

**PRESERVING ALIENS' AND MIGRANT WORKERS'
ACCESS TO CIVIL LEGAL SERVICES:
CONSTITUTIONAL AND POLICY CONSIDERATIONS**

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INTRODUCTION

In 2001, in *Legal Services Corporation v. Velazquez*, the United States Supreme Court struck down as unconstitutional Congress' restriction that had prevented legal services lawyers from challenging any welfare laws or regulations in the course of representing individual clients seeking welfare benefits.¹ This case falls squarely within the theme of this symposium—suing the government—because it challenged Congress' attempt to control the arguments that clients represented by legal services lawyers were able to raise in lawsuits against the government. *Velazquez* is also relevant to this theme because it was itself a lawsuit against the government, in which the Court tread new ground in its discussion of how the “welfare challenge” restriction at issue in the case was viewpoint discriminatory, and in its discussion of how that restriction violated the separation of powers by depriving the courts of essential information.

The *Velazquez* Court did not address the constitutionality of a whole host of other restrictions that the Gingrich Congress imposed on legal services lawyers in 1996.² These restrictions include bans on

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¹ 531 U.S. 533, 548-49 (2001). The *Velazquez* ruling, which has been discussed at length elsewhere, will not be the focus of this article. See, e.g., Laura K. Abel & David S. Udell, *If You Gag the Lawyers Do You Choke the Courts? Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor*, 29 FORDHAM URB. L.J. 873 (2002); Burt Neuborne & David Udell, *Legal Services Corporation v. Velazquez*, CLEARINGHOUSE REV. (May-June 2001); Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835, 856-62 (2002).

² The Supreme Court denied certiorari regarding the plaintiffs' challenge to a number of the other restrictions. See *Velazquez v. Legal Servs. Corp.*, 532 U.S. 903, 903 (2001).

representing certain alien workers, representing clients in class action litigation, claiming attorneys' fee awards, engaging in certain types of representation before legislative and administrative bodies, and many other important types of representation.³ Nor did it address the constitutionality of similar restrictions that some state funders impose on funding for civil legal services. As with the "welfare challenge" restriction, the remaining restrictions are relevant to the theme of this symposium for two reasons: 1) they make it harder for low-income people to obtain legal representation in lawsuits against the government and in other civil proceedings; and 2) legal challenges to them would entail suing the government.

This article focuses on a subset of the remaining federal and state restrictions: those that make it impossible for certain categories of alien workers, and in some instances migrant workers, to obtain access to civil legal services for the poor. In an era of increasing restrictions on individuals' ability to seek legal redress against the government, low-income workers are particularly vulnerable. When workers cannot enforce their rights, employers can exploit them by paying less than the minimum wage, failing to pay overtime, providing substandard working conditions, or violating the laws in other ways. Part I argues that, much as the "welfare challenge" restriction was intended to insulate the federal government's welfare reform laws from court challenges, restrictions on the ability of alien and migrant workers to access legal services are intended to insulate the employment practices of certain employers from application of the applicable labor and employment laws. Just as the "welfare challenge" restriction violated the separation of powers, the aliens and migrants restrictions warp our system of justice and our regime of rights enforcement.

³ The restrictions, which apply to all funding received by a legal services program that receives any funding from the federal Legal Services Corporation [hereinafter "LSC"], are imposed through a series of riders enacted by Congress in connection with the annual appropriation for LSC. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 107-77, Title V, 115 Stat. 748, 794-95 (2001); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, FY 2001, Pub. L. No. 106-553, 114 Stat. 2762A-101 (2000); Department of State and Related Agency Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-49 (1999); Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2681, 2681-107 (1998); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 502(a)(2), 111 Stat. 2440, 2510-11 (1997); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 502, 110 Stat. 3009, 3009-59-60 (1996); Omnibus Consolidated Recission Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1321-53-56 (1996). The relevant LSC regulations are codified at 45 C.F.R. §§ 1600-1644 (2000). See also 42 U.S.C. § 2996i(c) (2003) (imposing certain restrictions on LSC and private funding, but not on state and local government funding).

Focusing on Virginia as an example, the remaining Parts discuss the constitutional infirmities of two restrictions on legal services for alien workers and migrants that are currently in effect, and of one restriction on legal services for alien workers that some legal services critics have threatened to impose. Part II discusses the right to travel implications of a ban on migrant legal services imposed on Virginia state funding for legal services in 2001. Part III discusses the equal protection infirmities of a restriction on providing legal services to certain categories of legal aliens—copied from the restriction on legal services provided by federal Legal Services Corporation (hereinafter “LSC”) grantees—that the Virginia legislature came close to passing in 2000 and again in 2001. In the event that a legislator in Virginia or any other state again proposes extending the federal restrictions onto state funding, it is crucial that legal services advocates understand these constitutional infirmities. Finally, Part IV discusses the equal protection problems with a restriction existing in a number of states, including Virginia, and also imposed on federal LSC grantees—the denial of legal services to children of undocumented workers.

I. RESTRICTING THE AVAILABILITY OF CIVIL LEGAL SERVICES FOR ALIEN AND MIGRANT WORKERS IS BAD POLICY

An agribusiness hires two Spanish-speaking workers to work its fields. The manager decides not to pay them, but he does not want them to make a scene. So when they are done, he hands them each a check with “VOID” written in the corner. It is not until the men leave the premises and try to cash their checks that they realize they have been tricked. If the men could get into court, they could use the checks as evidence that the employer hired them and owed them money. The employer does not care that he has left a trail, though. He knows that the men are undocumented, are scared of being deported, know little about the American legal system, and could not, in any event, hire a lawyer. Although the men are legally entitled to the wages that they earned, there is very little chance that they will be able to enforce their rights.⁴

The employer feels invincible because he knows how hard it is for alien workers to enforce their legal rights. Undocumented aliens are particularly vulnerable to workplace exploitation. Although they are legally entitled to the minimum wage, health and safety protections,

⁴ This scenario is based on an event that happened in Virginia. See Henry Weinstein, *Powerful Foes of Legal Aid: State Money for a Virginia Justice Center for Migrants Is Slashed After Business Protests. Dispute Focuses on Who Needs Government-Funded Attorneys*, L.A. TIMES, May 30, 2001, at A1.

and other types of legal protections,⁵ they generally find it almost impossible to enforce those rights because they are scared that if they do so their employers will retaliate by reporting them to the Immigration and Naturalization Service.⁶ The vulnerability extends to some categories of aliens in the country legally, however. Aliens can be vulnerable to exploitation because they lack the language skills to navigate the legal system or seek help doing so; because they lack familiarity with our legal system and consequently do not know that they have rights or how to enforce those rights; because they work in jobs where they are physically isolated from other people, from people who speak their language, or from advocates who can help them; because they work such long hours that they find it difficult to reach out for help; or because they are dependent on their employers for their housing, food and other necessities of life.⁷ Some aliens are particularly vulnerable because their employers have brought them into the country and have the power to send them home at the least provocation, or have sponsored them for citizenship and can likewise stop their sponsorship if the worker complains.⁸

⁵ See Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 415-16 (1995) (noting that undocumented workers are protected by the Fair Labor Standards Act, the National Labor Relations Act [hereinafter "NLRA"], employment discrimination statutes, and workers' compensation regimes).

Last year, the Supreme Court reaffirmed an earlier ruling that undocumented workers are protected by the NLRA. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144-45 (2002) (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984)). See also Memorandum From Arthur F. Rosenfeld, National Labor Relations Board General Counsel, to All Regional Directors et al., *Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens After Hoffman Plastic Compounds, Inc.* (July 19, 2002), available at 2002 WL 1730518 (N.L.R.B.G.C.). In *Hoffman*, the Court ruled that undocumented workers are not entitled to back pay awards under the NLRA, but that employers who violate the NLRA rights of undocumented workers may be subject to "other significant sanctions." *Hoffman*, 535 U.S. at 150-52.

⁶ See William R. Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. DAVIS L. REV. 1075, 1082 (2000) (describing how fear of deportation inhibits undocumented workers, or documented workers with undocumented people in their family, from enforcing their legal rights).

⁷ See, e.g., LSC, *The Ertenborn Commission Report*, 15 GEO. IMMIGR. L.J. 99, 106 (2000) ("Because of their limited English language ability and isolation within communities, many aliens are particularly vulnerable to exploitation by unscrupulous sales and marketing enterprises, landlords and other business, and employers."); *id.* at 115-16 (discussing farmworkers' dependence upon employers, fear of retaliation, geographic isolation, long hours, and lack of knowledge regarding legal services); *id.* at 122-26 (describing workers' isolation and their lack of access to legal aid); Lori Nessel & Kevin Ryan, *Migrant Farmworkers, Homeless and Runaway Youth: Challenging the Barriers to Inclusion*, 13 LAW & INEQ. 99, 130 (1994) (discussing the case of a farmworker client who was evicted from her housing for speaking to a legal services lawyer).

