

ALIENATING ALIENS: EQUAL PROTECTION VIOLATIONS IN THE STRUCTURES OF STATE PUBLIC-BENEFIT SCHEMES

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INTRODUCTION

On July 28, 2009, Hawaii's Department of Human Services announced its plan to cease enrolling certain legally residing¹ aliens in its federally supported Medicaid programs and to disenroll aliens already covered by the programs.² Letters soon went out to the affected population, informing them that they would be switched to a solely state-funded insurance program called "Basic Health Hawaii." That new program would provide a limited number of outpatient visits, inpatient hospital days, and prescriptions.³ But the switch to Basic Health Hawaii eliminated coverage for life-saving treatments—including dialysis and chemotherapy—that Hawaii's resident aliens were receiving through Medicaid.

Hawaii has not been the only state to reduce or altogether eliminate public benefits for its legally residing alien population.⁴ Several states have turned to such health benefit reductions (as well as elimi-

* J.D., Stanford Law School; B.A., American University. I am grateful to Janet Alexander for very helpful comments on early drafts, to Jenna Sheldon-Sherman for invaluable advice on structure and clarity, and to Garrison Cox for lending his editing acumen. I also thank the staff of the Journal of Constitutional Law for their hard work on this Article.

¹ I use this term to refer generally to aliens that have some form of documented legal status. Specific categories of alien status are reviewed below in Part I.B.

² News Release, Hawai'i Dep't of Human Servs., DHS Moving Non-Citizen Adults into New Medical Assistance Program, 'Basic Health Hawai'i,' on September 1 (July 28, 2009) (on file with author).

³ Complaint at Exhibit B, *Sound v. Koller*, No. CV09-00409, (D.Haw. Aug. 31, 2009), 2010 WL 1992198, *sub nom.* *Korab v. Koller*, No. CV10-00483 (D.Haw. Aug. 23, 2010).

⁴ *See, e.g.*, Act of Feb. 18, 2011, ch. 5, 2011 Wash. Sess. Laws § 271 (amending 2010 Wash. Sess. Laws § 212) (restricting alien eligibility for Washington State Basic Health program); 2011 Me. Laws 580 (terminating health benefit coverage to certain resident aliens); N.J. ADMIN. CODE § 10:78-3.2 (2010) (restricting alien eligibility for NJ FamilyCare Program, which offers subsidized health insurance to low-income adults and children); MASS. GEN. LAWS ch. 65, § 31 (2009) (restricting alien eligibility for the Commonwealth Care Health Insurance Program); *Ehrlich v. Perez*, 908 A.2d 1220, 1224 (Md. 2006) (describing the state's failure to appropriate funds for medical benefits to certain resident alien children and pregnant women while funding similar benefits to citizens).

nating other types of welfare benefits⁵) as a way of containing costs in light of budgetary pressures.⁶ Facing the potentially dire consequences⁷ that would follow from losing such critical benefits, legally residing aliens in many of these states have filed lawsuits seeking injunctions against the restrictive measures. A common thread through each of these lawsuits is the claim that the state has violated the Equal Protection Clause of the Fourteenth Amendment.⁸

This Article is the first to broadly review the decisions of state and federal courts that have addressed aliens' equal protection challenges to their exclusions from state-run public-benefit programs. As courts and scholars have recognized,⁹ these lawsuits present a difficult ques-

5 See, e.g., *Pimentel v. Dreyfus*, 670 F.3d 1096, 1101 (9th Cir. 2012) (describing the elimination of Washington's Food Program for Legal Immigrants); *Doe v. Comm'r of Transitional Assistance*, 773 N.E.2d 404, 407 (Mass. 2002) (recounting certain aliens' ineligibility for the state's "transitional aid to families with dependent children" (TAFDC) program).

6 See, e.g., *Finch v. Commonwealth Health Ins. Connector Auth.*, 959 N.E.2d 970, 977 (Mass. 2012) (describing the "drastically reduced revenue estimate" that motivated state lawmakers to cut benefits for resident aliens); *Guaman v. Velez*, 23 A.3d 451, 461 (N.J. Super. Ct. App. Div. 2011) (noting the state's estimate of \$20 million in Fiscal Year 2011 savings from the disenrollment of resident aliens from NJ FamilyCare and an additional \$24.6 million in Fiscal Year 2011 savings from the non-enrollment of aliens not already enrolled in the benefit program).

7 For instance, the plaintiffs in *Sound*, 2010 WL 1992198, did not know whether they would continue receiving life-saving treatments after August 31, 2009, the last day they were to be enrolled in the comprehensive Medicaid programs. See Complaint, *supra* note 3, at 7. Most plaintiffs were dialysis patients for whom death could have come as early as five days from their last treatment. *Id.* at Declaration of Dr. Neal A. Palafox. After pressure mounted from a series of marches, a sit-in in Governor Linda Lingle's office, and lawsuits, Hawaii's Department of Human Services announced that the state found a source of \$1.5 million in federal funds to cover dialysis treatments for certain resident aliens as an emergency service for the next two years. *State Finds \$1.5M for Dialysis*, HAW. STAR-BULLETIN (Sept. 1, 2009), available at http://archives.starbulletin.com/content/20090901_State_finds_15M_for_dialysis.

8 The Equal Protection Clause states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

9 See, e.g., Tricia A. Bozek, Comment, *Immigrants, Health Care, and the Constitution: Medicaid Cuts in Maryland Suggest that Legal Immigrants Do Not Deserve the Equal Protection of the Law*, 36 U. BALT. L. REV. 77, 80 (2006) (concluding that "the courts in Maryland should apply a strict scrutiny test to the . . . cuts in Medicaid funding affecting legal immigrants and declare those cuts unconstitutional."); Liza Cristol-Deman & Richard Edwards, *Closing the Door on the Immigrant Poor*, 9 STAN. L. & POL'Y REV. 141 (1998) (discussing the changes in benefits to immigrants caused by the PRWORA and the constitutional issues it raised); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 795 (2008) (arguing that a "federalism lens is a particularly fine tool for determining the proper allocation of immigration authority among levels of government and is vastly superior to the blunt tool of structural preemption"); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1627 (1997) (arguing that "the Personal Responsibility Act presages new possibilities for state-level modulation in immigrant policy that will more efficiently represent wide state-to-state variations in voter preferences

tion that the Supreme Court's alienage equal protection jurisprudence does not clearly resolve: What standard of review must a court apply to the exclusion of aliens from solely state-funded and joint-funded¹⁰ benefit programs when Congress has delegated (or "devolved"¹¹) some of its policymaking authority to the states? Absent clear precedents, some courts have treated these alien exclusions as a federal immigration policy that warrants a deferential, rational basis review standard;¹² other courts have viewed the exclusions as state-level alienage classifications that must withstand strict scrutiny.¹³

Drawing on recent cases, I argue that the categorical approach that courts have taken—labeling the alienage classification as either "state" or "federal" and applying the attendant standard of review—ignores the nuances of alien status under federal law and how that status dictates the underlying policy options available to states for their provisions of public benefits. The argument proceeds in four parts. Part I will explain the equal protection doctrinal framework applied to aliens and how the alien-eligibility scheme enacted as part of the 1996 federal welfare reform challenges that framework. Part II will review the limited relevant case law in three groups: (1) exclusion of aliens from joint-funded benefit programs by reason of a uniform federal rule; (2) exclusion of aliens from joint-funded benefit programs for which federal law permits eligibility; and (3) exclusion of aliens from solely state-funded benefit programs. Part III will then propose guideposts for courts to use when reviewing similar alienage-based equal protection challenges.

and that may ultimately benefit aliens as a group"); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 493 (2001) (concluding that "any devolution of authority over immigration to the states, such as that contained in the 1996 welfare reforms, may not receive the judicial deference traditionally granted to federal immigration law"); Note, *The Constitutionality of Immigration Federalism*, 118 HARV. L. REV. 2247 (2005) (discussing various court decisions on the constitutionality of the PRWORA).

- ¹⁰ I use this term to refer to a benefit program supported by both state and federal funds.
- ¹¹ Much of the scholarship in this area refers to Congress's "devolving" its power to set immigration policy. *E.g.*, Roger C. Hartley, *Congressional Devolution of Immigration Policymaking: A Separation of Powers Critique*, 2 DUKE J. CONST. L. & PUB. POL'Y 93, 93 (2007) ("For roughly a decade, federal legislation has devolved to the states some of Congress's authority to adopt immigration policies that discriminate against permanent resident aliens."); Wishnie, *supra* note 9, at 496 (describing the relevant federal statute as "an attempt by Congress to devolve some of the exclusively federal immigration power to the states").
- ¹² *See, e.g.*, *Soskin v. Reinertson*, 353 F.3d 1242, 1256 (10th Cir. 2004) (applying rational basis review); *Cid v. S.D. Dep't of Soc. Servs.*, 1999 SD 108, ¶ 18, 598 N.W.2d 887, 892 (S.D. 1999) (same).
- ¹³ *See, e.g.*, *Ehrlich v. Perez*, 908 A.2d 1220, 1243 (Md. 2006) (applying strict-scrutiny review); *Aliessa v. Novello*, 754 N.E.2d 1085, 1098 (N.Y. 2001) (same).

Finally, Part IV will use those guideposts to identify alienage-based equal protection violations that have not been challenged in the cases reviewed. Those cases focused on state conduct that clearly and directly affected aliens—e.g., statutes or administrative regulations that ended eligibility for public benefits that aliens previously enjoyed. But proper equal protection review requires an assessment of the underlying policy choices that states make when structuring their provisions of public benefits. I identify three such state-level policy choices that effect alienage classifications and should thus be invalidated under strict scrutiny review. Because these policy choices are far more common among the states than the types of state actions challenged in cases to date, the argument advanced here could significantly expand the scope of alienage equal protection litigation. I also recommend how states can alter their public-benefit schemes to remedy the identified constitutional defects.

I. PRUDENTIAL AND STATUTORY BACKGROUND

A. *The Graham and Mathews Decisions*

Two Supreme Court decisions govern the landscape of challenges to government classifications based on alienage. In the first, *Graham v. Richardson*,¹⁴ the Court held that laws in Pennsylvania and Arizona that restricted welfare benefits to U.S. citizens or imposed durational residency requirements on aliens violated the Equal Protection Clause.¹⁵ The challenged Arizona law conditioned a legally residing alien's eligibility for federally supported welfare benefits on residing in the United States for fifteen years.¹⁶ Pennsylvania's law, in contrast, extended a solely state-funded welfare benefit to citizens only.¹⁷ The Court applied strict scrutiny review to both laws because classifica-

¹⁴ 403 U.S. 365 (1971).

¹⁵ *Id.* at 376. The Court also noted that these state laws were unconstitutional because they impermissibly encroached on exclusive federal power over immigration. *Id.* at 379–80. While Justice Harlan joined the opinion only with respect to this federalism-based rationale, the rest of the Court joined Justice Blackmun's entire opinion.

¹⁶ *Id.* at 367. Arizona argued that the Social Security Act authorized states to impose such requirements, *id.* at 380–81, but the Court applied the avoidance canon of statutory interpretation because the constitutionality of such an authorization would be suspect. *Id.* at 382–83. This is the constitutional question confronting state and lower federal courts today and which this Article addresses in the context of state-funded and joint-funded benefit programs.

¹⁷ *Id.* at 368.

tions based on alienage are inherently suspect.¹⁸ Both states argued that the desire to preserve limited welfare benefits for its citizens justified the laws, but the Court found this state interest¹⁹ inadequate to meet strict scrutiny.²⁰

Five years later, the Court held in *Mathews v. Diaz*²¹ that Congress may impose a five-year durational residency requirement before an alien is eligible for enrollment in Medicare, a federal health insurance program for the elderly. Writing for a unanimous Court, Justice John Paul Stevens explained that the Constitution gives Congress broad powers over naturalization and immigration, allowing Congress to regulate aliens in a manner that it could not regulate citizens.²² These powers, for which there is no state counterpart, justified Congress's line-drawing between citizens and aliens, and within the class of aliens, for the provision of welfare benefits.²³ The two requirements Congress set for alien eligibility in Medicare—

18 An alien class is a quintessential “discreet and insular minority,” *id.* at 372 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (internal quotation marks omitted)), and is particularly vulnerable to political process failures because aliens cannot vote. See *Aliessa*, 754 N.E.2d at 1095 (“Recognizing, however, that ‘discrete and insular minorities’ can be shut out of the political process, the [Supreme] Court has applied a more searching inquiry to statutes that draw classifications aimed at these groups.”) (citation omitted); see also Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1371 (2007) (“Those who drafted the Equal Protection Clause knew all too well that discrimination against noncitizens required constitutional prohibition.”); Press Release, Health Law Advocates, Healthcare Advocacy Group *Health Law Advocates Challenges Law Excluding Legal Immigrants From Healthcare* (Feb. 25, 2010) (noting that legal immigrants “can’t vote—so in a budget crisis, they’re the first ones to suffer” (internal quotation marks omitted)). The risk of such process failures requires more thorough judicial review of laws that target aliens as a class. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

19 Subsequent cases have carved out a “political-function exception” by which a state may justify an alienage classification, such as barring aliens from becoming state police troopers, *Foley v. Connelie*, 435 U.S. 291, 300 (1978), and public school teachers, *Ambach v. Norwick*, 441 U.S. 68, 80–81 (1979). For a limitation on this exception, see *Bernal v. Fainter*, 467 U.S. 216, 227–28 (1984) (refusing to apply the political-function exception to notaries).

20 *Graham*, 403 U.S. at 374. The Court later held that a state alienage classification inconsistent with federal law could be struck down as a matter of federal preemption. *Toll v. Moreno*, 458 U.S. 1, 17 (1982). For an argument advancing the equal protection rationale, see Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51 (1985). For a critique of applying equal protection doctrine to state laws regarding aliens that instead advances a preemption view, see David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069 (1979).

21 426 U.S. 67 (1976).

22 *Id.* at 79–80.

23 *Id.* at 80 (“The real question . . . is not whether discrimination between citizens and aliens is permissible; rather, it is whether the statutory discrimination *within* the class of aliens . . . is permissible.” (emphasis in original)).

permanent-residence status and five years of continuous residency—were not wholly irrational²⁴ and thus met the Court’s highly deferential standard of review.²⁵

The Court noted that *Graham* did not control the question presented in *Mathews*. Even though the classification was essentially the same, the source of the classification was not.²⁶ That Congress, not the states, imposed the classification was significant because “the Fourteenth Amendment’s limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization.”²⁷ The Court held that the exercise of Congress’s expansive immigration power required judicial deference.²⁸ Thus, *Mathews* left *Graham* intact but clarified that its rule of strict scrutiny review did not apply to federal alienage classifications.²⁹

Together, *Graham* and *Mathews* establish the twin principles that the federal government’s power over immigration and naturalization

²⁴ *Id.* at 83.

²⁵ *Id.* at 82. Some scholars contend that *Mathews* was wrongly decided—i.e., that equal protection principles require strict scrutiny of any level of government making alienage classifications. See Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 314 (noting that rationales for treating aliens as a suspect class, such as the “immutable characteristic” and “political powerlessness” theories, apply equally as to state and federal government); see generally Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994) (discussing the distinction in the current case law between the scrutiny applied to individuals considered “inside” the political community and those considered “outside” of it); Tamra M. Boyd, Note, *Keeping the Constitution’s Promise: An Argument for Greater Judicial Scrutiny of Federal Alienage Classifications*, 54 STAN. L. REV. 319 (2001) (asserting that aliens are protected by the same laws as citizens, and that the Supreme Court should set out to more strictly review laws that classify based on alienage, even if those laws are enacted under the federal power to control immigration and naturalization); see also Raquel Aldana, *On Rights, Federal Citizenship, and the “Alien,”* 46 WASHBURN L.J. 263, 296–306 (2007) (arguing that *Mathews* should be challenged and strict scrutiny should apply to federal alienage classifications because “the ‘alien’ construction functions as a proxy for race or nationality”); Note, *The Constitutionality of Immigration Federalism*, 118 HARV. L. REV. 2247, 2270 n.171 (2005) (noting that “[a] reexamination of *Mathews* has wide support in the legal academy” and citing examples). This Article, however, works within the current *Graham/Mathews* framework so that it can be of practical use to lower courts and practitioners.

²⁶ *Mathews*, 426 U.S. at 84–85.

²⁷ *Id.* at 86–87.

²⁸ *Id.* at 81–82, 81 n.17. See also Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 602–03 (1994) (noting the “great deference accorded to Congress on issues of immigration and naturalization” illustrated by the *Mathews* decision).

²⁹ *Mathews*, 426 U.S. at 84–85 (noting that while *Graham*’s holding that states may not regulate aliens’ welfare benefits is upheld, this does not mean the federal government is prohibited from such regulation).

allows it wide discretion to set the conditions for an alien's entry and residence in the United States, but that states do not have a comparable power.³⁰ Rather, the states have "little, if any, basis" for preferential treatment of citizens over aliens.³¹

This two-tiered doctrinal structure from *Graham* and *Mathews*—strict scrutiny for state welfare laws restricting alien eligibility and rational basis review for their federal counterparts—functions when the source of the classification and the funding for the benefit are clear and, in the case of federal classifications, aligned. State classifications are constitutionally infirm, whether the benefit is solely state-funded (an equal protection violation), or partially federal-funded (an equal protection violation and a Supremacy Clause violation).³² Federal classifications are constitutionally permissible for a federal-funded benefit.³³

This doctrinal framework does not function adequately, however, if the system of providing public benefits to aliens varies from the relatively straightforward scheme of states determining eligibility for state-funded benefits and the federal government determining eligibility for federal-funded benefits. But Congress nonetheless departed from that scheme in 1996 with the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).³⁴ Among its many reforms to the welfare system, PRWORA redistributed the decision-making authority over alien eligibility for public benefits between the federal government and state governments. After PRWORA became law, state and federal court decisions reviewing alien eligibility for welfare benefits diverged,³⁵ demonstrating a lack of consensus regarding how the *Graham/Mathews* framework should apply when the relevant policymaking is in some parts federal and other parts state-by-state.

³⁰ See *id.* (describing and distinguishing the *Graham* holding).

³¹ *Id.* at 85.

³² See *supra* note 20.

³³ At issue in *Mathews* was the Medicare Part B medical-insurance program, financed in equal parts by the federal government and monthly premiums by the enrollees. *Mathews*, 426 U.S. at 70, n.1.

³⁴ Pub. L. No. 104-193, 110 Stat. 2105 (1996). Commonly referred to as the Welfare Reform Act, the provisions relevant to alien eligibility for public benefits are codified at 8 U.S.C. §§ 1601-1641.

³⁵ Compare *Finch v. Commonwealth Health Ins. Connector Auth.*, 959 N.E.2d 970 (Mass. 2012) (holding that the elimination of a state-funded benefit for certain aliens violated the Equal Protection Clause), and *Aliessa v. Novello*, 754 N.E.2d 1085 (N.Y. 2001) (same), with *Soskin v. Reinertson*, 353 F.3d 1242 (10th Cir. 2004) (holding that the elimination of such a state-funded benefit did not violate the Equal Protection Clause) and *Hong Pham v. Starkowski*, 16 A.3d 635 (Conn. 2011) (same).

