County Interactions with Immigrants

Prof. Andrew Ayers

Updated July 31, 2018

ALBANY LAW SCHOOL
GOVERNMENT LAW CENTER

EXPLAINER

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

by Andy Ayers[*]

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

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

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

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

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

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

RESOURCES

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

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

I. When Equal Protection Requires Benefits

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

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

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

So the Constitution treats state discrimination against noncitizens with the same suspicion reserved for racial discrimination. But in the case of noncitizens, there are some important exceptions—cases in which states are allowed to treat noncitizens differently.

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

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

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

RESOURCES

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

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

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

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

There are other noncitizens who, although lawfully present, commit a crime that makes them deportable, and it is far from clear how this group would be regarded under the Equal Protection Clause. Still other noncitizens are temporarily without lawful status, but have a right to remain in the country and are simply waiting for their paperwork to be processed. (For example, someone whose fiancé is a U.S. citizen might be between statuses while they wait for their green card to be issued.) It is not clear which of these groups might be denied state or local benefits without triggering strict scrutiny.

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

This exception for temporarily present noncitizens has been adopted by two federal appellate courts. But it has been rejected by the Second Circuit, which covers New York, Vermont and Connecticut.[10] This creates a "circuit split" that will likely be resolved by the U.S. Supreme Court at some point in the future.

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

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

RESOURCES

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

http://www.pewtrusts.org/~/media/assets/2014/09/mappingpublicbenefitsforimmigrantsinthestatesfinal.pdf

The holding of *Aliessa* was based not only on the U.S. Constitution but also on the New York State Constitution.[12] This means that even if the Supreme Court were to allow state discrimination against temporarily present noncitizens temporary visitors, the New York ruling would stand.

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

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

The court held that this provision forbids the state from imposing an "eligibility condition having nothing to do with need."[13] Interestingly, no subsequent case has analyzed whether the same constitutional prohibition would forbid denying essential benefits to undocumented people. But it is reasonable to expect a judicial challenge to any state or local policies that deny benefits to undocumented people, because a requirement that denies benefits on grounds of undocumented status would be an "eligibility condition having nothing to do with need."

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

RESOURCES

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

https://www.health.ny.gov/health_care/medicaid/publications/docs/gis/08ma009att.pdf

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

II. When Congress Prohibits Benefits

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

Section 1621: Noncitizens in Certain Marginal Statuses Are Generally Ineligible for Subfederal Benefits. The most important statute restricting state and local rights to offer benefits and services to noncitizens is 8 U.S.C. § 1621. This statute limits state and local governments' right to provide a wide variety of government benefits, contracts, and licenses, including:

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

The statute also applies to "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit."[15]

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

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

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

The upshot of § 1621 is that states can offer to noncitizens with green cards, student visas, or other listed statuses all of the benefits listed in § 1621, including things like welfare, Medicaid, professional licenses, government contracts, or unemployment benefits. But states cannot offer these benefits to noncitizens in Temporary Protected Status, DACA beneficiaries, or undocumented people.

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

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

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

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

RESOURCES

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

https://save.uscis.gov/web/media/resourcesContents/SAVEGuideCommonlyusedImmigrationDocs.pdf

For information about the limitations of the SAVE system, see: https://www.americanimmigrationcouncil.org/research/systematic-alien-verification-entitlements-save-program-fact-sheet

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

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

Currently, the District of Columbia and twenty states (including New York) allow undocumented students to pay in-state tuition.[29] Three states (Alabama, Georgia, and South Carolina) bar undocumented students from enrolling in some or all higher-educational institutions.[30] Many state legislatures have pending bills that would expand or limit in-state tuition for undocumented students.[31]

III. When Congress Gives States a Choice

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

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

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

Noncitizens in this large group are covered by 8 U.S.C. § 1622, which says that states are "authorized to determine the eligibility

for any State public benefits" of anyone with these benefits.[33]

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

But other courts, including the New York Court of Appeals, have found that whenever states have a choice, the Equal Protection Clause applies—and requires equal treatment of noncitizens.[35] Congress may want states to have discretion, but, in the words of the Supreme Court, "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause."[36]

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

IV. When Congress Requires Benefits

Section 1622(b) requires benefits for Permanent Residents, Refugees, and Asylees After a Certain Amount of Time. As discussed above, Congress generally wanted states to have the discretion to choose whether to offer benefits to most lawfully present noncitizens. But, as always, there's an important exception.

Under § 1622(b), states are *required* to offer public benefits to legal permanent residents ("LPRs," i.e., green-card holders), asylees, and refugees after specified periods of time. For refugees, it's five years after entry into the U.S.; for asylees, 5 years after the grant of asylum; and for green-card holders, it's 40 quarters of work.[37]

State are also required to offer benefits to noncitizens in active military service, veterans, and their children.[38]

Does Congress Have the Power to Require Benefits?

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

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

This principle might seem to prevent Congress from requiring states to give any particular benefits to noncitizens. But Congress has traditionally been given great deference in the realm of immigration policy. And even if Congress can't constitutionally require benefits, there remains the Equal Protection Clause, which

will require benefits in most situations. The difficult question, again, will be what happens when Congress requires, by statute, the provision of benefits in an area where the Equal Protection Clause would not require them.

In New York State, equal protection clearly requires the provision of benefits for lawfully present aliens; nationally, the issue remains to be definitively resolved.

Conclusion

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

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

Endnotes

* Andy Ayers is Director of the Government Law Center and an assistant professor at Albany Law School. Research assistance by Olivia Fleming, Brendan Nashelsky, and Michele Monforte.

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

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

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

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

[5] This definition of strict scrutiny is from *Bernal v. Fainter*, 467 U.S. 216, 227 (1984).

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

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

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

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

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

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

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

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

[14] 8 U.S.C. § 1621(c)(1)(A).

[15] *Id.* § 1621(c)(1)(B).

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

[17] *Id.* § 1621(b).

[18] On Temporary Protected Status, see http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status.

