying that "[i]t is health which is real wealth . . . and not pieces of gold and

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education. Jennifer Steinhauer, *California Plan for Health Care Would Cover All*, N.Y. TIMES, Jan. 9, 2007, at A1.

[167] 415 U.S. 250 (1974).

[168] *Plyler*, 457 U.S. at 202.

[169] *Maricopa County*, 415 U.S. at 250.

[170] *Id.* at 269. To be clear, the fundamental right ostensibly at issue was *not* the right to have access to health care, but instead the right of unfettered interstate travel; it is the denial of basic necessities (in this instance, health care) based on the length of residency within a county or state that impermissibly impinges upon this right to travel.

[171] *See infra* notes 174-176

[172] *See infra* notes 177-180.

[173] Dandridge v. Williams, 397 U.S. 471, 485 (1970) (establishing that there is no fundamental right to welfare benefits, writing: "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'").

[174] *Maricopa County*, 415 U.S. at 259 (emphasis added).

silver."[175] Notably, the Court directly addressed the inadequacy of only providing free emergency care:

> To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health. Cancer, heart disease, or respiratory illness, if untreated for a year, may become all but irreversible paths to pain, disability, and even loss of life. *The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment.*[176]

In addition to its language, the second striking feature of this opinion is that the Court essentially used the right to travel to protect access to health care.[177] By invoking the right to travel, the Court prevented the state legislature from using irrelevant criteria (the length of in-state residence as opposed to, for example, income) to prevent individuals from accessing government benefits that, while not fundamental, are nonetheless of great importance to well-being.[178] This has clear applications to the issue presented in this Note. If a certain government benefit is deemed integral to an individual's ability to lead a productive, non-infirm life and to achieve personal success, its denial based on characteristics extraneous to the welfare legislation (the same way alienage is extraneous to the Medicaid Act, which determines eligibility based on need[179]) will be treated with suspicion. The *Maricopa* Court's disavowal of the plaintiffs' need to prove an *actual* impediment on their ability to travel supports the theory that the right to travel was used as a back-door way of keeping states from denying access to "important" rights, such as health care, based on what the Court deemed to be inappropriate criteria.[180]

(b) *The American Public*

In reaching its decision, the *Plyler* Court expressly relied on the public's

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[175] *Id.* at 260 n.14 (quoting Health, Message from the President, 92d Cong., 1st Sess., H.R.Doc. No. 92-49, p. 18 (1971).

[176] *Id.* at 261 (emphasis added).

[177] *Id.* at 250.

[178] Indeed, the dissenting opinion characterizes the majority's opinion as upholding the appellants' claim that "the state legislature, having decided to give free care to certain classes of persons, must give that care to [the defendant] as well." *Id.* at 278.

[179] U.S. Dep't of Health & Human Services, Centers for Medicare and Medicaid Services, Medicaid Eligibility Overview, http://www.cms.hhs.gov/MedicaidEligibility (last visited Mar. 15, 2007).

[180] The dissent highlights this point as well: "The legal question in this case is simply whether the State of Arizona has acted arbitrarily in determining that access to local hospital facilities for nonemergency medical care should be denied to persons until they have established residence for one year. *The impediment which this quite rational determination has placed on [the plaintiff's] "right to travel" is so remote as to be negligible . . . .*" *Id.* at 288.

belief that providing a free basic education is one of the most important responsibilities of local governments, and there is ample evidence that the same may be said today about health care at the federal level.[181] A 2005 study found that 60% of those polled thought that "providing health insurance to the uninsured" was a top federal priority, while another 30% believed it was an "important but lower priority."[182] Another study of U.S. adults in 2004 found that 76% of respondents agreed that "access to health care should be a right."[183]