B. Alien Eligibility for Public Benefits under PRWORA

Before PRWORA, legally residing aliens had access to most public benefits on the same terms as citizens.³⁶ This was true with regard to legal permanent residents (holders of “green cards”) as well as any other alien who was “permanently residing under color of law” (“PRUCOL”).³⁷ But PRWORA dramatically changed the eligibility for, and administration of, public benefits for these aliens.³⁸

Both the text of the Act and its financial implications show that PRWORA targeted legal aliens.³⁹ It proclaims a national policy that aliens not depend on public resources and that public benefits not attract immigrants to the United States.⁴⁰ Congress also noted in the Act that then-current eligibility rules had failed to ensure that aliens not burden public-benefit programs.⁴¹ Moreover, the cost savings from PRWORA attributable to restricting alien eligibility were vastly disproportional to the share of total welfare spending that aliens comprised.⁴²

36 See WENDY ZIMMERMANN & KAREN C. TUMLIN, *THE URBAN INST., PATCHWORK POLICIES: STATE ASSISTANCE FOR IMMIGRANTS UNDER WELFARE REFORM 14-18* (May 1999).

37 Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 *UCLA L. REV.* 1453, 1458 (1995). PRUCOL originated as a category in a 1972 amendment to the Social Security Act. See Ryan Knutson, *Deprivation of Care: Are Federal Laws Restricting the Provision of Medical Care to Immigrants Working as Planned?*, 28 *B.C. THIRD WORLD L.J.* 401, 414 (2008) (citing Pub. L. No. 92-603, § 1614, 86 Stat. 1329, 1471 (defining, “[f]or purposes of this title, the term ‘aged, blind, or disabled individuals’ as, amongst others, ‘an alien lawfully residing in the United States under color of law’)). The term generally refers to asylees, persons paroled into the United States, “and miscellaneous others who remain in the United States with the knowledge and permission of the [federal government] and whom the [federal government] does not intend to remove.” Legomsky, *supra* at 1459. Plaintiffs in *Korab* and *Aliessa*, among other cases, include PRUCOLs. See *Korab v. McManaman*, 805 F. Supp. 2d 1027, 1029–30 (describing one set of plaintiffs as residents of countries with Compacts of Free Association (“COFA”) with the United States) and SOCIAL SECURITY ADMINISTRATION, PROGRAMS OPERATIONS MANUAL SYSTEM: GN 00303.400 AUTHORIZED ALIEN STATUS, available at <https://secure.ssa.gov/poms.nsf/lnx/0200303400> (last visited March 17, 2014) (describing COFA residents as “permanent nonimmigrants” who fall under the PRUCOL eligibility rules); *Aliessa*, 754 N.E.2d at 1088 (describing plaintiff aliens as falling into two groups, lawfully admitted permanent residents and PRUCOLs).

38 ZIMMERMANN & TUMLIN, *supra* note 36, at 15.

39 See Wishnie, *supra* note 9, at 511 (“Immigrants, especially legal immigrants, were plainly a chief congressional target.”).

40 See 8 U.S.C. § 1601(2) (2012) (“It continues to be the immigration policy of the United States that . . . the availability of public benefits not constitute an incentive for immigration to the United States.”).

41 See *id.* § 1601(4) (2012) (“Current eligibility rules . . . have proved wholly incapable of assuring that individual aliens not burden the public benefits system.”).

42 The National Conference of State Legislatures estimated that alien benefit cuts accounted for \$24 billion of PRWORA’s \$53 billion in savings. But \$12 billion of those savings

But PRWORA's most significant change with respect to aliens and public benefits was the delegation to the states of the authority to restrict or expand alien eligibility.⁴³ This shift of authority from the federal government to the states "threw a wrench"⁴⁴ into the *Graham/Mathews* framework. To understand the significance of this shift and the divergent court decisions it has produced, one must first understand PRWORA's alien-eligibility scheme. That scheme in part dictates what discretion, if any, a state may exercise in determining the alien's eligibility for public benefits.

Congress built PRWORA's alien-eligibility scheme on defining two primary types of benefits and three categories of aliens. PRWORA distinguishes, according to funding source and administering agency, a "federal public benefit,"⁴⁵ governed by 8 U.S.C. §§ 1611–1613, and a "state or local public benefit,"⁴⁶ governed by 8 U.S.C. § 1621. A benefit funded by both state and federal funds is considered a federal public benefit.⁴⁷ Federal public benefits are further subdivided into two

were retracted when Congress restored Supplemental Security Income benefits to qualified aliens residing in the United States before 1996 who were already receiving SSI payments. ANN MORSE ET AL., NAT'L CONF. OF ST. LEGISLATURES, AMERICA'S NEWCOMERS: MENDING THE SAFETY NET FOR IMMIGRANTS 1 (1998). See also Wishnie, *supra* note 9, at 511–12 (noting that approximately forty-four percent of PRWORA's overall federal savings came from denying benefits to legal immigrants, who make up "a far lower percentage of welfare recipients").

43 See Spiro, *supra* note 9, at 1627 (describing PRWORA as "the Great Devolution," which "eschew[ed] a century of judicially protected exclusive federal authority").

44 Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1606 (2008).

45 8 U.S.C. § 1611(c)(1)(B) defines this term, in relevant part, as "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided . . . by an agency of the United States or by appropriated funds of the United States."

46 8 U.S.C. § 1621(c) follows the same definition structure as § 1611(c), except substituting "agency of a state or local government" for "agency of the United States" and "funds of a state or local government" for "funds of the United States." For ease of reading, I refer to these benefits as "state public benefits" or, to contrast joint-funded benefit programs, as "solely state-funded benefit programs."

47 8 U.S.C. § 1621(c)(3) provides that a state public benefit "does not include any Federal public benefit under section 1611(c) of this title," indicating that public benefits with federal and state funding sources are "federal public benefits" under PRWORA. This interpretation of the two sections appeared in regulations proposed, but not adopted, by the Immigration and Naturalization Service and the Department of Justice. See *Verification of Eligibility for Public Benefits*, 63 Fed. Reg. 41662-01, (proposed Aug. 4, 1998) (proposing that various entities providing "Federal public benefits" verify the eligibility of its alien recipients); *Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 62 Fed. Reg. 61344 (proposed Nov. 17, 1997) (same). A regulation on "affidavits of support on behalf of immigrants" adopts a similar interpretation of

groups: (1) “specified Federal programs,” defined as food stamps and supplemental security income (SSI)⁴⁸; and (2) “designated Federal programs,” defined as Temporary Assistance for Needy Families (TANF), social services block grants (SSBG), and Medicaid.⁴⁹

“Specified federal programs” are wholly federally funded, while “designated federal programs” are jointly funded. Medicaid programs, which provide health benefits to certain low-income populations, are state-run and state-funded but receive substantial federal reimbursements.⁵⁰ TANF “replaced the former federal welfare program popularly known as Aid to Families with Dependent Children”⁵¹ and, along with SSBG, provides federal block grants to assist state-funded efforts to provide needy families assistance while moving them towards self-sufficiency.⁵² Nearly all of the alien equal protection litigation to date has challenged exclusions from Medicaid, TANF, and solely state-funded programs that provide benefits comparable to Medicaid and TANF.⁵³ This Article concentrates on those programs.⁵⁴

PRWORA classifies aliens into three categories: (1) “qualified aliens”; (2) “nonimmigrants”; and (3) aliens who are neither qualified aliens nor nonimmigrants (I will call this group “undocumented aliens”).⁵⁵ A qualified alien is a legal permanent resident.⁵⁶ A nonim-

the PRWORA definitions, noting that a state public benefit is “any public benefit for which no Federal funds are provided.” 8 C.F.R. § 213a.1 (2000) (defining “means-tested public benefit”).

48 8 U.S.C. § 1612(a) (3) (2012).

49 8 U.S.C. § 1612(b) (3) (2012).

50 See 42 U.S.C. § 1396 (making appropriations for “making payments to States which have submitted . . . State plans for medical assistance”).

51 *Maldonado v. Houstoun*, 157 F.3d 179, 182 n.3 (3d Cir. 1998).

52 See generally 42 U.S.C. §§ 601–619; *Temporary Assistance for Needy Families (TANF)*, U.S. DEP’T OF HEALTH AND HUMAN SERVS., <http://www.acf.hhs.gov/programs/ofa/programs/tanf> (describing the nature and goals of the TANF program).

53 A notable exception is *Pimentel v. Dreyfus*, 670 F.3d 1096, 1101 (9th Cir. 2012) (noting the elimination of Washington’s Food Assistance Program for Legal Immigrants, a solely state-funded food benefit). The reason for this focus on Medicaid and TANF programs is that, as explained, *infra* note 63, states do not have discretion to determine alien eligibility for food stamps or SSI.

54 I do not focus on exclusion of aliens from specified federal programs because PRWORA applies a uniform federal rule to alien eligibility for wholly federally funded benefits. These benefits thus fall neatly under the *Mathews* rule of rational basis review. See cases cited, *infra* note 89.

55 Courts have misinterpreted PRWORA as creating only two categories—qualified aliens and non-qualified aliens—which lumps together lawfully residing nonimmigrants, such as the *Korab* plaintiffs, with unlawfully present aliens. See, e.g., *Doe v. Comm’r of Transitional Assistance*, 773 N.E.2d 404, 406 n.2 (Mass. 2002) (“A ‘qualified alien’ is one who has some legal residency status in the United States. An alien who is not ‘qualified’ does not.” (citation omitted)); *Aliessa v. Novello*, 754 N.E.2d 1085, 1090–91 (N.Y. 2001) (“Under ti-

migrant is an alien meeting the definition of that term provided in the Immigration and Nationality Act.⁵⁷ Undocumented aliens, the third category of aliens under PRWORA, lack a recognized legal status by the federal government and thus do not meet the definition of either qualified aliens or nonimmigrants.⁵⁸ Generally, qualified aliens have greater potential eligibility for federal and state public benefits than nonimmigrants, and nonimmigrants have greater potential eligibility than undocumented aliens.

The qualified-alien category is further subdivided based on when the alien entered the United States and how long he or she has resided with qualified-alien status. Aliens legally entering on or before August 22, 1996 (“pre-enactment aliens”) and aliens residing in the United States with qualified-alien status for at least five years (what I will call “the five-year bar”)⁵⁹ have greater potential eligibility for public benefits than qualified aliens not meeting either of those conditions.

Chart 1,⁶⁰ summarizes how PRWORA matches these categories of aliens and benefits into an eligibility scheme. PRWORA gives individual states the authority to determine a qualified alien’s eligibility for state public benefits,⁶¹ benefit programs using federal TANF⁶²

file IV, aliens are divided into two categories: qualified aliens and non-qualified aliens.” (citation omitted)). Some PRWORA provisions apply to nonimmigrant and non-qualified aliens equally, but others, like eligibility for state and local public benefits, do not. *Compare* 8 U.S.C. § 1611 (2012) (providing that “an alien who is not a qualified alien . . . is not eligible for any Federal public benefit”) *with* 8 U.S.C. § 1621 (2012) (providing that “aliens who are not qualified aliens or nonimmigrants [are] ineligible for State and local public benefits). Thus, PRWORA’s distinction between these three categories of aliens is important.

56 8 U.S.C. § 1641(b) (2012) (definition of “qualified alien”). Qualified aliens also include specific aliens that are not legal permanent residents, including Cuban and Haitian entrants, asylees, refugees, and certain victims of spousal or parental battery. *Id.*

57 8 U.S.C. § 1621(a) (2012) (citing 8 U.S.C. § 1101(a)(15)). This definition covers a wide range of aliens who are present in the United States under color of law, generally on a temporary basis. *See* 8 U.S.C. § 1101(a)(15) (2012); 8 C.F.R. § 214.1(a)(2) (listing various classifications of nonimmigrants).

58 *See supra* notes 55, 57. PRWORA bars aliens who are neither qualified aliens nor nonimmigrants from receiving state public benefits unless the state “affirmatively provides for such eligibility” through a statute enacted after August 22, 1996. 8 U.S.C. § 1621(d) (2012). This same bar does not apply to nonimmigrants.

59 8 U.S.C. § 1613(a) (2012).

60 *See infra* Chart 1.

61 8 U.S.C. § 1622 (2012) (“[A] State is authorized to determine the eligibility for any State public benefits of an alien who is a qualified alien . . .”).

62 States have the option of administering TANF funds as a separate federal benefit, or combining it with state funds into a joint-funded benefit program. *See* 45 C.F.R. § 263.2 (2005) (outlining which state expenditures count towards meeting a State’s “Maintenance of Effort” expenditure requirements).

funds, and Medicaid.⁶³ But Congress reserved two exceptions to this broad grant of authority to states. First, the five-year bar on eligibility for TANF and Medicaid is mandatory; a state cannot enroll a qualified alien in either program until five years after the alien attains qualified-alien status. Second, a qualified alien who has worked forty qualifying quarters as defined in the Social Security Act or is a veteran or on active duty in the armed forces⁶⁴ must be eligible for state⁶⁵ and federal⁶⁶ public benefits.

In contrast, state discretion over nonimmigrant eligibility is narrower. A state can determine whether a nonimmigrant receives state public benefits, but not federal public benefits. Nonimmigrants are, with few exceptions, mandatorily ineligible for federal public benefits.⁶⁷

Undocumented aliens are presumptively ineligible for state public benefits. These aliens may receive such benefits only if a state “affirmatively provides for such eligibility” through a state statute enacted after PRWORA’s enactment.⁶⁸ They are categorically barred from federal public benefits.

Courts must give careful attention to the particular legal status of aliens bringing equal protection challenges for two reasons. First, an alien’s legal status under PRWORA dictates, in part, the options available to states for providing public benefits. As I will explain further, those state options in turn bear on the appropriate standard of equal protection review to apply.

Second, legal status has constitutional significance independent of PRWORA as well. The Supreme Court noted in *Plyler v. Doe* that states have greater leeway to draw classifications that disfavor individuals who entered the United States illegally and thus are not a suspect

63 8 U.S.C. § 1612(b)(1),(3) (2012) (defining Medicaid as a “designated Federal program” and stating that “a State is authorized to determine the eligibility of an alien who is a qualified alien . . . for any designated Federal program”). States may not set eligibility for the federal-funded SSI or food stamp programs. These two programs are “specified Federal programs” under 8 U.S.C. § 1612(a)(3), and not “designated Federal programs” under 8 U.S.C. § 1612(b)(3), which means that states do not have authority to determine a qualified alien’s eligibility for either program. *Id.* § 1612(b)(1). PRWORA generally bars aliens from receiving these two types of federally funded benefits. *Id.* § 1612(a)(1) (noting that qualified aliens are ineligible for specified Federal programs except for those outlined by statute); 8 U.S.C. § 1611(a) (2012) (“[A]n alien who is not a qualified alien . . . is not eligible for any Federal public benefit . . .”).

64 8 U.S.C. § 1612(a)(2)(B)(ii)(I), (a)(2)(C)(i)–(ii) (2012).

65 8 U.S.C. § 1612(b)(2) (2012).

66 8 U.S.C. § 1622(b)(2)–(3) (2012).

67 8 U.S.C. § 1611 (2012).

68 8 U.S.C. § 1621(d) (2012).

class.⁶⁹ Such state-drawn classifications are not subject to strict scrutiny.⁷⁰ Thus, the same discriminatory state action that would receive strict scrutiny if taken against qualified aliens and nonimmigrants would receive more deferential review if taken against undocumented aliens. This distinction explains why the cases reviewed in this Article were brought by both qualified aliens and nonimmigrants but not by undocumented aliens. Likewise, the argument I develop for proper equal protection review applies only to the two PRWORA categories of aliens that have a documented legal status (qualified aliens and nonimmigrants).

II. PRWORA-ERA CASES

Congress's devolving to the states the authority to determine alien eligibility for public benefits—an example of what scholars have joined Professor Hiroshi Motomura in calling “immigration federalism”⁷¹—created an uneven “patchwork”⁷² of state policies, where similarly situated aliens can receive vastly different benefits solely depending on their state of residence. Under PRWORA, some states provide little or no state-funded benefits to qualified aliens and nonimmigrants, while other states provide them substantial benefits.⁷³ For many aliens, states determine eligibility for state-funded benefits and benefits heavily subsidized by the federal government, like TANF and Medicaid.⁷⁴ Indeed, the same qualified alien could, for instance, ac-

69 Plyler v. Doe, 457 U.S. 202, 223 (1982) (“[U]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a ‘constitutional irrelevancy.’” (citation omitted)).

70 *Id.* at 226. See also Maria Pabón López & Diomedes J. Tsitouras, *From the Border to the Schoolhouse Gate: Alternative Arguments for Extending Primary Education to Undocumented Alien Children*, 36 HOFSTRA L. REV. 1243, 1260 (2008) (describing the standard of review applied in Plyler as “the rational basis standard, albeit ‘with a bite.’” (citation omitted)).

71 Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1364 (1999). However, Motomura supports the view that immigration power is exclusively federal. See Spiro, *supra* note 9, at 1627 n.* (crediting Hiroshi Motomura with coining the phrase); see, e.g., Huntington, *supra* note 9; Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 63 (2007); Spiro, *supra* note 9; Wishnie, *supra* note 9, at 508.

72 I borrow this term from ZIMMERMAN & TUMLIN, *supra* note 36, at 14–18.

73 ZIMMERMAN & TUMLIN, *supra* note 36, at 49. See also U.S. DEP’T OF HEALTH AND HUMAN SERVS., OVERVIEW OF IMMIGRANTS’ ELIGIBILITY FOR SNAP, TANF, MEDICAID, AND CHIP 19 (2012), available at <http://aspe.hhs.gov/hsp/11/ImmigrantAccess/Eligibility/ib.shtml> (comparing alien eligibility for state-funded benefits among the states).

74 For example, states can deny such joint-funded benefits to aliens who arrived in the United States prior to PRWORA’s enactment, to qualified aliens even after the mandatory five-year bar, and to nonimmigrants. See ZIMMERMAN AND TUMLIN, *supra* note 36, at 15 (outlining where states have the option of determining eligibility).

cess TANF benefits in Louisiana but not Mississippi,⁷⁵ or Medicaid benefits in Pennsylvania but not Ohio.⁷⁶ Some states facing budget difficulties have taken advantage of the discretion PRWORA affords them, eliminating benefits for qualified aliens and nonimmigrants as a viable cost-saving measure.⁷⁷

Alien challenges to this patchwork system of public benefits have produced divergent decisions in state and federal courts.⁷⁸ Courts struggle to fit the alienage-based eligibility classifications within the *Graham/Mathews* doctrinal structure because those classifications are neither clearly state nor clearly federal. Unlike Arizona and Pennsylvania's pre-PRWORA laws reviewed in *Graham*,⁷⁹ these eligibility classifications are now made with congressional approval.⁸⁰ Likewise, the classifications are distinct from those drawn by the federal eligibility requirement reviewed in *Mathews*. That requirement was a uniform, nationwide rule and applied to Medicare, a solely federal-funded benefit.⁸¹

Without clear guidance from the Supreme Court, federal and state courts have employed inadequate equal protection analyses to reach inconsistent decisions.⁸² The following three categories of cases will demonstrate how the current judicial methodology fails to meet the twin foundations of *Graham* and *Mathews*: preventing states from favoring their resident citizens over their resident aliens (*Graham*) and allowing the federal government wide latitude in regulating the terms and conditions of alien entrance and residency (*Mathews*).