⁸ This is particularly true with respect to employees in the country on special immigrant visas, such as agricultural employees on H-2A visas, non-agricultural employees on H-2B visas, and household workers on diplomatic visas. See Andrew Scott Kosegi, *The H-2A Program: How The Weight of Agricultural Employer Subsidies Is Breaking the Backs of Domestic Migrant Farm Workers*, 35 IND. L. REV. 269, 288 (2001); LSC, *supra* note 7, at 117-19; Chisun Lee, *Women Raise the City:*

Employers who hire immigrant workers may claim that they hire aliens not because they want vulnerable workers but rather because aliens are the only people willing to do the work. Whether this is true for various sectors of the economy is in dispute.⁹ More importantly, the restrictions on access to legal services for alien workers provide evidence that the vulnerability of alien workers is part of a conscious system aimed at subverting our regime of employment rights. In fact, the American Farm Bureau Federation and its state affiliates, whose members typically hire large numbers of alien and migrant workers,¹⁰ are among the most vociferous opponents of legal services generally, and of legal services for alien and migrant workers in particular.¹¹

Domestic Disturbance; The Help Set Out to Help Themselves, VILLAGE VOICE, Mar. 13-19, 2002, available at <http://www.villagevoice.com/issues/0211/lee.php> (last visited Feb. 18, 2003) (discussing domestic workers brought into the United States on special visas by diplomats); Martin Mbguwa, *Working for Slave Wages: Diplomats' Household Help Are Toiling and Suffering for Pennies*, N.Y. DAILY NEWS, June 10, 2001, at 13. Household and other workers whose employers are sponsoring them for citizenship are in a similar situation. See Martha Davis, *No Papers, No Rights, No Safety*, NAT'L L.J., Feb. 22, 1993, at 15:

An undocumented woman from Russia working as a nanny in Minnesota was raped by her employer. Because her employer was sponsoring her for a green card, she did not leave the job and did not report the crime to the police. Similarly, a Chinese woman in the New York area was raped by her employer. To prevent her from reporting the crime, the employer threatened to cut off the sponsorship that he had initiated.

⁹ See generally *Hearing on Agriculture Workforce Needs, Before the Subcomm. on Immigration of the Senate Judiciary Comm.*, 106th Cong. (1999) (statement of Josh Wunsch, Michigan Farm Bureau), available at 1999 WL 306431 (F.D.C.H. 1999) (discussing a farm labor shortage in Michigan); Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers From Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 589 (2001) (arguing that the workers who employers bring into the United States on H-2A immigrant visas are not necessary "to get the crops picked" because farmworkers have a high unemployment rate even during the peak growing season, and there is a surplus of farmworkers in the country); LSC, *supra* note 7, at 102-03 (noting that agricultural employers assert that many U.S. citizens do not want to work in agriculture, while organized labor and farmworker advocates have contested this assertion).

¹⁰ In California, for instance, 62% of all agricultural workers are foreign-born Latinos, and another 3% are foreign-born Asians. CALIFORNIA WORKING IMMIGRANT SAFETY AND HEALTH COALITION, *IMPROVING HEALTH AND SAFETY CONDITIONS FOR CALIFORNIA'S IMMIGRANT WORKERS* 6 (Nov. 2002) (citing D. Lopez & C. Feliciano, *Who Does What? California's Emerging Plural Labor Force*, in RUTH MILKMAN, *ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA* (2000)). Nationally, migrant and seasonal workers constitute a large percentage of the agricultural workforce. See U.S. GENERAL ACCOUNTING OFFICE, *HIRED FARMWORKERS: HEALTH AND WELL-BEING AT RISK*, GAO/HRD-92-46, at 8 (Feb. 1992). According to some estimates, as much as 40% to 50% of seasonal farmworkers in the United States are undocumented aliens. Holley, *supra* note 9, at 588.

¹¹ See BRENNAN CENTER FOR JUSTICE, *HIDDEN AGENDAS: WHAT IS REALLY BEHIND THE ATTACKS ON LEGAL AID LAWYERS?* 5-10 (2001), available at http://www.brennancenter.org/resources/atj_series/article7.pdf (last visited Apr. 14, 2003) [hereinafter "BRENNAN CENTER FOR JUSTICE, HIDDEN AGENDAS"]; Alexander D. Forger, *Address: The Future of Legal Services*, FORDHAM URB. L.J. 333, 340 (1998):

The Farm Bureau is by far the most powerful influence [among LSC's critics]. I think, if Congress dared to do so, they would eliminate permitted representations of migrant workers. The Farm Bureau, in its zeal to discredit LSC, alleges lawyer misconduct such as extortion, blackmail, and the like. It does so because LSC is extremely unpopular in

Since at least 1978, they have worked for the abolition of the federal LSC, urging that in its stead the federal government issue vouchers so low-income people can hire private lawyers.¹² In arguing for the abolition of LSC, the Farm Bureau has pointed to the advocacy that LSC grantees perform on behalf of the migrant and seasonal workers its members employ,¹³ many of whom are aliens. Since at least the late 1980s, they have backed the imposition of restrictions on federal legal services funding.¹⁴

The pressure has succeeded in diminishing substantially the ability of alien and migrant workers to obtain legal counsel to enforce their rights. Since 1980, Congress has barred LSC grantees from using federal funds to represent undocumented aliens,¹⁵ and since 1983 it has barred them from using federal funds to represent even some categories of documented aliens.¹⁶ The documented aliens excluded from eligibility include workers recruited and brought into this country by their employers under the federal H-2B visa program for non-agricultural employees; individuals granted Temporary Protected Status (granted to people from selected countries, like Honduras and

its efforts to enforce employment, housing, and environmental requirements to which the growers are subject.

See also Douglas S. Eakely, *Role of the Legal Services Corporation in Preserving Our National Commitment to Equal Access to Justice*, 1997 ANN. SURV. AM. L. 741, 742 (1997) (discussing "the most virulent of our foes, the American Farm Bureau, which has consistently lobbied against any advocacy on behalf of migrant farmworkers and their children"); Holley, *supra* note 9, at 613-15.

¹² BRENNAN CENTER FOR JUSTICE, HIDDEN AGENDAS, *supra* note 11, at 5.

¹³ In 1980, for example, the American Farm Bureau argued that LSC should be defunded because, among other reasons, "Legal Services attorneys . . . are soliciting business and stirring up controversy particularly among migrant and seasonal workers." Letter from Vernie R. Glasson, American Farm Bureau Federation, to Peter Rodino, Chairman, U.S. House Judiciary Committee (Apr. 10, 1980), in *Legal Services Corporation Reauthorization: Hearing Before the House Comm. on Judiciary, Subcomm. on Courts, Civil Liberties, and the Admin. of Justice* (1981).

¹⁴ See BRENNAN CENTER FOR JUSTICE, HIDDEN AGENDAS, *supra* note 11, at 6.

¹⁵ See Act of Sept. 24, 1979, Pub. L. No. 96-9868, 93 Stat. 416 (1979) (making appropriations for the Departments of State, Justice, and Commerce, the Judiciary, and related agencies for the fiscal year ending September 30, 1980, and for other purposes).

¹⁶ See Act of Dec. 21, 1982, Pub. L. No. 97-377, 96 Stat. 1830, 1874-76 (1982) (making continuing appropriations and for other purposes). Today, only aliens falling within certain categories are eligible for legal services from offices that receive federal LSC funding. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134 § 504(a)(11), 110 Stat. 1321 (1996). Those categories include lawful permanent residents; aliens who are spouses, parents or unmarried children under age 21 of U.S. citizens and who have pending applications for permanent residence; agricultural workers with H-2A visas (limited to representation on employment contract matters only, such as wages, housing and transportation); asylees and refugees; individuals granted withholding of deportation; refugees granted conditional entry prior to April 1, 1980; women battered by their spouses, children battered by their parents and women whose children have been battered by a spouse (limited to representation to prevent or obtain relief from domestic violence); and victims of severe forms of trafficking in persons in the United States. See *id.*; Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104-208, § 502(a)(2), 110 Stat. 3009, at 59 (1997) (containing the domestic violence exception); Victims of Trafficking Protection Act, 22 U.S.C. § 7105(b)(1)(B) (2001).

Nicaragua, which the U.S. has recognized as being in turmoil and therefore unsafe); asylum applicants; parolees; special immigrant juveniles (undocumented children adjudicated state dependents because of abandonment, neglect or abuse); aliens in exclusion or deportation proceedings; aliens who have not filed for permanent residence but who are the spouses, parents or unmarried children under age 21 of U.S. citizens; individuals on temporary visas (e.g., student visas); and others.¹⁷ Since 1996, Congress has extended its aliens restrictions to cover even the non-federal funding received by LSC grantees.¹⁸ The only exceptions to these restrictions are that LSC grantees can use non-federal funds to represent aliens who are victims of domestic violence and can use federal funds to represent victims of illegal trafficking.¹⁹

States have also put various restrictions on legal services for aliens and migrants. For example, Virginia prohibits assistance to migrant workers.²⁰ Texas, Virginia, and Washington State all prohibit assistance to undocumented aliens.²¹

Many aliens and migrants excluded from eligibility for legal services assistance are unable to find legal assistance elsewhere.²² For example, in Arkansas and Wyoming there are no legal services programs assisting people ineligible for assistance from LSC grantees.²³ The unrestricted legal services program in Tennessee does not take employment cases.²⁴ The difficulty finding legal representation is particularly acute for agricultural workers who live in rural areas where there are few pro bono attorneys, and where the few pro bono attorneys do not speak languages other than English, lack the resources to conduct outreach to the workers, lack expertise regarding

¹⁷ See 45 C.F.R. § 1626 (2000) (listing aliens eligible for representation by LSC grantees); Memorandum from Esther Olivarría Cruz to Marcia Cypen (Dec. 5, 1995), in 141 Cong. Rec. H14182-06, H14201 (Dec. 7, 1995) (discussing people ineligible for representation by LSC grantees).

¹⁸ See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, § 504(a)(11), 110 Stat. 1321 (1996).

¹⁹ See Victims of Trafficking Protection Act, 22 U.S.C. § 7105(b)(1)(B) (2001); Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104-208, § 502(a)(2), 110 Stat. 3009, at 59 (1997) (containing the domestic violence exception).

²⁰ See discussion *infra* Part II.

²¹ See discussion *infra* Part IV.

²² LSC, *supra* note 7, at 135.

²³ Arkansas Legal Services, *Arkansas Legal Services' Response to Program Letter 2000-7*, at 3 (Sept. 13, 2002) available at <http://www.rin.lsc.gov/Stplns/Arkansas%20Self%20Evaluation%20Report.pdf> (last visited Apr. 14, 2003); Letter from Janet Millard, Director, Wyoming Legal Services, to LSC 13 (Apr. 16, 2002), available at <http://www.rin.lsc.gov/Stplns/Wyoming%20Self%20Evaluation%20Report.pdf> (last visited Apr. 14, 2003).

