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May Congress Grant the States the Power to Violate the Equal Protection Clause? *Aliessa v. Novello* and Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996

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May Congress Grant the States the Power to Violate the Equal Protection Clause? *Aliessa v. Novello* and Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996

I. INTRODUCTION

"All of our people all over the country—except the pure-blooded Indian are immigrants or descendants of immigrants, including even those who came over here on the Mayflower."[1] The United States has a rich immigrant heritage. Throughout its history, its doors (and borders) have been open to immigrants and those searching for a new way of life. However, in 1996, Congress disregarded this rich heritage and enacted the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"). PRWORA was designed to "end welfare as we know it"[2] as well as to curb welfare's effect as an "incentive for immigration to the United States."[3]

The Act has met its goals. It has dramatically changed the face of welfare and has had far-reaching effects on the United States immigrant population. In its effort to eliminate welfare as an incentive for immigration, however, Congress delegated many of its immigration and naturalization powers to the states. But can Congress transfer these powers to the states? This was the issue facing the New York Court of Appeals in *Aliessa v. Novello*.[4] In a unanimous decision, the court took the road *not* traveled and held that in enacting Title IV of PRWORA, Congress went beyond its authority by placing critical immigration policy powers into the hands of the states. In taking on this issue, "*Aliessa v. Novello* . . . marks the first state high court decision addressing whether Congress can, in the context of welfare reform,

1. Aliessa v. Whalen, 694 N.Y.S.2d 308, 309 (Sup. Ct. 1999) (quoting JOHN BARTLETT, FAMILIAR QUOTATIONS 973 (Emily Morison Beck ed., 14th ed. 1968)), *rev'd sub nom.*, Aliessa v. Novello, 754 N.E.2d 1085 (N.Y. 2001).

2. Steven M. Dawson, *The Promise of Opportunity—and Very Little More: An Analysis of the New Welfare Law's Denial of Federal Public Benefits to Most Legal Immigrants*, 41 ST. LOUIS U. L.J. 1053, 1066 (1997).

3. 8 U.S.C. § 1601(2)(B) (2000).

4. 754 N.E.2d 1085 (N.Y. 2001).

confer on states the authority to determine whether certain classes of legal aliens are eligible for Medicaid."[5]

Was the New York Court of Appeals correct in deciding that Congress could not devolve this power to the states? If so, the court's decision could impact other states' laws enacted as a response to PRWORA as well as PRWORA itself. This Note focuses on that issue and explores the legal background and arguments on which the New York Court of Appeals based its decision. This Note begins with a brief overview of the Medicaid system as well as an overview of PRWORA and Title IV of that Act, which contains the immigration provisions. Part III briefly details the factual and procedural history of the *Aliessa* case. Part IV examines the court's analysis by first reviewing the court's determination that the New York Social Security Act section 122, which was enacted in response to PRWORA, violated New York's Constitution. It then turns to the court's analysis of Congress's ability to devolve their immigration policy powers (and thereby effectively grant virtual immunity from strict scrutiny) to the states, wherein the court determined that this power could not be devolved to the states. This analysis will also discuss other arguments available to the court and whether its conclusions were correct. Part V offers a brief conclusion.

II. BACKGROUND

To understand the issues facing the New York Court of Appeals, it is imperative to generally understand the Medicaid system, PRWORA and the reasons for its enactment, and New York's response to PRWORA. This section, therefore, gives a brief overview of each area contributing to the court's decision.

A. The Medicaid System

Congress enacted the Medicaid system in 1965.[6] It is the basic system for providing for the medical needs of indigent Americans.[7] The system consists of both federal and state spending to finance special health care programs.[8] Under this complex scheme, the "Federal

5. John Caher, *Legal Resident Aliens Win Medicaid Dispute; Statute Violated Federal and State Constitutions*, 225 N.Y. L. J. 108, June 6, 2001, at 1.

6. *See* Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended in scattered sections of Title 42 of the United States Code); *see also* Atkins v. Rivera, 477 U.S. 154, 156 (1986). For a more detailed overview of the Medicare system including its history and structure, see LESSONS FROM THE FIRST TWENTY YEARS OF MEDICARE: RESEARCH IMPLICATIONS FOR PUBLIC AND PRIVATE SECTOR POLICY (Mark V. Pauly & William L. Kissick eds., 1988).

7. William Alvarado Rivera, *A Future for Medicaid Managed Care: The Lessons of California's San Mateo County*, 7 STAN. L. & POL'Y REV. 105, 107 (1995–96).