75 U.S. DEP'T OF HEALTH AND HUMAN SERVS., OVERVIEW OF IMMIGRANTS' ELIGIBILITY, *supra* note 73, at 31.

76 *Id.* at 13–14, 16.

77 *See supra* note 6.

78 *See supra* note 35.

79 *Graham v. Richardson*, 403 U.S. 365, 367–68 (1971) (describing the state laws ultimately declared unconstitutional). *See also id.* at 382–83 (rejecting Arizona's argument that federal law authorized its state statute).

80 8 U.S.C. § 1622 (2012).

81 *Mathews v. Diaz*, 426 U.S. 67, 71 n.3 (1976).

82 This is not to say that *Graham* and *Mathews* are unable to resolve any challenge brought against a PRWORA provision. Where Congress sets its own uniform eligibility rule for federal-funded benefits (SSI and food stamps), it is operating well within the heartland of *Mathews* and courts have correctly applied rational basis review in suits challenging this rule. *See, e.g., Rodriguez v. United States*, 169 F.3d 1342 (11th Cir. 1999); *City of Chi. v. Shalala*, 189 F.3d 598 (7th Cir. 1999); *Kiev v. Glickman*, 991 F. Supp. 1090 (D. Minn. 1998); *Abreu v. Callahan*, 971 F. Supp. 799 (S.D.N.Y. 1997). Following *Mathews*, these courts have held that Congress's near-plenary immigration power requires judicial deference in reviewing a federal determination of how federal funds will be distributed amongst classes of aliens. *See, e.g., Rodriguez*, 169 F.3d at 1346–47 (adopting a narrow standard of review in light of the need for “flexibility of the political branches of government to respond to changing world conditions”).

A. *Exclusions from Joint-Funded Benefits by Uniform Rule*

The first category of cases is challenges brought by qualified aliens that have yet to meet the five-year residency threshold for Medicaid and TANF eligibility (“QAs<5”).⁸³ These challenges appear to be an easy case for the straightforward application of deferential review under *Mathews*. Consistent with the Medicare eligibility rule at issue in *Mathews*, PRWORA’s five-year bar is a federal rule that states do not have discretion to alter.⁸⁴ However, PRWORA’s rule applies to benefits that, unlike Medicare, are funded with both federal *and* state dollars. Thus, unlike the federal statute reviewed in *Mathews*, the federal rule here restricts alien access to federal funds and the state funds that a state chooses to put into a joint-funded benefit program.

By channeling state funds into a Medicaid program or commingling them with federal TANF funds, a state can block QAs<5 (and other legally residing aliens) from accessing state funds but point to PRWORA as the source of alien exclusion. This difference from *Mathews* is significant because PRWORA’s rule allows states to dedicate substantial funds to the benefit of its citizen residents but not its legal-alien residents, a result that directly conflicts with *Graham*.⁸⁵ As outlined below, courts have failed to recognize this difference from *Mathews* or its import. Because courts focus on PRWORA as the source of the alienage classification, rather than the underlying state decision to dedicate its funds only to an alien-excluding benefit program, they have applied rational basis review to states’ removals of QAs<5 from joint-funded benefit programs. In other words, courts have focused on the states’ compliance with mandatory federal rules for joint-funded benefit programs, but ignored the antecedent fact that state funding of those programs is a state policy choice subject to equal protection review. Decisions from two state high courts demonstrate this proposition.

1. *South Dakota’s Cid Decision*

In *Cid v. South Dakota Department of Social Services*, two QAs<5 who entered the United States in December 1996 challenged on equal protection grounds South Dakota’s 1997 regulations implemented to comply with PRWORA.⁸⁶ Under the regulations, the plaintiffs were

⁸³ 8 U.S.C. § 1613 (2012); *see supra* note 59.

⁸⁴ 8 U.S.C. § 1613 (2012).

⁸⁵ *Graham v. Richardson*, 403 U.S. 365, 368 (1971) (striking down Pennsylvania’s law that would restrict state-funded benefits to its citizen residents only).

⁸⁶ *Cid v. S.D. Dep’t of Soc. Servs.*, 598 N.W.2d 887, 889 (S.D. 1999).

no longer eligible for Medicaid, TANF, and food stamps.⁸⁷ The South Dakota Supreme Court applied rational basis review to the regulations because the state rules were consistent with federal law, which bars QAs<5 from receiving joint-funded benefits.⁸⁸ In applying rational basis review, the court relied on decisions from federal district courts and courts of appeals that upheld PRWORA's five-year bar applied to wholly federal-funded benefits.⁸⁹ Neither the *Cid* court nor any of its cited authority considered whether *Mathews* should apply to joint-funded⁹⁰ benefits the same way it applies to wholly federal-funded benefits.

Since these courts have not acknowledged the difference between wholly federal-funded benefits and joint-funded benefits, they do not offer a justification for why the *Mathews* standard of review should apply to a state's implementation of a federal rule restricting alien eligibility for *state* funds. The *Cid* decision is correct insofar as *Mathews* recognizes federal power to limit alien access to federal benefits. The problem with *Cid* is that its application of *Mathews*'s deferential standard of review to the denial of a joint-funded benefit allows South Dakota to do what *Graham* forbids—afford preferential treatment to its resident citizens over its resident aliens through its choice of how to fund public benefits.⁹¹ Nothing in *Mathews* or *Graham* suggests that a state's commingling its funds with federal funds shields from strict scrutiny the state's choice to commit such funds to the benefit of citizens and not aliens. Even though PRWORA's five-year bar sets a uniform rule for alien eligibility in joint-funded benefit programs, states

87 *Id.*

88 *Id.* at 892.

89 The court cited *Kiev v. Glickman*, 991 F. Supp. 1090 (D. Minn. 1998) (upholding a federal law denying food stamp benefits to certain groups of documented noncitizens under the rational basis test), and *Rodriguez v. Unites States*, 169 F.3d 1342 (11th Cir. 1999) (upholding federal laws denying food stamps and SSI to documented aliens based on rational basis). Also cited was *Sinelnikov v. Shalala*, No. 97C 4884, 1998 WL 164889 (N.D. Ill. Mar. 31, 1998), *sub nom* *City of Chi. v. Shalala*, 189 F.3d 598 (7th Cir. 1999), which did concern Medicaid and TANF, but adopted the reasoning of *Kiev*, *Rodriguez*, and another SSI case, *Abreu v. Callahan*, 971 F. Supp. 799 (S.D.N.Y. 1997). *Sinelnikov*, 1998 WL 164889 at *11.

90 Although technically joint-funded, the federal food stamp program (SNAP) has only nominal state financial participation, *see Pimentel v. Dreyfus*, 670 F.3d 1096, 1099 (9th Cir. 2012) (“The federal government pays for the other fifty percent of administrative costs, as well as the entire cost of the actual food benefits.” (citations omitted)), and is functionally a federal benefit.

91 *See Graham v. Richardson*, 403 U.S. 368, 368 (1970) (describing the Pennsylvania statute that violated equal protection as regarding “that portion of a general assistance program that is not federally supported” and that was limited to “needy persons who are citizens of the United States”).

still exercise discretion in funding the benefit programs in the first instance.

2. Massachusetts' Doe Decision

*Doe v. Commissioner of Transitional Assistance*⁹² provides a similar, but more complicated, example of a court applying *Mathews*-style deference where equal protection principles require a more searching review. The plaintiffs in *Doe* were QAs<5 and also had resided in Massachusetts for less than six months.⁹³ They challenged a state statute that, pursuant to the five-year bar, made plaintiffs ineligible for the state's "transitional aid to families with dependent children (TAFDC) program."⁹⁴ The TAFDC program combined federal TANF funds with state funds to support a cash-assistance benefit for its low-income residents.⁹⁵ At the same time, Massachusetts created a solely state-funded supplement to TAFDC that provided comparable benefits to QAs<5 who would no longer be eligible for TAFDC because of the five-year bar.⁹⁶ The state imposed a six-month Massachusetts residency requirement for enrollment in the supplemental program.⁹⁷

Consistent with *Cid*, the *Doe* court found that *Graham's* strict-scrutiny rule did not apply to the plaintiffs' challenge to their TAFDC ineligibility because the state was merely adopting a mandatory, uniform federal rule, passed pursuant to Congress's immigration powers.⁹⁸ Although *Graham* provides the "general rule" for "State laws that discriminate against legal immigrants," the court found that "[t]his general rule does not apply . . . to State laws that merely adopt uniform Federal guidelines regarding the eligibility of aliens for benefits."⁹⁹ But the *Doe* plaintiffs, unlike the *Cid* plaintiffs, also challenged their exclusion from a solely state-funded benefit program. The court held that rational basis review also was appropriate for the

92 773 N.E.2d 404 (Mass. 2002).

93 *Id.* at 407–08.

94 *Id.* at 407.

95 *Id.*; See also MASS. DEP'T OF HEALTH AND HUMAN SERVS., *Cash Assistance*, available at <http://www.mass.gov/dta/assistance> (last visited Jan. 1, 2014) (describing TAFDC as cash assistance to families with children and pregnant women who have little income or assets). Massachusetts's commingling of federal TANF funds with state funds was optional. States have wide latitude in how they spend the TANF funds, which they receive as block grants from the federal government. See *infra* notes 284–89 and accompanying text.

96 *Doe*, 773 N.E.2d at 407.

97 *Id.*

98 *Id.* at 409 (citing *Mathews v. Diaz*, 426 U.S. 67, 82–83 (1976) and *Sudomir v. McMahon*, 767 F.2d 1456, 1466 (9th Cir. 1985)).

99 *Doe*, 773 N.E.2d at 409.

state supplemental program's eligibility requirements because the state was under no obligation to provide this benefit,¹⁰⁰ which meant that the classification used was not alienage, but rather "Massachusetts residency."¹⁰¹

3. *Massachusetts's Finch Decision*

Nine years later, the Supreme Judicial Court of Massachusetts revisited the issue of the appropriate standard of review to apply to the exclusion of aliens from a joint-funded benefit program.¹⁰² The plaintiffs in the class action *Finch v. Commonwealth Health Insurance Connector Authority* challenged¹⁰³ a Massachusetts statute that eliminated their eligibility for Commonwealth Care, "a premium assistance program in which enrollees pay a portion of their health insurance premium based on a sliding scale with the remainder paid by the defendant [Connector]."¹⁰⁴ "Both State and Federal funds¹⁰⁵ support the provision of premium assistance payments on behalf of Commonwealth Care enrollees."¹⁰⁶ Commonwealth Care is a Medicaid "demonstration project"¹⁰⁷ that operates much like a regular Medicaid

¹⁰⁰ *Id.* at 411.

¹⁰¹ *Id.* at 414. The court noted that the state was not discriminating between citizens and aliens, but among a sub-class of aliens on the basis of bona fide Massachusetts residency. *Id.*

¹⁰² See *Finch v. Commonwealth Health Ins. Connector Auth.*, 946 N.E.2d 1262, 1265 (Mass. 2011) ("[S]hould a State classification based on alienage be subjected to a 'rational basis' standard of review . . . ?").

¹⁰³ The plaintiffs asserted equal protection claims under both the United States and Massachusetts Constitutions. After the state removed the case to federal court, the plaintiffs dismissed the federal constitutional claim to get the case back into state court. *Id.* at 1268. However, "[i]n matters concerning aliens, the Massachusetts Declaration of Rights has been interpreted to provide a right to the equal protection of the laws, coextensive with the Federal right." *Doe*, 773 N.E.2d at 408.

¹⁰⁴ *Finch*, 946 N.E.2d at 1265.

¹⁰⁵ The federal contribution to the program is approximately fifty percent of total expenditures, but was even higher (61.59 percent) in fiscal year 2010 due to the American Recovery and Reinvestment Act of 2009. *Id.* at 1267. As such, "at least two federally eligible residents (citizens or federally eligible aliens) could be enrolled in Commonwealth Care for the same cost to the State as one member of the plaintiff class." *Id.*

¹⁰⁶ *Id.* at 1266.

¹⁰⁷ 42 U.S.C. § 1315. Congress has given the Secretary of the Department of Health and Human Services the power to waive certain requirements of state-administered welfare programs, including Medicaid, so long as the Secretary determines the program is a "demonstration project." *Id.* § 1315(a). These projects are also referred to as "Section 1115 projects" or "Section 1115 waivers" because of the section of the Social Security Act by which they are authorized. See also EVELYNE P. BAUMRUCKER, CONG. RESEARCH SERV., RS21054, MEDICAID AND SCHIP SECTION 1115 RESEARCH AND DEMONSTRATION WAIVERS (2004) (explaining the unique provisions of Section 1115 of the Social Security Act, which give broad authority to the Secretary of Health and Human Services to modify

program but uses state funds to extend coverage to some classes of federally ineligible individuals,¹⁰⁸ including the plaintiff class of aliens.¹⁰⁹ This coverage ended for the plaintiffs in 2009 when the state adopted for Commonwealth Care the same alien-eligibility standards PRWORA sets for federal-funded public-benefit programs.¹¹⁰

Whereas Massachusetts's high court held in *Doe* that the exclusion of aliens from the joint-funded TAFDC program need only survive rational basis review,¹¹¹ it concluded in *Finch* that the exclusion of aliens from the joint-funded Commonwealth Care program must be reviewed under strict scrutiny.¹¹² The court distinguished the two cases by explaining that while Congress dictated the eligibility rule at issue in *Doe*, in *Finch* the state voluntarily adopted an eligibility rule that Congress neither required nor prohibited.¹¹³ Describing the termination of Commonwealth Care benefits for aliens, the court noted that “[w]here the State is left with a range of options including discriminatory and nondiscriminatory policies, its selection amongst those options must be reviewed under the standards applicable to the State and not those applicable to Congress.”¹¹⁴

4. *Doe and Finch Are Not Distinguishable*

Applying rational basis review to a state's acquiescence to a uniform eligibility rule imposed by Congress,¹¹⁵ while holding to strict

SCHIP and Medicaid without congressional review). Although the *Finch* court explains that “Commonwealth Care receives no reimbursement from the Federal government in respect of expenditures made on behalf of federally ineligible individuals,” 946 N.E.2d at 1267, this may not be the case for all demonstration projects. See *Spry v. Thompson*, 487 F.3d 1272, 1275 (9th Cir. 2007) (noting that demonstration projects can expand coverage to individuals who otherwise would not be eligible for Medicaid, with the state receiving federal reimbursement as if those individuals were eligible).

108 For instance, the program extended coverage to individuals with a household income level below 300 percent of the federal poverty level who are uninsured and “not eligible for certain other State, Federal or employer-subsidized health insurance programs.” *Finch*, 946 N.E.2d at 1266.

109 *Finch*, 946 N.E.2d at 1267. Commonwealth Care's enabling statute provided eligibility for not only “qualified aliens,” but also nonimmigrants. *Id.* at 1266.

110 *Id.* at 1267.

111 *Doe v. Comm'r of Transitional Assistance*, 773 N.E.2d 404, 410 (Mass. 2002)

112 *Finch*, 946 N.E.2d at 1277. The court later determined that the alien exclusion failed strict scrutiny and thus violated equal protection. *Finch v. Commonwealth Health Ins. Connector Auth.*, 959 N.E.2d 970, 984 (Mass. 2012).

113 *Finch*, 946 N.E.2d at 1275–76.

114 *Id.* at 1277.

115 See *Sudomir v. McMahon*, 767 F.2d 1456, 1466 (9th Cir. 1985) (upholding under rational basis review a California law that adhered to a uniform federal policy requiring states to deny welfare assistance to certain aliens). The *Sudomir* court stressed that Congress had enacted a uniform rule, such that the court did not have to address the indication from

scrutiny a state's decision to parrot that eligibility rule when Congress does not so require, is a sound application of the *Graham/Mathews* equal protection framework. But the *Finch* decision does not adequately articulate how a mandatory PRWORA provision was at work in the TAFDC programs (*Doe*) but not in Commonwealth Care (*Finch*). It notes that PRWORA permits alien eligibility for Commonwealth Care "so long as no Federal funds contribute to such benefits."¹¹⁶ The court implicitly assumed that Commonwealth Care met this condition because the state received federal funds based on its expenditures for only federally eligible enrollees.¹¹⁷ This assumption is not only incorrect, but it also fails to distinguish *Doe*.

The court's assumption was wrong because the federal and state funds in a benefit program such as Commonwealth Care are fungible. When similarly situated aliens and citizens receive the same level of benefits from a joint-funded program, they benefit equally from the federal contribution, even if that contribution was calculated based only on citizen enrollees. A simplified example will demonstrate the point: Suppose I am going to order pizza for a group of students and you agree to reimburse me for fifty percent of what I spend on pizza for students who wear glasses. If I divide the pizza that our combined funds purchased equally among all of the students, then they all will benefit equally from your subsidy, regardless of whether they wear glasses. The same principle applies to the federal subsidy of Commonwealth Care.¹¹⁸

The court's assumption also fails to distinguish *Doe*. Like the Commonwealth Care benefits for federally ineligible enrollees in *Finch*, the supplemental TAFDC program in *Doe* was solely state-funded. Under *Finch*, this similarity would mean that in both situations the state is acting of its own discretion, with no mandatory PRWORA rule to apply. The state was in the same position with re-

Graham "that *Shapiro* may require the invalidation of congressional enactments permitting states to adopt divergent laws regarding the eligibility of aliens for federally supported welfare programs." *Id.* at 1466-67.

116 *Finch*, 946 N.E.2d at 1276. The court cited 8 U.S.C. §§ 1622, 1624, & 1621(d), the PRWORA provisions that authorize states to determine alien eligibility for state benefits.

117 *Id.* at 1267 ("[Massachusetts] assumed one hundred per cent of the cost of providing Commonwealth Care subsidies to federally ineligible aliens."). *See id.* at 1276 (explaining how the state did not argue that it was in fact required to apply PRWORA's alien-eligibility rule to Commonwealth Care, presumably because the program did not follow that rule in its first three years of operation).