²⁴ Letter from Douglas A. Blaze, Tennessee Alliance for Legal Services, to Randi Youells, LSC 13 (Sept. 20, 2001) (on file with authors).

legal issues often faced by the workers, and represent agricultural employers and thus are conflicted out of representing workers.²⁵

Attempts to deprive immigrant workers of access to counsel are not limited to restrictions on who lawyers can help—some employers also try to prevent legal services lawyers from entering their premises to talk to workers.²⁶ This is a particular problem for farmworkers and domestic workers, who often live on the employer's premises.²⁷ Human Rights Watch has reported that employers who recruit foreign workers and bring them into North Carolina on special H-2A immigrant visas have used the local sheriff to scare away legal services lawyers the workers had called.²⁸ Likewise, farmers in New York have threatened to physically harm farmworker advocates or to have them arrested, and have physically blocked them from entering the workers' housing areas.²⁹ The many reported cases holding that employers cannot bar legal services lawyers from their premises make clear that the North Carolina and New York employers are not unique.³⁰

Some employers have also tried other tactics to prevent their workers from seeking legal assistance, such as maintaining blacklists of workers who talk to legal services lawyers.³¹ Testimony to LSC's Erlenborn Commission in 1999 established that agricultural employers and the employers' recruiters in North Carolina, Virginia, and Florida maintain such blacklists.³² Some employers specifically warn their workers that if they talk to legal services lawyers they will be blacklisted, and employers who have brought their workers into the country on temporary work visas sometimes send the employees home in retaliation for talking to lawyers.³³ Employers have also required their workers to destroy "Know Your Rights" manuals distributed by legal services lawyers,³⁴ confiscated mail sent from legal services lawyers to

²⁵ LSC, *supra* note 7, at 131-34, 136-37.

²⁶ *Id.* at 125.

²⁷ Nessel & Ryan, *supra* note 7, at 126.

²⁸ See Holley, *supra* note 9, at 597 (citing HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 146, 147-48 (2000)).

²⁹ Nessel & Ryan, *supra* note 7, at 129.

³⁰ See, e.g., Petersen v. Talisman Sugar Corp., 478 F.2d 73, 82 (5th Cir. 1973); State v. Shack, 277 A.2d 369 (N.J. 1971).

³¹ Holley, *supra* note 9, at 596-97.

³² LSC, *supra* note 7, at 119-20.

³³ *Id.* at 199.

H-2A aliens' fear of retaliation stems from observing punitive measures taken against fellow workers or from being told by the employer or the employer's agent not to talk to legal services. The relationship between H-2A workers' unwillingness to complain and their bonded status is illustrated by the fact that when the possibility arose that Florida H-2A sugar industry workers may be able to remain permanently in the United States and work anywhere in the U.S., the number of workers willing to complain to legal services significantly increased.

³⁴ Holley, *supra* note 9, at 597.

their clients,³⁵ and warned workers that legal services lawyers are their enemies and could even physically harm workers.³⁶

These facts suggest the existence of a regime where employers can hire immigrant and migrant workers—and sometimes recruit them and bring them into this country too—knowing that those workers are virtually powerless to enforce their legal rights. There are several problems with this. First, it is a basic tenet of our legal system that the legal system works best when all parties are represented. Although it is unclear how far the right to counsel in civil cases extends,³⁷ the federal government and many state governments have recognized that providing counsel to indigent people in such cases is essential to ensure that the legal system functions fairly. For example, in creating the federal LSC in 1974, Congress declared,

[T]here is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances . . . providing legal assistance to those who face an economic barrier to adequate counsel will serve best the ends of justice . . . for many of our citizens, the availability of legal services has reaffirmed faith in our government and laws.³⁸

It has, of course, never been the case that everyone who needs counsel in a civil case is able to get it. But the presumption has been that the unavailability of counsel is the unfortunate result of inadequate funding, and is viewed as an inevitability in a regime where so many social services needs compete for scarce tax dollars. The fact that the exclusion of aliens and migrant workers from eligibility for legal services results, at least in part, from pressure brought to bear by the workers' employers—their legal adversaries—subverts this belief. As David Luban argues, “taking out your adversary's lawyers is dirty

³⁵ LSC, *supra* note 7, at 124.

³⁶ *Id.* at 124-25. Lori Nessel reports that when she worked for Farmworker Legal Services of New York, a farmworker asked her “if it was true that we had killed farmworkers. He said that the grower had told the farmworkers not to speak with anyone from legal services because ‘you come onto the farms talking to workers and then take them away and kill them.’” Nessel & Ryan, *supra* note 7, at 100.

³⁷ See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981) (requiring a case-by-case determination regarding whether the Due Process Clause requires a right to counsel in cases involving the termination of parental rights).

³⁸ 42 U.S.C. § 2996 (1974). Likewise, in creating the New York Interest on Lawyer Account Fund, the New York legislature declared that “the availability of civil legal services to poor persons is essential to the due administration of justice.” N.Y. STATE FIN. LAW § 97-v (McKinney 2001) (Historical & Statutory Notes) (quoting 1983 N.Y. LAWS 659, § 1). See also 30 ILL. COMP. STAT. ANN. 765/5 (West 2001):

Equal justice is a basic right that is fundamental to democracy in this State, and the integrity of this State and this State's justice system depends on protecting and enforcing the rights of all people Not-for-profit legal services organizations make a substantial contribution to the expeditious operation and maintenance of the courts in civil cases Equal justice is an integral part of the general public welfare.

law,” where the adversaries try not to make the best arguments but rather to simply silence their opponents.³⁹

The exclusion of aliens from eligibility for legal services also subverts our regime of legal rights enforcement. Both legal and undocumented aliens in this country are generally entitled to the same legal protections as everyone else.⁴⁰ This stems in part from the belief underlying the Equal Protection Clause of the Fourteenth Amendment that everyone subject to the laws of this country should also benefit from the protection of those laws.⁴¹ Without access to legal services, however, the legal protections that aliens have are often meaningless. As Senator Schumer (then a Congressman) stated in 1986, arguing that agricultural workers in the country on H-2A visas should be eligible for LSC-funded assistance,

[Y]ou can give people all the rights you want, but if they have no way to enforce those rights, those rights are meaningless. We all know that INS is terribly overburdened; we all know that the Department of Agriculture, the Department of Labor are overburdened If we are not going to have legal services, why kid ourselves? Why not just abolish all the laws that are supposed to protect these folk; because if you do not have legal services, the laws are unenforceable and useless.⁴²

Extending legal protections to non-citizens also inures to the benefit of citizens, because when only citizens are able to enforce legal rights, there are incentives for employers to hire only non-citizens, for landlords to rent only to non-citizens, and so on.⁴³ The

³⁹ David Luban, *Four Ways the Law Keeps Poor People From Getting Heard in Court*, LEGAL AFF. 54 (May-June 2002); see also David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 211 (2003).

⁴⁰ See *supra* note 5 and accompanying text.

⁴¹ See *Plyler v. Doe*, 457 U.S. 202, 213 (1982). As Justice Field wrote in *Wong Wing v. United States*, 163 U.S. 228, 242-43 (1896):

A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar—in face of the great constitutional amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.

⁴² 132 Cong. Rec. H9867 (daily ed. Oct. 10, 1986) (statement of Rep. Schumer), quoted in LSC, *supra* note 7, at 152 n.408.

⁴³ See H.R. Rep. No. 99-682, pt. 1, at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662 (“[A]pplication of the NLRA [to undocumented workers] ‘helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.’”) (internal citation omitted); H.R. Rep. No. 99-682, pt. 2, at 8-9 (1986), reprinted in 1986 U.S.C.C.A.N. 5757, 5758:

[Congress should not] limit the powers of State or Federal labor standards agencies such as the Occupational Safety and Health Administration, the Wage and Hour Division of the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, or Labor arbitrators, in conformity with existing law, to

exclusion of aliens from eligibility for legal services has, however, made a mockery of the equal protection of our laws and has created precisely these types of skewed incentives. As Gregory Schell, the managing attorney of the Farmworker Justice Project at Florida Legal Services has explained, “employers’ perverse response [to the exclusion of undocumented workers from LSC-funded legal services] is to make sure that they do not hire any documented workers.”⁴⁴

II. DENYING LEGAL SERVICES TO MIGRANT WORKERS VIOLATES THE RIGHT TO TRAVEL GROUNDED IN ARTICLE IV’S PRIVILEGES AND IMMUNITIES CLAUSE

Legal services programs and their funders sometimes face intense pressure from the agribusiness lobby and from other employers to deny assistance to migrant workers. For example, in 2001 the Virginia Farm Bureau agreed to stop lobbying the state legislature for the imposition of broad restrictions on Virginia’s state legal services funding only if it received a promise that the funding would not be used to support legal services for migrants in employment matters.⁴⁵ As a result, today recipients of such funding are barred from using that funding to assist migrant workers.⁴⁶ This outright denial of legal services to migrant workers has serious constitutional implications, particularly in the wake of the United States Supreme Court’s decision in *Saenz v. Roe* affirming the right to travel.

To understand the incongruity between a restriction denying legal services to migrants and the constitutional right to travel, it is first necessary to understand the link between the right to travel and legal services lawyers. *Shapiro v. Thompson*,⁴⁷ which established that, even when there is no constitutional right to a benefit, government cannot deny the benefit to migrants in violation of the right to travel, was the

remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.

See also Gordon, *supra* note 5, at 416 n.34 (citing others who make this argument); LSC, *supra* note 7, at 104, 109 & n.69 (noting that agricultural workers brought into this country on H-2A visas by their employers are eligible for representation by LSC grantees “to ensure that the employment of such workers would not depress the wages and working conditions of U.S. workers”).