8. Dawson, *supra* note 2, at 1057.

Government shares the costs of Medicaid with States that elect to participate in the program."[9] For states to receive the federal grants, however, they must follow evolving federal guidelines and procedures, which is what many states, including New York, did after Congress enacted PRWORA.[10] Prior to 1996, states were allowed to extend state benefits, at the states' own cost, to both qualified and unqualified aliens.[11] But this changed with the enactment of PRWORA.

B. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996

The Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") was enacted in 1996 in order to "create a system in which society has less responsibility for the poverty-stricken by focusing on increased personal responsibility—a shift from welfare to workfare."[12] The Act was designed to "break the cycle of welfare dependency among the poor by severely restricting eligibility for federal benefits and instituting workplace-oriented reforms that would promote individual self-reliance."[13]

With this proposed reform, the Act was estimated to save the federal government over $54 billion in the first six years.[14] Because noncitizen welfare expenditures were estimated to amount to forty-four percent of the estimated federal savings and were perceived to be an incentive for immigration into the United States, the Act aimed to restrict welfare benefits to noncitizens specifically.[15] To this end, Congress enacted Title IV of PRWORA, which directly addressed the issue of aliens (both legal and illegal) and their eligibility for welfare benefits. In drafting this Title, Congress cited numerous reasons for the restrictions on immigrant benefits including increasing self-sufficiency[16] and remedying the eligibility rules which had "proved wholly incapable of assuring that

9. *Atkins*, 477 U.S. at 156-57.

10. *Id*; Aliessa v. Novello, 754 N.E.2d 1085, 1089 (N.Y. 2001).

11. John Fredriksson, *Bridging the Gap Between Rights and Responsibilities: Policy Changes Affecting Refugees and Immigrants in the United States Since 1996*, 14 GEO. IMMIGR. L.J. 757, 766 (2000).

12. Dixie R. Switzer, Comment, *Welfare Reform: Oregon's Response to the Personal Responsibility and Work Opportunity Reconciliation Act*, 77 OR. L. REV. 759, 760 (1998).

13. John. P. Collins, Jr., *Developments in Policy: Welfare Reform*, 16 YALE L. & POL'Y REV. 221, 221 (1997).

14. *Id.*

15. *Id.* at 761; 8 U.S.C. § 1601(2)(B) (2000).

16. Self-sufficiency has been a "basic principle of United States immigration law since [the] country's earliest immigration statutes." 8 U.S.C. § 1601(1), (4).

individual aliens not burden the public benefits system."[17] Title IV was directly at issue in *Aliessa*.

In establishing the restrictions on welfare benefits for aliens, Title IV created two different categories of aliens: qualified and non-qualified. The "qualified aliens" category covers only a short list of legal aliens in the United States.[18] All other aliens that do not fit into the small category of qualified aliens, including those aliens permanently residing in the United States under color of law ("PRUCOLs"), fall into the non-qualified alien category and are not eligible for federal welfare benefits.[19]

Yet even qualified aliens are not automatically eligible for federal Medicaid. Instead, they are further broken down into two subcategories: (1) those lawfully residing in the United States prior to August 22, 1996 and (2) those entering on or after August 22, 1996.[20] Those in the second

17. *Id.* The stated reasons for enacting Title IV are listed in 8 U.S.C. § 1601:

> The Congress makes the following statements concerning national policy with respect to welfare and immigration:
>
> (1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.
>
> (2) It continues to be the immigration policy of the United States that
>
> (A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and
>
> (B) the availability of public benefits not constitute an incentive for immigration to the United States.
>
> (3) Despite the principle of self-sufficiency, aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates.
>
> (4) Current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable of assuring that individual aliens not burden the public benefits system.
>
> (5) It is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy.
>
> (6) It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.
>
> (7) With respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits in this title, a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.

Id.

18. *See id.* § 1641(b) (1997). The list of qualified aliens included "aliens who are lawfully admitted for permanent residence (generally green card holders), granted asylum, designated refugees, paroled into the United States for at least one year, having their deportation withheld, granted conditional entry, Cuban and Haitian entrants or victims of battering or extreme cruelty by a spouse or other family member." Aliessa v. Novello, 754 N.E.2d 1085, 1091 (2001); *see also* 8 U.S.C. § 1641(b).

19. 8 U.S.C. § 1611(a) (2000).