118 *See id.* at 1285 (Gants, J., concurring in part and dissenting in part) (explaining how the use of "twice the State funds per capita" to provide the same health benefits to PRWORA-barred aliens that Medicaid-eligible citizens and aliens receive nullifies the effect of PRWORA's bar).

spect to supplemental TAFDC as it was with the solely state-funded portion of Commonwealth Care: It had a “range of options including discriminatory and nondiscriminatory policies, [and] its selection amongst those options [had to] be reviewed under the standards applicable to the State.”¹¹⁹ And in both cases, the state selected a discriminatory policy. In *Finch*, that policy was ending PRWORA-barred aliens’ eligibility for Commonwealth Care; in *Doe*, it was applying a six-month durational residency requirement on PRWORA-barred aliens’ receipt of supplemental TAFDC, a condition that did not apply to citizens’ receipt of TAFDC.¹²⁰ Despite these similarities, the *Doe* court applied rational basis review to the latter,¹²¹ while *Finch* held that the former must be reviewed under strict scrutiny.¹²²

Surely the formality of denominating TAFDC and supplemental TAFDC as separate programs, as compared to the state-funded and joint-funded portions of Commonwealth Care falling under a single program umbrella, cannot justify the different standards of review applied,¹²³ and neither *Finch* nor *Doe* suggest that it does. Contrary to the *Finch* court’s reasoning, the same mandatory, uniform federal rule (i.e., the five-year bar) applied to the benefit programs in both cases. What the court failed to recognize is that the five-year bar did not dictate the state’s policy choice of how to divide its welfare dollars between joint-funded benefit programs (for which most aliens are ineligible) and solely state-funded benefit programs (for which PRWORA allows all aliens to be eligible).

That state-level policy choice—combining state funds with federal funds to create the TAFDC and Commonwealth Care programs—exists entirely apart from and antecedent to the application of PRWORA’s five-year bar. It thus cannot be shielded from judicial scrutiny based on an argument that the state is complying with a federal mandate instead of exercising its own discretion. By choosing to

119 *Id.* at 1277.

120 Although the state chose to merely withhold the benefit during a qualified alien’s first six months of Massachusetts residency, integral to the *Doe* court’s holding was the “undisputed” fact that “the Massachusetts Legislature was not required to establish the supplemental program.” *Doe v. Comm’r of Transitional Assistance*, 773 N.E.2d 404, 411 (Mass. 2002). Thus, the opinion’s logic dictates that a decision to eliminate the benefit entirely need satisfy only rational basis review.

121 *See id.* at 414 (“Where, as here, [the] classification is Massachusetts residency, the proper standard of review is rational basis.”).

122 *See Finch*, 946 N.E.2d at 1277 (“Settled equal protection law therefore requires that [the statute] be reviewed under strict scrutiny”).

123 *See Pimentel v. Dreyfus*, 670 F.3d 1096, 1107 (9th Cir. 2012) (explaining that a state “could not evade strict scrutiny” simply through the formality of creating separate programs).

combine state funds with federal funds, Massachusetts voluntarily adopted the federal eligibility rule. The court should have recognized this state policy choice and applied strict scrutiny to the six-month durational residency requirement in *Doe* just as it did to the termination of state-funded Commonwealth Care benefits in *Finch*.

5. *The Finch Dissent: Requiring Equal Per-Capita Funding*

In his dissent to the *Finch* majority's conclusion that strict scrutiny is the appropriate standard of review to apply to Massachusetts's exclusion of the plaintiff aliens from Commonwealth Care, Justice Ralph Gants, joined by Justice Robert Cordy,¹²⁴ recognized that "substantially less" state expenditures per capita for the plaintiff aliens than similarly situated Commonwealth Care enrollees would be a state alienage classification subject to strict scrutiny.¹²⁵ This recognition is nearly correct, with an important caveat.

The dissenting justices "believe[d] that strict scrutiny is the appropriate standard of review to evaluate a State's alienage classification only where the State's per capita expenditures" are "substantially" unequal between similarly situated aliens and citizens.¹²⁶ This statement articulates the general idea of what equal protection review requires in these circumstances, but confuses the mechanics. A state alienage classification is always subject to strict scrutiny, with some exceptions not relevant here.¹²⁷ The per-capita expenditures on al-

124 That Justice Cordy joined in this dissent is notable because he was the author of *Doe*. Although consistent with *Doe*'s holding with regard to alien exclusion from TAFDC, this dissent undermines *Doe*'s validation of the durational residency requirement imposed on aliens receiving supplemental TAFDC. That latter holding depended on the preliminary conclusion that the supplemental TAFDC program was optional and could be entirely eliminated. See *Doe*, 773 N.E.2d at 411 ("It is undisputed that the Massachusetts Legislature was not required to establish the supplemental program."). Justice Gants's dissent in *Finch*, however, suggests that, absent a compelling state interest, the state could not eliminate all state funding for resident aliens while continuing to fund a program benefitting resident citizens. *Finch*, 946 N.E.2d at 1281.

125 *Finch*, 946 N.E.2d at 1281 (Gants, J., concurring in part and dissenting in part). Justice Gants dissented only because he concluded that the plaintiffs had not yet shown on the limited record in the case that they were "suffering discrimination in the expenditure of funds derived from State revenues." *Id.* Neither Justice Gants nor the majority suggest that the state provides plaintiffs any type of state-funded benefit that would be comparable to the state's per capita expenditures in Commonwealth Care. Assuming there is no such program, the basis for Justice Gants's dissent is unfounded. He identified much of the correct analysis, but reached the wrong result.

126 *Id.*

127 See, e.g., *Bernal v. Fainter*, 467 U.S. 216, 220 (1984) ("We have, however, developed a narrow exception to the rule that discrimination based on alienage triggers strict scrutiny. This exception has been labeled the 'political function' exception and applies to laws that

iens relative to citizens does not directly change the level of scrutiny applied to a state alienage classification, as Justice Gants suggests, but rather determines whether there is a state alienage classification in the first place. If the state spends equal amounts on aliens and citizens alike, then it has not classified on the basis of alienage and the equal protection inquiry never reaches the selection of a standard of review.¹²⁸ With that said, Justice Gants' dissent is the first judicial opinion to correctly observe that a state's financial participation in a joint-funded benefit program implicates the equal protection rights of individuals excluded from that program on the basis of alienage.¹²⁹

6. *The Risk of Improper Application of Mathews's Deferential Review*

As a result of the *Doe* opinion's equal protection analysis, Massachusetts could continue barring a number of legally residing aliens, such as nonimmigrants, from receiving a state-funded benefit (supplemental TAFDC), even though state dollars were supporting a similar benefit for citizens (primary TAFDC), federally eligible aliens (primary TAFDC), and some federally ineligible aliens (supplemental TAFDC). The state could also place a six-month durational residency requirement on the state benefit given to QAs<5 that it did not place on individuals receiving primary TAFDC. But the improper application of *Mathews* to joint-funded benefits could have a much broader impact. Because the *Mathews* analysis leads courts to the conclusion that solely state-funded benefits for federally ineligible aliens are en-

exclude aliens from positions intimately related to the process of democratic self-government.”).

128 To be sure, an alienage classification would remain if citizens receive a higher level of benefits because their benefit program has federal support. But that classification would be federal and thus subject to rational basis review if challenged.

129 I note briefly that a potential distinction between Commonwealth Care and the TAFDC programs, although not recognized by the *Finch* court, could support the different outcomes in *Finch* and *Doe*. Commonwealth Care was available for uninsured resident citizens with household incomes up to 300 percent of the federal poverty level (FPL). *Finch*, 946 N.E.2d at 1266. The federal government, however, sets an income ceiling on the various categories of Medicaid-eligible populations for which it will provide funding. 42 C.F.R. § 435.1007 (2012). Because these ceilings do not approach 300 percent of the FPL for most recipients and because Massachusetts receives federal reimbursement for expenditures on Commonwealth Care enrollees who are federally eligible, *Finch*, 946 N.E.2d at 1267, it appears that higher-income enrollees are supported solely by state funds. If so, then the state was using its funds to benefit its higher-income resident citizens while, had the statute challenged in *Finch* stood, making no such expenditures to benefit its resident aliens with similar or lower incomes. This reading provides an equal-protection basis for requiring the state to retain the plaintiff aliens in Commonwealth Care. So long as the state uses its resources to extend the benefit to federally ineligible citizens, it must do so for federally ineligible aliens as well.

tirely optional,¹³⁰ rather than constitutionally required to match state contributions to a joint-funded benefit that excludes legally residing aliens, these courts would allow states to deny such aliens public benefits altogether.¹³¹

The danger of cloaking eligibility requirements for joint-funded benefits in Congress's immigration powers is that it allows states to funnel state dollars away from legal aliens to citizens, simply by mixing them with federal funds that are tied to alien-excluding provisions. The state then excludes the legal aliens from the joint-funded benefit and argues to the courts that it is merely applying a federal eligibility requirement, not adopting its own alienage classification. *Doe* and *Cid* demonstrate that courts readily accept this argument,¹³² protecting a state's unequal distribution of resources under the shield of deferential review, even though such deference is tied to the exercise of exclusively¹³³ federal immigration power. These decisions contravene a maxim that the Supreme Court has repeated: Congress may not authorize the states to violate the Equal Protection Clause.¹³⁴

Accepting *Doe's* and *Cid's* application of *Mathews* appears more reasonable when the joint-funded benefit is predominantly federally sourced, or at least sourced at a one-to-one ratio.¹³⁵ The greater the proportion of federal dollars in the joint-funded benefit, the more justifiable it seems to apply rational basis review to the alien-excluding provision because the benefit becomes more like the wholly federal-funded Medicare benefit that was the subject of *Mathews*. But as PRWORA is written, and as courts have interpreted *Mathews*,

130 See *Doe v. Comm'r of Transitional Assistance*, 773 N.E.2d 404, 411 (Mass. 2002) (noting that Massachusetts was "not required to establish [its] supplemental program"); *Soskin v. Reinertson*, 353 F.3d 1242, 1244 (10th Cir. 2004) (describing the state Medicaid benefit offered to, then withdrawn from, aliens as "optional Medicaid coverage").

131 See, e.g., *Bruns v. Mayhew*, 931 F. Supp. 2d 260 (D. Me. 2013) (concluding in the course of denying a preliminary injunction that plaintiffs were unlikely to succeed on their equal protection challenge to the elimination of a state-funded, alien-only health benefit program, which left plaintiffs without health benefits altogether).

132 *Accord Soskin*, 353 F.3d at 1255–56 (explaining how states use separate programs for aliens and citizens).

133 *Graham v. Richardson*, 403 U.S. 365, 380 (1971) (holding that state laws that deny or condition welfare benefits to noncitizens "equate with the assertion of a right . . . to deny entrance and abode," and "encroach upon exclusive federal power"); *Mathews v. Diaz*, 426 U.S. 67, 84–85 (1976) (holding that the political branches of the federal government regulate the conditions of entry and residence of aliens, not the states).

134 *Graham*, 403 U.S. at 382; *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969); *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966). But see *Soskin*, 353 F.3d at 1254 (criticizing this maxim as nearly tautological).

135 Federal participation in Medicaid is calculated pursuant to 42 U.S.C. § 1396d(b) (2011). These "federal medical assistance percentage[s]" (FMAP) are available at <http://aspe.hhs.gov/health/fmap.htm> (last visited Jan. 1, 2014).

this deferential review would still apply even if the federal portion of the benefit is nominal. And yet a predominantly state-funded benefit would appear more like the welfare benefits at issue in *Graham* for which the Supreme Court held that states could not deny on the basis of alienage.

Rather than blessing every joint-funded benefit with *Mathews*-style deference or engage in arbitrary line-drawing with respect to what percentage of federal dollars will trigger such deference, the Equal Protection Clause requires courts to ensure that state welfare expenditures, whether administered separately or commingled with federal funds, are not disparately apportioned on the basis of the recipient's alienage. Such a rule has the advantage of being judicially workable: A state need only demonstrate to the court that it has spent the same pro-rata funds on benefits for legally residing aliens as it has spent on benefits for citizens in the joint-funded program. But more importantly, it adheres to the requirements of equal protection as interpreted by both *Graham* and *Mathews*.

B. Exclusions from Joint-Funded Benefits, But Not by Uniform Rule

1. Soskin

The second category of PRWORA-era cases are challenges to a state's exclusion of aliens from a joint-funded benefit for whom PRWORA permits eligibility. This situation arises for qualified aliens who have either met or are not subject to the five-year bar, such as pre-enactment qualified aliens.¹³⁶ PRWORA allows individual states to determine whether such aliens will receive joint-funded benefits like Medicaid and TANF.¹³⁷

In *Soskin v. Reinertson*,¹³⁸ a class of legally residing aliens challenged a 2003 Colorado law¹³⁹ that rendered them ineligible for Medicaid, a benefit program that the state had enrolled them in since 1997.¹⁴⁰ Unlike when states exclude aliens from a joint-funded benefit pro-

¹³⁶ 8 U.S.C. § 1613 (2012).

¹³⁷ See 8 U.S.C. § 1612(b)(1) (2012) (providing that "a State is authorized to determine the eligibility of an alien who is a qualified alien . . . for any designated Federal program (as defined in paragraph (3))"). Such programs include TANF, social services block grants, and Medicaid. 8 U.S.C. § 1612(b)(3)(A)-(C).

¹³⁸ *Soskin*, 353 F.3d at 1244.

¹³⁹ S.B. 03-176 § 1 (Colo. 2003) (repealing COLO. REV. STAT. §§ 26-4-301(1)(l)-(m), (2)-(4)) (eliminating Medicaid coverage for qualified aliens present in the United States before August 22, 1996 and for qualified aliens who have been present for five years).

¹⁴⁰ *Soskin*, 353 F.3d at 1246.

gram pursuant to PRWORA's mandatory five-year bar,¹⁴¹ here Colorado exercised discretion at two levels. First, Colorado chose to contribute state dollars to the joint-funded benefit, as described in the preceding section. Second, it withdrew joint-funded benefits from legal aliens for whom PRWORA allowed, and the state had previously provided, eligibility. In contrast to the circumstances underpinning *Cid* and *Doe*, Colorado was determining access to both state *and* federal funds, not just state funds.¹⁴²

The *Mathews* doctrine and its policy rationale do not apply here. Whereas *Mathews* concerned a purely federal-funded benefit administered in every part of the country using the same federal-eligibility requirement,¹⁴³ PRWORA authorizes something quite different: a state-by-state determination of alien eligibility for federal funds (the federal contributions to Medicaid and TANF) and state funds (the state contributions to those same programs). As explained above, *Graham* prohibits state discrimination on the basis of alienage in the provision of state-funded benefits.¹⁴⁴ But neither the *Graham* nor *Mathews* holdings speak to a state's ability to determine eligibility for federal funds when Congress has by statutory design approved such state discretion.

Although the holdings are silent on the issue, *Graham* sheds some light on the proper standard of review in this situation. In dicta, the *Graham* court acknowledged that Congress has broad power to control alien admission into the United States and the "terms and conditions of their naturalization," but that Congress cannot exercise this power to "authorize the individual states to violate the Equal Protection Clause."¹⁴⁵ The Constitution textually constrains Congress's immigration and naturalization power to establishing "an uniform Rule of Naturalization."¹⁴⁶ Although the *Graham* court did not reach the

141 8 U.S.C. § 1613 (2012). Courts have appropriately upheld state's complying with mandatory eligibility rules under PRWORA. *See, e.g.,* Avila v. Biedess, 78 P.3d 280, 286 (Ariz. Ct. App. 2003); *see also* Sodomir v. McMahon, 767 F.2d 1456, 1466 (9th Cir. 1985) (upholding California's compliance with a mandatory federal rule that precluded plaintiffs from receiving AFDC benefits).

142 For a critique of *Soskin*, *see* Michael Shapland, *Soskin v. Reinertson: An Analysis of the Tenth Circuit's Decision to Permit the State of Colorado to Withhold Medicaid Benefits from Aliens Pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act*, 2 SETON HALL CIRCUIT REV. 339 (2005).

143 *Mathews v. Diaz*, 426 U.S. 67, 69–70 (1976).

144 *See supra* Part I.A.

145 *Graham v. Richardson*, 403 U.S. 365, 382 (1971) (citing *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969)). *See also* *Saenz v. Roe*, 526 U.S. 489, 507 (1999) ("[W]e have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment.").

146 U.S. CONST. art. I, § 8, cl. 4.

issue because it applied the constitutional-avoidance cannon to interpret a federal statute to preclude Arizona's fifteen-year national residency requirement, it stated that a federal statute that would "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."¹⁴⁷

2. Soskin's *Misinterpretation of Graham and Mathews*

The Tenth Circuit in *Soskin*, along with some state courts,¹⁴⁸ has misinterpreted *Graham's* guidance. *Graham* stated that there is an "explicit constitutional requirement of uniformity"¹⁴⁹ and that it "would appear" that divergent state eligibility requirements for aliens receiving federal benefits would fail to meet this requirement.¹⁵⁰ The *Soskin* decision purports to recognize that the only open question, if any, from *Graham* is "whether this appearance of unconstitutionality is real."¹⁵¹ The court's analysis, however, wrongly suggests that there is no uniformity requirement with which PRWORA must comport.¹⁵² In other words, instead of answering whether PRWORA complies with a constitutional uniformity requirement, the court instead concludes, contrary to *Graham*, that there is no such requirement.¹⁵³

147 *Graham*, 403 U.S. at 382. Commentators have critiqued and defended the Court's conclusion that Congress's immigration power is exclusive and subject to a uniformity requirement. Compare Huntington, *supra* note 9, at 831 (arguing that states have some measure of inherent power over immigration and alienage law and therefore alienage law does not have to be uniform), with Wishnie, *supra* note 9, at 539 (arguing that each source of immigration power—the Naturalization Clause, the Foreign Affairs Clauses, the Foreign Commerce Clause, and the extra-constitutional concept of "inherent sovereignty"—is exclusively federal and cannot be devolved to the states).

148 See, e.g., *Cid v. S.D. Dep't of Soc. Servs.*, 598 N.W.2d 887 (S.D. 1999) (affirming the decision to terminate certain welfare benefits to a legal resident alien, and holding that such denial does not violate the United States or South Dakota Constitutions); *Doe v. Comm'r of Transitional Assistance*, 773 N.E.2d 404 (Mass. 2002) (similarly upholding Massachusetts' TAFDC eligibility requirements).

149 *Graham*, 403 U.S. at 382. Subsequent cases have reiterated this uniformity requirement. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 219 n.19 ("But if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction.").

150 See *Graham*, 403 U.S. at 382.

151 *Soskin v. Reinertson*, 353 F.3d 1242, 1256 (10th Cir. 2004).

152 *Id.* But see *id.* at 1274 (Henry, J., dissenting) (noting that Congress could not decide on a federal policy and instead adopted a "compromise" that promotes variation in policy among the states and thus violates the uniformity requirement).

153 *Id.* at 1256 ("Of course, if Congressional authority for the PRWORA's provisions regarding aliens does not rest on the Naturalization Clause, the limits on the exercise of power

Although *Graham* provides¹⁵⁴ that Congress's power in the context of regulating alien eligibility for welfare benefits comes from the Naturalization Clause,¹⁵⁵ the *Soskin* court reasoned that congressional authority for such regulation "does not rest on the Naturalization Clause" and that a constraint on power exercised through that Clause—the uniformity requirement—does not necessarily apply.¹⁵⁶ The court's justification for contradicting *Graham* is that *Mathews* did not refer specifically to the Naturalization Clause.¹⁵⁷ But *Mathews* did note that Congress's ability to make rules for aliens that it could not make for citizens stems from "its broad power over naturalization and immigration."¹⁵⁸ *Mathews* does not cast any doubt on *Graham*'s authority; in fact, the opinion explains its consistency with *Graham*.¹⁵⁹ Moreover, the *Soskin* decision ignores the Supreme Court's later confirmation that the federal regulation of aliens reviewed deferentially in *Mathews* was tied to congressional power to establish a uniform rule of naturalization, as well as the power to regulate foreign commerce and foreign affairs.¹⁶⁰

The issue of uniformity did not arise in *Mathews* because the Court was considering a federal eligibility requirement that obviously applied uniformly throughout the country.¹⁶¹ Since uniformity was a non-issue, the Court had no reason to consider the uniformity constraint on congressional power exercised through the Naturalization

under that clause do not necessarily apply; the uniformity requirement is imposed only on a 'Rule of Naturalization.'").