⁴⁴ BRENNAN CENTER FOR JUSTICE, HIDDEN AGENDAS, *supra* note 11, at 11.

⁴⁵ See Jen McCaffery, *Legal Board Drops Migrant Clients*, ROANOKE TIMES, Jan. 31, 2001, at B4; E-mail from Mark Braley, Legal Services Corporation of Virginia, to Marilyn Goss, et al. (Jan. 26, 2001) (on file with authors). The restrictions that the Farm Bureau had originally pushed the legislature to impose are described in Part III, *infra*.

⁴⁶ McCaffery, *supra* note 45, at B4; Braley, *supra* note 45.

⁴⁷ 394 U.S. 618 (1969).

first case brought to the United States Supreme Court by neighborhood legal services lawyers.⁴⁸ *Shapiro* was part of a strategy by some of the first legal services lawyers to establish basic legal rights for their clients who received government benefits.⁴⁹ The strategy was remarkably successful, establishing “[b]aseline rights of procedural and substantive fairness” for low-income people.⁵⁰ Even today, *Shapiro* remains one of the most well known legal services cases.⁵¹

Two decades later, in *Saenz v. Roe*,⁵² the Supreme Court breathed new life into the right to travel doctrine and grounded it in the text of the Constitution. The Court reaffirmed its *Shapiro* holding that a burden on the right to travel is subject to strict scrutiny, and reiterated *Shapiro*'s observation that the Court “had long ‘recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.’”⁵³ The Court then found that California’s two-tiered welfare benefit structure, which capped new residents to the level of welfare benefits granted by their former state of residence, violates this long-standing right.

Despite these clear holdings, and despite the deep investment of the legal services community in developing and safeguarding the right to travel, just two years after *Saenz* the Virginia restriction denying representation to migrant workers in employment matters was imposed. This funding restriction, which made it virtually impossible for the approximately 10,000 migrant workers in Virginia to obtain legal services in such cases,⁵⁴ flies in the face of the precedents set by both *Shapiro* and *Saenz*.

In *Shapiro*, the Court held that three state statutes denying welfare benefits to new state residents violated their right to travel. Although the Court found it unnecessary to identify the specific constitutional source of the right, it recounted its historical recognition of the right to travel and decisions grounding the right in various constitutional

⁴⁸ *King v. Smith*, 392 U.S. 309 (1968), was the first argued by a legal services backup center, but *Shapiro* was the first argued by lawyers from neighborhood offices. MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, at 76-77 (1993).

⁴⁹ See generally DAVIS, *supra* note 48, at 142 (noting that legal services lawyers collaborated with recipient activists).

⁵⁰ *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Shapiro*, 394 U.S. 618; *King*, 392 U.S. 309).

⁵¹ See Matthew Diller, *The New Localism in Welfare Advocacy*, 19 ST. LOUIS U. PUB. L. REV. 413, 414 (2000) (citing *Shapiro* as one of “the most well known cases brought by poverty lawyers”).

⁵² 526 U.S. 489 (1999).

⁵³ *Id.* at 499 (quoting *Shapiro*, 394 U.S. at 629).

⁵⁴ McCaffery, *supra* note 45, at B4.

provisions.⁵⁵ In *Saenz*, the Court expanded on *Shapiro*, identifying three specific components of the right to travel: (1) the right of a citizen of one state to enter and leave another state; (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily in the second state; and (3) the right to be treated like other citizens of that state for those travelers who elect to become permanent residents.⁵⁶ The Court declined to identify any textual basis for the first component, suggesting rather that the right to enter and leave another state may simply be “a necessary concomitant of the stronger Union the Constitution created.”⁵⁷ The Court grounded the second component of the right to travel in the Privileges and Immunities Clause contained in Article IV, Section 2 of the Constitution.⁵⁸ The third component the Court found “plainly identified” in the Fourteenth Amendment’s Privileges or Immunities Clause.⁵⁹ Having found that California’s two-tiered welfare law violated this third component of the right to travel, the Court applied strict scrutiny.⁶⁰

It is the second component of the right to travel—grounded in Article IV, Section 2’s Privileges and Immunities Clause—that is compromised by restrictions on legal services for migrant workers. That clause states: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states.” Its purpose is set forth in *Paul v. Virginia*.⁶¹

It was undoubtedly the object of the clause . . . to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits

⁵⁵ *Shapiro*, 394 U.S. at 630. The Court cited the following cases as grounding the right to travel in the Privileges and Immunities Clause of Article IV, § 2: *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Corfield v. Coryell*, 6 F. Cas. 546, 552 (E.D. Pa. 1825) (No. 3230). The Court cited *Edwards v. California*, 314 U.S. 160, 181, 183-85 (1941) (Douglas & Jackson, J.J., concurring separately), as grounding the right to travel in the Privileges or Immunities Clause of the Fourteenth Amendment. Finally, the Court cited *Passenger Cases*, 48 U.S. (7 How.) 283 (1849), as grounding the right in the Commerce Clause. *Shapiro*, 394 U.S. at 630 n.8.

⁵⁶ *Saenz*, 526 U.S. at 500-03.

⁵⁷ *Id.* at 501 (quoting *United States v. Guest*, 383 U.S. 745, 748 (1966)).

⁵⁸ *Id.*

⁵⁹ *Id.* at 503.

⁶⁰ The *Saenz* Court grounded the right to travel at issue in that case in the Fourteenth Amendment’s Privileges or Immunities Clause because there was no dispute that the plaintiff class consisted of newly arrived residents of the state of California; the state subjected different classes of state residents to differential treatment. *See id.* at 505. In contrast, here, by definition, migrant workers are most likely not residents of Virginia. Most have entered the state solely for the purpose of obtaining work, and have no intention of remaining in the state. Accordingly, the denial of legal services to these individuals does not amount to differential treatment of state residents, and the right to travel grounded in the Privileges or Immunities Clause of the Fourteenth Amendment, as identified in *Saenz*, is probably not implicated.

⁶¹ 75 U.S. (8 Wall.) 168 (1869).

discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.⁶²

The Privileges and Immunities Clause has long been understood to protect against discrimination against nonresidents “seeking to ply their trade, practice their occupation, or pursue a common calling with the State.”⁶³ As the Court noted in *Hicklin v. Orbeck*, Article IV’s Privileges and Immunities Clause ensures that “a resident of one State is constitutionally entitled to travel to another State for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other State.”⁶⁴ States may treat nonresidents differently only where there is “something to indicate that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed,” such that there is a “reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them.”⁶⁵

Clearly, then, this Clause calls into question the constitutionality of restrictions on legal services for migrant workers, at least as they pertain to migrant farmworkers who are also United States citizens.⁶⁶ By denying legal services only to migrant workers—a class of workers who by definition are mostly nonresidents—but not to other, resident, workers, the restriction treats the workers as “unfriendly alien[s]”⁶⁷ when temporarily in Virginia. Moreover, by defining the class by the nature of their work, the Clause discriminates against nonresidents seeking to “practice their occupation,”⁶⁸ namely by frustrating their efforts to protect themselves from exploitation in the workplace.

There are two ways that the Virginia migrants restriction could overcome Article IV’s prohibition on this type of discrimination. First, the restriction could be justified according to the analysis out-

⁶² *Id.* at 180.

⁶³ *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978).

⁶⁴ *Id.* at 525 (citing *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871)).

⁶⁵ *Id.* at 526 (quoting *Toomer v. Witsell*, 334 U.S. 385, 398-99 (1948)).

⁶⁶ The protections of Article IV’s Privileges and Immunities Clause extend only to citizens. See *Matthews v. Diaz*, 426 U.S. 67, 78 n.12 (1976) (providing examples of statutes distinguishing between citizens and aliens). See also *Zobel v. Williams*, 457 U.S. 55, 73 n.3 (1982) (O’Connor, J., concurring) (explaining that the Clause’s use of “citizen” does not include aliens and thus prohibition of discrimination against aliens must be found in other constitutional provisions). This limitation is, of course, a significant one, as the majority of migrant farmworkers may not, in fact, be U.S. citizens. See *supra* note 10 and accompanying text.

⁶⁷ *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

⁶⁸ *Hicklin*, 437 U.S. at 524.

lined in *Hicklin*. Specifically, the legal services restriction would have to be aimed at remedying a “peculiar source of evil” constituted by migrant workers. Yet, the State would be hard-pressed to articulate a legitimate “source of evil” that the restriction seeks to remedy. As in *Saenz*, it is unlikely that there is some type of “magnet” theory at work, i.e. that migrant workers are attracted to Virginia for the purpose of obtaining legal services.⁶⁹ In fact, the case would be even more difficult to make than in *Saenz*, because it is implausible that people would move to Virginia for the purpose of subjecting themselves to legal wrongs so that they may then seek legal redress. Moreover, as the Court held in *Shapiro* and reaffirmed in *Saenz*, a state may not penalize needy persons migrating to a new state by denying them benefits, even if their reason for traveling to the new state was to seek benefits.⁷⁰ Likewise, it seems implausible that the State would consider the provision of legal services to a traditionally exploited class of workers to be a source of evil in need of a remedy. Even if migrant workers were, in fact, the “evil” targeted by the restriction, there is no substantial relationship between the provision and the problem, as it is unlikely that denying legal services to such workers will dissuade them from entering the state: many of them are recruited by their employers to work in the state, and many do not know of their legal rights, or lack thereof, prior to arriving.