When Medicaid was first created in 1965, the legislation reflected this sentiment by "offer[ing] the potential for a nationwide catastrophic health insurance program—an opportunity for the nation's poor to participate in the mainstream of American medicine."[184] As mentioned previously, this goal was never realized as costs for the program skyrocketed and Congress quickly sought to limit the program's expenses.[185] Nevertheless, the idea that all people are entitled to basic health care has deep roots, and recent political action and discourse reflects the belief amongst politicians that access to health care is a cornerstone of individual success and happiness: Between 2004 and 2006, three states attempted universal health care coverage;[186] California is considering universal health insurance for its 6.5 million uninsured residents (including undocumented immigrants);[187] President Bush prophesized in his 2007 State of the Union address that "[a] future of hope and opportunity requires that all our citizens have affordable and available health care;"[188] and, finally, universal

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[181] Plyler v. Doe, 457 U.S. 222 (1982).

[182] Pew Research Center, Public's Agenda Differs from President's, question 20 (2005), http://people-press.org/reports/print.php3?PageID=919.

[183] COMMUNITY VOICES, *Nation's Health Care System Ill, Survey Finds* (2004), http://www.communityvoices.org/Article.aspx?ID=298 (reporting that 48% of respondents said that they "strongly" agreed with the statement and 28% "somewhat" agreed with the statement).

[184] Kenneth Wing, *The Impact of Reagan-Era Politics on the Federal Medicaid Program*, 33 CATH. U. L. REV. 1, 4-5 (1983).

[185] *Id.* at 6 ("Even under the most ambitious state programs, Medicaid has offered medical benefits to only a fraction of the people who lived below the poverty line, and its benefits have been distributed in a pattern that was neither wholly rational nor fully understood."). One fairly recent attempt at cutting costs is Medicaid's move towards managed care. *See* FURROW, *supra* note 154, at 790-792.

[186] Massachusetts (An Act Providing Access to Affordable, Quality, Accountable Health Care, MASS. GEN. LAWS ch. 58 (2006); Maine (Dirigo Health Act, Me. Rev. Stat. Ann. tit. 24-A, §§ 6901-15, 6951-71 (2003)); Vermont (An Act Relating to Health Care Affordability for Vermonters, H. 861 (2006).

[187] *See* GOVERNOR OF THE STATE OF CALIFORNIA, *Governor's Health Care Proposal*, *available at* http://gov.ca.gov/pdf/press/Governors_HC_Proposal.pdf (last visited February 28, 2008).

[188] President George W. Bush, 2007 State of the Union Address, *available at* http://www.whitehouse.gov/news/releases/2007/01/20070123-2.html (last visited February 28, 2008).

health care coverage is a key issue in the 2008 Democratic primary elections.[189] Nor are the politicians' beliefs without merit:

> The U.S. health-care system, according to *Uninsured in America*, has created a group of people who increasingly look different from others and suffer in ways that others do not. The leading cause of personal bankruptcy in the United States is unpaid medical bills. Half of the uninsured owe money to hospitals, and a third are being pursued by collection agencies . . . . The death rate in any given year for someone without health insurance is twenty-five per cent higher than for someone with insurance. Because the uninsured are sicker than the rest of us, they can't get better jobs, and because they can't get better jobs they can't afford health insurance, and because they can't afford health insurance they get even sicker.[190]

C. *The Government's Interest in Enacting PRWORA Fails Heightened Scrutiny*

1. Denying Medicaid Eligibility to Undocumented Immigrants Is Not Sufficiently Related to the Goal of Reducing Incentives for Illegal Immigration

Congress was explicit that it prohibited undocumented immigrants' access to public benefits, including all non-emergency Medicaid, to deter undocumented immigrants from coming into the country.[191] Naturally, Congress has a perfectly legitimate, and indeed compelling, interest in preventing illegal immigration. This Note has proposed, however, that this legislation should be scrutinized, at a minimum, under intermediate scrutiny, and therefore a compelling governmental interest is not sufficient; the means used must also be "substantially related" to achieve that purpose.[192] If the judiciary uses rational basis review, it will almost certainly defer to Congress—it is not irrational to suppose that denying valuable public benefits to undocumented immigrants may prevent other individuals from choosing to immigrate illegally to the United States. If, however, Congress's decision-making is scrutinized more rigorously, the judiciary

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[189] *See* THE HENRY J. KAISER FAMILY FOUNDATION, KAISER HEALTH TRACKING POLL: ELECTION 2008 (2007), *available at* http://www.kff.org/kaiserpolls/pomr032907pkg_v2.cfm; Hillary for President, Providing Affordable and Accessible Health Care, *available at* http://www.hillaryclinton.com/issues/healthcare/ (last visited March 11, 2008); Obama '08, Healthcare, *available at http://www.barackobama.com/issues/healthcare/* (last visited March 11, 2008).