154 See *Graham*, 403 U.S. at 382 (noting that Congress has power to "establish an uniform Rule of Naturalization" (citing U.S. CONST. art. I, § 8, cl. 4)).

155 U.S. CONST. art. I, § 8, cl. 4.

156 See *Soskin*, 353 F.3d at 1256; see also *Unthaksinkun v. Porter*, No. C11-0588JLR, 2011 WL 4502050, at *27 (W.D. Wash. Sept. 28, 2011) ("The [*Soskin*] court concluded that a uniform rule was unnecessary to authorize the state's action . . ."). The *Unthaksinkun* decision goes on to note that "unlike the Tenth Circuit, the Ninth Circuit has not discarded [the] requirement that courts apply rational basis review to suspect classifications only where Congress has established a uniform rule." *Id.* (citing *Sudomir v. McMahan*, 767 F.2d 1456, 1466 (9th Cir. 1985)).

157 *Soskin*, 353 F.3d at 1256.

158 *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976).

159 *Id.* at 84–85. The Court subsequently described federal immigration and naturalization power in terms consistent with *Graham*. *Plyler v. Doe*, 457 U.S. 202, 219 n.19, 225 (1982) (noting the uniformity limitation to federal immigration and naturalization power and citing the Naturalization Clause).

160 See *Toll v. Moreno*, 458 U.S. 1, 10 (1982) ("Federal authority to regulate the status of aliens derives from various sources, including the Federal Government's power to establish a uniform Rule of Naturalization . . . , its power to regulate Commerce with foreign Nationals . . . , and its broad authority over foreign affairs." (citations omitted) (internal quotation marks omitted)).

161 *Mathews*, 426 U.S. at 70 n.1.

Clause. The *Soskin* court placed too much significance on the fact “that *Mathews* made no explicit mention of the Naturalization Clause,”¹⁶² and not nearly enough significance on the fact that *Graham*—a decision that *Mathews* did not disturb—already established that the Clause’s uniformity requirement applied when Congress regulates alien eligibility for welfare benefits.¹⁶³

Recognizing the uniformity requirement is crucial to proper alienage equal protection review because it precludes the casting of PRWORA’s grant of discretion to the states as a federal immigration policy that requires judicial deference. State-by-state discretion is certainly Congress’s “rule” with regard to much of alien eligibility, but it is not a *uniform* rule. And because a state exercise of discretion is not a uniform federal rule, the deference that the Supreme Court has afforded such rules is unwarranted. For this reason, the basic principle of *Graham* holds true—state policy that disfavors a class based on alienage must bear strict scrutiny.

C. Exclusions from Solely State-Funded Benefits

The final category of PRWORA-era cases is challenges to the exclusion of legally residing aliens from solely state-funded benefit programs. In this section, I will review *Aliessa*,¹⁶⁴ a 2001 decision from the New York Court of Appeals, as a counterpoint to *Soskin*’s flawed conclusion that the Naturalization Clause’s uniform-rule requirement did not constrain the power that Congress exercised when enacting PRWORA. I will also offer further support for *Aliessa*’s conclusion that state discretion exercised pursuant to PRWORA does not warrant *Mathews*-style deference.

Then I will turn to the Connecticut Supreme Court’s 2012 decision in *Pham v. Starkowski*,¹⁶⁵ which, unlike the *Aliessa* and *Soskin* decisions, avoids the question of uniformity (and substantive equal protection analysis altogether) by concluding that Connecticut did not classify based on alienage when it terminated the plaintiff class’s solely state-funded health benefits. Finally, I will review *Pham* to critique

¹⁶² *Soskin*, 353 F.3d at 1256. In his lengthy dissent, Judge Robert Harlan Henry argues that PRWORA’s devolution of immigration and naturalization powers to the states violates the uniformity requirement. *Id.* at 1274 (Henry, J. dissenting).

¹⁶³ See Wishnie, *supra* note 9, at 493 (discussing how every source of federal immigration and naturalization power precludes the devolution of that power, which would produce non-uniformity and contradict the notion of sovereignty).

¹⁶⁴ *Aliessa v. Novello*, 754 N.E.2d 1085 (N.Y. 2001).

¹⁶⁵ *Hong Pham v. Starkowski*, 16 A.3d 635 (Conn. 2012).

its threshold disposal of meritorious equal protection claims, which other courts have likewise employed.

I. Aliessa Applies Strict Scrutiny

The New York Court of Appeals was the first state high court to hold that the discretion that § 1622 accords states does not constitute a uniform rule, and therefore strict scrutiny remains the appropriate standard of review for state alienage classifications.¹⁶⁶ New York argued in *Aliessa* that the court should apply rational basis review to a state statute that denied qualified aliens and PRUCOLs (who are nonimmigrants) access to a state-funded health benefit that it offered to its resident citizens.¹⁶⁷ The state contended that because it was implementing a federal immigration policy at the direction of Congress through PRWORA, *Mathews's* rule of deferential review must apply.¹⁶⁸

Unlike the *Soskin* court's analysis that would follow three years later in the Tenth Circuit, the *Aliessa* court properly read *Graham* (and *Plyler*¹⁶⁹) as limiting deferential review to when the federal government dictates an alienage classification by uniform rule.¹⁷⁰ PRWORA does not meet the uniformity requirement, the court noted, because §§ 1621 and 1622 allow the states to extend or restrict benefits for aliens, "producing not uniformity, but potentially wide variation based on localized or idiosyncratic concepts of largesse, economics and politics."¹⁷¹

The court also recognized that § 1622's constitutional infirmity is even greater than what *Graham* instructed would be suspect. *Graham* said that a congressional authorization for states to adopt non-uniform eligibility requirements for "federally supported welfare" benefits would appear to contravene the Naturalization Clause.¹⁷² The *Aliessa* decision explains that § 1622 goes well beyond this suspect ground by authorizing states to bar legally residing aliens from a *state-funded* benefit.¹⁷³ As such, the court concluded that New York's statute "must be evaluated as any other State statute that classifies

¹⁶⁶ *Aliessa*, 754 N.E.2d at 1097-98 (discussing the uniformity requirement and concluding that Title IV of PRWORA "does not impose a uniform immigration rule for States to follow").

¹⁶⁷ *Id.* at 1091-92 (describing New York's Social Services Law § 122).

¹⁶⁸ *Id.* at 1096-97.

¹⁶⁹ *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1981).

¹⁷⁰ *Aliessa*, 754 N.E.2d at 1096 (citing *Plyler*, 457 U.S. at 219 n.19); *Graham v. Richardson*, 403 U.S. 365, 382 (1971).

¹⁷¹ *Aliessa*, 754 N.E.2d at 1098.

¹⁷² *Graham*, 403 U.S. at 382.

¹⁷³ *Aliessa*, 754 N.E.2d at 1098.

based on alienage” because § 1622’s authorization did not alter the power of any state to discriminate against legally residing aliens.¹⁷⁴ Applying the strict scrutiny standard that such state classifications require, the court held that New York’s statute violated the Equal Protection Clause.¹⁷⁵

Aliessa also reached the right result because the power that states exercise under § 1622 is distinct from and weaker than the power Congress exercised in setting the Medicare eligibility requirements that *Mathews* upheld. If we conceive a state-level exclusion of aliens from state public benefits as an exercise of inherent state police power,¹⁷⁶ then § 1622’s authorization to discriminate cures only the preemption defect found in *Graham*;¹⁷⁷ the equal protection violation remains. But if instead the exclusion is an exercise of devolved, federal power, then we must evaluate how that power stacks against the expansive power that *Mathews* recognized.

The power that PRWORA ostensibly devolved to the states in § 1622 is the federal power to regulate eligibility for a solely state-funded benefit. That power is weaker than the power to set conditions on who can benefit from federal funds (e.g., eligibility for Medicare) because it encroaches on the states’ sovereign prerogatives to make their own spending decisions.¹⁷⁸ This difference in powers is what distinguishes § 1622 from § 1612(b), where Congress purported to devolve to states the power to set alien eligibility for joint-funded benefit programs.¹⁷⁹ The substantial federal funds granted to joint-funded programs provide a direct link to Congress’s power under the Spending Clause, while the link in the § 1622 context is more tenuous because the benefit is solely state-funded.¹⁸⁰

174 *Id.*

175 *Id.* at 1098-99.

176 *See, e.g.*, Huntington, *supra* note 9, at 820 (discussing how cases from the mid-nineteenth century “express[ed] approval of state immigration laws based on state police powers”).

177 403 U.S. at 374.

178 *See* South Dakota v. Dole, 483 U.S. 203, 203 (1987) (discussing how Congress cannot command the states to spend state funds to its liking; rather, it may cajole state cooperation using its Spending Clause powers by offering federal funds with attached conditions).

179 A conditional grant of federal funds for joint-funded benefit programs is a well-established exercise of Congress’s power under the Spending Clause. *E.g.*, Rosemary B. Guiltinan, *Enforcing a Critical Entitlement: Preemption Claims as an Alternative Way to Protect Medicaid Recipients’ Access to Healthcare*, 51 B.C. L. REV. 1583, 1590 (2010) (describing Medicaid as one such program enacted pursuant to the Spending Clause).

180 Federal rules controlling the provision of solely state-funded benefits would effectively be a “cross-cutting” spending condition tied to federal funds granted to the same state agency that administers such benefits. *See* David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Ad-*

In other words, Congress's power to set eligibility for benefits (whether exercised itself or devolved) is strongest when the benefit consists of only federal funds and attenuates as the benefit becomes more and more state-funded. Congress has many ways to manipulate and influence state spending,¹⁸¹ but its power to directly control its own funds is nevertheless greater than its power to influence, but not command,¹⁸² the spending of state funds.

The upshot of this assessment of background powers at work in PRWORA is further support for *Aliessa's* conclusion with respect to congressional authorization of state-made eligibility requirements. The court found that if, per *Graham*, such authorizations were constitutionally suspect with regard to federally supported benefits, then solely state-funded benefits must engender an even greater constitutional defect.¹⁸³ The foregoing analysis bolsters that finding and further demonstrates why state choices that prefer citizens over aliens in the allocation of state welfare dollars are subject to strict scrutiny, even under the guise of federal approval.

2. Pham: *Wrongly Avoiding Equal Protection Review*

Not all challenges to the exclusion of legally residing aliens from state public-benefit programs map squarely onto *Aliessa's* analytical framework.¹⁸⁴ In *Aliessa*, the state benefit denied to legally residing aliens was offered to New York's resident citizens. But in cases such as *Pham*, *Bruns v. Mayhew*,¹⁸⁵ and *Khrapunskiy v. Doar*,¹⁸⁶ the state benefits in dispute were available only to certain legal aliens and not to cit-

ministrative State, 82 TEX. L. REV. 1197, 1240 (2004) (contrasting programmatic spending conditions, such as Medicaid and TANF, with cross-cutting spending conditions).

181 For an extensive treatment of the constitutional dimensions of Congress exercising its power through conditional spending, see generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989) (criticizing the Supreme Court's traditional analysis of unconstitutional conditions on governmental benefits).

182 See Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1631–32 (2006) (arguing for a standards and balancing approach to analyzing the anti-commandeering doctrine rather than a rules based approach).

183 *Aliessa v. Novello*, 754 N.E.2d 1085, 1098 (N.Y. 2001).

184 See *Doe v. Comm'r of Transitional Assistance*, 773 N.E.2d 404, 404 (Mass. 2002) (scrutinizing Massachusetts's six-month alien residency requirement); see also *Soskin v. Reinertson*, 353 F.3d 1242 (10th Cir. 2004) (scrutinizing the Colorado legislature's removal of the optional Medicaid coverage that it had previously provided to legal aliens); *Ehrlich v. Perez*, 908 A.2d 1220 (Md. 2006) (describing the state benefit for a class of aliens "newly excluded" from federal Medicaid).

185 931 F. Supp. 2d 260 (D. Me. 2013).

186 909 N.E.2d 70 (N.Y. 2009). Similar cases are *Doe*, 773 N.E. 2d at 407, and *Perez*, 908 A.2d at 1227 (concerning programs that provided benefits to legally residing alien women and children whose benefits were eliminated by the Welfare Reform Act).

izens. Some courts have cited this difference from *Aliessa* to wrongly dismiss claims, concluding that the alien plaintiffs were not similarly situated to anyone receiving preferential treatment from the state.¹⁸⁷ Their overly narrow conceptions of class-comparison analysis has led them to conclude that states have drawn no alienage classification at all and to therefore reject equal protection claims that in fact have merit.¹⁸⁸

I will review the *Pham* decision to provide an example of this misguided analysis and to make two related points in support of properly defining the similarly situated classes in these types of equal protection challenges. First, assessing whether plaintiffs are similarly situated to a favorably treated class is part of the substantive equal protection analysis and is not a separate threshold requirement that plaintiffs must overcome. Second, funding comparable benefits through a single program or separate programs is a formal distinction that does not dictate whether two beneficiaries are similarly situated.

Pham addressed a challenge brought by a class of QAs<5¹⁸⁹ in Connecticut to the loss of two solely state-funded health benefits.¹⁹⁰ One benefit was exclusively for aliens and the other, as in *Aliessa*, was open to aliens and citizens.¹⁹¹ Connecticut created the alien-only benefit, called State Medical Assistance for Noncitizens (SMANC), in 1997 to provide medical assistance to aliens excluded by PRWORA from its Medicaid program.¹⁹² SMANC is akin to the alien-only supplemental TAFDC benefit at issue in *Doe*, which was designed to assist aliens who PRWORA rendered ineligible for federal TANF funds.¹⁹³ The other benefit at issue in *Pham* was the “State Administered General Assistance Medical program (SAGA-medical).”¹⁹⁴

187 *E.g., Bruns*, 931 F. Supp. 2d at 273 (following the analysis articulated in *Pham* and concluding that “the Plaintiffs are unable show [sic] they were similarly situated with citizens for equal protection purposes”); *see also Khrapunskiy*, 909 N.E.2d at 77 (“As there is no state program of aid for this class, there are *no* state residents receiving public assistance from New York at the level requested by plaintiffs.”).

188 *See, e.g., Recent Cases, Constitutional Law – Equal Protection – New York Court of Appeals Hold That State May Restrict Legal Alien Access to Disability Benefits – Khrapunskiy v. Doar*, 123 HARV. L. REV. 800, 803 (2010) (criticizing New York’s *Khrapunskiy* decision for erring in “refusing to conduct an equal protection analysis” which would have “turn[ed] the case for the plaintiffs”).

189 Recall that “QAs<5” is my shorthand for qualified aliens that have yet to meet the five-year residency threshold for Medicaid and TANF eligibility.

190 *Hong Pham v. Starkowski*, 16 A.3d 635, 637–38 (Conn. 2011).

191 *Id.* at 641–42.

192 *Id.* at 641.

193 *Doe v. Comm’r of Transitional Assistance*, 773 N.E.2d 404, 407 (Mass. 2002).

194 *Pham*, 16 A.3d at 642.

Until 2009, low-income citizens and legally residing aliens were eligible for SAGA-medical if they were not eligible for Medicaid.¹⁹⁵ Responding to budgetary pressures, the Connecticut legislature passed Spec. Sess. P.A. 09-05, “which substantially eliminated SMANC,” thereby “terminat[ing] publicly funded medical assistance for most recipients,” and effectively excluded the plaintiff aliens from SAGA-medical.¹⁹⁶

A trial court enjoined the state from terminating the *Pham* plaintiffs’ benefits in both programs, but that injunction was short-lived. The Connecticut Supreme Court reversed, concluding that neither the elimination of SMANC nor the exclusion of aliens from SAGA-medical discriminated on the basis of alienage and thus did not violate the Equal Protection Clause.¹⁹⁷ Rather than reach the issue of whether rational basis review or strict scrutiny should apply to “state classifications based on alienage that are authorized by the federal government,” the court instead held that the challenged statutory provisions “[did] not discriminate on the basis of alienage.”¹⁹⁸ The court concluded that only persons still enrolled in SMANC were similarly situated to the plaintiff class.¹⁹⁹

The first problem with *Pham*’s analysis is that its inquiry into whether “the state is affording different treatment to similarly situated groups of individuals”²⁰⁰ as a “threshold requirement” is not rooted in the U.S. Supreme Court’s equal protection jurisprudence.²⁰¹ Although many state courts²⁰² and lower federal courts, including the

195 *Id.*

196 *Id.* at 641–43.

197 *Id.* at 664.

198 *Id.* at 645.

199 *Id.* at 648. The court alternatively held that even if the plaintiffs in the class were similarly situated to citizens enrolled in Medicaid, the state-drawn classification was based on eligibility for Medicaid, not alienage. *Id.* at 657–58, 662. I explain in Part III.D. why this alternative holding is likewise unfounded.

200 *Pham*, 16 A.3d at 645.

201 See Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 598 (2011) (reviewing Supreme Court precedent and concluding that the Court “has not historically viewed [the phrase ‘similarly situated’] as a separate, threshold requirement, but rather as one and the same as the equal protection merits inquiry”).

202 *E.g.*, *People v. Buffington*, 74 Cal. Rptr.2d 696, 701 (“If persons are not similarly situated for purposes of the law, an equal protection claim fails at the threshold.”); *Brazas v. Prop. Tax Appeal Bd.*, 791 N.E.2d 614, 620 (Ill. App. Ct. 2003) (“The threshold inquiry in equal protection analysis is whether similarly situated persons are treated dissimilarly.”); *In re Weisberger*, 169 P.3d 321, 328 (Kan. 2007) (“[A] threshold requirement for stating an equal protection claim is to demonstrate that the challenged statutory enactment treats ‘arguably indistinguishable’ classes of people differently.” (citation omitted)).

First,²⁰³ Eighth,²⁰⁴ Ninth,²⁰⁵ and D.C. Circuits,²⁰⁶ have treated class comparisons as an independent threshold inquiry. Professor Giovanna Shay has noted that the Supreme Court refers to “similarly situated” classes when applying “rational review with bite” and “intermediate scrutiny.”²⁰⁷ These are two versions of the substantive equal protection “fit” analysis,²⁰⁸ not separate threshold inquiries. Moreover, Shay observed that the phrase rarely appears in Supreme Court decisions concerning suspect classifications, bolstering her argument that the phrase describes substantive equal protection principles rather than acts as a prerequisite to applying those principles.²⁰⁹ Indeed, if a “similarly-situated” showing were a true threshold requirement, it would apply to cases involving suspect and non-suspect classifications alike.