20. *Id.* §§ 1612–1613 (2000). Because of controversy surrounding Title IV, some amendments to the title were enacted as part of the Balanced Budget Act. Collins, *supra* note 13, at

group of qualified aliens are largely ineligible for Medicaid and other federal benefits for at least five years after becoming a legal alien.[21]

In addition to dictating new eligibility requirements for federal welfare, Title IV also addressed state and local welfare benefits. In general, non-qualified aliens—many of whom are legal aliens—are not eligible for state and local benefits.[22] The only health benefits they are eligible for are emergency medical assistance, emergency disaster relief, and immunizations.[23] Although non-qualified aliens are ineligible for most benefits, under Title IV Congress did grant states the discretion to extend these benefits to those aliens.[24] The states, naturally, will carry the financial responsibility of these affirmative grants. Yet, as Congress granted the states the power to extend benefits to ineligible aliens, it also granted the states the power to deny state benefits to those qualified aliens who would otherwise be eligible.[25] In this way, Congress also granted the states the power to discriminate based on alienage.

C. New York's Response to PRWORA

Many states "feared that as a result of the diminished federal funds the states would have to spend more to provide medical care for indigent immigrants" [26] and adopted Title IV federal classifications into their state medical assistance policies. New York, with one of the largest populations of immigrants residing in its jurisdiction, was one of those states. New York incorporated the federal classifications into its laws and limited state-funded benefits to immigrants.[27] This enactment, which was

225–26. These changes, however, mostly affected the aliens falling into the qualified aliens residing lawfully in the United States prior to August 22, 1996 category. *Id*.

21. 8 U.S.C. § 1613(a).

22. *See id*. § 1621(a), (c)(1) (2000).

23. *Id*. § 1621(b); *see also* 42 U.S.C. § 1396b(v)(3) (2000).

24. This can be done "only through the enactment of State law . . . which affirmatively provides for such eligibility" to those ineligible aliens. 8 U.S.C. § 1621(d).

25. *Id*. § 1622(a), (b) (1997). Section 1622 (b) provides exceptions to this power to revoke eligibility for qualified aliens including 1) a time-limited exception for refugees and aliens, 2) certain permanent resident aliens, 3) veterans and aliens on active duty, and 4) those aliens transitioning from receiving benefits to becoming ineligible for benefits. *Id*. § 1622(b).

26. Victoria Rivkin, *Judge Nullifies Limits on Immigrant Benefits; Law Denying Medicaid Held Unconstitutional*, 221 N.Y. L. J. 95, May 19, 1999, at 1.

27. N.Y. SOC. SERV. § 122 (2001). This section provides that "no person except a citizen or an alien who has been duly naturalized as a citizen shall be eligible . . . for additional state payments for aged, blind and disabled persons, family assistance, safety net assistance, services funded under title XX of the federal social security act, or medical assistance." *Id*. Section 122 does provide the same exceptions as provided for by the PRWORA, as well as an exception for aliens who were lawfully residing in the United States under the color of law and who were diagnosed with AIDS and were receiving medical assistance. *Id*. § 122(1)(a), (b), (c).

in direct response to PRWORA, appeared to be in line with the Act. In fact, Congress noted:

> With respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits in this chapter, a State that chooses to follow the Federal classifications in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.[28]

Therefore, by denying state benefits to non-qualified aliens and even to otherwise eligible aliens, New York was only following the dictates of Congress.

Prior to PRWORA, New York had "provided State Medicaid to needy recipients without distinguishing between legal aliens and citizens. It ceased to do so, however, after Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996."[29] With this change in state law, New York was free to deny benefits to individuals based on alienage.

III. ALIESSA V. NOVELLO

A. The Facts

As detailed above, shortly after the passage of PRWORA, New York enacted section 122 of the New York Social Services Act, thereby limiting state-funded welfare benefits to many immigrants lawfully residing in New York. The twelve plaintiffs fell into the new "unqualified alien" category. These individuals immigrated to the United States from such countries as "Bangladesh, Belorussia, Ecuador, Greece, Guyana, Haiti, Italy, Malaysia, the Philippines, Syria and Turkey."[30] Each suffered from severe medical ailments and, prior to the enactment of section 122, each would have allegedly qualified "for Medicaid benefits funded solely by the State."[31] However, their alien status made them ineligible for state-funded welfare benefits.[32] Furthermore, their medical conditions did not fall into the "emergency medical treatment"

28. 8 U.S.C. § 1601(7) (2000).
29. Aliessa v. Novello, 754 N.E.2d 1085, 1089–90 (N.Y. 2001).
30. *Id*. at 1088.
31. *Id*.
32. *Id*.

exception; yet, each condition, although not technically an emergency, was potentially life threatening.[33]