[190] Malcolm Gladwell, *The Moral-Hazard Myth: The Bad Idea Behind our Failed Health-care System*, THE NEW YORKER, August 29, 2005, at 44-45, *available at* http://www.newyorker.com/fact/content/articles/050829fa_fact.

[191] 8 U.S.C. § 1601(6) (2000) ("It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.").

[192] Craig v. Boren, 429 U.S. 190, 197 (1976).

must ask whether, outside of pure speculation and theory, there is a reason to believe the availability of public welfare benefits induces undocumented immigrants to come to the United States. Further, the judiciary must ascertain whether a restriction in public benefits is an appropriately tailored means of deterring illegal immigration. A brief overview of the evidence offered to Congress before the passage of PRWORA and other available information reveals that there is no logical basis for the belief that denying public benefits would reduce illegal immigration.

The theory that undocumented immigrants come to the United States to take advantage of the public benefits that are available to them has been persistent among politicians and the general public despite a lack of credible evidence that access to public benefits is in fact a motivating factor.[193] While undocumented immigrants may use whatever benefits they have access to once they arrive in the United States, one can hardly infer from that information alone that they came to the United States with the intention of taking advantage of those services. In the words of Howard Ezell, as he spoke before the House of Representatives in 1996 as a member of the U.S. Commission on Immigration Reform: "[I]llegal aliens do come here and use welfare and other public benefits programs . . . [b]ut I am here to tell you, that the reason most illegal aliens come here can be summed up in three little words: *They get jobs*."[194]

A study published in 2000, conducted in response to PRWORA's contention that federal benefits "invite" undocumented immigrants, found that less than 1% of Latinos (who constitute approximately 70% of all undocumented immigrants)[195] responded that availability of social services was the most important reason for immigrating.[196] The study concluded that "excluding undocumented immigrants from government-funded health care services is unlikely to affect immigration. This supports earlier studies indicating that immigrants come to the United States primarily in search of employment."[197] A recent New York Times article echoed this sentiment by stating, "Ask Mexican immigrants why they risk coming to the United States illegally, and the reasons seldom vary:

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[193] A 1994 study of undocumented immigrants who applied for legal status under the 1986 Immigration Reform and Control Act found that 94% of the respondents claimed economic reasons for immigration. Berk, *supra* note 105, at 60. Despite this, as recently as January 2007, California Assemblyman Robert Huff claimed that health coverage "creates a magnet for them coming here rather than staying there." Jesse McKinley, *Schwarzenegger's Plan for Universal Care Draws No Universal Agreement*, N.Y. TIMES, Jan. 10, 2007, at A20.

[194] *United States Commission on Immigration Reform: Hearing Before the United States House of Representatives Committee on Economic and Educational Opportunities*, 104th Cong, (1996)(testimony of Harold Ezell, President, Ezell Group), *available at* http://www.utexas.edu/lbj/uscir/022296.html.

[195] Berk, *supra* note 105, at 53.

[196] *Id.* at 56.