[19] On DACA, see http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca

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

[21] http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/deferred-enforced-departure

[22] See info on the Compact of Free Association Agreements here: http://www.uscis.gov/sites/default/files/files/pressrelease/Micronesia_MarshallIslFS.pdf

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

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

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

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

[26] For New York regulations admitting teachers to licensure under the *Vargas* authority, see 8 N.Y.C.R.R. § 80-1.3 (for teacher licensure, "pursuant to 8 USC § 1621(d), no otherwise qualified alien shall be precluded from obtaining a professional license under this Title if any individual is not unlawfully present in the United States, including but not limited to applicants granted deferred Action for Childhood Arrivals relief or similar relief from deportation8 NYCRR § 80-1.3"); 8 N.Y.C.R.R. § 59.4 (same language applied to other professions); 2016-10 N.Y. St. Reg. 19 (Mar. 9, 2016; Volume 38, Issue 10) (proposed regulation); 2016-22 N.Y. St. Reg. 23, 25 (final rule and response to comments) ("While the *Vargas* decision is based on an intrusion on the role of the judiciary over bar admissions in violation of the Supremacy Clause, we believe that the Court's reasoning applies equally to the adoption of regulations having the force and effect of law by an administrative agency that is part of the executive branch of New York government, another one of the three coequal branches of government under the New York Constitution."). http://www.nysed.gov/news/2016/board-regents-permanently-adopts-regulations-allow-daca-recipients-apply-teacher. For more on the process leading to these changes, see Janet M. Calvo, *Professional Licensing and Teacher Certification for Non-Citizens: Federalism, Equal Protection and a State's Socioeconomic Interests*, COL. J. RACE & LAW (forthcoming).

[27] 8 U.S.C. § 1625.

[28] 8 U.S.C. § 1623.

[29] On in-state tuition for undocumented students, see the National Immigration Law Center's table at https://www.nilc.org/issues/education/eduaccesstoolkit/eduaccesstoolkit2/#maps. See also the National Conference of State Legislatures' excellent overview at http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx.

[30] For states that bar enrollment to undocumented students, see the National Immigration Law Center's table at https://www.nilc.org/issues/education/eduaccesstoolkit/eduaccesstoolkit2/#maps.

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

[32] 8 U.S.C. § 1621(a); for the definition of "qualified alien," see 8 U.S.C. § 1641.

[33] 8 U.S.C. § 1622(a).

[34] See, e.g., *Korab v. Fink*, 797 F.3d 572, 582 (9th Cir. 2014).

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

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

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

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

[38] On benefits for servicemembers, veterans, and their children, see 8 U.S.C. § 1622(b)(3).

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

[40] *New York*, 505 U.S. at 162.

96 N.Y.2d 418 (2001)
754 N.E.2d 1085
730 N.Y.S.2d 1

In the Matter of MOHAMED ALIESSA, by His Guardian ad Litem, SUMAYA AL FAYAD, et al., Appellants,

v.

ANTONIA NOVELLO, as Commissioner of the New York State Department of Health, Respondent.

Court of Appeals of the State of New York.

Argued March 29, 2001.
Decided June 5, 2001.

420 *420 *Greater Upstate Law Project, Inc.,* Rochester (*Ellen M. Yacknin* of counsel), *Legal Aid Society,* New York City (*Helaine Barnett, Steven Banks, Janet Sabel, Scott Rosenberg* and *Elisabeth R. Benjamin* of counsel), and *New York Legal Assistance Group* (*Yisroel Schulman, Constance P. Carden* and *Andrea Spratt* of counsel), for appellants.

Eliot Spitzer, Attorney General, New York City (*Deon J. Nossel, Preeta D. Bansal, Michael S. Belohlavek* and *Mark Gimpel* of counsel), for respondent.

421 *421 *Mara K. Youdelman,* Washington D.C., for National Health Law Program, Inc., and others, *amici curiae.*

Kalkines, Arky, Zall & Bernstein, L. L. P., New York City (*Deborah Bachrach, Stephen A. Warnke, Karen Lipson* and *Clarke Bruno* of counsel), for Coalition of Voluntary Safety Net Hospitals and others, *amici curiae.*

Chief Judge KAYE and Judges SMITH, LEVINE, CIPARICK, WESLEY and GRAFFEO concur.

OPINION OF THE COURT

ROSENBLATT, J.

On this appeal, we must decide whether Social Services Law § 122 violates the United States and New York Constitutions
422 *422 by denying State Medicaid benefits to plaintiffs based on their status as legal aliens. We conclude that it does.

I.

Plaintiffs are 12 aliens who lawfully reside in New York State. They immigrated to the United States from various countries, including Bangladesh, Belorussia, Ecuador, Greece, Guyana, Haiti, Italy, Malaysia, the Philippines, Syria and Turkey. As legal aliens, they fall into two groups. Some are lawfully admitted permanent residents of the United States under the Immigration and Nationality Act (i.e., green card holders) (*see,* 8 USC § 1101 *et seq.*);[1] the rest are permanently residing in the United States under color of law (PRUCOLs).[2] All suffer from potentially life-threatening illnesses and, but for the exclusion under Social Services Law § 122, would allegedly qualify for Medicaid benefits funded solely by the State.

Plaintiffs brought a class action in Supreme Court seeking a declaration that Social Services Law § 122 violates article XVII, sections 1 and 3 of the New York State Constitution and the Equal Protection Clauses of the United States and New York State Constitutions. The putative class consists of "[a]ll Lawful Permanent Residents who entered the United States on or after September 22, 1996 and all [PRUCOLs] who, but for the operation of New York Social Services Law § 122, would be eligible for Medicaid coverage in New York State." The State moved to dismiss or, in the alternative, for summary judgment, for which plaintiffs cross-moved. Deferring its decision on class certification, Supreme Court denied the State's motion and
423 granted in part plaintiff's motion for summary judgment, declaring that section 122 of the Social Services Law violates *423 article XVII, § 1 of the New York State Constitution and the Equal Protection Clauses of the United States and New York Constitutions. (*Aliessa v Whalen,* 181 Misc 2d 334.)

Three days later, the Appellate Division decided *Alvarino v Wing* (261 AD2d 255). In that case, resident aliens argued that Social Services Law § 95 unconstitutionally denied them food assistance. The court held that because the State enacted the statute in direct response to a Federal supplemental appropriations bill (Pub L 105-18), the challenged classification should be evaluated, for equal protection purposes, under a rational basis standard rather than the strict scrutiny standard Supreme Court had employed.

Supreme Court granted reargument in light of *Alvarino* and vacated the portion of its decision that declared section 122 violative of the Equal Protection Clauses of the United States and New York State Constitutions. The court left undisturbed, however, so much of its decision as held section 122 of the Social Services Law violative of article XVII, § 1 of the New York State Constitution. The Appellate Division reversed in part and affirmed in part, holding that section 122 did not violate equal protection or article XVII, § 1. Plaintiffs appeal to this Court as of right (*see,* CPLR 5601 [b]).

II.

A.

The Medicaid System

The Legislature established New York's Medicaid system in 1966 (L 1966, ch 256), the year after Congress created the federally funded Medicaid program (*see,* Pub L 89-97, 79 US Stat 344). Under this complex scheme, the Federal government and States share the cost of providing Medicaid to certain categories of needy individuals. The shared program provides benefits to the disabled, the blind, the elderly, children, pregnant women, single-parent families and parents of children where there is a deprivation factor in the household (*see,* 42 USC § 1396a [a]). To remain eligible for Federal matching funds, New York must conform its Medicaid program to evolving Federal standards (*see,* 42 USC § 1396a [b]; Social Services Law § 363-a).