The second argument that could be made to distinguish the legal services restrictions from *Saenz* rests on an interpretation of that case’s approval of the continued validity of bona fide residency requirements. Specifically, if *Saenz* approves of bona fide residency requirements when legal services and other services for the poor are at issue, the state may not be restricted by the Privileges and Immunities Clause protections.⁷¹ A line of cases does, in fact, uphold residency requirements for certain benefits, such as in-state university tuition. For example, in *Martinez v. Bynum*,⁷² the Court held that a bona fide residency requirement is permissible when the requirement furthers a substantial state interest in assuring that services provided for its residents are enjoyed only by residents.⁷³ In that case, the Court held that Texas could deny free public schooling to a child who had been physically present in the district, but who was determined to be living in the district for the sole purpose of getting a free public education. The Court, defining residency as requiring both physical presence

⁶⁹ See *Saenz*, 526 U.S. at 504-05.

⁷⁰ See *Saenz*, 526 U.S. at 505; *Shapiro v. Thompson*, 394 U.S. 618, 632 (1969).

⁷¹ See *Saenz*, 526 U.S. at 503-04.

⁷² 461 U.S. 321 (1983).

⁷³ *Id.* at 328.

and an intention to remain, held this to be a bona fide residency requirement.⁷⁴

Similarly, it may be argued that restrictions on legal services for migrant workers are merely bona fide residency requirements. Migrant workers by definition have no intention of remaining in their host state, as they generally enter a state only for the purpose of obtaining employment. Thus, one could argue that the restriction is intended to ensure that state legal services are reserved for a state's own residents.

Unlike in the case of true bona fide residency requirements, however, the legal services restriction does not appear to single out migrant workers because they are non-residents, thereby preserving legal services for in-state residents only. As the Court recognized in *Martinez*, bona fide residency requirements are valid when they require that a person establish residence before taking benefits: "A bona fide residence requirement simply requires that the person does establish residence before demanding the services that are restricted to residents."⁷⁵ Here, the Virginia restriction is not aimed at ensuring that persons first establish in-state residency. Rather, the restriction appears simply to discriminate against one class of out-of-state residents, migrant workers, regardless of whether they ever intend to or do in fact become state residents.

Regardless, *Saenz* indicates that the provision of legal services may, in fact, fall outside this analysis altogether.⁷⁶ In *Saenz*, the Court considered those "bona fide residency" cases in which it had held that states may charge higher tuition or deny public schooling to non-residents, and made a clear distinction between persons who are seeking welfare benefits and students seeking education:

[B]ecause whatever [welfare] benefits they receive will be consumed while they remain in California, there is no danger that recognition of their claim will encourage citizens of other States to establish residency for just long enough to acquire some readily portable benefit, such as a divorce or a college education, that will be enjoyed after they return to their original domicile.⁷⁷

In short, the *Saenz* Court clearly distinguished non-portable welfare benefits from the more portable benefits that may motivate individuals to move to a state. Similarly, while migrant workers may, in-

⁷⁴ *Id.* at 330. See also *Starns v. Malkerson*, 401 U.S. 985 (1971) (summarily affirming a decision allowing Minnesota to make in-state tuition available only to students who had been in-state residents for at least one year).

⁷⁵ *Martinez*, 461 U.S. at 329.

⁷⁶ *Saenz* thus casts doubt on the constitutionality of another existing legal services restriction: Iowa's Poverty Grant Program, which restricts eligibility for legal services to residents of the state. See IOWA CODE ANN. § 13.34 (West 2002).

⁷⁷ *Saenz*, 526 U.S. at 505.

deed, travel to their host state for the purpose of obtaining work, it strains credulity to argue that they travel to the state in order to avail themselves of the legal services of the state. Rather, these workers find themselves in need of legal services in order to challenge the exploitation they may face *once in the host state*. The analogy to welfare benefits—which also address a need arising in the host state—is strong, and thus legal services restrictions on migrant workers are likely outside the bona fide residency exception to the protections offered by the Privileges and Immunities Clause.

Thus, the Privileges and Immunities protections offered by Article IV provide a strong argument that the Virginia migrants restriction violates the right to travel, as least for migrant workers who are also United States citizens. It is worth noting, however, that the right to travel violated by this legal services restriction may be grounded in other Constitutional provisions, as well. Without affirmatively choosing one, the *Shapiro* court recognized several sources protecting the right to travel, including the Privileges and Immunities Clause, the Privileges or Immunities Clause, the Commerce Clause, and the Fifth Amendment Due Process Clause, as well as the simple understanding that it is “a right so elementary [it] was conceived from the beginning to be a necessary concomitant of a stronger Union the Constitution created.”⁷⁸ *Saenz’s* grounding within the Privileges and Immunities Clause of Article IV of the right to travel from one state to another free from discrimination does not in any way conflict with *Shapiro* or thereby necessarily supercede *Shapiro’s* recognition of the multiple sources for the right to travel. What is clear, however, is that by singling out migrant workers for exclusion from state funded legal services in employment matters, the government discriminates against one class of individuals traveling to a state for purposes of seeking employment, long-recognized to be a violation of the fundamental right to travel.

III. STATE LEGAL SERVICES FUNDERS’ DENIAL OF LEGAL SERVICES TO VARIOUS CATEGORIES OF DOCUMENTED ALIENS VIOLATES EQUAL PROTECTION

Since 1996, when Congress imposed far-ranging restrictions on the activities of legal services programs that receive any funding from the federal Legal Services Corporation,⁷⁹ legal services advocates have

⁷⁸ *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) (quoting *United States v. Guest*, 383 U.S. 745, 758 (1966)). See cases cited *supra* note 55 (cases in which the Court had previously grounded the right to travel).

⁷⁹ The restrictions, which bar legal services lawyers from participating in class actions, claiming attorneys’ fee awards, representing prisoners and many legal aliens, lobbying, and many other activities, apply to the lawyers’ private funding as well as their federal funding. Depart-

been afraid that states would be tempted to follow suit.⁸⁰ The fear is that states will assume that the federal restrictions set some sort of standard for the activities in which lawyers for low-income clients should be able to engage.⁸¹ Moreover, states may assume that if the federal government has imposed the restrictions then they must be legal. But, as this Part argues, at least with respect to restrictions on certain categories of legal aliens, it would be unconstitutional for states to follow the federal example.

In early 2000, and again in 2001, the advocates' prediction almost came true when the Virginia legislature threatened to impose on recipients of state funding for legal services essentially the same restrictions that Congress imposes on recipients of federal LSC funding.⁸² Like the federal restrictions, the proposed restrictions included bans on representing clients in class action litigation, claiming attorneys' fee awards, certain types of representation before legislative and administrative bodies, and many other important types of representa-

ments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 107-77, Title V, 115 Stat. 748, 794-95 (2001); Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1321-53-56 (1996).

⁸⁰ See David S. Udell, *Implications of the Legal Services Struggle for Other Government Grants for Lawyering for the Poor*, 25 FORDHAM URB. L.J. 895, 898 (1998) (warning that "while efforts to identify alternatives to LSC funding . . . should be applauded, they likely will generate the same kinds of restrictions that now govern LSC").

⁸¹ This argument has certainly been used by proponents of various restrictions. For example, in support of a bill that would have imposed on recipients of Virginia state legal services funding the same restrictions currently imposed on recipients of federal legal services funding, see discussion *infra* Part III, a spokeswoman for the Virginia Farm Bureau said, "We just felt all legal services programs should be subject to the federal restrictions." Pamela Stallsmith, *Migrant Workers Lose Funding; Va. Assistance for Legal Services to Be Cut Off*, RICHMOND TIMES-DISPATCH, Feb. 14, 2001, at A1.

The Virginia Farm Bureau has likewise accused legal services lawyers who do not receive any federal funding of using state funding to "circumvent the federal restrictions." *Id.*; see also Jen McCaffery, *Bill Would Limit Legal Aid for State's Migrant Workers; Rules Could Block "Justice for Some of the Most Vulnerable Workers in Virginia"*, ROANOKE TIMES, Jan. 28, 2001, at B1. This accusation implies that the federal restrictions were intended to be a standard that applies to all legal services lawyers, regardless of the source of their funding. However, since the federal restrictions apply only to recipients of federal funding, organizations that do not receive any federal funding are not bound by the restrictions. It is hardly fair to accuse them of "circumventing" restrictions that do not bind them and were not intended to bind them.

⁸² See H.B. 1942, 2001 Gen. Assem., Reg. Sess. (Va. 2001) (imposing on state legal services funding "the same restrictions placed on recipients of LSC funds as set forth in § 504 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996," with specific exceptions regarding legislative and administrative advocacy, timekeeping and other administrative requirements, and helping victims of domestic violence regardless of alienage status). See also McCaffery, *supra* note 81, at B1 (describing subsequent bill introduced in 2001 by Virginia State Delegate Terry Kilgore); McCaffery, *supra* note 45, at B4 (describing Kilgore bill and a companion budget amendment); Pamela Stallsmith, *Farm Workers Measure to Get Further Study*, RICHMOND TIMES-DISPATCH, Mar. 1, 2000, at A6 (describing a bill introduced in 1999-2000 by Virginia State Senator Randy J. Forbes).

tion.⁸³ One of the most devastating restrictions would have limited the categories of aliens eligible for legal services, making a wide variety of aliens legally in the country ineligible for state-funded legal services.⁸⁴ In particular, the several thousand workers recruited and brought into this country by their employers under the federal H-2B visa program for nonagricultural employees would have been made ineligible for legal services at any office that received state funding.⁸⁵

The restrictions bill passed the state Senate in 2000, and the following year, after it was reintroduced, it was widely expected to pass.⁸⁶ Passage of the bill was avoided only when the Farm Bureau agreed to a compromise in the form of the migrants restriction discussed below in Part II.⁸⁷ As this Part argues, if another state considers imposing the federal restrictions on state funding, everyone involved in the funding process should be aware that states lack the power to copy the federal aliens restrictions.⁸⁸

The Constitution grants the political branches of the federal government power over the conduct of foreign affairs and immigration

⁸³ See *supra* note 3 and accompanying text.