Seeking an injunction, these twelve immigrants alleged that the New York Social Services Law section 122 violated the Equal Protection Clauses of both the United States and New York State Constitutions.[34] They also alleged that section 122 violated article XVII, section 1 of the New York State Constitution requiring "the State to provide aid, care and support for the needy."[35]

B. Procedural History

The twelve plaintiffs filed a class action against the commissioner. The proposed class action represented "[a]ll Lawful Permanent Residents who entered the United States on or after . . . [August] . . . 22, 1996 and all Persons Residing [in the United States] Under Color of Law (PRUCOLs) who, but for the operation of New York Social Services Law section 122, would be eligible for Medicaid coverage in New York State."[36] They initially filed for a declaratory judgment seeking a declaration that the state's policy denying plaintiffs' medical benefits based solely on their immigration status was unlawful.[37] They also sought an injunction of the policy as well as reimbursement for the denied benefits.[38]

The Supreme Court of Manhattan granted the plaintiffs' motion for summary judgment finding that the New York Social Services Law section 122 violated both the New York constitutional mandate to support the needy as well as the Equal Protection Clauses of the United States and New York State Constitutions.[39] In finding that section 122 violated the Equal Protection Clauses, the court employed the strict scrutiny analysis and determined that the state did not have a compelling state interest justifying such a violation.[40]

33. Aliessa v. Whalen, 694 N.Y.S.2d 308, 311 (Sup. Ct. 1999), *rev'd sub nom.*, Aliessa v. Novello, 754 N.E.2d 1085. For example, one immigrant suffered from end-stage renal disease, which required kidney dialysis twice a week and numerous prescriptions. *Id*. Another immigrant suffered from many chronic diseases including arthritis requiring medical attention and medication. *Id*. Each plaintiff had similar severe health problems; each was denied Medicaid benefits based on their immigration status. *Id*.

34. *Id*. at 311–14.

35. *Id*. at 314.

36. *Id*. at 311 (footnote omitted) (second alteration in original).

37. *Id*.

38. *Id*.

39. Aliessa v. Novello, 754 N.E.2d 1085, 1088–89 (N.Y. 2001).

40. Aliessa v. Whalen, 694 N.Y.S.2d at 313–14.

Only three days after the decision, however, the New York Appellate Division decided a case directly on point with *Aliessa.*[41] That case dealt with food stamps under the New York Social Services Act section 95.[42] The appellate court held that because New York had "enacted the statute in direct response to a Federal supplemental appropriations bill . . . the challenged classification should be evaluated, for equal protection purposes, under a rational basis standard rather than the strict scrutiny standard the [New York S]upreme [C]ourt had employed."[43] After this holding, the Supreme Court of Manhattan granted reargument and vacated its prior decision relating to the Equal Protection Clause violation.[44] It did not, however, disturb the holding regarding article XVII, section 1 of the New York State Constitution.[45]

On appeal, the appellate division reversed, holding that section 122 violated neither article XVII, section 1 of the New York State Constitution, nor the Equal Protection Clauses of the United States and New York Constitutions.[46]

C. The New York Court of Appeals's Holding

On June 5, 2001, the New York Court of Appeals announced its decision.[47] In determining *Aliessa*, the court considered the article XVII, section 1 and the equal protections claims. First, based on precedent, the court found that the New York Legislature may not deny aid to those whom it had previous classified as needy, and therefore, could not deny state-funded benefits to the plaintiffs.[48] Second, the court determined that Congress could not authorize the states to violate the Equal Protection Clause even in the name of immigration policy.[49] Because the defendants did not allege a compelling state interest to justify their racial classifications, the court determined that section 122 violated the Equal Protection Clauses of both the United States and New York constitutions.[50]

41. Aliessa v. Novello, 754 N.E.2d at 1089.
42. *Id*.
43. *Id*.
44. *Id*.
45. *Id*.
46. *Id*.
47. *See generally id*.
48. *Id.* at 1092.
49. *Id*. at 1094–99.
50. *Id*.