[197] *Id.* at 60.

better wages, plentiful jobs, family ties and future opportunity."[198] Based on this evidence, there is frequent criticism that the government is improperly handling the undocumented immigrant problem by focusing its energy on removing welfare benefits to undocumented immigrants in the country instead of tightening the country's borders or creating stronger disincentives for employers to hire undocumented immigrants.[199]

PRWORA's denial of all public benefits is also not appropriately tailored towards the goal of deterring illegal immigration. If the government wishes to withhold welfare benefits as a means to deter individuals from coming to the United States illegally it should isolate which benefits, if any, actually act as inducements. Assuming there are public benefits that do have an inducing effect, the government can regulate those benefits without unnecessarily denying undocumented immigrants life-sustaining benefits, such as needed health care.[200]

D. *PRWORA Should Not be Considered Immigration Legislation and Therefore Should Not Receive Greater Judicial Deference*

Congress's plenary power over issues of immigration has traditionally been accorded great deference by the judiciary.[201] This section argues that while undocumented immigrants are the subject of the PRWORA provision discussed in this Note, that alone does not mean the provision constitutes "immigration legislation" deserving of greater judicial deference. In *Rodriguez v. United States*, the Eleventh Circuit rejected plaintiffs' argument that the provision of

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[198] Lizette Alvarez, *A Growing Stream of Illegal Immigrants Choose to Remain Despite the Risks*, N.Y. TIMES, Dec. 20, 2006, at A26.

[199] *See* Kullgren, *supra* note 21, at 1633 ("Consequently, public health advocates should work to ensure that policymakers seeking to reduce the number of undocumented immigrants in the United States focus their attention on strengthening border control and weakening the 'pull factors' that actually drive illegal immigration, instead of endangering the public's health through misguided restrictions on provision of health services."); *see also* Chang, *supra* note 41 ("If the government seeks to discourage illegal immigration, it should focus its efforts instead of enforcing or modifying existing laws against employing undocumented immigrants."); Shari B. Fallek, Comment, *Health Care for Illegal Aliens: Why it is a Necessity*, 19 HOUS. J. INT'L L. 951, 978 (1997) ("The only way to deal with the illegal immigrant problem is to tighten the borders, not to cut off social services."); Alison Fee, Note, *Forbidding States from Providing Essential Services to Illegal Immigrants: The Constitutionality of Recent Federal Action*, 7 B.U. PUB. INT. L.J. 93, 114-15 (1998) ("Focus on social services for illegal immigrants will distract the federal government from enacting the bold, fundamental reforms that are truly necessary.").

[200] There is, of course, the possibility that if the government decides to isolate which welfare benefits act as an inducement for illegal immigration, Medicaid access may be one of those benefits. Such a finding would clearly change the constitutional analysis, although not necessarily the outcome.

[201] Mathews v. Diaz, 426 U.S. 67, 81 (1976).

PROWRA being challenged, which discriminated between *legal* aliens, was not passed pursuant to Congress's sovereign power over immigration and therefore did not require strict scrutiny.[202] The court relied on *Mathews*, which maintained that Congress's power in this area should be broadly defined, and quoted the *Mathews* Court as explaining: "[T]he responsibility for regulating the *relationship* between the United States and our alien visitors has been committed to the political branches of the Federal government" and "it is the business of the political branches of the Federal Government, rather than that of . . . the Federal Judiciary, to regulate the *conditions of* entry and *residence* of aliens."[203] However, it is important to note that the *Rodriguez* court also relied on the fact that the statute before the *Mathews* Court was "impossible to distinguish" from the one before it—they both conditioned a legal alien's ability to access federal welfare benefits on length of residence in the United States.[204] Both opinions stand for the proposition that "the decision to discriminate among [legal] aliens in the provision of welfare benefits is a decision that lies within Congress' plenary power over immigration."[205] This Note, however, questions the constitutionality of a fundamentally different provision[206]—one that deals with undocumented immigrants instead of those here legally and therefore raises an entirely different set of considerations.

In 1976, the same year *Mathews* was decided, the Supreme Court also decided *DeCanas v. Bica*.[207] The latter case considered whether a state law was an unconstitutional regulation of immigration because it prohibited employers from contracting with undocumented immigrants if doing so would adversely affect resident workers.[208] Since the power to regulate immigration is an exclusively federal one,[209] a state law found to "regulate immigration" is automatically *ultra vires* and invalid.[210] In *DeCanas*, the Supreme Court stated that "standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[211]

A federal district court in California relied upon this distinction when it reviewed the constitutionality of California's Proposition 187, the controversial ballot initiative from 1994 intended to "provide for cooperation between [the]

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[202] Rodriguez v. United States, 169 F.3d 1342, 1349 (11th Cir. 1999); U.S. CONST. art. I, § 8, cl.4 grants Congress the power "[t]o establish an uniform Rule of Naturalization . . . ."