⁸⁴ See *supra* notes 15-19 and accompanying text (listing the categories of aliens eligible for representation from LSC grantees). The Virginia bill would have barred state-funded legal services from being provided to all categories of aliens ineligible for representation from LSC grantees. Although the LSC restrictions contain an exception allowing victims of trafficking to obtain representation, the Virginia bill contained no such exception. H.B. 1942, 2001 Gen. Assem., Reg. Sess. (Va. 2001).

⁸⁵ Virginia employers bring workers into the country on H-2B visas to work in the vegetable packing, seafood and landscaping industries. In 2000, the over 250 Virginia employers who applied for H-2B visas brought 5,000 workers into Virginia from countries including Mexico and Guatemala. McCaffery, *supra* note 81, at B1; Weinstein, *supra* note 4, at A1.

⁸⁶ See Jennifer Bier, *Left Out in the Cold: Deal Costs Migrant Workers Their Counsel*, LEGAL TIMES, Feb. 19, 2001, at 1; Stallsmith, *supra* note 81, at A1 (quoting Mark Braley).

⁸⁷ See Braley, *supra* note 45.

⁸⁸ The constitutionality of the other restrictions in the bill is beyond the scope of this article. However, it is worth noting that in February 2001, the U.S. Supreme Court struck down as viewpoint discriminatory and violative of the separation of powers the federal restriction on LSC grantees challenging welfare reform laws in the course of representing an individual client. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001). The imposition of this restriction by a state would likely be unconstitutional as well.

Additionally, the proposed restrictions on claiming attorneys' fee awards and engaging in class action litigation may violate the separation of powers mandated by the Virginia constitution, VA. CONST. art. III, § 1, although further analysis regarding the requirements of Virginia's separation of powers provision is necessary. See Abel & Udell, *supra* note 1, at 896-903 (discussing the ways in which the federal attorneys' fee award and class action restrictions violate the separation of powers required by the federal Constitution, and suggesting that similar state restrictions may run afoul of similar state constitutional provisions).

Finally, one of the proposed restrictions—on informing potential clients of their legal rights and then offering to represent them—clearly violates the rights of lawyers and potential clients under the First Amendment to the federal Constitution. See *In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415, 437 (1963); Plaintiffs' Memorandum of Law Supporting Motion for Preliminary Injunction, at § IV, *Velazquez v. Legal Servs. Corp.*, 985 F. Supp. 323 (E.D.N.Y. 1997) (No. 97-Civ-182).

and naturalization.⁸⁹ The United States Supreme Court has ruled that decisions by the federal government to grant or deny benefits to aliens implicates these powers.⁹⁰ Consequently, courts treat alienage classifications created by the executive and legislative branches with deference and subject such classifications to only rational basis scrutiny under the Equal Protection Clause of the Fifth Amendment.⁹¹

State governments, on the other hand, lack the authority to regulate immigration, and their alienage classifications are thus afforded no deference. State alienage classifications have consequently been struck down under two constitutional theories. First, the United States Supreme Court has held that states lack the authority to impose any burdens on aliens other than those that the federal government has specifically contemplated.⁹² Congress has not specifically contemplated imposing on all state funding for legal services the restrictions it has imposed on recipients of LSC funding. In fact, to the extent that there is any legislative history bearing on this issue, it reveals that Congress believed that state governments and other legal services funders would fund the representation of clients and matters that the federal government declined to fund.⁹³ Consequently, states

⁸⁹ See U.S. CONST. art. I, § 8, cl. 3 (empowering Congress to regulate foreign commerce); *id.* art. I, § 8, cl. 4 (empowering Congress “[t]o establish an uniform Rule of Naturalization”); *id.* art. I, § 8, cls. 10-11 (empowering Congress to declare war and to define and punish offenses against the law of nations); *id.* art. II, § 2, cl. 2 (empowering the Senate to advise and consent on the appointment of ambassadors and the making of treaties); *id.* art. II, §§ 2-3 (naming the President Commander-in-Chief of the armed forces and empowering him to make treaties, with the advice and consent of the Senate, and send and receive ambassadors). See also Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 494 (2001) (noting that although the immigration power is not specifically enumerated in the Constitution it is “universally recognized”).

⁹⁰ *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (“[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 . . . [D]ecisions in these matters may implicate our relations with foreign powers.”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.”).

⁹¹ *Diaz*, 426 U.S. at 82.

⁹² See, e.g., *Toll v. Moreno*, 458 U.S. 1, 12-13 (1982) (enunciating “the broad principle 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’”) (quoting *De Canas v. Bica*, 424 U.S. 351, 358 n.6 (1976)).

⁹³ The relevant legislative history has to do with proposals to eliminate LSC, not restrict it, but the underlying assumption that state governments and other funders will fill in voids is what is relevant here. For example, in 1995 Congressman Robert Dornan (R-Cal.) argued that the absence of LSC—or its functional equivalent at the federal level—will not leave women and children without access to the legal system. LSC-funded programs already receive substantial resources from state and local governments, private entities, the United Way, the NAACP and the ACLU, just to name a few.

Testimony Before the House of Representatives Judiciary Committee on Legal Services Reauthorization, 104th Cong. (1995) (statement of Rep. Robert K. Dornan), available at 1995 WL 446736

lack the authority to copy onto state funding the federal government's aliens restriction.

Second, the United States Supreme Court has held that state alienage classifications are subject to classic equal protection analysis.⁹⁴ According to this analysis, if the classifications discriminate against a suspect class or impinge on a fundamental right they are subject to strict scrutiny.⁹⁵ Aliens present within this country are a suspect class, and alienage classifications are consequently subject to strict scrutiny, because aliens are a "prime example of a 'discrete and insular' minority."⁹⁶ Aliens can be shut out of the political process, because they are generally barred from voting.⁹⁷ This leaves the protection of their rights and interests largely dependent on the judiciary. Additionally, aliens have long been the subject of invidious discrimination, as is clear from the many United States Supreme Court cases overturning state governmental attempts to deny aliens access to employment or benefits.⁹⁸ This, too, may make it appropriate to treat aliens as a suspect class.⁹⁹ Additionally, as the Supreme Court has repeatedly noted, aliens pay taxes and contribute to the economy, and some can even be called into the armed forces, so "[i]t is appropriate that a State bear a heavy burden" when it discriminates against

(F.D.C.H. 1995). Likewise, in 1996, U.S. Representative Charles Taylor (R.-N.C.) urged a reduction in LSC's funding, arguing that "[t]he poor will not be denied free legal services," in part because of the "millions of dollars of increases in interest on lawyers' for trust accounts." 142 CONG. REC. H8149, H8177 (1996).

⁹⁴ *Diaz*, 426 U.S. at 84-85.

⁹⁵ *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).

⁹⁶ *Graham v. Richardson*, 403 U.S. 365, 372 (1971). This article discusses only those constitutional protections available to aliens present in the country and does not attempt to assess those available to aliens outside the country.

⁹⁷ *Aliessa v. Novello*, 754 N.E.2d 1085, 1095 (N.Y. 2001). See also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (noting that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

⁹⁸ See, e.g., *Bernal v. Fainter*, 467 U.S. 216 (1984) (state attempted to exclude certain aliens from being notary public); *Plyler*, 457 U.S. 202 (state attempted to exclude children of illegal aliens from public schools); *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (state attempted to exclude certain aliens from state financial assistance for higher education); *In re Griffiths*, 413 U.S. 717 (1973) (state attempted to bar aliens from admission to the bar); *Graham* (states attempted to exclude certain aliens from public assistance programs).

⁹⁹ See *Plyler*, 457 U.S. at 216 n.14 ("Several formulations might explain our treatment of certain classifications as 'suspect.' Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective."); Mitchell Kurfis, *The Constitutionality of California's Proposition 187: An Equal Protection Analysis*, 32 CAL. W. L. REV. 129, 150 (1995) (noting that "a history of invidious discrimination" is a factor in finding a group to be a suspect class). But see *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445-46 (1985) (holding that a history of discrimination, immutable disabilities, and political powerlessness are not sufficient to create a suspect class).

them.¹⁰⁰ Aliens consequently constitute a suspect class, and state government discrimination against them is generally subject to strict scrutiny.¹⁰¹

The Supreme Court cases holding that state government alienage classifications are subject to strict scrutiny have involved lawful permanent residents.¹⁰² Consequently, with the exception of the children of undocumented aliens,¹⁰³ the Supreme Court has not yet had occasion to determine the level of scrutiny applicable to state government classifications involving other types of aliens.¹⁰⁴

However, the logic of the cases involving lawful permanent residents dictates that strict scrutiny also be applied to state classifications involving at least some of the aliens that state versions of the federal restrictions would exclude.¹⁰⁵ The Supreme Court has consistently held that all aliens—even those in the country illegally—are people for purposes of the Equal Protection guarantee of the Fourteenth Amendment.¹⁰⁶ Like permanent resident aliens, all other types of aliens are generally ineligible to vote and are consequently shut out of the political process.¹⁰⁷ Other types of aliens are as likely as permanent resident aliens to be the objects of prejudice. And, like per-

¹⁰⁰ *In re Griffiths*, 413 U.S. at 722; see also *Aliessa*, 754 N.E.2d at 1095 (citing these contributions by aliens as a reason state alienage classifications are subject to strict scrutiny).

¹⁰¹ *Graham*, 403 U.S. at 372.

¹⁰² See, e.g., *Bernal*, 467 U.S. 216; *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Nyquist*, 432 U.S. 1; *Examining Bd. v. Flores de Otero*, 426 U.S. 572 (1976); *In re Griffiths*; *Sugarman v. Douglass*, 413 U.S. 634 (1973); *Graham*, 403 U.S. at 367, 369. See also *Wishnie*, *supra* note 89, at 506 n.66 (“[T]he aliens in *Graham* were permanent resident aliens So too were the plaintiffs in all but two of the subsequent Supreme Court decisions regarding local anti-immigrant discrimination.”).