IV. ANALYSIS

This section focuses on the court's analysis, breaking the opinion down into two sections: 1) the court's New York article XVII, section 1 constitutional analysis, and 2) the court's Equal Protection Clause analysis. This section first provides a brief discussion of the court's article XVII, section 1 analysis wherein it determined that the Social Services Law section 122 violated the article's mandate to aid the needy. The court could have stopped with only this analysis to find section 122 unconstitutional; however, it went one step further and engaged in an equal protection analysis. The majority of this section will focus on this portion of the opinion as the court took on the issue of whether Congress could authorize the states to violate the Equal Protection Clause and discriminate against immigrants. Central to this question is whether Congress can devolve its immigration powers to the states. This section will also look at whether this analysis was necessary and whether the court could or should have engaged in another analysis rather than taking on the issue of whether Congress exceeded its powers in enacting PRWORA. This section concludes that the court, in relying on the Constitution and available precedent, was within its bounds and rightfully looked to Congress's authority to determine whether section 122 was unconstitutional.

A. A Constitutional Mandate to Help the Needy

The New York Court of Appeals faced immigrants in dire need of ongoing medical attention, but who did not have the means to obtain that attention. Prior to section 122, these immigrants, based on need, would have received the necessary aid, but now they did not have access to ongoing medical attention, a basic necessity of life.[51] The court seized this opportunity to reiterate the intent of article XVII. Their conclusion to reverse the appellate division's decision regarding the article XVII, section 1 claim was correct on both legal and public policy grounds. Although the State's arguments were persuasive, the plaintiffs' arguments were well grounded in New York precedent and constitutional history, dictating the interpretation of article XVII, section 1. The plaintiffs also offered sound policy arguments that overcame the State's defenses. Furthermore, a determination that section 122 did not violate article XVII, section 1 would have rewritten the purpose and the intent of the framers of the New York Constitution.

51. *Id.*

1. Article XVII, section 1: an affirmative duty

On the heels of the Great Depression in 1938, the New York Constitutional Congress adopted a constitutional mandate to support the needy in New York.[52] This mandate, in article XVII, section 1 reads:

> The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions and in such manner and by such means, as the legislature may from time to time determine.[53]

The section took the decision regarding whether to support the needy away from the legislature. In fact, the section dictated that supporting the needy was no longer "a matter of legislative grace"; rather it is specifically mandated by the New York Constitution.[54] The legislative history of the section illustrates the belief that "[s]tate aid to the needy was . . . a fundamental part of the social contract."[55] In fact, a chairman of the New York Constitutional Committee stated that "[h]ere are words which set forth a definite policy of government, a concrete social obligation which no court may ever misread."[56] The policy set forth was to aid those individuals who must "look to society for the bare necessities of life."[57] The constitution, therefore, placed an affirmative duty on the legislature to support the needy and indigent. The question then facing the *Aliessa* court was whether the plaintiffs were in fact "needy."

2. Definition of needy and a requirement to aid those classified as needy

The New York Constitution placed upon the legislature the duty to determine who was needy, which they had done. In fact, prior to the enactment of section 122, the plaintiffs would have fit into the "needy" category and would have allegedly qualified for state-funded Medicaid benefits.[58]

Once the legislature has characterized a class of individuals as needy and an individual has met the requirements for aid, the New York Constitution prevents the legislature from refusing to aid them.[59] Because

52. Tucker v. Toia, 371 N.E.2d 449, 451 (N.Y. 1977).

53. N.Y. CONST. art. XVII, § 1.

54. *Tucker*, 371 N.E.2d at 451.

55. *Id*.

56. *Id*.

57. *Id*. at 452.

58. Aliessa v. Novello, 754 N.E.2d at 1088 (N.Y. 2001).

59. The New York Constitution "unequivocally prevents the Legislature from simply refusing to aid those whom it has classified as needy. Such a definite constitutional mandate cannot be ignored or easily evaded in either its letter or its spirit." *Tucker*, 371 N.E.2d at 452; *see also* Flushing Nat'l Bank v. Mun. Assistance Corp., 40 N.Y.2d 731, 737, 739 (1976).

the legislature had previously determined that individuals within the jurisdiction of New York in the same situation as the plaintiffs were needy, the state was required to provide the plaintiffs aid. The issue then shifted to how much support the legislature must provide the plaintiffs.