If a State wants to extend Medicaid benefits to others, it is free to proceed at its own expense. New York has done so. It has
424 provided non-federally subsidized Medicaid benefits to *424 certain categories of individuals, including residents between the ages of 21 and 65 whose income and resources fall below a statutory "standard of need" and who are not otherwise entitled to federally subsidized Medicaid (*see,* Social Services Law § 366 [1]; 18 NYCRR 360-3.3 [b]). Thus, New York State's Medicaid system has two components: one that is federally subsidized and one that the State funds entirely on its own.[3]

New York had long provided State Medicaid to needy recipients without distinguishing between legal aliens and citizens. It ceased to do so, however, after Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub L 104-193, 110 US Stat 2105 [codified in scattered sections of 8 and 42 USC]) (PRWORA). Asserting that they have been unlawfully deprived of State Medicaid for which they would otherwise qualify, plaintiffs have brought this challenge.

B.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996

After extensive debate, Congress enacted PRWORA as a comprehensive reform initiative designed to "end welfare as we know it."[4] PRWORA touches on virtually all aspects of welfare. In this case, however, we are concerned only with title IV of PRWORA, which deals with aliens.[5]

425 *425 In its preamble to title IV, Congress stressed that its goals were to promote self-sufficiency—an enduring principle of United States immigration law—and to discourage aliens from immigrating here just to avail themselves of welfare or other public resources (*see,* 8 USC § 1601 [1]-[2]). The lawmakers stated that meeting these goals was a "compelling government interest" (*see,* 8 USC § 1601 [5]-[6]).

By enacting title IV, Congress restricted alien eligibility for federally funded public assistance benefits (including Medicaid) and authorized States to follow suit with their own programs. Its restrictions govern eligibility for Federal and State retirement, welfare, health, disability, public or assisted housing, post-secondary education, food assistance and unemployment benefits, among others (*see,* 8 USC § 1611 [c]; § 1621 [c]). For purposes of this decision, however, we address solely its effect on Medicaid eligibility.

Under title IV, aliens are divided into two categories: qualified aliens and non-qualified aliens (*see,* 8 USC § 1641). Broadly speaking, qualified aliens include aliens who are lawfully admitted for permanent residence (generally green card holders), granted asylum, designated refugees, paroled into the United States for at least one year, having their deportation withheld, granted conditional entry, Cuban and Haitian entrants or victims of battering or extreme cruelty by a spouse or other family member (*see,* 8 USC § 1641 [b]-[c]). All other aliens, including PRUCOLs, are non-qualified aliens.[6] Plaintiffs in this case fall into both categories. The lawfully admitted permanent resident plaintiffs are qualified aliens and the PRUCOL plaintiffs non-qualified aliens. These classifications carry significant Medicaid consequences.

426 *426 **1.**

PRWORA's Treatment of Aliens' Entitlement to Medicaid

Title IV renders non-qualified aliens ineligible for Federal Medicaid (8 USC § 1611 [a]). Qualified aliens are divided into two subcategories. The first subcategory includes those who were lawfully residing in the United States before August 22, 1996. Section 1612 (b) (2) requires States to provide Federal Medicaid to some, but not all, of this group.[7] The second subcategory includes those who entered the country on or after August 22, 1996. This latter group is largely ineligible for Federal Medicaid for five years (*see,* 8 USC § 1613 [a]).[8] Moreover, title IV authorizes States to extend the ineligibility period beyond the initial five years (*see,* 8 USC § 1612 [b] [1]).

In addition to rendering PRUCOLs ineligible for Federal Medicaid, title IV renders them ineligible for State Medicaid as well (*see,* 8 USC § 1621 [a], [c] [1] [B]). Section 1621 (d), however, authorizes States to provide State Medicaid to PRUCOLs—and indeed even to illegal aliens—by enacting a new law (after August 22, 1996) "which affirmatively provides for such eligibility" (*see,* 8 USC § 1621 [d]).[9] As for qualified aliens, title IV does not require, but instead allows States to grant or deny them State Medicaid, subject to certain exceptions (*see,* 8 USC § 1622 [a]).[10]

Finally, notwithstanding all of these restrictions, both non-qualified aliens and qualified aliens (during their periods of
427 ineligibility) may receive State and federally funded emergency *427 medical treatment (*see,* 8 USC § 1611 [b] [1] [A]; § 1613 [c] [2] [A]; § 1621 [b] [1]).

2.

New York's Response to PRWORA

In response to PRWORA, New York enacted Social Services Law § 122, terminating Medicaid for non-qualified aliens—including PRUCOL plaintiffs (*see,* Social Services Law § 122 [1] [c]). New York did, however, maintain Medicaid for otherwise eligible PRUCOLs who, as of August 4, 1997, were receiving Medicaid and were diagnosed with AIDS or residing in certain licensed residential health care facilities (*see,* Social Services Law § 122 [1] [c]).

As for qualified aliens, section 122 provides Medicaid to all otherwise eligible qualified aliens who entered the United States before August 22, 1996 and continuously resided in the United States until attaining qualified status (Social Services Law § 122 [1] [b] [i]). Those entering on or after August 22, 1996, however, are no longer immediately eligible for State Medicaid, but must now wait five years for coverage (*see,* Social Services Law § 122 [1] [b] [ii]).[11] This group includes the lawfully admitted permanent resident plaintiffs. Finally, all plaintiffs (both PRUCOLs and qualified aliens) may receive safety net assistance and emergency medical treatment (*see,* Social Services Law § 122 [c] [i]-[ii]).

III.

Plaintiffs argue that section 122 violates article XVII of the New York State Constitution and denies them equal protection under the United States and New York State Constitutions.

A.

New York State Constitution, Article XVII

Plaintiffs contend that section 122 violates article XVII, § 1 of the State Constitution, which provides:

> "The aid, care and support of the needy are public concerns and shall be provided by the state and by such
> 428 of its subdivisions, and in such manner and *428 by such means, as the legislature may from time to time determine" (NY Const, art XVII, § 1 [emphasis added]).

As this provision demonstrates, care for the needy is not a matter of "legislative grace"; it is a constitutional mandate (*Tucker v Toia*, 43 NY2d 1, 7; *see also, Lovelace v Gross*, 80 NY2d 419, 424; *Jiggetts v Grinker*, 75 NY2d 411, 416). Of course, New York is not required to meet every legitimate need of every needy person (*see, Matter of Bernstein v Toia*, 43 NY2d 437, 448-449). Rather, the Legislature may determine who is "needy" and allocate the public dollar accordingly.