¹⁰³ See discussion *infra* Part IV.

¹⁰⁴ See *Wishnie*, *supra* note 89, at 506 n.66 (“The Court . . . has not considered which level of scrutiny to apply to state discrimination against thousands of other legal immigrants, from student and employment visa holders to refugees and asylum seekers.”).

In *Toll v. Moreno*, the Court struck down Maryland’s denial of low in-state tuition rates to nonimmigrant aliens, including holders of G-4 visas, but the Court’s ruling rested on Supremacy Clause grounds, not equal protection grounds. 458 U.S. 1, 9-10 (1982). The federal government grants G-4 visas to employees of certain international organizations and their families. Noting that the federal government also grants a variety of tax benefits to G-4 visa holders as an inducement for the international organizations to locate themselves in the United States, the Court held that by requiring G-4 visa holders to pay higher tuition than other domiciliaries Maryland was frustrating this important federal policy. *Id.* at 16.

¹⁰⁵ See *Wishnie*, *supra* note 89, at 568 n.384:

[W]hile the current alienage jurisprudence does not extend clearly to legal immigrants other than permanent residents, the rationale of *Graham* and its progeny would seem to apply with equal force to other legally present noncitizens, who also work, pay taxes, and often form extensive and long-term ties to their communities in the United States.

¹⁰⁶ *Plyler v. Doe*, 457 U.S. 202, 210-15 (1982).

¹⁰⁷ Kiyoko Kamio Knapp, *The Rhetoric of Exclusion: The Art of Drawing a Line Between Aliens and Citizens*, 10 GEO. IMMIGR. L.J. 401, 405 (1996).

manent resident aliens, other types of aliens can pay taxes,¹⁰⁸ be gainfully employed, and otherwise contribute in important ways to our economy and country. For example, many aliens, including those who are brought into this country through guestworker programs, are here to engage in work that most citizens are unable or unwilling to perform. Other aliens help maintain communities that would otherwise become depopulated and lose their viability.¹⁰⁹

There are several exceptions to the rule that state alienage classifications are subject to strict scrutiny, but none apply to the denial of legal services to certain categories of aliens. One exception is that when the federal government acts within its powers to instruct the states to treat aliens in a certain way in order to achieve the federal government's immigration goals, a state alienage classification based on those instructions will not be subject to strict scrutiny.¹¹⁰ However, this exception applies only when the federal government has prescribed a uniform rule for the treatment of aliens—it does not apply when the federal government grants the states discretion to decide how to treat aliens.¹¹¹ This is because although the federal government's plenary control over immigration and naturalization permits it to distinguish between aliens and citizens, the United States Supreme Court has held that the federal government lacks the "power to authorize the individual States to violate the Equal Protection Clause."¹¹² Moreover, the Constitution grants the federal government the power to "establish [a] uniform Rule of Naturalization,"¹¹³ and the Court has held that a "congressional enactment construed so as to

¹⁰⁸ Aliens pay a wide variety of taxes, including but not limited to property taxes, sales taxes, income taxes, unemployment insurance taxes, social security taxes, and Medicare taxes. Among the aliens legally able to work—and thus likely to have taxes deducted from their paychecks—who would have been ineligible for state-funded legal services under the Virginia bill are H-2B workers, individuals granted Temporary Protected Status, some asylum applicants, and some parolees.

¹⁰⁹ For example, in 2000, Iowa's Strategic Planning Council concluded that Iowa's economic and social health required Iowa to attract 310,000 people, including immigrants and refugees, by 2010. Governor's Strategic Planning Council, *Iowa 2010: The New Face of Iowa 10* (2000), available at <http://www.iowa2010.state.ia.us/library/finalreport/finalreport.html> (on file with the authors). Likewise, the Task Force on the Productive Integration of the Immigration Workforce Population, created by the Nebraska Legislature, concluded that immigrants are "a necessity" to Nebraska, because "[w]ithout these new workers and their families, much of Nebraska's economic growth over the last decade would not have happened." Task Force on the Productive Integration of Immigrant Workforce Population, *The Dream Lives On: New Immigrants/Opportunities for Nebraska* (Oct. 2001), available at <http://www.state.ne.us/home/NEOC/edu/TaskForce.pdf> (on file with authors).

¹¹⁰ *Aliessa v. Novello*, 754 N.E.2d 1085, 1096-98 (N.Y. 2001).

¹¹¹ *Id.* at 1096-98. See also *Graham v. Richardson*, 403 U.S. 365 (1971) (holding that a federal statute authorizing "discriminatory treatment of aliens at the option of States" would present "serious constitutional questions").

¹¹² *Graham*, 403 U.S. at 382. See also *Aliessa*, 754 N.E.2d at 1096-98.

¹¹³ U.S. CONST. art. I, § 8, cl. 4.

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."¹¹⁴ Congress has not instructed the states to deny their own funding to any categories of aliens.¹¹⁵ Indeed, given principles of federalism, it is doubtful that Congress could do so.¹¹⁶ Therefore, states cannot escape strict scrutiny by arguing that their aliens restrictions merely mimic the alienage restriction on federal LSC funding.

Under the "political function" exception, strict scrutiny is not applied to "exclusions that entrust only to citizens important elective and nonelective positions whose operations 'go to the heart of representative government.'"¹¹⁷ This exception is narrowly construed,¹¹⁸ and although it has been applied to exclusions of aliens from certain government positions,¹¹⁹ by its own terms it is not applicable to exclusions of aliens from public benefits.¹²⁰ Consequently, this exception does not apply to state-funded legal services.

One other exception is that classifications involving undocumented aliens are not subject to strict scrutiny.¹²¹ However, as discussed below in Part IV, at least some classifications involving undocumented aliens are subject to heightened scrutiny. Thus, this is not a blanket exception validating legal services restrictions to certain categories of aliens.

States' denials of legal services to certain categories of lawful aliens are thus subject to strict scrutiny, which they would most likely fail. To survive strict scrutiny, the classification "must advance a compelling state interest by the least restrictive means available."¹²²

¹¹⁴ *Graham*, 403 U.S. at 382. See also *Aliessa*, 754 N.E.2d at 1096-98. Some academics have questioned the logic of applying the Constitutional requirement of a federal rule of uniformity to public benefits programs, arguing that the process of naturalization does not clearly encompass the administration of public benefits programs. See, e.g., Wishnie, *supra* note 89, at 533 (arguing that despite the failure of the *Graham* Court to address "a number of important questions," the Court's conclusion that a federal statute authorizing state alienage classifications would be unconstitutional is nonetheless "well warranted"). Nonetheless, *Graham* remains good law. See *Aliessa*, 754 N.E.2d at 1096-98.

¹¹⁵ See discussion *supra* note 93 and accompanying text.

¹¹⁶ See Abel & Udell, *supra* note 1, at 902-03.

¹¹⁷ *Bernal v. Fainter*, 467 U.S. 216, 221 (1984) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).

¹¹⁸ *Id.* at 222 n.7.

¹¹⁹ See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (deputy probation officers); *Ambach v. Norwick*, 441 U.S. 68, 75-81 (1979) (elementary & secondary school teachers); *Foley v. Connelie*, 435 U.S. 291, 297 (1978) (state troopers).

¹²⁰ *Bernal*, 467 U.S. at 221-22. See also *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971) (holding that the public interest doctrine could not justify Pennsylvania's restriction of public assistance to citizens, and Arizona's restriction of public assistance to citizens and longtime resident aliens).

¹²¹ *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982).

¹²² *Bernal*, 467 U.S. at 219.

The purpose of state legal services funding is often to provide equal access to the courts.¹²³ But aliens' need for access to the courts is generally greater than that of citizens, because aliens are generally unable to enforce their rights or protect their interests by voting or otherwise through the political process.¹²⁴ Additionally, aliens are more likely than citizens to be unable to protect their rights without the assistance of a lawyer due to unfamiliarity with our country's legal system, with their rights within that legal system, and with the English language.¹²⁵ Another frequent purpose of state legal services funding is to assist the courts by providing counsel.¹²⁶ That purpose is diserved by denying legal services to aliens, many of whom are likely to have limited English skills and to be unfamiliar with our legal system and therefore to need the assistance of an attorney more than citizens do.¹²⁷ Finally, to the extent that the purpose of the classification is to save the state money, that cannot support the denial of legal services to some types of aliens. As the United States Supreme Court has noted, "[a]liens like citizens pay taxes and may be called into the armed forces [A]liens may live within a state for many years, work in the state and contribute to the economic growth of the state."¹²⁸ Consequently, the Court has held, "the 'justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens.'"¹²⁹ Thus, a state restriction on legal services for documented aliens is unlikely to pass constitutional scrutiny.

IV. THE DENIAL OF LEGAL SERVICES TO UNDOCUMENTED CHILDREN VIOLATES EQUAL PROTECTION

The federal government denies undocumented aliens access to legal services provided by any office that receives funding from the federal Legal Services Corporation, and Texas, Virginia, and Wash-

¹²³ See *supra* note 38 and accompanying text.

¹²⁴ See *supra* note 97 and accompanying text.

¹²⁵ See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976) ("Aliens . . . are often handicapped by a lack of familiarity with our language and customs."). See also *supra* Part II.

¹²⁶ See, e.g., N.Y. STATE FIN. LAW § 97-v (McKinney 2001) (Historical & Statutory Notes) (quoting 1983 N.Y. Laws 659, § 1) ("[T]he availability of civil legal services to poor persons is essential to the due administration of justice.").

¹²⁷ See *supra* Part II.