[203] *Rodriguez*, 169 F.3d at 1349 (citing *Mathews*, 426 U.S. at 81, 84).

[204] *Id.*

[205] *Id.*

[206] 8 U.S.C. § 1611 (2000).

[207] DeCanas v. Bina, 424 U.S. 351 (1976).

[208] *Id.* at 353.

[209] *Id.* at 354.

[210] *Id.* at 358 n.6.

[211] *Id.* at 355.

agencies of state and local government with the federal government, and to establish a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California."[212] The court held that various provisions of the legislation were unenforceable on federal preemption grounds because they infringed upon the federal government's plenary power over immigration.[213] Significantly, however, the court found that the provisions denying welfare benefits to undocumented immigrants would *not* impermissibly regulate immigration if they were severable from the verification, notification, and reporting provisions.[214] That is, California would not be preempted simply because it determined which welfare benefits undocumented immigrants may receive; thus, such legislation cannot be "immigration legislation." These cases illustrate that while Congress may have the authority to regulate which benefits undocumented immigrants may receive, that does not automatically render such restrictions "immigration regulation" in the constitutional sense of the term. There is an important distinction between legislation that *affects* immigrants and legislation that *regulates* immigration. Only the later is entitled to special deference from the judiciary, and these cases indicate that benefit determinations do not fall into that category. While Congress itself refers to PRWORA as "immigration policy" passed with the intent of removing incentives for illegal immigration created by availability of public benefits,[215] a court need not also defer to Congress's characterization of its legislation.[216] Indeed, a key purpose of judicial review is to determine whether Congress legislated within its constitutional bounds.

PRWORA itself and its legislative history support characterizing the measure as welfare legislation and budget policy aimed at shifting the costs of legal and illegal immigration to the states, rather than as immigration legislation. The Nebraska Senator who introduced the amendment to PROWRA denying federal benefits to undocumented immigrants said that "we must not pass up this opportunity to stop, once and for all, providing scarce Federal benefits to

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[212] League of United Latin American Citizens. v. Wilson, 1998 U.S. Dist. LEXIS 3418, at *1 (C.D. Cal. Mar. 13, 1998).

[213] *Id.* at *45

[214] *Id.* at *17 ("[I]f the benefits denial provisions are severed from the verification, notification and reporting provisions of Proposition 187, they do not impermissibly regulate immigration because they do not amount to a determination of 'who is and who is not lawfully admitted' in this country.") (internal quotations omitted) (citing *Wilson*, 1998 U.S. LEXIS 3418, at 770, 772).

[215] 8 U.S.C. § 1601(5) (2000).

[216] *See* City of Boerne v. Flores, 521 U.S. 507, 531 (1997) ("Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.' ") (quoting Oregon v. Mitchell, 400 U.S., 112, 207 (1970)).

illegal aliens."[217] Noting that the federal government has exclusive control over immigration, a Florida Senator lamented that by failing to protect America's borders and then denying undocumented immigrants federal benefits, the federal government levies costs on the communities most burdened with undocumented immigrants.[218] The Senator later reiterated this point by arguing that PRWORA is telling his State: "[W]e are going to stick you with hundreds of millions of dollars in costs for legal and illegal immigration, even though you have no control over these foreign policy decisions that affect immigration."[219] In criticizing the Act as a whole, another Senator said, "[T]his bill is not a serious policy document. It is a budget document."[220] Yet another Senator, who supported the Act, essentially agreed with this characterization by saying that the bill is "one of the key elements to change the direction of this country as it relates to welfare and to allow us to balance the budget."[221]

Given Congress's ceaseless efforts to reduce Medicaid expenditures, it seems clear that the purpose of this Act was only incidentally, if at all, to remove incentives for illegal immigration. The legislation instead appears to reflect a congressional judgment that denying undocumented immigrants Medicaid access would save federal funds without offending a group with any significant political clout or empathy from the public.