The second problem with *Pham* is that, putting aside whether the similarly-situated inquiry is an independent threshold analysis,²¹⁰ the court wrongly concluded that the plaintiffs were similarly situated only to other SMANC recipients.²¹¹ Instead, the court should have viewed plaintiffs as similarly situated to all other Connecticut residents with comparable characteristics that are relevant to the purposes²¹² of providing need-based medical assistance (such as income, re-

203 *Macone v. Town of Wakefield*, 277 F.3d 1, 10 (1st Cir. 2002) (“Here, we look for two elements: (1) whether the appellant was treated differently than others similarly situated, and (2) whether such a difference was based on an impermissible consideration, such as race.”).

204 *Klinger v. Dep’t of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994) (“Absent a threshold showing that she is similarly situated to those who allegedly receive favorable treatment, the plaintiff does not have a viable equal protection claim.”).

205 *Pimentel v. Dreyfus*, 670 F.3d 1096, 1106 (9th Cir. 2012) (“Only once this threshold showing is made may a court proceed to inquire whether the basis of the discrimination merits strict scrutiny.”).

206 *Women Prisoners of D.C. Dep’t of Corr. v. District of Columbia*, 93 F.3d 910, 924 (D.C. Cir. 1996) (“The threshold inquiry in evaluating an equal protection claim is, therefore, ‘to determine whether a person is similarly situated to those persons who allegedly received favorable treatment.’” (quoting *United States v. Whiton*, 48 F.3d 356, 358 (8th Cir. 1995))).

207 Shay, *supra* note 201, at 613–14 (noting the prominence of the phrase in Supreme Court cases invalidating legislative classifications under rational basis review and “presag[ing the] appearance of intermediate scrutiny” as a standard of review).

208 *Id.* at 615–16.

209 *Id.* at 614 (“By contrast, the phrase ‘similarly situated’ did not figure as prominently in race cases that were reviewed under strict scrutiny.”).

210 I make this argument because the “threshold” version of the similarly-situated inquiry is pervasive in state and lower federal courts, *see supra* notes 202–06, and appears unlikely to be corrected soon.

211 *Hong Pham v. Starkowski*, 16 A.3d 635, 648–49 (Conn. 2011).

212 *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 345–46 (1949) (noting common errors in applying the “similarly situated” analysis and concluding that “[t]he inescapable answer is that we must look beyond the classifica-

sources, age, and disability status) and who are receiving benefits funded at least partially by the state. Getting this class comparison correct is fundamental to an adequate equal protection review.²¹³

To conclude that plaintiffs were not similarly situated to citizens enrolled in Medicaid, the *Pham* court noted that SMANC was a separate program from Connecticut's Medicaid program. Only aliens could enroll in the former, while citizens (and certain aliens not barred by PRWORA) could enroll in the latter. But the separation of comparable benefits into two programs or the combination of such benefits into a single program is a formal distinction without a difference for the purpose of determining a similarly situated class.²¹⁴ The Ninth Circuit explained in *Pimentel* that a state "could not evade strict scrutiny simply by first authorizing one state-funded program for citizens and certain aliens and another for a subclass of aliens, and then canceling the latter."²¹⁵ For instance, Massachusetts' Commonwealth Care program at issue in *Finch* was administered as a single program, with some enrollees funded solely by state funds.²¹⁶ But the state just as well could have administered the benefits in separate programs, much as it did with primary and supplemental TAFDC.²¹⁷ This strictly formal alteration would not render the beneficiaries of each program differently situated.

In sum, the problems that I have identified in *Pham* are not unique to that decision. Other courts have applied a threshold version of the similarly-situated analysis,²¹⁸ concluding that no equal protection review was required because the plaintiffs could not be compared to individuals receiving benefits in a separate benefit program

tion to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law."); *see also* Varnum v. Brien, 763 N.W.2d 862, 882–83 (Iowa 2009) (explaining that "equal protection demands that laws treat alike all people who are similarly situated *with respect to the legitimate purposes of the law*" and that "[t]he purposes of the law must be referenced in order to meaningfully evaluate whether the law equally protects all people similarly situated with respect to those purposes" (emphasis added) (internal quotation marks omitted)).

²¹³ *See infra* Part III.A.

²¹⁴ *See Pimentel v. Dreyfus*, 670 F.3d 1096, 1101, 1107–08 (9th Cir. 2012) (concluding that Washington's "Basic Food Benefits" program, which used a single application form processed by the same state agency and did not communicate to recipients whether their benefits were state or federal, was in fact "two separately administered programs funded by two distinct sovereigns").

²¹⁵ *Pimentel*, 670 F.3d at 1107.

²¹⁶ *Finch v. Commonwealth Health Ins. Connector Auth.*, 946 N.E.2d 1262, 1267 (Mass. 2011).

²¹⁷ *Doe v. Comm'r of Transitional Assistance*, 773 N.E.2d 404, 407 (Mass. 2002).

²¹⁸ *See Pimentel*, 670 F.3d at 1106; *Bruns v. Mayhew*, 931 F. Supp. 2d 260, 267 (D. Me. 2013).

for which plaintiffs were never eligible.²¹⁹ Consistent with Supreme Court precedent, the similarly-situated inquiry is best understood as an expression of the substantive equal protection analysis. But where it is applied as a threshold test, courts should not be confined by the formal separation of two programs that provide essentially the same type of benefit.

III. GUIDEPOSTS FOR ALIEN EQUAL PROTECTION REVIEW

The decisions reviewed in Part II should be both instructive and cautionary to state and federal courts that review similar equal protection challenges. This section will draw out the critical lessons from those cases to provide courts with guideposts to follow in their assessments of equal protection suits brought by aliens whom states have excluded from public-benefit programs. These guideposts will help ensure that courts engage in the robust equal protection review that *Graham* and *Mathews* require.

A. Guidepost One: Similarly Situated

In the preceding section, I argued that courts should not apply a threshold similarly-situated analysis of aliens' equal protection claims because such class comparisons are properly understood as part of the substantive equal protection review. I noted, however, that many state courts and lower federal courts employ the threshold version and are unlikely to depart from that practice.²²⁰ For this reason I propose a two-part test for assessing who is similarly situated to plaintiff aliens. Applying this test will avoid the *Pham* court's error of prematurely dismissing meritorious equal protection claims.

Before turning to my proposed test, I first consider the analysis that the Ninth Circuit used in *Pimentel*. As noted above, *Pimentel* rejected the type of formalism on which *Pham* relied, where the state's decision to provide benefits through one program or many programs would determine which beneficiaries were similarly situated to plaintiffs. Instead, the Ninth Circuit suggested that "[a] careful consideration of the contours of the [alien-excluding benefit program]" will

219 See *Bruns*, 931 F. Supp. 2d at 273 ("Because citizens were statutorily unable to receive health benefits under the same state-sponsored program, the Plaintiffs are unable to show they were similarly situated with citizens for equal protection purposes."); *Khrapunskiy v. Doar*, 909 N.E.2d 70, 77 (N.Y. 2009) ("As there is no state program of aid for this class, there are no state residents receiving public assistance from New York at the level requested by plaintiffs.").

220 See *supra* note 210.

demonstrate whether the beneficiaries of that program are similarly situated to the plaintiff class.²²¹ These “contours” include “the statutory scheme, source of funding, extent of state involvement, and history” of the benefit program.²²²

This vague test²²³ was sufficient for the *Pimentel* court to reach the right result in that case, but I predict that it will lead to inconsistent results going forward. Indeed, the one lower federal court to have employed it to date wrongly concluded that aliens terminated from a solely state-funded health benefit program were not similarly situated to individuals enrolled in Medicaid.²²⁴

I argue instead that a court undertaking a similarly-situated inquiry need only make two determinations: (1) the similarity of plaintiffs to benefit-receiving individuals with regard to characteristics relevant to the purpose of the benefit at issue;²²⁵ and (2) the degree to which the state funds the benefit those individuals receive. The first determination is no more than an expression of the basic equal protection principle that similarity and dissimilarity must be evaluated as it relates to the purpose of the government (typically legislative) action.²²⁶ The second determination ensures that the difference in treatment between the plaintiffs and the benefit-receiving individuals is properly attributable to the state.

For example, suppose a state determines that low-income families with children have a particular need for health benefits, and it provides those benefits through a joint-funded benefit program. The relevant characteristics for determining the state’s residents who are similarly situated with respect to these benefits would be income level and number of children in the family. And the presence of state funds in the joint-funded benefit program indicates that the state has

²²¹ *Pimentel*, 670 F.3d at 1108.

²²² *Id.*

²²³ The court does not explain how (or to what degree) each of these “contours” is relevant to the question of similarity between plaintiffs and a class receiving more favorable state treatment. *Id.*

²²⁴ *See Bruns*, 931 F. Supp. 2d at 272 (“After considering the ‘contours’ of the programs in dispute, the Court concludes that there were two separate benefit programs: an aliens-only program and a program for citizens and qualified aliens who satisfied PRWORA’s residency requirement.”).

²²⁵ To the degree this rule begs the questions, “How relevant must these characteristics be?” and “What latitude does the state have in defining the purpose of the benefit?” the answer is that, as argued above, this analysis is part and parcel to *substantive* equal protection review. Thus, what may constitute the purpose of the benefit program and what is the required degree of relevance between characteristics and purpose both depend on the standard of review being applied.

²²⁶ *See Tussman & tenBroek*, *supra* note 212, at 346 (“The inescapable answer is that we must look beyond the classification to the purpose of the law.”).

treated beneficiary families more favorably than low-income families with children who are not beneficiaries.²²⁷ The non-beneficiary families would be similarly situated to the beneficiary families in an equal protection suit against the state.

Applying my proposed similarly-situated analysis to the *Pimentel* case would reach the same (correct) result that the Ninth Circuit reached. The *Pimentel* court held that Washington's resident citizens receiving federal food benefits were dissimilarly situated from resident aliens who had received a now-terminated solely state-funded food benefit, even though both benefits were administered as a single program by a single state agency.²²⁸ Plaintiffs in this case meet the first part of my similarly-situated rule because they had similar relevant characteristics (income level)²²⁹ to individuals receiving federal food benefits. But they fail the second part of my rule because state funding of the federal food benefit program was nominal—the state funded only fifty percent of the *administrative* costs of the program, while the federal government funded the other half of those costs and 100 percent of the benefits.²³⁰ This result makes sense because a state should not be held responsible for the preferential treatment that results from federal, not state, funding.

Applying this analysis to *Pham*, however, shows that the plaintiff class was similarly situated to individuals receiving Medicaid benefits. As in *Pimentel*, the plaintiffs had similar relevant characteristics (such as age, income level, and disability status) to Medicaid recipients.²³¹ What distinguishes *Pham* from *Pimentel* is that whereas Washington's funding of the federal food benefit was nominal, Connecticut's contribution to its Medicaid program was upwards of \$1.9 billion.²³² Thus, with respect to Connecticut's support of need-based health benefits, the plaintiff class of needy aliens who received no health benefits was similarly situated to the needy citizens (and some aliens) who received Medicaid.

227 If the characteristic that distinguishes the beneficiary and non-beneficiary families is suspect, such as alienage, then strict scrutiny is required.

228 *Pimentel*, 670 F.3d at 1101, 1108.

229 *Id.* at 1099.

230 *Id.* at 1099, 1108; *see also* 7 U.S.C. § 2025 (2012) (requiring states to cover fifty percent of the program's administrative costs).

231 *Hong Pham v. Starkowski*, 16 A.3d 635, 642–43 (noting that the plaintiff class members are categorically eligible for Medicaid).

232 *Pham*, 16 A.3d at 654.

B. *Guidepost Two: Alien Status*

A court reviewing an alien's equal protection challenge will quickly lose its way if it does not identify the plaintiff's status as an alien with as much particularity as possible. This status is critical to understanding how the alien and the benefits at issue fit within the PRWORA scheme. Contrary to assertions made in the opinions reviewed above,²³³ an alien's status under PRWORA is not binary, so it will not suffice to determine merely whether an alien is "qualified." PRWORA provides different eligibility rules for state and federal public benefits depending on whether an individual is a qualified alien, a nonimmigrant, or an undocumented alien.²³⁴ Grouping nonimmigrants with undocumented aliens runs the risk of wrongly applying rational basis review instead of strict scrutiny to a state's exclusion of nonimmigrants from a state public benefit.²³⁵

Courts must also pay attention to other characteristics of the plaintiff alien that affect eligibility under PRWORA, such as the date when the alien first entered the United States and how long the alien has resided with qualified status, because those characteristics dictate how much discretion a state may exercise. As I explain further in the following subsection, recognizing which aspects of a state's public-benefit scheme are discretionary and which are federally mandated is critical to determining the proper standard of equal protection review to apply. Courts should apply strict scrutiny when states, rather than Congress, exercise discretion to restrict benefits for a class of aliens.

C. *Guidepost Three: Uniform Federal Rule*

Once the court has identified the plaintiff's alien status, the court should determine whether he or she is subject to a uniform federal rule under PRWORA. These uniform rules in PRWORA include the five-year bar for qualified aliens and the permanent bar for nonimmigrants from joint-funded benefit programs. Determining the applicability of a uniform federal rule helps to define what a state must

²³³ See, e.g., *Bruns v. Mayhew*, 931 F. Supp. 2d 260, 263 (D. Me. 2013) ("PRWORA divided noncitizens into two groups for Medicaid eligibility: qualified and non-qualified aliens."); *Pham*, 16 A.3d at 640 ("[PRWORA] divides aliens into two groups: qualified and non-qualified aliens."); *Doe v. Comm'r of Transitional Assistance*, 773 N.E.2d 404, 406 n.2 (Mass. 2002) ("A 'qualified alien' is one who has some legal residency status in the United States. An alien who is not 'qualified' does not." (citation omitted)).

²³⁴ See *supra* Part I.B.

²³⁵ For example, the supplemental TAFDC program in *Doe* extended benefits to qualified aliens, but not to nonimmigrants. 773 N.E.2d at 407.

provide its alien residents to comport with the command of equal protection. For instance, QAs²³⁶ excluded from Medicaid or TANF programs on account of the five-year bar have the right to only a pro-rata match of the state's contribution to those Medicaid or TANF programs.²³⁶ But if Congress has not made a class of aliens ineligible for a benefit, then any state effort to exclude such aliens must be reviewed under strict scrutiny and the appropriate remedy is enrollment in the benefit program.²³⁷

When, like in *Soskin*, PRWORA does not categorically bar the alien class from joint-funded benefit programs, a state that eliminates aliens from such programs contravenes the equal protection rationale of the *Graham* holding. The state denies aliens state funds that it contributes for the benefit of similarly-situated citizens. But these situations also implicate the federalism rationale of *Graham*²³⁸ because the state also blocks alien access to federal funds that federal policy would permit. Granted, federal policy also permits denying these aliens federal support, but a state-by-state determination of alien access to federal support creates a non-uniform immigration policy and raises the federalism concern of political accountability.²³⁹

For example, a qualified alien is unlikely to know that his ineligibility for Medicaid is a federal policy for his first five years of qualified status but an optional state policy thereafter. Obscuring the source of a policy encumbers the mobilization of political forces against that policy. Both the federalism and equal protection concerns that led the *Graham* court to apply strict scrutiny are present when state policy is akin to Colorado's statute in *Soskin*.

In contrast, if a court confronts a situation like *Doe*, where the alien class falls under PRWORA's five-year bar or other uniform rule regarding eligibility for a joint-funded benefit, then the court should apply *Mathews* deference, but only to Congress's choice to deny the aliens federal funds. PRWORA does not prevent states from creating alien-only state-funded benefits, such as supplemental TAFDC in *Doe*. Thus, a state's participation in a joint-funded benefit without contributing equal pro-rata funds to an alien-eligible benefit is a state, not federal, policy that treats aliens unequally on the basis of their al-

²³⁶ But if the state is providing its citizen residents additional benefits outside of Medicaid that it is denying its alien residents, comparable benefits must be provided to aliens as well.

²³⁷ See *supra* Part II.B.

²³⁸ See *supra* note 20.

²³⁹ See Carrasco, *supra* note 28, at 628. See also *Alden v. Maine*, 527 U.S. 706, 751 (1999) (discussing the tie between political accountability and federalism).

ienage. This point will be explored in further detail in my next guidepost.

D. Guidepost Four: Adopted Alienage Classifications

Courts must also be aware of the precise extent of PRWORA's uniform rules. Although these rules prohibit certain aliens' enrollments in joint-funded benefit programs, they actual block these aliens' receipt of federal-funded support. The reason is because PRWORA allows states to create solely state-funded programs that provide excluded aliens the same types of benefits that citizens and non-excluded aliens (e.g., aliens with five years of qualified status) receive from the joint-funded programs. For example, Connecticut created its SMANC program to give health benefits to aliens that PRWORA rendered ineligible for Medicaid.²⁴⁰ PRWORA's uniform rule blocked these aliens from receiving health benefits supported by federal funds, but they nonetheless received health benefits supported by state funds.

Understanding this limited scope of PRWORA's uniform rules clarifies that a state's participation in a joint-funded benefit program does not require the state to adopt the alienage classifications inherent to the program's eligibility rules.²⁴¹ Courts have failed to recognize that states retain the choice of whether to adopt for receipt of their own welfare dollars any or all of the federally imposed eligibility criteria (whether alienage-related or otherwise) attached to joint-funded benefit programs.

To be clear, I do not mean that states can ignore federal eligibility rules and enroll individuals that Congress has barred. Instead, I mean that states can provide separate, solely state-funded benefits to a class of individuals excluded from the joint-funded benefit program because of any given criteria (e.g., income level, age, or alienage). By so doing, state participation in the joint-funded benefit program no longer accords preferential treatment to individuals meeting those eligibility criteria.

²⁴⁰ Hong Pham v. Starkowski, 16 A.3d 635, 641 (Conn. 2011).

²⁴¹ This point undermines the *Pham* court's alternative holding that Connecticut's participating in Medicaid "does not discriminate on the basis of alienage" because the classification is between those who meet the federal criteria for Medicaid and those who do not. *See id.* at 657–59. By providing aliens no health benefits whatsoever, Connecticut adopted an alienage classification that PRWORA did not require—contributing significant state funds to a Medicaid program that helps citizens (and excludes most aliens) while failing to provide equal funding to a health-benefit program for aliens.

This guidepost requires some unpacking. To do this, I will first use a simple hypothetical to show how states adopt federal classifications as their own through their funding of joint-funded benefit programs. I will then use *Pham* as a real-world example of a state using solely state-funded benefits to reject some of the non-suspect classifications that the federal government imposes on Medicaid programs, while retaining the federally imposed alienage classifications.