¹²⁸ *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (quoting *Leger v. Sailer*, 321 F. Supp. 250, 253 (E.D. Pa. 1970)); see also *Nyquist v. Mauclet*, 432 U.S. 1, 4 (1977) ("Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society.") (quoting *In re Griffiths*, 413 U.S. 717, 722 (1973)); *id.* at 12 ("Resident aliens are obligated to pay their full share of the taxes that support the assistance programs. There thus is not real unfairness in allowing resident aliens an equal right to participate in programs to which they contribute on an equal basis.").

¹²⁹ *Graham*, 403 U.S. at 376.

ington State all deny state-funded legal services to undocumented aliens.¹³⁰ As previously discussed, undocumented aliens are beneficiaries of the Equal Protection Clause of the Fourteenth Amendment.¹³¹ The United States Supreme Court has reasoned that because they have voluntarily entered the country in violation of federal law, undocumented aliens do not fulfill the criteria for a suspect class,¹³² but it has not established a general rule regarding what level of scrutiny should be applied to classifications involving them. Supreme Court precedent, however, implies that at the very least the denial of legal services to children of undocumented workers is subject to heightened scrutiny, and that it cannot survive such scrutiny.¹³³

The Supreme Court has recognized the need to protect undocumented immigrant children from discrimination. In *Plyler v. Doe*, the Court held that Texas' denial of public education to undocumented children violated the equal protection rights of those children.¹³⁴ The Court noted that children of undocumented workers have little or no control over their entry into this country.¹³⁵ Because Texas' discrimination was "directed against children, and impose[d] its discriminatory burden on the basis of a legal characteristic over which children can have little control," stated the Court, "[i]t is . . . difficult to conceive of a rational justification for penalizing these children for their presence in the United States."¹³⁶ Moreover, noted the Court, deprivation of education

imposes a lifetime hardship on a discrete class of children not accountable for their disabling status By denying these children a basic edu-

¹³⁰ See TEX. GOV'T CODE ANN. § 51.943(c) (Vernon 2001) ("Funds from the basic civil legal services account may not be used to provide legal services to an individual who is not legally in this country, unless necessary to protect the physical safety of the individual."); An Act to appropriate the Public Revenue for the Two Years Ending, Respectively, on the 30th day of June, 2003, and the 30th day of June, 2004, 2002 Va. Acts, ch. 899, item 41.A (approved May 17, 2002) (stating court filing fees collected pursuant to VA. CODE ANN. § 17.1-278 (Michie 2002) and Interest on Lawyer Trust Account Funds collected pursuant to VA. CODE ANN. § 54.1-3916 (Michie 2002) shall not be used to file lawsuits on behalf of "aliens present in the United States in violation of law"); WASH. REV. CODE ANN. § 43.08.260(5)(g) (West 2001) (providing that funds allocated by the state legislature and "distributed to qualified legal aid programs under this section may not be used directly or indirectly for . . . [r]epresentation of undocumented aliens"). See also *supra* notes 15-19 and accompanying text.

¹³¹ See *supra* note 104 and accompanying text.

¹³² See *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982) (rejecting the idea that aliens are a suspect class).

¹³³ Although legal services offices can generally represent documented children of undocumented aliens, there remains a significant number of undocumented children of undocumented aliens who cannot access legal assistance.

¹³⁴ *Plyler*, 457 U.S. at 219-20.

¹³⁵ See *id.* at 220 ("[T]he children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status.'" (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977))).

¹³⁶ *Id.*

education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.¹³⁷

Consequently, ruled the Court, the denial of a public education to undocumented children “can hardly be considered rational unless it furthers some substantial goal of the State.”¹³⁸

The Court then held that the denial of public education to undocumented children did not further a substantial goal.¹³⁹ It did not, for example, further the state’s interest in “protect[ing] itself from an influx of illegal immigrants,” because “[t]he dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal aliens come to this country, or presumably to the State of Texas, in order to avail themselves of free education.”¹⁴⁰ Nor was there evidence that excluding undocumented children was likely to improve the quality of education in the state.¹⁴¹ Finally, there was no evidence that undocumented children were less likely to use their education within the borders of the state than were other children.¹⁴²

Although the Supreme Court has not applied *Plyler* to other circumstances,¹⁴³ lower courts have. For example, in 2001, the Second Circuit relied on the case to hold that the federal government’s failure to extend to children of undocumented mothers automatic eligibility for Medicaid, similar to that extended to children of citizen mothers, violated principles of equal protection.¹⁴⁴ Likewise, a district court in California relied on *Plyler* when it noted that the denial of health care services to undocumented children “appears to be in direct conflict with federal law.”¹⁴⁵

Moreover, the Court has applied reasoning similar to the reasoning underlying the *Plyler* ruling in other cases involving differential treatment of children based on circumstances of their birth. Beginning with *Levy v. Louisiana*,¹⁴⁶ which involved a state statute prohibiting out-of-wedlock children from recovering wrongful death damages

¹³⁷ *Id.* at 223.

¹³⁸ *Id.* at 224.

¹³⁹ *See id.* at 227-30.

¹⁴⁰ *Id.* at 228.

¹⁴¹ *See id.* at 229.

¹⁴² *See id.* at 229-30.

¹⁴³ *See Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 459 (1988); *Lewis v. Thompson*, 252 F.3d 567, 591 (2d Cir. 2001).

¹⁴⁴ *See Thompson*, 252 F.3d at 590.

¹⁴⁵ *See League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 785 n.37 (C.D. Cal. 1995) (“declin[ing] at this time to rule on this extension of *Plyler*”), *reconsidered in part on other grounds*, 997 F. Supp. 1244 (C.D. Cal. 1997). *See also Doe v. Reivitz*, No. 85-C-793, slip op. at 13-19 (E.D. Wis. July 22, 1986) (applying intermediate level of scrutiny to strike down denial of welfare benefits to children of undocumented aliens), *cited in Doe v. Reivitz*, 830 F.2d 1441, 1445 (7th Cir. 1987), *amended by Doe v. Reivitz*, 842 F.2d 194 (7th Cir. 1988).

¹⁴⁶ 391 U.S. 68 (1968).

for the death of their mother, the Court has repeatedly struck down statutes that penalize children based upon their birth status.¹⁴⁷ For example, in *New Jersey Welfare Rights Organization v. Cahill*,¹⁴⁸ the Court held that New Jersey could not constitutionally restrict welfare payments to families in which the parents were ceremonially married, finding that the state's rationale—the preservation and strengthening of family life—did not justify discrimination against needy children on the basis of circumstances surrounding their birth over which they had no control.¹⁴⁹

Most birth status cases decided by the Supreme Court have involved discrimination against children born out-of-wedlock. But the rationale underlying the rejection of less favorable treatment for non-marital children than for children born to married parents requires the rejection of less favorable treatment for children born to undocumented parents than is accorded to children born to documented parents. In both cases, children are discriminated against because of their status at birth, a status over which they have no control. In both cases, the result is that the government punishes the child for the purpose of controlling the parents' behavior. The reasoning behind the protection against discrimination based on birth status is the same whether the discrimination is aimed at the marital or immigration status of their parents: birth status is an immutable characteristic (like race or gender) over which the child has no control, and punishing children for the conduct of their parents in not being legally admitted into this country is illogical, unjust, and unconstitutional.¹⁵⁰

The denial of legal services to children of undocumented aliens by state legal services funders and by the federal government is clearly unconstitutional under these precedents. As in the "birth status" cases, undocumented children are not responsible for their status.

¹⁴⁷ See *Trimble v. Gordon*, 430 U.S. 762, 776 (1977) (striking statute prohibiting non-marital children from inheriting from fathers); *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (striking bar to non-marital child's right to paternal support); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 165 (1972) (right of non-marital children to workman's compensation award cannot be denied); *Glonn v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 76 (1968) (striking bar to mother recovering for death of out-of-wedlock child).

¹⁴⁸ 411 U.S. 619, 621 (1973).

¹⁴⁹ *Id.* at 621.

¹⁵⁰ As the Court noted in *Weber*:

[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent . . . [T]he Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where . . . the classification is justified by no legitimate state interest, compelling or otherwise.

406 U.S. at 175-76.

Like the children in *Plyler* and its progeny, undocumented children seeking legal services are in this country through no fault of their own, so any denial of legal services to them should be subject to heightened scrutiny and must be justified by a substantial government interest. It is difficult to conceive of a legitimate state interest, much less a substantial one, that is furthered by the discriminatory denial of legal services to undocumented children. Merely avoiding paying for the cost of the representation of such children is not an adequate justification, because saving money is never an adequate justification for invidious discrimination; as the Court stated in *Saenz*, a state may not achieve fiscal savings by discriminatory means.¹⁵¹ The “magnet theory” justification fails here, as well: it is implausible to assume that aliens enter the country illegally in order to obtain legal services—to enter with such a hope they would have to also hope that they will be subjected to legal wrongs while they are here, which does not seem likely.¹⁵² Nor can the government point to a legitimate desire to ensure that undocumented children cannot enforce their rights under law—to the extent that undocumented children have legal rights, the government surely has an interest in ensuring that those rights are enforced, just as it has an interest in ensuring that the laws generally are enforced. Thus, the principles set forth in *Plyler* demand that children not be excluded from eligibility for legal services solely because of their undocumented status.

As this symposium makes clear, the ability of low-income people to obtain legal redress is under attack on many fronts. Aliens and migrant workers have become the targets of particularly harmful efforts to limit access to legal services. Federal and state legal services restrictions focused exclusively on aliens and migrant workers violate core constitutional protections, including the right to travel and equal protection. Preserving access to civil legal services for aliens and migrant workers ensures a balanced regime of rights enforcement that protects against exploitation and holds all employers accountable for their actions.

¹⁵¹ *Saenz v. Roe*, 526 U.S. 489, 506-07 (1999).

¹⁵² See *supra* note 69 and accompanying text.