3. Legislative discretion in setting the level of benefits for the needy

Although article XVII, section 1 has been interpreted as prohibiting the legislature from denying support to those whom it had previously classified as needy, it has also been interpreted to afford the legislature wide "discretion [in] set[ting] levels of benefits for the needy."[60] Therefore, even though the legislature must provide for those whom it has classified as needy, it can determine how much support to give them. But *Tucker v. Toia* made clear that in setting the level of benefits, the state may not refuse to aid the needy; therefore, the level must provide those individuals with *some* form of aid.[61]

Furthermore, New York has held that the legislature, in setting the level of benefits, cannot impose onerous requirements upon the needy that have nothing to do with need. In *Tucker*, the New York Court of Appeals held that a state requiring needy minors to obtain a final disposition in support proceedings before they could obtain public assistance contravened the spirit of article XVII, section 1.[62] Because these requirements were so onerous, the *Tucker* court determined that the statute effectively denied the minors, whom the legislature had classified as needy, the support mandated by the constitution.[63]

In *Aliessa*, the State argued that they had guaranteed the plaintiffs some aid.[64] Social Services Law section 122 provided the plaintiffs and immigrants similarly situated with emergency care and safety net assistance.[65] However, the court correctly determined that this level has nothing to do with need at all. Instead the government placed a five-year time restriction on the benefits in an attempt to ensure that the immigrants are self-sufficient.[66] In this case, it appears that "[l]egitimate financial need is no longer the criteria for receiving government support," but instead rests upon a time qualification.[67] The court held this

60. Aliessa v. Novello, 754 N.E.2d at 1093.

61. *See generally Tucker*, 371 N.E.2d 449.

62. *Id.* at 449.

63. *Id*.

64. Aliessa v. Novello, 754 N.E.2d at 1093.

65. *Id*.

66. Kostas A. Poulakidas, *Welfare Reform and Immigration: Attempting to Find a Domestic Answer to a Global Problem*, 6 IND. J. GLOBAL LEGAL STUD. 283, 306 (1998).

67. *Id*. at 304.

to be true and agreed with the plaintiffs' claim that ongoing care, the kind that the plaintiffs were lacking, is "a species of aid distinct from safety net assistance and emergency medical treatment."[68]

The court was also persuaded by the policy arguments advanced by the plaintiffs. They claimed that in many cases, as with diabetics, when ongoing medical treatment is not available, they begin a cycle of stability, deterioration, "emergency, recovery, stabilization, deterioration and the onset of another emergency."[69] If ongoing medical treatment were available, this cycle could be broken and medical costs would be lowered.

Relying on these policy arguments as well as upon precedent and the requirements inherent in article XVII, section 1, the court essentially created a floor for medical benefits for the needy. The court reiterated the requirement set forth in *Tucker* that need must be a factor for determining or denying benefits and concluded that "section 122 violate[d] the letter and spirit of article XVII, [section] 1 by imposing on the plaintiffs an overly burdensome eligibility condition having nothing to do with need, depriving them of an entire category of otherwise available basic necessity benefits."[70] The immigrants could do nothing to change their situation or classification. Citizenship, therefore, could not be used to determine need. The court also reigned in the legislature's wide discretion over the level of benefits for the needy by proscribing that the basic needs of the indigent or those the legislature classifies as needy must be met. An emergency medical assistance program in this case was not enough.

B. Questioning the Authority of Congress: Did the New York Court of Appeals Go Too Far?

After determining that section 122 was unconstitutional, as it violated article XVII, section 1 of the New York Constitution, the court could have concluded its analysis, but due to the federal preemption defense raised by the state, the court went one step further.[71] It took on the equal protection issue and in so doing faced the question of whether Congress could authorize the states to violate the Equal Protection Clause—by allowing them to discriminate based on alienage—in the name of immigration policy. The heart of the issue came down to

68. Aliessa v. Novello, 754 N.E.2d at 1093.

69. *Id.*

70. *Id.*

71. The State argued that federal law in the area of immigration is preemptive of state law. Therefore, because the legislature enacted section 122 in direct response to Title IV, the court should be preempted from striking it down as unconstitutional. *Id.* at 1093 n.12.

whether Congress could devolve its plenary power over immigration to the States—an issue on which the United States Supreme Court has not directly ruled. Although New York was one of the first states[72] to tackle this issue, it unequivocally determined that Congress exceeded its power when it effectively conferred upon the states discretion over national immigration policy.

This section will review the court's analysis and discuss the consequences of the court's decision. In so doing, this section will 1) explore the consequences that would flow from a holding that Congress could devolve its immigration powers; 2) examine why Congress cannot devolve these powers based on both a) the reasons the court used in holding that Congress could not devolve the powers and b) other theoretical reasons inherent in the powers themselves that would not allow devolution; and 3) other options available to the *Aliessa* court.