Suppose, for example, that two individuals are similarly situated in every respect except that X is blind and Y is sighted. Pursuant to Medicaid's eligibility criteria, X receives Medicaid benefits but Y does not. A state's funding of part of X's Medicaid benefits constitutes preferential state treatment of X over Y. In other words, the state is classifying on the basis of blindness. But if the state provides equal state funds to a separate health benefit for Y, the state would no longer be treating X and Y differently—there would no longer be a state-level blindness classification. The state would thus participate in Medicaid without adopting Medicaid's classification based on blindness. And the same principle holds for Medicaid's (or TANF's) alienage classifications because no federal law impedes the states from providing solely state-funded benefits to aliens barred from Medicaid (or TANF).²⁴²

The facts in *Pham* demonstrate how a state can participate in Medicaid but draw classifications different from those that Congress drew in establishing the baselines for Medicaid eligibility. Through its SAGA-medical program, Connecticut uses state funds to extend Medicaid-like benefits to a subset of individuals who do not meet one of Medicaid's "categorical eligibility"²⁴³ criteria. A low-income Connecticut resident who was not aged, blind, disabled, pregnant, or a parent of a dependent child could nonetheless qualify for the solely state-funded SAGA-medical program. As with the separate state-funded benefit in my blindness hypothetical, Connecticut's provision of SAGA-medical essentially negates the classifications that the state's participation in Medicaid would otherwise draw.

Prior to the 2009 enactment of the statute challenged in *Pham*, Connecticut likewise negated the alienage classification that is otherwise inherent to Medicaid participation. It achieved this by providing SMANC and SAGA-medical to aliens excluded from Medicaid. But its

²⁴² See 8 U.S.C. § 1622 (2012) (allowing states to determine alien eligibility for state public benefits).

²⁴³ This phrase "generally refers to those who are disabled, blind, pregnant, a parent of a dependent child, or an individual under twenty-one years of age or sixty-five years of age or older." *Pham*, 16 A.3d at 639 (citing 42 U.S.C. §§ 1396a(a)(10), 1396d(a) (2006)).

elimination of SMANC and exclusion from SAGA-medical of individuals ineligible for Medicaid because of alienage (while still providing SAGA-medical to persons ineligible for Medicaid because of other criteria) shows how Connecticut selected which aspects of Medicaid eligibility criteria it would adopt (alienage) and which it would reject (certain categorical eligibility criteria).

In sum, PRWORA contains a uniform mandate that federal funds not support benefits for certain aliens. But courts must not interpret this as a mandate that states commit more of their funds to the support of their in-need citizen populations than their in-need alien populations. That decision is left to the states. States that fund a separate benefit program for aliens at an equal pro-rata level as they fund a Medicaid or TANF program do not classify based on alienage; states that fund Medicaid and TANF programs with no separate benefits for excluded aliens have voluntarily adopted alienage classifications.

E. Guidepost Five: Sources and Levels of Funding

The essential lesson from *Graham* and *Mathews* is that the federal government has much wider latitude to make decisions that treat aliens and citizens differently than do state governments.²⁴⁴ This lesson forms the foundation of what must anchor a court's equal protection analysis in the PRWORA context. Rather than confine its analysis to the eligibility requirement of a particular benefit and which government entity created that requirement, the court should look more broadly to the public-benefit scheme as a whole and ask: Has the state decided to devote its resources to the benefit of its resident citizens that it has not likewise devoted to its resident aliens?

By looking beyond the facial classification to root out underlying state policy decisions that disadvantage aliens based on the fact of their alienage, courts will shut off a back-door method for Congress to authorize states to violate the Equal Protection Clause.²⁴⁵ Without this robust judicial review, nothing but political pressure will prevent states from funneling more and more of their funds through a federal program to benefit citizens over aliens. The futility of a discreet and insular minority's reliance on the political process is a fundamental justification for the judiciary's role in enforcing the mandates of equal protection.²⁴⁶ This justification is especially salient when that

²⁴⁴ See discussion, *supra* Part I.

²⁴⁵ See *supra*, note 134.

²⁴⁶ See *supra*, note 18.

minority is a class of aliens, who by definition lack the basic tool of political power: the vote.²⁴⁷

IV. EQUAL PROTECTION VIOLATIONS

Proper attention to the guideposts outlined in Part III brings into focus the equal protection violations that result not only from reductions or terminations of existing public benefits for aliens, but also from the basic structures of state public-benefit schemes in the PRWORA era. Whereas class actions brought by aliens to date have focused on the former, judicial recognition of the latter would significantly expand the scope of aliens asserting their rights of equal access to public benefits. Far more states have structured their public-benefit programs to the disadvantage of aliens than have first provided, then reduced or terminated, benefits for aliens. The following Part will describe three characteristics of these structures that render state-funded and joint-funded benefit programs equal protection violations. In each section I will recommend actions that state legislatures can take to remedy these violations.

The first characteristic I will address is the denial of a joint-funded benefit to aliens for whom PRWORA does not bar eligibility by uniform rule. Examples include denials of Medicaid and TANF benefits, as well as benefits under the Children's Health Insurance Program (CHIP).²⁴⁸ Next, I will turn to the expansion of joint-funded benefits for a state's resident citizens but not aliens. States can expand these benefits using solely state funds (administered within the joint-funded benefit program or as a separate, supplemental benefit) or using both state and federal funds in a § 1115 demonstration project.²⁴⁹ Finally, I address the choice to commingle state and federal funds in the provision of public benefits.

A. *Soskin Situations*

State public-benefit schemes that deny joint-funded benefits to aliens for whom federal law permits eligibility are unconstitutional because they effect alienage classifications as a matter of state discretion. With regard to most qualified aliens, PRWORA allows the states to determine eligibility for not only solely state-funded benefit pro-

²⁴⁷ See Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 341 (1993) ("The [Supreme] Court has viewed the vote primarily as a tool for exerting political power.").

²⁴⁸ See generally 42 U.S.C. § 1397aa (2006) (providing no uniform bar for eligibility for "child health assistance to uninsured, low-income children").

²⁴⁹ See *supra* note 107.

grams,²⁵⁰ but also joint-funded benefit programs.²⁵¹ Although PRWORA uniformly bars qualified aliens from receiving these joint-funded benefits for five years, states have discretion under § 1612(b) to effectively extend that bar. States may also deny joint-funded benefit eligibility to pre-enactment qualified aliens,²⁵² a population that PRWORA does not uniformly exclude from such benefit programs.²⁵³ Examples of states exercising this discretion in a manner that classifies based on alienage are seen in the Medicaid, TANF, and CHIP contexts.

1. *Denying Federally Available Medicaid and TANF Benefits*

As noted in the discussion of *Soskin* in Part II.B.1 above, Colorado exercised § 1612(b) discretion to make alien eligibility for parts of its Medicaid program more restrictive than Congress required.²⁵⁴ Other states have elected this restrictive option as well, limiting Medicaid benefits for aliens arriving in the United States after PRWORA's enactment to only those qualified aliens for whom PRWORA requires coverage.²⁵⁵ These states include Alabama, Mississippi, North Dakota, Ohio, Texas, Virginia, and Wyoming.²⁵⁶

Similarly, states have restricted qualified aliens' eligibility for TANF benefits beyond PRWORA's five-year bar. For instance, Indiana and Kansas provide TANF benefits after five years only to qualified aliens who are refugees, asylees, and "persons granted a withholding of deportation,"²⁵⁷ while Idaho and Texas limit these benefits

²⁵⁰ See generally 8 U.S.C. § 1622 (2012).

²⁵¹ See 8 U.S.C. § 1612(b) (2012) (providing that, except for the mandatory five-year bar, "a State is authorized to determine the eligibility of an alien who is a qualified alien (as defined in section 1641 of this title) for [TANF, social services block grants, and Medicaid]"). States do not have such discretion under PRWORA with regard to joint-funded benefits for a small subset of qualified aliens that include refugees, asylees, veterans, members of the military, and legal permanent residences with credit for forty qualifying quarters of work. See also *id.* § 1612(b)(2) (2012) (listing such exceptions).

²⁵² See 8 U.S.C. § 1612(b)(2)(D) (2012) (mandating joint-funded benefit eligibility for pre-enactment lawfully residing aliens only until January 1, 1997); see also KARINA FORTUNY & AJAY CHAUDRY, URBAN INSTITUTE, A COMPREHENSIVE REVIEW OF IMMIGRANT ACCESS TO HEALTH AND HUMAN SERVICES 9 (2011) (noting certain subsets of qualified aliens for which TANF and Medicaid eligibility is mandatory, but that "[s]tates can determine eligibility for all other qualified immigrants").

²⁵³ See 8 U.S.C. § 1613(a) (2012) (stating that the statutorily required five-year ineligibility applies only to aliens "who enter[] the United States on or after August 22, 1996").

²⁵⁴ See *supra* note 139.

²⁵⁵ See *supra* note 251.

²⁵⁶ FORTUNY & CHAUDRY, *supra* note 252, at 13–14. Wyoming also restricts Medicaid coverage for aliens arriving prior to PRWORA's enactment. *Id.*

²⁵⁷ *Id.* at 31.

to only those qualified aliens who are battered spouses or children.²⁵⁸ Mississippi and North Dakota are the most restrictive states, providing TANF benefits to only those qualified aliens for whom PRWORA mandates eligibility.²⁵⁹

These states are denying qualified aliens benefits supported by both state and federal funds. And unlike aliens who are ineligible for federally supported benefits because of the five-year bar, these aliens would be eligible for such benefits were it not for the states' decisions to restrict eligibility.²⁶⁰ *Graham* suggests that a federal authorization of state-by-state alien-eligibility determinations contravenes the Naturalization Clause's uniformity requirement and thus cannot exempt these state alienage classifications from strict scrutiny review.²⁶¹ And states are unlikely to satisfy strict scrutiny because they lack a compelling state interest for which these alienage classifications are the least restrictive means of advancement.²⁶² Thus, state public-benefit schemes that are more restrictive of alien eligibility for joint-funded benefit programs than PRWORA requires are unconstitutional.

2. CHIP Eligibility

Another important variant of “*Soskin* situations” that effects a state-level alienage classification is a state’s barring legally residing children and pregnant women from receiving benefits under CHIP. Created by federal statute in 1997,²⁶³ CHIP funding expands health-benefit coverage to otherwise Medicaid-ineligible children and preg-

258 *Id.* at 31–32. These populations covered by Indiana, Kansas, Idaho, and Texas are in addition to the qualified aliens for whom PRWORA mandates coverage. *See supra* note 252.

259 *Id.* at 31–32.

260 For instance, thirty-nine states provide TANF benefits to all qualified aliens after the five-year bar. *Id.*

261 *See Graham v. Richardson*, 403 U.S. 365, 382 (1971) (noting that since “[u]nder Art. I, § 8, cl 4, of the Constitution, Congress’ power is to ‘establish a uniform Rule of Naturalization,’” allowing each state “to adopt divergent . . . citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity”).

262 *See Bernal v. Fainter*, 467 U.S. 216, 219 (1984) (describing what a state law that discriminates on the basis of alienage must do to withstand strict scrutiny); *see also Soskin v. Reinertson*, 353 F.3d 1242, 1248 (10th Cir. 2004) (“The parties appear to agree that SB 03-176 would not survive strict scrutiny . . .”); *cf. Finch v. Commonwealth Health Ins. Connector Auth.*, 959 N.E.2d 970, 984 (Mass. 2012) (holding that Massachusetts’s exclusion from Commonwealth Care of aliens who are ineligible for federal support did not satisfy strict scrutiny).

263 *See generally* Balanced Budget Act of 1997, Pub. L. No. 105-33, tit. I, subtit. J, 111 Stat. 251, 275 (1997) (codified at 42 U.S.C. §§ 1397aa–1397mm).

nant women.²⁶⁴ Under the CHIP Reauthorization Act of 2009 (CHIPRA),²⁶⁵ states can choose whether to extend such coverage to lawfully residing²⁶⁶ alien children and pregnant women.²⁶⁷ The statute gives states this discretion explicitly notwithstanding the PRWORA provisions (e.g., the five-year bar or the required status as a qualified alien) that would make certain alien children and pregnant women otherwise ineligible for federally supported benefits.²⁶⁸ States may also cover pregnant women, regardless of immigration status, through CHIP's "unborn child" option.²⁶⁹

Despite the availability of federal funds,²⁷⁰ twenty-nine states did not provide health-benefit coverage to lawfully residing children under CHIP, and twenty-five states denied such coverage to lawfully residing pregnant women.²⁷¹ Thus, lawfully residing children and pregnant women in these states who are ineligible for Medicaid or stand-alone CHIP benefits because of an exercise of state discretion

264 CHIP, like Medicaid, is a joint-funded program administered by the states. See *Children's Health Insurance Program (CHIP)*, CTRS. FOR MEDICARE & MEDICAID SERVS., <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Childrens-Health-Insurance-Program-CHIP/Childrens-Health-Insurance-Program-CHIP.html> (noting that the program "provides health coverage to nearly eight million children in families with incomes too high to qualify for Medicaid, but can't afford private coverage"); see also *id.* (noting that states have the option to incorporate CHIP as an expansion of their existing Medicaid program (as elected by seven states, the District of Columbia, and five territories), to maintain CHIP as a separate benefit program (as elected by seventeen states) or a combination of Medicaid expansion and separate program (as elected by twenty-six states)); *id.* (stating that the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat 119, 286 (2010) (codified at 42 U.S.C. § 1397ee(b)) provides that the federal matching rate for CHIP after 2015 will increase an additional "23 percentage points, bringing the average federal matching rate for CHIP to 93%"). Thus, states that do not allow their resident aliens to participate in CHIP will soon be denying that population a benefit that is almost entirely federal-funded.

265 Pub. L. No. 111-3, 123 Stat. 8 (2009) (codified at 42 U.S.C. § 1396).

266 This is a broader category than "qualified aliens" under PRWORA. FORTUNY AND CHAUDRY, *supra* note 252, at 14.

267 Letter from Cindy Mann, Dir. for the Center for Medicaid and CHIP Services, to State Health Officials (July 1, 2010), available at <http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SHO10006.pdf>; see also FORTUNY AND CHAUDRY, *supra* note 252, at 4.

268 42 U.S.C. § 1396b(v)(4)(A) (2006).

269 FORTUNY AND CHAUDRY, *supra* note 252, at 14 (citing Letter from Jackie Garner, Acting Dir., Ctr. for Medicaid and State Operations, to State Health Officials (May 11, 2009), available at <https://www.cms.gov/SMDL/downloads/SHO051109.pdf>).

270 Moreover, these federal funds are available at a higher matching rate than standard Medicaid reimbursement. See CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 264.

271 FORTUNY AND CHAUDRY, *supra* note 252, at 16. These figures are current as of March 2011. Eight states had pending amendments to their Medicaid or CHIP plans to provide coverage to children and/or pregnant women. *Id.* at 14. Twenty-six states and the District of Columbia provided coverage to pregnant women directly, through the unborn child option, or both. *Id.* at 16.

have viable equal protection claims. Again, these state-by-state alien-eligibility determinations warrant strict scrutiny because they are not the product of a uniform federal rule, and the states will be unlikely to meet that exacting review.

3. *Remedying the Violation*

States that are denying joint-funded benefits to aliens for whom PRWORA does not bar eligibility can remedy these “*Soskin* situation” equal protection violations by enrolling the aliens in the joint-funded benefit programs—be it Medicaid, TANF, or CHIP—as they would similarly situated citizens. A separate, state-funded, alien-only benefit would be an insufficient remedy because these aliens are eligible for federal support, and the state has no compelling interest in obstructing that support. Nor can the states constitutionally place restrictions, such as durational residency requirements, on aliens’ receipt of these benefits that are not applied to citizens. States need to amend their statutory or regulatory eligibility rules that currently bar, due to alienage, any individual from enrolling in a joint-funded benefit program that PRWORA does not require to be so barred.

B. *Expanding Joint-Funded Benefits for Citizens but Not Aliens*

The next characteristic of state public benefit schemes that implicates certain aliens’ equal protection rights is the expansion of joint-funded benefit programs (or the creation of state substitute programs) to cover persons otherwise ineligible for such benefits, while still excluding classes of aliens. Two basic ways of achieving this selective expansion are through creating a state-funded program to provide a benefit comparable to that provided in the joint-funded program and through § 1115 demonstration projects.²⁷² Connecticut’s SAGA-medical program, for instance, used state funds to provide medical assistance to persons categorically ineligible for Medicaid, but not to persons ineligible for Medicaid solely due to alien status.²⁷³

²⁷² See BAUMRUCKER, *supra* note 107.

²⁷³ See *supra* notes 194–96 and accompanying text (discussing *Pham*). Another example of selective expansion through a state-funded program is found in *Guaman v. Velez*, 23 A.3d 451 (N.J. Super. Ct. App. Div. 2011). New Jersey excluded qualified aliens and nonimmigrants from its state-funded FamilyCare, “a state program created to provide subsidized health insurance coverage to low-income [families] . . . whose family incomes are too high for them to be eligible for traditional Medicaid.” *Id.* at 468. See also *Avila v. Biedess*, 78 P.3d 280, 287–88 (upholding under strict scrutiny review Arizona’s Premium Sharing Program, which “is intended to be an extension of the [Medicaid] program available to persons whose incomes exceed the [Medicaid] limits” but nonetheless excludes aliens).

Similarly, Washington is an example of a state using federal funds secured through a § 1115 waiver, along with state funds, to provide health insurance to its Medicaid-ineligible citizens but not to QAs²⁷⁴ or nonimmigrants.²⁷⁴ And although both of these examples concern Medicaid expansions, the same principle applies to TANF as well.²⁷⁵

Both methods of selective expansion represent state choices to expend additional state funds for benefits that exclude certain aliens. Although the contours of state-funded benefit programs and § 1115 demonstration projects vary, each has the potential to violate the Equal Protection Clause insofar as it contributes to a state's discretionary and preferential treatment of certain residents on the basis of alienage. Just as a state's participation in a joint-funded benefit like Medicaid is optional, so too is its choice to create a solely state-funded health benefit or to apply for, and allocate funds to, a § 1115 demonstration project that aids Medicaid-ineligible citizens but not certain Medicaid-ineligible aliens.

But unlike the "*Soskin* situations" described in the preceding subsection, remedying these equal protection violations does not require states to enroll their alien residents into a joint-funded benefit program. Indeed, such a remedy would violate federal law to the extent it would extend federally supported benefits to PRWORA-barred aliens. Nor does the Equal Protection Clause require states to use their own funds to compensate for what the federal government withholds.²⁷⁶ The proper remedy is to support a solely state-funded benefit for aliens at the same pro-rata level that the state funds similar benefits for citizens. Funding such a program would ensure that any difference between the level of benefits that aliens and similarly situated citizens receive is solely on account of a uniform federal rule and not state discretion, thus adhering both to *Graham* and *Mathews*.

274 *Unthaksinkun v. Porter*, No. C11-0588JLR, 2011 WL 4502050 at *2 (W.D. Wash. Sept. 28, 2011) (noting that the Washington program requires beneficiaries to be a "qualified alien for at least five years"). Both the Commonwealth Care program at issue in *Finch* and the Medicaid program at issue in *Korab* are also operated under § 1115 waivers.

275 Indeed, the U.S. Department of Health and Human Services announced in 2012 its willingness to consider § 1115 waivers, which have been common in the Medicaid context, for TANF programs. Letter from George Sheldon, Acting Assistant Sec'y, U.S. Dep't of Health and Human Servs., to State Human Service Officials (July 12, 2012), *available at* <http://www.acf.hhs.gov/programs/ofa/resource/2012-ltr-gs-to-commissioners-im-2012-03>.