An analysis of the legislation in its entirety reinforces the impression that Congress was not truly concerned about deterring illegal immigration and instead simply wished to defray the costs of illegal immigration on the federal government by passing them on to the states. Since PRWORA denies benefits to new immigrants, it means, at least in the short term, that anyone who intended to immigrate to the United States for welfare benefits would have no incentive to go through the proper channels. The objective of deterring illegal immigration by restricting welfare benefits must be seriously weakened if even those immigrants who comply with the legal requirements are still denied access for a substantial period of time. More tellingly, states have the option to provide welfare benefits to undocumented immigrants as long as they pass an affirmative law to that effect and pay for them without using Medicaid funds.[222] If even one state offers this coverage then there is no longer a disincentive effect and the proffered purpose of the legislation is undermined.

Clearly, the intent and effect of prohibiting undocumented immigrants from accessing welfare benefits was to save money, not to regulate immigration. While few would want to interfere with the government's goal of saving taxpayers' money, particularly for a program as desperately needed by Americans

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[217] 141 CONG. REC. S13568 (daily ed. Sept. 14, 1995) (statement of Sen. Exon).

[218] 141 CONG. REC. S13568 (daily ed. Sept. 14, 1995) (statement of Sen. Graham).

[219] 141 CONG. REC.. S19172 (daily ed. Dec. 22, 1995) (statement of Sen. Graham).

[220] 141 CONG. REC. S19098 (daily ed. Dec. 21, 1995) (statement of Sen. Lautenberg).

[221] 141 CONG. REC. S19107 (daily ed. Dec. 21, 1995) (statement of Sen. Hutchison).

[222] 8 U.S.C. § 162(d) (2000).

as Medicaid, the judiciary has a constitutional obligation to prevent Congress from engaging in invidious discrimination. This means that the judiciary may not permit Congress to take advantage of undocumented immigrants' lack of political power and negative public image by saving money at their expense.

CONCLUSION

"Immigration is the big issue right now. Earlier today, the Senate voted to build a 370-mile fence along the Mexican border. . . . Experts say a 370-mile fence is the perfect way to protect a border that is 1,900 miles long." — Conan O'Brien[223]

"Proponents of this amnesty program for illegal immigrants say they are willing to take on jobs Americans are not willing to do. You know, like come up with an immigration policy." — Jay Leno[224]

The inability of U.S. lawmakers to create and enforce a sensible immigration policy is great for late-night comedians but unfortunate for undocumented immigrants. Current American immigration policy is one of inducement and punishment. Undocumented immigrants are drawn to this country because of the availability of work (the result of lax enforcement of already inadequate legislation) and then, once here, denied, under the guise of deterrence, the public benefits that their tax dollars helped fund. As this Note has shown, policy experts have long argued that the denial of non-emergency Medicaid imposes an incredible hardship on what is already a vulnerable population. Further, the effects of that hardship are borne not only by the undocumented immigrant community, but is shared, whether we realize it or not, by all U.S. residents in both the financial and public health realms.

This Note aims to give public health professionals another leg to stand on by showing that not only is this deprivation of non-emergency health care poor public policy, it is also a violation of undocumented immigrants' constitutional right to equal protection of the law. Congress has failed to make America's legal treatment of undocumented immigrants rational or just. It is time for the judiciary to recognize this and see undocumented immigrants not just as "illegals" but as politically powerless and socially disparaged individuals who need full constitutional protection.

Elizabeth R. Chesler

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[223] Daniel Kurtzman quoting Conan O'Brien. About.com, Political Humor, http://politicalhumor.about.com/od/immigration/a/immigration.htm (last visited March 19, 2007).

[224] *Id.* (quoting Jay Leno).