This Court, however, has interpreted article XVII, § 1 as prohibiting the Legislature from "refusing to aid those whom it has classified as needy" (*Tucker v Toia*, 43 NY2d, at 8, *supra*). In *Tucker,* the State required minors to obtain final orders of disposition in support proceedings against their parents before they could become eligible for home relief. We found this requirement so onerous as to constitute a practical deprivation of benefits. Needy minors, we recognized, may not know the whereabouts of their parents, or even if their parents are located in this State. In some cases, it could take a minor as long as a year to obtain a disposition in an often futile support proceeding. While waiting, needy minors were effectively denied home relief. Because the requirement imposed an overly burdensome eligibility condition on recipients—one unrelated to need—we held that the requirement contravened the "letter and spirit" of section 1 of article XVII (*see,* 43 NY2d, at 9, *supra*).

The State argues that the allocation scheme here does not contravene *Tucker.* It contends that the Constitution affords it discretion to set levels of benefits for the needy and, in the exercise of that discretion, it has provided plaintiffs full safety net assistance and emergency medical treatment. We agree that article XVII, § 1 affords the State wide discretion in defining who is needy and in setting benefit levels. Indeed, in *Matter of Barie v Lavine* (40 NY2d 565, 566), this Court upheld a regulation that required welfare recipients to participate in a work referral program and denied them benefits for 30 days if they failed to comply.

Plaintiffs argue that section 122 does not merely set levels of benefits for the needy, but deprives them of all otherwise available ongoing medical care—a species of aid distinct from safety net assistance and emergency medical treatment.
429 They contend that ongoing medical care covers a full spectrum of ailments, *429 whereas emergency medical treatment becomes necessary when their medical conditions reach crisis or catastrophic levels. Plaintiffs and *amici* point out that diabetics, for example, often require daily insulin doses and blood glucose monitoring in order to stay alive, and that with such care they can lead healthy, productive lives. They are, however, denied this coverage. Treatment is unavailable until the condition reaches emergency proportions, involving insulin shock, renal failure and possibly amputation. Similarly, asthmatics receive no coverage for inhalers and medications to control their conditions. They receive no medical care until they experience severe attacks that can lead to suffocation and death. Contrasting it with emergency treatment, the Supreme Court has characterized ongoing medical care as a "basic necessity of life" (*see, Memorial Hosp. v Maricopa County*, 415 US 250, 259-261). "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" (*id.* at 261).

In this context, plaintiffs and *amici* argue that when such patients are treated in emergency settings, the hospitals are not permitted to release them without a discharge plan for necessary continuing health care services, citing Public Health Law § 2803 (1) (g). Because they cannot be readily discharged, many remain in hospital facilities. Those who are discharged experience a cycle of emergency, recovery, stabilization, deterioration and the onset of another emergency. All of this, plaintiffs and *amici* contend, could be avoided through ongoing medical treatment.

In *Barie* the work incentive requirement was an appropriate mechanism for identifying need. Here, however, the concept of need plays no part in the operation of section 122. Indeed, the statute suffers from an infirmity comparable to the one in *Tucker* and cannot be justified on the basis of a distinction between qualified aliens and PRUCOLs on the one hand, and citizens on the other. We conclude that section 122 violates the letter and spirit of article XVII, § 1 by imposing on plaintiffs an overly burdensome eligibility condition having nothing to do with need, depriving them of an entire category of otherwise available basic necessity benefits.[12]

430 *430 **B.**

Equal Protection

Plaintiffs argue that section 122 denies them equal protection under the United States and New York State Constitutions. The Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws" (US Const, 14th Amend, § 1). The New York State Constitution contains its own equal protection requirement (NY Const, art I, § 11). It is axiomatic that aliens are "persons" entitled to equal protection (*see,* Yick Wo v Hopkins, 118 US 356, 369 ["The fourteenth amendment to the constitution is not confined to the protection of citizens"]; *see also,* Mathews v Diaz, 426 US 67, 77; *Takahashi v Fish & Game Commn.*, 334 US 410, 419-420).

In considering whether a State statute violates the Equal Protection Clause, the Supreme Court applies different levels of scrutiny to different types of classifications (*see,* Clark v Jeter, 486 US 456, 461). The parties disagree as to the level of scrutiny section 122 must withstand. Plaintiffs urge this Court to apply strict scrutiny because section 122 creates classifications based on alienage. The State argues that section 122 implements Federal immigration policy and therefore must merely withstand rational basis scrutiny. We agree with plaintiffs.

As a general rule, the Supreme Court has strictly scrutinized State laws that create alienage classifications when distributing economic benefits or regulating economic activity (*see, e.g.,* Bernal v Fainter, 467 US 216, 227-228 [invalidating a Texas statute that required citizenship for notaries public]; Nyquist v Mauclet, 432 US 1, 7-12 [striking down a New York statute that restricted eligibility for Regents college scholarships based on alienage]; *In re Griffiths*, 413 US 717, 718-722 [invalidating a Connecticut statute that allowed only citizens to qualify for the bar examination]; Graham v Richardson, 403 US, at 370-376, *supra* [invalidating statutes in Arizona and Pennsylvania that limited welfare benefits based on citizenship]; *Takahashi v Fish & Game Commn.*, 334 US, at 414, 418-422, *supra* [striking down a California statute that granted
431 commercial fishing *431 licenses to citizens but denied them to aliens who were ineligible for citizenship]; *see generally,* 3 Rotunda & Nowak, Constitutional Law: Substance and Procedure § 18.12, at 469 [3d ed 1999]). Under strict scrutiny, a State statute will withstand an equal protection challenge only when the State can show that the law "furthers a compelling state interest by the least restrictive means practically available" (*see,* Bernal v Fainter, 467 US, at 227, *supra*).[13]

Heightened scrutiny is premised on the Supreme Court's view of the political process. The Court generally accords States broad discretion to create classifications in implementing economic and social welfare policy (*see,* Dandridge v Williams, 397 US 471, 485). In these instances, the Court leaves it to the political process to "bring about repeal of undesirable legislation" (*see,* United States v Carolene Prods. Co., 304 US 144, 152-153 n 4). If a statute has "some `reasonable basis,'" the Court will sustain it even if the classification "`is not made with mathematical nicety [or] results in some inequality'" (Dandridge v Williams, 397 US, at 485, *supra* [quoting Lindsley v Natural Carbonic Gas Co., 220 US 61, 78]). Recognizing, however, that "discrete and insular minorities" can be shut out of the political process, the Court has applied a more searching inquiry to statutes that draw classifications aimed at these groups (*see,* United States v Carolene Prods. Co., 304 US, at 152-153 n 4, *supra*).