1. Consequences flowing from a holding that Congress can devolve their immigration and naturalization powers

As discussed previously, Title IV dictates that the states may not provide state- or locally-funded benefits to aliens that do not meet the specifications in 8 U.S.C. § 1641 (non-qualified aliens). Section 1621 of the same Title does provide, though, that states may affirmatively provide benefits to those individuals that would otherwise, under Title IV, be ineligible by enacting laws or promulgating rules to support these individuals.[73] But Congress went one step further. In 8 U.S.C. § 1622, Congress gave the states the power to discriminate based on alienage under the veil of immigration policy.[74]

72. Arizona and Massachusetts have also been called to rule upon statutes enacted pursuant to Title IV. *See* Kurti v. Maricopa County, 33 P.3d 499 (Ariz. Ct. App. 2001); Doe v. Comm'r of Transitional Assistance, 773 N.E.2d 404 (Mass. 2002). However, each case raised issues different than *Aliessa*, and therefore, the courts distinguished *Aliessa*. *Kurti*, 33 P.3d at 503 n.5 (finding that the statutes at issue did not mirror Title IV and therefore determining that it was "unnecessary to decide what the appropriate standard of review would be if Arizona's statutes did mirror the federal law"); *Comm'r of Transitional Assistance*, 773 N.E.2d at 414 (applying the rational basis review to the statute at issue, which supplemented the federal medical benefits to aliens, but which contained a six-month residency requirement because "the operative classification for equal protection purposes in the setting of [the] case [was] not alienage, but residency").

73. *See* 8 U.S.C. § 1621 (2000).

74. Section 1622(a) states that "a State is authorized to determine the eligibility for any State public benefits of an alien . . . ." *Id.* § 1622(a). Under this framework, and limited only by a few exceptions, a state could now deny state benefits to otherwise qualified aliens based solely upon their classification as an alien. New York chose to adopt the federal classifications in its Social Services Law section 122 determining that unqualified and many qualified aliens were ineligible to receive state Medicaid. *See supra* Part II. Because this statute allows New York to treat these immigrants differently than other states and differently than other individuals within the State of New York, the plaintiffs claimed that section 122 denied them the equal protection secured by the United States and New York Constitutions.

As stated above, the Supreme Court has not directly addressed whether Congress may devolve their immigration and naturalization powers. If this power could be delegated, there would be two primary effects: 1) The states could violate the Equal Protection Clause of the Fourteenth Amendment and discriminate based on alienage because Congress, when enacting statutes under its immigration power, can discriminate and therefore, in an equal protection analysis, those statutes are subject only to rational basis of review; this immunity from strict scrutiny would be passed, with the immigration power, to the states; and 2) The immigration and naturalization policy would be inconsistent and could possibly violate the Privileges and Immunities Clause of the Constitution.

a. The Equal Protection Clause and rational basis of review. The Fourteenth Amendment provides that "no state shall . . . deny to any *person* within its jurisdiction the equal protection of the laws."[75] This provision forbids the government from treating individuals in like situations differently. Furthermore, it is well established that "person" includes lawfully admitted aliens in the United States.[76] Therefore, the Fourteenth Amendment protects the *Aliessa* plaintiffs from unequal protection before the laws of any state within the United States. New York has a similar provision guaranteeing persons in New York equal protection before the laws of the state.[77]

Generally, when a court is presented with an equal protection claim, it will defer to the legislature, unless the "state 'classifications [are] based on race or national origin and classifications affecting fundamental rights.'"[78] This deference is due largely to the fact that the judiciary feels that policy decisions are best left to the legislature and the political process.[79] In these cases, the court will review the classification searching only for a rational basis.[80] However, when a state classification

75. U.S. CONST. amend. XIV, § 1 (emphasis added). On its face, this amendment applies only to the states; however, the court has found that the federal government, although not bound by the Fourteenth Amendment, has the same restriction placed upon them by the Due Process Clause of the Fifth Amendment. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 18.1 (3d ed. 1999). Therefore, neither the states nor the federal government can deny any person equal protection of the laws.

76. *See* Mathews v. Diaz, 426 U.S. 67, 77 (1976); Graham v. Richardson, 403 U.S. 365, 371 (1971); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

77. It provides that "[n]o person shall, because of race, color, creed or religion, be subjected to any discrimination in his [or her] civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." N.Y. CONST. art. I § 11.