276 *See, e.g., Sudomir v. McMahon*, 767 F.2d 1456, 1465-66 (9th Cir. 1985) (holding that the Equal Protection Clause did not require California to compensate with state funds the cash-assistance benefits that Congress prohibited to the plaintiff class of aliens).

C. *The Choice to Mix State and Federal Funds*

The final and most prevalent characteristic of state public-benefit schemes that violates aliens' equal protection rights is the state-level choice to commingle state and federal funds in a single benefit program without providing a separate benefit for excluded aliens. This constitutional defect pervades the health-benefit schemes of at least thirty-seven states and in the welfare-benefit schemes (i.e., TANF-related benefit programs) of at least thirty-four states.²⁷⁷

Because states' participation in joint-funded benefit programs is voluntary—they are free to maintain benefit programs independent of federal funding or forgo providing benefits altogether—the combining of state and federal dollars is a matter of state discretion. This choice is significant because federal funding of a benefit renders many aliens (e.g., most QAs<5, and all nonimmigrants and undocumented aliens) mandatorily ineligible under PRWORA. In contrast, if a state maintains a benefit program without federal funding, then the state is free to provide the benefit to all of its resident aliens, regardless of legal status.

1. *Comparing Commingling Options in Medicaid and TANF*

Both Medicaid and TANF programs exemplify this final characteristic, but the exercise of state discretion to commingle funds is more explicit in the latter program than the former. Federal Medicaid funding requires commingling with state funds because it is structured as a reimbursement: The state spends its own money on covered services for its Medicaid-eligible population and recoups a certain percentage of those expenditures from the federal government. No federal reimbursement is payable for state health-benefit programs that do not meet the program requirements set by federal law, including PRWORA's alien-eligibility rules.²⁷⁸ Thus, states have a choice to participate in Medicaid or not; but if they want federal Medicaid dollars, then commingling is necessary for at least a portion of the total state resources devoted to need-based medical assistance.

Still, states are free to maintain separate health-benefit programs that do not meet Medicaid's program requirements (e.g., provide

²⁷⁷ See *infra* notes 280, 290, and accompanying text. These estimates are based on states that do not provide solely state-funded benefits to QAs<5, but that does not capture the full extent of constitutionally defective state schemes. Other legally residing aliens excluded from Medicaid or TANF programs have an equal protection right to separate state benefits as well.

²⁷⁸ See generally 42 U.S.C. § 1396b (2006) (outlining the payment of federal funds to states).

benefits to PRWORA-barred aliens) without suffering any penalty or reduction in their Medicaid reimbursement.²⁷⁹ As explained in Part III.C. above, funding Medicaid programs without a separate health-benefit provision for aliens effects a state alienage classification. But only fourteen states and the District of Columbia provided any type of solely state-funded health benefit to QAs<5 as of March 2011.²⁸⁰ Health-benefit coverage of nonimmigrants is likewise limited, with most states offering no such coverage and many states limiting the coverage to specific subsets, such as children,²⁸¹ aliens who were lawfully present in the United States before PRWORA's enactment,²⁸² or certain aliens who are in long-term care.²⁸³

TANF is similar to Medicaid in that states must contribute their own funds in order to qualify for federal funds²⁸⁴ (called "qualified State expenditures"²⁸⁵ but commonly known as the "maintenance of effort" requirement, or "MOE"²⁸⁶), but states may nonetheless maintain separate benefit programs. However, unlike Medicaid, states receive TANF funds as block grants, not reimbursements. Although states must contribute a certain level of their own funds to programs that promote one of the four overarching purposes²⁸⁷ specified by the

279 Of course, any funds dedicated to a non-Medicaid program represent funds that could have been dedicated to the Medicaid program and thereby garnered additional federal reimbursement. The *Pham* court proffered this point as a reason why in-need aliens were not similarly situated to in-need citizens, but the availability of federal funds is properly analyzed in the substantive equal protection analysis, where the court assesses the state's interest (e.g., maximizing federal reimbursement to provide the highest level of benefits possible) and the relationship of the classification to that interest. *Cf.* *Windsor v. United States*, 699 F.3d 169, 183 (2d Cir. 2012), *aff'd*, 133 S.Ct. 2675 (2013) (finding that a same-sex couple's alleged "diminished ability to discharge family roles in procreation and the raising of children" pertains to whether a federal statute could withstand scrutiny, "rather than upon the level of scrutiny to apply").

280 FORTUNY & CHAUDRY, *supra* note 252, at 19.

281 Illinois, Florida, and Washington are examples. *Id.* at 16-17.

282 Ohio and Rhode Island are examples. *Id.*

283 This is the case in Virginia. *Id.*

284 42 U.S.C. § 609(a)(7) (2006); *see also* 45 C.F.R. § 263.1 (2005).

285 42 U.S.C. § 609(a)(7)(B)(i)(I) (2006).

286 Liz Schott, LaDonna Pavetti & Ife Finch, *How States Have Spent Federal and State Funds Under the TANF Block Grant*, CTR. ON BUDGET & POLY PRIORITIES 1 (Aug. 7, 2012), <http://www.cbpp.org/files/8-7-12tanf.pdf>.

287 These four purposes are: "(1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families." 42 U.S.C. § 601 (a) (2006); *see also* Schott, Pavetti, & Finch, *supra* note 284, at 1 (explaining the requirement that expenditures promote one of the four TANF statutory purposes).

federal TANF statute, they need not commingle the state funds with federal TANF dollars for the expenditures to count towards the MOE requirement.²⁸⁸ More importantly, the separate state expenditures are not subject to the same restrictions placed on federal TANF funds, including PRWORA's five-year bar and other mandatory alien exclusions.²⁸⁹ A state is therefore not only free to maintain a separate, solely state-funded benefit for which PRWORA-barred aliens are eligible, but state funding for such a benefit would also help win the state federal TANF funds just as much as would commingling those same state funds in a joint-funded TANF program.

Despite having the option to provide PRWORA-barred aliens state-only assistance and have that assistance count towards the MOE requirement, two-thirds of states (and the District of Columbia) provide no such assistance to QAs.²⁹⁰ Only seven states provide such assistance to any nonimmigrants.²⁹¹

2. Consequences of Commingling

The discretion to provide certain public benefits through solely state-funded programs or through commingling state and federal funds in joint-funded programs gives states several options for how to spend state resources allocated to public welfare. The following example will summarize these options in the context of health-benefit programs to illustrate three points: (1) channeling state funds into a joint-funded benefit program without a separate provision for excluded aliens is a state-level alienage classification; (2) equal protection does not mandate equal levels of benefits between aliens and citizens; and (3) states can take advantage of federal funding while still comporting with the Equal Protection Clause.

Consider a state that has \$1 billion to provide medical assistance to residents that it deems, based on non-suspect criteria, are in need (e.g., low-income families, individuals with disabilities or blindness,

²⁸⁸ See 45 C.F.R. § 263.2(a) (2005) (noting that “[e]xpenditures of State funds in TANF or separate State programs may count” if made for certain types of benefits or services).

²⁸⁹ *Id.*; see also Schott, Pavetti & Finch, *supra* note 284, at 29; Elizabeth Lower-Basch, *TANF Policy Brief: Guide to Use of Funds*, CLASP 8 (Mar. 1, 2011), <http://www.clasp.org/resources-and-publications/files/Guide-to-Use-of-bTANF-Funds.pdf> (noting that state expenditures qualify as MOE even when they assist families who are excluded from federal-funded TANF programs because of PRWORA).

²⁹⁰ DAVID KASSABIAN, ANNE WHITESELL & ERIKA HUBER, URBAN INST., *WELFARE RULES DATABOOK: STATE TANF POLICIES AS OF JULY 2011* 50–51 (2012), *available at* <http://www.urban.org/UploadedPDF/412641-Welfare-Rules-Databook-2011.pdf>.

²⁹¹ *Id.* For instance, only nonimmigrants “with employment authorized by U.S. Citizenship and Immigration Services are eligible for assistance” in Wisconsin. *Id.* at 51 n.12.

etc.). I will call these residents the “in-need population.” Suppose one million people comprise the in-need population and that ninety percent of them are citizens, while ten percent are, for the sake of simplicity in illustrating the point of this example, QAs.⁵ The state thus has \$1,000 per person to provide medical assistance to the in-need population and four options: (1) put the entire \$1 billion in a Medicaid program; (2) put \$900 million in a Medicaid program and \$100 million in a solely state-funded health benefit program for qualified aliens; (3) fund Medicaid and the qualified-alien benefit such that the levels of benefits in both programs are equal, even accounting for the federal government’s contribution into Medicaid; and (4) put the entire \$1 billion into a solely state-funded benefit for the entire in-need population (forgoing Medicaid entirely).

Under option 1, the state maximizes the total pool of funds available for providing medical assistance to the in-need population because it puts all of the state funds into a program that garners matching federal funds. If the state receives the minimum federal matching rate, fifty percent,²⁹² then \$1 billion of state funds invested in Medicaid would reap an additional \$1 billion in federal funds for the program. But maximizing the total size of the pie comes at the cost of unequal distribution: The state’s resident citizens would receive a benefit valued at \$2,222 per person, while its resident aliens would receive no benefits.

Option 2 represents a pro-rata division of available state funds among the in-need population. Ninety percent of the funds go into Medicaid, benefitting the ninety percent of the population that are citizens, while ten percent of the funds go into the solely state-funded health-benefit program for the ten percent of the population that are qualified aliens. The resident citizens still benefit from matching federal funds, although to a slightly lesser degree (\$900 million in federal money, as opposed to the \$1 billion under option 1). As such, the resident citizens’ Medicaid benefits would be funded at \$2,000 per person. The resident aliens’ state-funded benefit would be funded at \$1,000 per person.

Option 3 is an equal-outcome scenario. If the state wants to provide its qualified aliens the same level of benefits that its resident citizens receive, then it must match the federal government’s per-person contribution to Medicaid with additional funds for its qualified-alien benefit. Where the federal contribution to Medicaid is a dollar-for-dollar match, achieving equal benefits would require the state to ded-

292 See *supra* note 135.

icate twice the amount of funds per person in the qualified-alien benefit than in Medicaid.²⁹³ In this hypothetical, the state would put \$818,181,818 (\$909.09 per resident citizen) into Medicaid and the remainder in the qualified-alien benefit. Matching federal funds for Medicaid would produce a benefit valued at \$1,818.18 per person, which would equal the benefit that qualified aliens received, albeit solely from state funds.

Option 4 is also an equal-outcome scenario, but produces a lower level of benefits than option 3. By forgoing Medicaid and its matching federal funds, the \$1 billion in state funds would fund a \$1,000-per-person benefit for the entire in-need population. Qualified aliens would be no better off than they were under option 2, but citizens would be considerably worse off.

Option 1 effects a state-level alienage classification because the state chooses to spend all of its available funds on a benefit program that excludes aliens. Option 3 produces equal outcomes but has its own potential constitutional difficulties. This spending choice constitutes preferential treatment of aliens over citizens and could be vulnerable to an *Adarand*-style²⁹⁴ equal protection challenge. Or it could be challenged on preemption grounds because the separate, disproportionately funded state program for aliens would essentially negate any effect of PRWORA to augment the level of public benefits received only by citizens (and certain aliens). Option 4 also produces equal outcomes, and it comports with equal protection principles; yet it fails to maximize the potential benefits for the entire in-need population.

Only option 2 maximizes the level of benefits under the parameters of comporting with equal protection and respecting Congress's policy of federal funds not benefitting certain aliens. The state makes equal pro-rata contributions towards health benefits for its residents irrespective of alienage, while the higher level of benefits that some residents will receive is purely the result of a uniform federal policy. This example shows that states can take advantage of federal matching funds, even if the award of such funds requires funneling state

²⁹³ See *Finch v. Commonwealth Health Ins. Connector Authority*, 946 N.E.2d 1262, 1267 (Mass. 2011) (noting that “[d]ue to the level of Federal reimbursement, at least two federally eligible residents (citizens or federally eligible aliens) could be enrolled in Commonwealth Care for the same cost to the State as one member of the plaintiff class”).

²⁹⁴ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (imposing a strict scrutiny standard on an affirmative action program). See also *Pimentel v. Dreyfus*, 670 F.3d 1096, 1107 (9th Cir. 2012) (considering Washington's FAP program, which “provides benefits exclusively to federally ineligible legal immigrants, while denying such benefits to citizens and federally eligible qualified aliens”).

money into a benefit program that excludes aliens, while still according its resident aliens and citizens equal protection of the law. It also demonstrates that equal protection in this context does not signify equal outcomes.²⁹⁵

3. *Remedying the Violation*

Options for remedying equal protection violations that are the result of commingling state and federal funds depend on the benefit-program context in which the funds are commingled. First, commingling is inherent to the reimbursement structure of Medicaid programs and, as explained above, a state that forgoes Medicaid altogether would miss out on substantial federal funds for supporting its in-need population. The best way for states to remedy the alienage classification that they would otherwise effect through Medicaid participation is to fund separate, solely state-funded health-benefit programs for aliens. State contributions to both programs must be equal on a pro-rata basis. These separate state programs would effectively cure the constitutional defects that funding Medicaid without such programs creates: The dedicating of greater state resources to the benefit of in-need citizens than in-need aliens.

States have more flexibility in the TANF context because states can receive federal TANF funds without having to commingle those funds with state funds. And the segregated state funds nonetheless count towards the level of MOE that states must achieve to qualify for the federal funds, even if federally ineligible aliens (e.g., nonimmigrants and QAs⁵) are benefitting from the state funds.²⁹⁶ If states want to continue to commingle MOE and federal TANF funds into a single benefit program, they can follow the model of the Medicaid remedy and create a separate, alien-only program supported by a level of MOE equal (on a pro-rata basis) to the MOE dedicated to the joint-funded program.

²⁹⁵ See *Khrapunskiy v. Doar*, 909 N.E.2d 70, 77 (N.Y. 2009) (“[T]he right to equal protection does not require the State to create a new public assistance program in order to guarantee equal outcomes under wholly separate and distinct public benefit programs. Nor does it require the State to remediate the effects of PRWORA.”). But recognizing that citizens and aliens with equal levels of need are similarly situated before the state’s decision to participate in Medicaid neither requires a state to “guarantee equal outcomes” nor “remediate the effect of PRWORA.” *Id.* Indeed, resident citizens (and aliens not barred under PRWORA) can continue to receive a higher level of benefits than similarly situated aliens because, under the rule of *Mathews*, the federal government is free to deny aliens federal support.

²⁹⁶ See *supra* notes 277–89 and accompanying text.

Alternatively, states can keep their MOE completely separate from federal TANF funds. With this remedy, aliens and citizens alike would benefit from the MOE funding streams, while only citizens (and federally eligible aliens) would benefit from the federal TANF funding stream as well. In either case, the state must ensure (1) that it does not withhold MOE-funded benefits from a legally residing alien (whether qualified or nonimmigrant) on the basis of alienage, and (2) that it excludes federally ineligible aliens from benefit programs supported by federal TANF funds.

CONCLUSION

The current mode of equal protection review of PRWORA-era state decisions to deny aliens public benefits is inadequate. Some courts avoid equal protection review altogether by applying a threshold analysis of whether the alien plaintiffs are similarly situated to a class that has received favorable state treatment. Other courts merely label the classification as “state” or “federal” and apply the accompanying standard of review. In both instances, courts ignore the underlying policy options that PRWORA and programs like Medicaid, TANF, and CHIP leave open to the states, as well as how those options can vary depending on the particular statuses of the alien plaintiffs.

This Article has proposed that courts (1) abandon or at least modify their threshold similarly situated inquiries, (2) focus on the status of the alien bringing the equal protection challenge, (3) determine the public-benefit options available to states with regard to aliens of that status, (4) look out for states adopting alienage classifications through their participation in joint-funded benefit programs, and (5) assess states’ funding decisions in light of their impacts on aliens and citizens who are similarly in need of public benefits. With proper focus on these factors, courts can ensure that public-benefit schemes meet the constitutional requirements outlined in *Mathews* and *Graham*. On one hand, this nuanced equal protection review will uphold Congress’s prerogative, expressed through a uniform national policy in PRWORA, to provide increased support (that is, support in excess of what the states provide) for citizens and select aliens. On the other hand, it will hold state-level discriminatory treatment of aliens to the strict-scrutiny standard that *Graham* requires.

Moreover, this Article has shown that aliens’ equal protection rights are implicated not only by the termination of benefits that they once received, but also through other, less-obvious state actions. Such actions include blocking alien access to available federally sup-

ported benefits, expanding joint-funded benefit programs for citizens but not aliens, and choosing to commingle state and federal funds in an alien-excluding benefit program without maintaining a separate and equally state-funded benefit program for aliens.

These policy choices are far more common than the termination of benefits that class actions have challenged to date. States should voluntarily address these equal protection violations by adopting the remedies outlined in Part IV. But if they do not, courts must apply the searching review that the Equal Protection Clause requires. This review will prevent states from using PRWORA as a shield for their own policies of forcing a disenfranchised population to bear the brunt of tightening welfare budgets.

CHART I – ALIEN ELIGIBILITY FOR PUBLIC BENEFITS UNDER PRWORA

	Supplemental Security Income	Food Stamps	Medicaid	TANF	State or Local Benefit
Qualified Alien Arriving Before 8/22/1996	Limited Eligibility ¹	Limited Eligibility ³	State discretion	State discretion	State discretion
Qualified Alien Arriving after 8/22/1996 and Having Less than 5 Years Residency	Ineligible; Military eligible	Ineligible; Military eligible	Ineligible	Ineligible	State discretion; 40Q work eligible; Military eligible
Qualified Alien Arriving after 8/22/1996 and Having More than 5 Years Residency	Ineligible; 40Q work eligible; Military eligible	Ineligible; 40Q work eligible; Military eligible	State discretion; 40Q work eligible; Military eligible	State discretion; 40Q work eligible; Military eligible	State discretion; 40Q work eligible; Military eligible
Non-immigrant	Limited eligibilty ²	Ineligible	Emergency Services Only	Ineligible	State discretion
Non-Qualified Alien	Ineligible	Ineligible	Emergency Services Only	Ineligible	State discretion ⁴

Note: Chart based on, with modifications, ZIMMERMANN & TUMLIN, *supra* n.36 at 15.

“40Q work” means an alien who has worked or can be credited with 40 qualifying quarters of coverage as defined under Title II of the Social Security Act, 42 U.S.C. § 401 et seq., and did not receive federal means-tested benefits during those quarters of work.

“Military” means an alien who is a veteran or on active duty in the armed forces, or a spouse or dependent child of such an alien.

1 – Qualified aliens who were receiving SSI before 8/22/1996, or who are disabled or become disabled, are eligible. 40Q work and Military are also eligible.

2 – PRUCOLs who were receiving SSI before 8/22/1996 are eligible.

3 – Only pre-1996 qualified aliens who are under eighteen years old, disabled or blind, or were 65 years or older on 8/22/1996, are eligible. 40Q work and Military are also eligible.

4 – 8 U.S.C. § 1621 makes non-qualified aliens ineligible, unless, per § 1621(d), a state passes a law after 8/22/1996 that “affirmatively provides for such eligibility.”