In Graham v Richardson (403 US 365, 372, *supra*), the Supreme Court held that as a class, aliens are a "prime example of a `discrete and insular' minority * * * for whom such heightened judicial solicitude is appropriate." Lawful resident aliens benefit our country in a great many ways. Like citizens, they contribute to our economy, serve in the Armed Forces and pay taxes (*see,* Hampton v Mow Sun Wong, 426 US 88, 107 n 30; *In re Griffiths*, 413 US, at 722, *supra; see generally,* Notes,
432 *Constitutional Limitations on the Naturalization* *432 *Power,* 80 Yale L Journal 769, 803 [1971]) including, of course, taxes that fund State Medicaid. Nevertheless, aliens may not vote, which has historically inhibited their ability to protect their interests (*see,* Nyquist v Mauclet, 432 US 1, 12; Hampton v Mow Sun Wong, 426 US, at 107, *supra; see generally,*

Chemerinsky, Constitutional Law: Principles and Policies § 9.5.2, at 618-619 [1997]; *Notes and Legislation,* 17 NYU LQ Rev 242, 242-243 [1940]).

The State does not attempt to justify section 122 under a strict scrutiny standard.[14] Nor has it identified any "compelling governmental interest" that section 122 promotes. Instead, the State argues that strict scrutiny does not apply here. It contends that section 122 implements title IV's Federal immigration policy and should therefore be evaluated under the less stringent "rational basis" standard. To address this argument, we must compare State and Congressional legislative authority in the context of immigration and naturalization.

The Constitution empowers Congress to "establish [a] uniform Rule of Naturalization" (US Const, art I, § 8, cl [4]), "regulate Commerce with foreign Nations" (US Const, art I, § 8, cl [3]), "declare War" (US Const, art I, § 8, cl [11]) approve treaties (US Const, art II, § 2, cl [2]), and legislate over foreign affairs (*see, Toll v Moreno,* 458 US 1, 10, *supra; Mathews v Diaz,* 426 US, at 81 n 17, *supra*). In entertaining challenges to Federal immigration and naturalization statutes, the Supreme Court has interpreted these sources of authority to accord Congress—as distinguished from the States—considerable latitude (*see, Fiallo v Bell,* 430 US 787, 792-797; *Hampton v Mow Sun Wong,* 426 US, at 100-105, *supra; Kleindienst v Mandel,* 408 US 753, 765-770; *see generally,* Chemerinsky, Constitutional Law: Principles and Policies § 3.5.1, at 204-208,
433 *supra*). The Court has explained that "over no conceivable subject is *433 the legislative power of Congress more complete" (*Oceanic Steam Nav. Co. v Stranahan,* 214 US 320, 339).[15]

When allocating Federal welfare benefits, the Constitution does not prohibit Congress from distinguishing between aliens and citizens. In *Mathews v Diaz* (426 US 67, 69, 77-81, *supra*) a group of aliens challenged a Federal statute that denied aliens Medicare eligibility unless they had been admitted for permanent residence and resided in the United States for at least five years. The Court held that the "decision to share [our] bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence" (*id.* at 80). Moreover, when Federal welfare programs are jointly administered with the States, Congress may direct the States to implement national immigration objectives as long as the "Federal Government has by *uniform* rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass" (*see, Plyler v Doe,* 457 US, at 219 n 19, *supra* [emphasis added]).[16]

Relying on these cases, the State argues that section 122 does what title IV has authorized it to do with regard to Federal immigration policy. Plaintiffs contend, however, that the issue is not whether the State has followed the authorization. Rather, it is whether title IV can constitutionally authorize New York to determine for itself the extent to which it will discriminate against legal aliens for State Medicaid eligibility. Plaintiffs argue that it cannot, and we agree.

Graham v Richardson (403 US 365, *supra*) is at the center of our analysis. There, the State of Arizona administered a Federal disability program under Federal guidelines much the same as New York administers Medicaid. Arizona argued that because its 15-year residency period for aliens was impliedly authorized by Federal law, it did not violate the Fourteenth
434 *434 Amendment (*see, Graham v Richardson,* 403 US, at 382, *supra*). The Supreme Court rejected this contention, holding that a Federal statute authorizing "discriminatory treatment of aliens *at the option of States*" would present "serious constitutional questions" (403 US, at 382 [emphasis added]). The Court recognized that although the Federal government has broad constitutional power to distinguish among aliens in setting the rules for their admission and naturalization, "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause" (*see,* 403 US, at 382, *supra*). Indeed, the Court went on to state that a "congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity" (*see,* 403 US, at 382, *supra*).[17]

Additional Supreme Court decisions reinforce *Graham*'s requirement for uniformity in immigration policy (*see, Plyler v Doe,* 457 US, at 219 n 19, *supra* ["(I)f the Federal Government has by *uniform* rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction"] [emphasis added]). Moreover, in *Mathews v Diaz,* the Court recognized that when it comes to State welfare policy, "there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country" (*see, id.,* 426 US, at 85, *supra*). In distinguishing between Federal and State powers, the Court held that a "division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business" (*see, Mathews v Diaz,* 426 US, at 85, *supra*).

435 Finally, in *Hampton v Mow Sun Wong* (426 US 88, 104, *supra*), the Supreme Court drew limits on the power of entities *435 other than Congress or the President to make alienage classifications in furtherance of Federal immigration policy. In addressing whether Federal agencies could make such classifications for civil service eligibility, the Court concluded that if Congress or the President had created the classification, it could be justifiable as a valid exercise of immigration authority in the national interest (*see, id.*, 426 US, at 104, *supra*). When, however, it came to Federal agencies that did not deal directly with immigration, the Court was not willing to presume they would deliberately foster national immigration interests, which are "so far removed from [their] normal responsibilities" (*see, id.*, 426 US, at 105, *supra*). Surely this is also true of the States.

Title IV does not impose a *uniform* immigration rule for States to follow. Indeed, it expressly authorizes States to enact laws extending "any State or local public benefit" even to those aliens not lawfully present within the United States (8 USC § 1621 [d]). The converse is also true and exacerbates the lack of uniformity: Section 1622 (a) provides that, subject to certain exceptions, States are authorized to withhold State Medicaid from even those qualified aliens who are eligible for Federal Medicaid under PRWORA. Thus, in administering their own programs, the States are free to discriminate in either direction —producing not uniformity, but potentially wide variation based on localized or idiosyncratic concepts of largesse, economics and politics. Considering that Congress has conferred upon the States such broad discretionary power to grant or deny aliens State Medicaid, we are unable to conclude that title IV reflects a uniform national policy. If the rule were uniform, each State would carry out the same policy under the mandate of Congress—the only body with authority to set immigration policy.

In exercising its discretion under title IV, New York has chosen to continue Medicaid coverage for any PRUCOL who, as of August 4, 1997, was receiving Medicaid and was either diagnosed with AIDS or residing in certain licensed residential health care facilities. This demonstrates that New York—along with every other State—with Congressional permission is choosing its own policy with respect to health benefits for resident, indigent legal aliens. Thus, we address this case outside the context of a Congressional command for nationwide uniformity in the scope of Medicaid coverage for indigent aliens as a matter of federal immigration policy.

436 We conclude that section 122 is subject to—and cannot pass—strict scrutiny, notwithstanding title IV's authorization. *436 Because title IV authorizes each State to extend the ineligibility period for Federal Medicaid beyond the mandatory five years (*see,* 8 USC § 1612)[18] and terminate Federal Medicaid eligibility for certain refugees and asylees after seven years (*see,* 8 USC § 1612 [b] [1], [2] [A] [i]), it is directly in the teeth of *Graham* insofar as it allows the States to "adopt divergent laws on the subject of citizenship requirements for *federally* supported welfare programs" (*see,* 403 US, at 382, *supra* [emphasis added]). Moreover, title IV goes significantly beyond what the *Graham* Court declared constitutionally questionable. In the name of national immigration policy, it impermissibly authorizes each State to decide whether to disqualify many otherwise eligible aliens from State Medicaid.[19] Section 122 is a product of this authorization. In light of *Graham* and its progeny, title IV can give section 122 no special insulation from strict scrutiny review. Thus, section 122 must be evaluated as any other State statute that classifies based on alienage. We hold that section 122 violates the Equal Protection Clauses of the United States and New York State Constitutions insofar as it denies State Medicaid to otherwise eligible PRUCOLs and lawfully admitted permanent residents based on their status as aliens.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the case remitted to Supreme Court for further proceedings in accordance with this Opinion.

Order reversed, etc.

[1] Federal law requires the Immigration and Naturalization Service (INS) to issue permanent resident cards (commonly known as green cards) to lawfully admitted permanent residents (*see,* 8 USC § 1304 [d]).

[2] As distinguished from *illegal* aliens subject to deportation, this designation is used to classify aliens of whom the INS is aware, but has no plans to deport (*see generally,* Polen, *Salvaging a Safety Net: Modifying the Bar to Supplemental Security Income for Legal Aliens,* 76 Wash U LQ 1455, 1455 n 3 [1998]). The classification appears in numerous statutes and regulations (*see, e.g.,* 8 USC § 1254a [f]; 26 USC § 3304 [a] [14] [A]; 20 CFR §§ 416.1618, 416.1619; 42 CFR § 435.408). When and whether a particular alien meets a given provision's definition has generated considerable litigation (*compare Holley v Lavine*, 553 F2d 845, 849 [2d Cir], *cert denied sub nom. Shang v Holley*, 435 US 947, *with Sudomir v McMahon*, 767 F2d 1456, 1461 [9th Cir]).

[3] For purposes of this decision, we refer to federally subsidized Medicaid as "Federal Medicaid" and Medicaid entirely funded by the State and its localities as "State Medicaid." This litigation, and our holding, relate only to the latter category (*compare, Lewis v Thompson*, 252 F3d 567 [dealing with claims by illegal aliens for prenatal care under Federal Medicaid]).

[4] *See generally, Recent Legislation: Welfare Reform—Treatment of Legal Immigrants—Congress Authorizes States to Deny Public Benefits to Noncitizens and Excludes Legal Immigrants from Federal Aid Programs,* 110 Harv L Rev 1191 (1997); Hoke, *Symposium, State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge,* 9 Stan L & Pol'y Rev 115 (1998); *Development in Policy: Welfare Reform,* 16 Yale L & Pol'y Rev 221 (1997).

[5] Title IV is codified beginning at section 1601, title 8, of the United States Code. Title I of PRWORA provides block grants to States for temporary assistance to needy families. Congress designed these grants to reduce out-of-wedlock pregnancies and promote job preparation, work, marriage and two-parent families. Title II modifies eligibility requirements for Supplemental Security Income benefits for, among others, fugitive felons, probation and parole violators, prisoners and persons found to have fraudulently misrepresented their residences. Title III streamlines child support collection procedures, requiring uniformity throughout the States. Title V mandates a national study of children at risk of abuse or neglect. Title VI provides block grants to States to develop localized child care programs that promote parental choice and independence from public assistance. Titles VII and VIII make changes to the National School Lunch Act and the Food Stamp Act. Finally, title IX implements a variety of initiatives that, among other provisions, authorize States to test welfare recipients for controlled substances, require public housing agencies to provide certain information to law enforcement agencies and encourage the use of electronic benefit transfer systems.

[6] Illegal aliens and certain others—with whom we are not here concerned—are also non-qualified aliens (*see,* 8 USC § 1641).

[7] For example, section 1612 (b) (2) (A) (i) requires States to provide Federal Medicaid to certain refugees and asylees for seven years. Thereafter, States have authority to determine eligibility (*see,* 8 USC § 1612 [b] [1]). Title IV also requires States to provide Federal Medicaid to other qualified aliens, including lawfully admitted permanent residents who worked or can be credited with 40 qualifying quarters under the Social Security Act and legally residing veterans and active duty members of the United States Armed Forces (and their dependants) (*see,* 8 USC § 1612 [b] [2] [B]-[F]).

[8] Refugees, asylees, Cuban and Haitian entrants, veterans and their dependants, active duty soldiers in the United States Armed Forces and their dependants, and certain other qualified aliens are exempt from this restriction (*see,* 8 USC § 1613 [b]).

[9] Section 1621 (d) refers to "State authority to provide for eligibility of illegal aliens." Inasmuch as only PRUCOLs are before us, we need not decide the full scope of this provision. The statute obviously authorizes the State to provide State Medicaid to PRUCOLs.

[10] States must, for example, provide State Medicaid to otherwise eligible refugees, asylees, and Cuban and Haitian entrants, among others (*see,* 8 USC § 1622 [b]).

[11] The five-year waiting period does not apply to, among others, refugees, asylees and veterans (*see,* Social Services Law § 122 [1] [a]).

[12] In light of this determination, we do not address plaintiffs' argument under article XVII, § 3. In addition, we note the State's argument that it enacted section 122 in response to title IV. We recognize that Federal law in the area of immigration is preemptive (*see, Toll v Moreno,* 458 US 1, 10; *DeCanas v Bica,* 424 US 351, 354; *Graham v Richardson,* 403 US 365, 378; *cf. Minino v Perales,* 79 NY2d 883, 885). In view of our holding in part III.B, *infra,* however, we need not reach this issue.

[13] In *Plyler v Doe* (457 US 202, 223, *supra*), however, the Supreme Court applied an intermediate level of scrutiny to a State statute that denied public education to children who were not lawfully admitted into the United States. In this context, a State must demonstrate that its classification is "reasonably adapted" to further a "substantial goal of the State" (*id.* at 224, 226). In addition, the Supreme Court has carved out exceptions to strict scrutiny for State laws pertaining to aliens' eligibility for participating in the political process or holding influential public positions (*see, e.g., Foley v Connelie,* 435 US 291, 297; *Ambach v Norwick,* 441 US 68, 75-81; *Boyd v Nebraska ex rel. Thayer,* 143 US 135; *compare, Sugarman v Dougall,* 413 US 634, 643).

[14] The State notes only that under title IV, a State choosing "to follow the Federal classification in determining the eligibility of [qualified] aliens for public assistance shall be *considered* to have chosen the *least restrictive means* available for achieving the *compelling governmental interest* of assuring that aliens be self-reliant in accordance with national immigration policy" (*see,* 8 USC § 1601 [7] [emphasis added]). Given our system of separation of powers, a lawmaking body may not legislatively declare that a statute meets constitutional criteria (*see, Board of Trustees of Univ. of Ala. v Garrett,* 531 US 356, 365-366; *City of Boerne v Flores,* 521 US 507, 519).

[15] Congress has power to exclude aliens (*see, Chae Chan Ping v United States,* 130 US 581, 603) and may "order the deportation of aliens whose presence in the country it deems hurtful" (*see, Bugajewitz v Adams,* 228 US 585, 592). The States have no like power (*see, Plyler v Doe,* 457 US, at 219 n 19, *supra*).

[16] The Supreme Court has cautioned, however, that State "regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress" (*De Canas v Bica,* 424 US, at 358 n 6, *supra; see also, Toll v Moreno,* 458 US, at 12-13, *supra; Plyler v Doe,* 457 US, at 225-226, *supra*).

[17] The Constitution empowers Congress to "establish [a] *uniform* Rule of Naturalization" (US Const, art I, § 8, cl [4] [emphasis added]). The framers of the Constitution did not include the word "uniform" by accident. It was an imperative design. James Madison decried the disorder that resulted from the operation of the Privileges and Immunities Clause of the Articles of Confederation when each State had its own criteria for citizenship (*see,* Federalist LXII; *see also,* 2 Story, Commentaries on the Constitution of the United States § 1103, at 41 [1873]). Although we are not dealing with the Privileges and Immunities Clause of the United States Constitution here, the concern for uniformity is similarly present.

[18] New York has declined this invitation (*see,* Social Services Law § 122 [1] [b] [ii] [adopting the five-year ineligibility period]).

[19] To be sure, title IV provides States with some uniform directives (*see, e.g.,* 8 USC § 1613 [a], [b]; § 1621 [b]; § 1622 [b]). These directives, however, do not cure the infirmity before us.

U.S. Citizenship and Immigration Services

Proposed Change to Public Charge Ground of Inadmissibility

Self-sufficiency has long been a basic principle of United States immigration law. Since the 1800s, Congress has put into statute that individuals are inadmissible to the U.S. if they are unable to care for themselves without becoming a public charge and federal laws have stated that foreign nationals generally must be self-sufficient. Despite this history, public charge has not been defined in statute or regulations, and there has been insufficient guidance on how to determine if an alien who is applying for a visa, admission, or adjustment of status is likely at any time to become a public charge.

The Law:

Section 212(a)(4) of the INA: Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible[...] In determining whether an alien is excludable under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's-(I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills . . . ."

8 U.S.C. § 1601 (PDF)(1): "Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes."

8 U.S.C. § 1601 (PDF)(2)(A): "It continues to be the immigration of the United States that aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations."

DHS Proposed Rule:

A Notice of Proposed Rulemaking (NPRM) related to the public charge ground of inadmissibility under INA section 212(a)(4) was published in the Federal Register for a 60-day comment period. This allows members of the public to provide input on how DHS should administer this rule. After the comment period ends, DHS will carefully consider public comments and will publish a final rule in the Federal Register, along with the date it will go into effect.

This NPRM (proposed rule), if finalized, would enable the federal government to better carry out provisions of U.S. immigration law related to the public charge ground of inadmissibility. This proposed rule would change the standard that is used when determining whether an alien is likely at any time in the future to become a public charge, and is therefore inadmissible under section 212(a)(4) of the INA, ineligible for adjustment of status, or ineligible for admission or a visa. The rule would also make nonimmigrant aliens who are public charges generally ineligible for change of status and extension of stay. USCIS believes this proposal is more consistent with Congressional intent regarding the public charge ground of inadmissibility.

The proposed rule would apply to individuals seeking admission to the United States from abroad on immigrant or nonimmigrants visas, individuals seeking to adjust their status to that of lawful permanent residents from within the United States, and individuals within the United States who hold a temporary visa and seek to either extend their stay in the same nonimmigrant classification or to change their status to a different nonimmigrant classification.

This rule would not impact groups of aliens that Congress specifically exempted from the public charge ground of inadmissibility, such as refugees, asylees, Afghans and Iraqis with special immigrant visas, nonimmigrant trafficking and crime victims, individuals applying under the Violence Against Women Act, and special immigrant juveniles. Additionally, the rule excludes consideration of benefits received by U.S. citizen children of aliens who will acquire citizenship under either section 320 or 322 of the INA, and by alien service members of the U.S. Armed Forces.

Questions and Answers

Q. When does this rule go into effect?

A. With the advance posting of the NPRM on its website and in the Federal Register, DHS is announcing a *proposed* rule, not a final rule. After DHS carefully considers public comments received on the proposed rule, DHS plans to issue a final public charge rule that will include an effective date. In the interim, and until a final rule is in effect, USCIS will continue to apply the current public charge policy (*i.e.*, the 1999 INS Interim Field Guidance).

Q. What changes does the rule propose?

A. The proposed rule would change the standard that DHS uses when determining whether an alien is likely to become a "public charge," at any time in the future and is therefore inadmissible and ineligible for adjustment of status or admission into the United States. The rule would also make nonimmigrant aliens who receive or are likely to receive designated public benefits above the designated threshold generally ineligible for change of status and extension of stay.

Q. Who is subject to the public charge inadmissibility ground?

A. Individuals seeking immigrant or nonimmigrant visas abroad, individuals seeking admission to the United States on immigrant or nonimmigrant visas, and individuals seeking to adjust their status from within the United States. The proposed rule also would consider certain receipt of public benefits by individuals within the United States in a nonimmigrant (i.e., temporary) status who are seeking to either extend their stay or change their status.

While some lawful permanent residents can be subject to the public charge ground of inadmissibility because specific circumstances dictate that they be considered applicants for admission, most lawful permanent residents are not subject to inadmissibility determinations, including public charge inadmissibility. Therefore, lawful permanent residents who subsequently apply for naturalization would *not* be subject to inadmissibility determinations, including a public charge inadmissibility determination.

Q. Who is exempt from this rule?

A. Congress has exempted certain classes of aliens from the public charge ground of inadmissibility. For instance, refugees, asylees, and Afghans and Iraqis with special immigrant visas are exempt from public charge.
In addition, DHS is proposing not to consider in the context of a public charge determination, receipt of public benefits by alien members of the U.S. armed forces, serving in active duty or in any of the Ready Reserve components, or received by the alien spouse or children of such service members. Similarly, DHS would not consider Medicaid benefits received by foreign-born children, as defined in section 101(c) of the INA, who either have U.S. citizen parents, have been adopted by U.S. citizen parents, or who are coming to the United States to be adopted by U.S. citizens, and where such children will automatically acquire citizenship pursuant to section 320 or 322 of the INA upon or soon after their admission to the United States.

Q. Which benefits are included in public charge inadmissibility determinations?

A. Public charge adjudications would only account for receipt of designated public benefits, including cash assistance for income maintenance, Medicaid (with limited exceptions for Medicaid benefits paid for an "emergency medical condition," and for certain disability services related to education), Medicare Part D Low Income Subsidy, the Supplemental Nutrition Assistance Program (SNAP, or food stamps), any benefit provided for institutionalization for long-term care at government expense, Section 8 Housing Choice Voucher Program, Section 8 Project-Based Rental Assistance, and Public Housing.
The covered benefits generally represent the largest Federal programs for low-income people by total expenditure that address basic living needs such as income, housing, food, and medical care.
Under the proposed rule, receipt of public benefits that are not covered by the 1999 Interim Field Guidance (i.e., Medicaid, the Medicare Part D Low Income Subsidy, SNAP, and the designated housing benefits) would not be considered for public charge purposes unless the receipt occurred after a final rule becomes effective.

Q. What amount of public assistance matters?

A. The proposed rule contains three different types of thresholds, as follows:

- The proposed threshold for those benefits that can be monetized easily (cash benefits, SNAP or food stamps, and Section 8 vouchers and rental assistance) is 15 percent of the Federal Poverty Guidelines (FPG) for a household of one within any period of 12 consecutive months, based on the per-month FPG for the months during which the benefits are received. For 2018, the equivalent 15 percent of the FPG dollar value is $1,821. As a result, under the proposed rule, if DHS determines that within any period of 12 consecutive months, an individual is likely to receive these "monetizable" benefits in a cumulative amount above the threshold, DHS would consider the alien inadmissible and ineligible for adjustment of status on public charge grounds.
- The proposed threshold for those benefits that cannot be monetized easily (Medicaid, the Medicare Part D Low Income Subsidy, and Public Housing) is receipt of such benefits for more than 12 months in the aggregate within a 36-month period (such that, for instance, receipt of two non-monetizable benefits in one month counts as two months). As a result, under the proposed rule, if DHS determines that in any 36-month period in the future, an individual is likely to receive these "non-monetizable" benefits for a cumulative duration above the threshold, DHS would consider the alien inadmissible and ineligible for adjustment of status on public charge grounds.
- The proposed rule also contains a third standard, under which a person would be considered likely to become a public charge if he or she is likely to receive a monetizable benefit below the threshold, plus one or more non-monetizable benefits for longer than 9 months.

Q. What period of benefits receipt is considered?

A. By law, the public charge inadmissibility determination is a prospective determination based on the totality of the circumstances. In making this determination, DHS would consider any current and past receipt of included public benefits above the designated thresholds as a factor in the totality of the circumstances to the extent probative in the determination; e.g., receipt of a small amount of public benefits for a short period of time many years ago would be less probative then more recent receipt of a greater amount and longer duration. The proposed rule also contains a "heavily weighted negative factor" for current receipt of public benefits or past receipt above the designated threshold within the past 36 months, i.e., within the past 36 months preceding the time of submission of an application or petition.

Q. Whose benefits are considered?

A. Under the proposed rule, DHS would only consider the direct receipt of benefits by the individual alien applicant. Receipt of benefits by dependents and other household members would not be considered in determining whether the alien applicant is likely to become a public charge. Similarly, any income derived from such benefits received by other household members could not be considered as part of the alien applicant's household income.

Q. Which benefits are not considered?

A. Many benefits are not considered as part of the proposed rule. In fact, the rule does not include consideration of emergency medical assistance, disaster relief, national school lunch programs, foster care and adoption, and head start. While the Department will take public comments on what benefits should be included or excluded, it is important to note that the proposed rule only includes certain public benefit programs mentioned above.

Q. How will DHS determine whether someone is likely to become a public charge for admission or adjustment purposes?

A. Inadmissibility based on the public charge ground is determined by looking at the mandatory factors set forth in INA section 212(a)(4) and making a determination of the applicant's likelihood of becoming a public charge at any time in the future based on the totality of the circumstances. This means that the adjudicating officer must weigh both the positive and negative factors when determining whether someone is likely at any time in the future to become a public charge. At a minimum, a U.S. Citizenship and Immigration Services (USCIS) officer must consider the following factors when making a public charge inadmissibility determination:

- Age;
- Health;
- Family status;
- Assets, Resources, and Financial status; and
- Education and skills.

DHS is also proposing to consider the alien's prospective immigration status, expected period of admission, and affidavit of support, when an affidavit of support is required under section 212(a)(4)(C) or (D) of the Act.

Q. What factors weigh heavily in favor of a determination that alien is likely to become a public charge?

A. The following factors would generally weigh heavily in favor of a finding that an alien is likely to become a public charge:

- The alien is not a full-time student and is authorized to work, but is unable to demonstrate current employment, and has no employment history or no reasonable prospect of future employment;
- The alien is currently receiving or is currently certified or approved to receive one or more of the designated public benefits above the threshold;
- The alien has received one or more of the designated public benefits above the threshold within the 36 months immediately preceding the alien's application for a visa, admission, or adjustment of status;
- The alien has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide for him- or herself, attend school, or work, and the alien is uninsured and has no prospect of obtaining private health insurance; or
- The alien had previously been found inadmissible or deportable based on public charge.

Q. What factors would weigh heavily against a determination that an alien is likely to become a public charge?

A. The following factors would weigh heavily against a finding that an alien is likely to become a public charge:

- The alien has financial assets, resources, and support of at least 250 percent of the Federal Poverty Guidelines for a household of the alien's household size; or
- The alien is authorized to work and is currently employed with an annual income of at least 250 percent of the Federal Poverty Guidelines for a household of the alien's household size.

Last Reviewed/Updated: 10/16/2018