78. United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988)).

79. *See id.*

80. Rational basis is the least restrictive standard of review. Under this test, the court will largely defer to the legislature by asking "only whether it is conceivable that the classification bears

affects a fundamental right or is based on race or national origin (which are termed "suspect" bases), the court will review the classification with strict scrutiny.[81] This second category—suspect bases—is rooted in the idea that an individual needs more protection because he or she is part of a "discrete and insular" minority and would be excluded from the ordinary policy process, which as stated above, normally serves to remedy any injustice and which is the basis for deference to the legislature in equal protection claims.[82]

A third level of review is the intermediate test, wherein the court will still give some deference to the legislature.[83] The Supreme Court has used this standard for gender classifications and illegitimacy classifications.[84]

The courts have applied each level of review in reviewing classifications based on alienage. In determining which level of review to apply, the courts have created three categories of alienage

a rational relationship to an end of government which is not prohibited by the constitution." *Id*. So at a minimum, the classification must be rationally related to "a legitimate governmental purpose." *Clark*, 486 U.S. at 461. The court will usually employ this test when the classification relates to general economic legislation. ROTUNDA & NOWAK, *supra* note 75, §18.3. This test is also applied to classifications used for "welfare benefits, property use, or business or personal activity that does not involve a fundamental right." *Id*.

81. A court will intervene and strictly scrutinize a classification when based on race or national origin or other classifications that affect fundamental rights, and thereby override the democratic process, because it believes that it "is able to assess [the] issues in a manner superior to, or at least different from, the determination of the legislature." *Id*. Under strict scrutiny review, the legislature must show that it was "pursuing a 'compelling' or 'overriding' end," rather than merely showing that a rational relationship existed between the classification and the government's objective. *Id*.

82. *See* United States v. Carolene Prod. Co., 304 U.S. 144, 153, n.4 (1938); ROTUNDA & NOWAK, *supra* note 75, § 18.3. Most cases involving classifications based on race, ethnic origins, or age are reviewed under strict scrutiny and the government is required to show a compelling interest. This is true even for classifications based on alienage because aliens fit into the "any person" text of the Fourteenth Amendment. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (the Fourteenth Amendment, including the Equal Protection Clause is "universal in [its] application to all persons within the territorial jurisdiction [of the United States] without regard to any differences of race, of color, or of nationality"); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1949) (reaffirming *Yick Wo* by invalidating a California statute that prohibited the issuance of commercial fishing licenses based on citizenship); Graham v. Richardson, 403 U.S. 365 (1971) (reaffirming that the Equal Protection Clause applies to aliens living legally in the United States by invalidating laws in both Pennsylvania and Arizona using a strict scrutiny standard of review because the laws were based on alienage and, therefore, violated the Equal Protection Clause). In fact, the Supreme Court has stated that "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom . . . [a] heightened judicial solicitude is appropriate." *Graham*, 403 U.S. at 372 (internal citation omitted).

83. ROTUNDA & NOWAK, *supra* note 75, § 18.3. Under this standard the court "will not uphold a classification unless [it] find[s] that the classification has a 'substantial relationship' to an 'important' government interest." *Id*. Although the court does not generally grant wide deference to Congress under this level of review, it does grant more deference than the under strict scrutiny standard.

84. *Id*.

classifications.[85] The first category deals with states that classify individuals based on their citizenship for distributing economic benefits or restricting their ability to participate in the economy.[86] This category of classification is subject to strict scrutiny, which the state will have a difficult time overcoming.[87] The second category again involves the states, but this category covers classifications based on "allocating power or positions in the political process."[88] These classifications are generally subject to only rational basis of review and will usually survive due to the state's legitimate interest.[89]

The third category includes alienage classifications created by federal law, which are subject only to rational basis review when they are enacted under Congress's immigration and naturalization power.[90] In *Mathews v. Diaz*, for instance, a unanimous Court found that Congress could restrict welfare benefits based on alienage.[91]The *Mathews* Court emphasized the importance of the immigration power:

> Any policy toward aliens is vitally and intricately interwoven with contemporaneous polices in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.[92]

Because the federal government enacted the statute at issue in *Mathews*, the Court held that they could classify based on alienage. The Court stated that it was "not 'political hypocrisy' to recognize that the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provision applicable to the federal

85. *See supra* note 82.

86. ROTUNDA & NOWAK, *supra* note 75, § 18.12; *see also Graham*, 403 U.S. at 375.

87. *Id*. These types of classifications are usually held invalid because it is almost impossible for a state to show a "compelling state interest" justifying the classification. Mathews v. Diaz, 426 U.S. 67, 85 (1976) ("Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interests in administering its welfare programs are concerned."). However, this logic does not always apply to Congress.

88. ROTUNDA & NOWAK, *supra* note 75, § 18.12.

89. *See* Foley v. Connelie, 435 U.S. 291 (1978) (the state can discriminate based on alienage for state troopers); Ambach v. Norwick, 441 U.S. 68 (1979) (states can discriminate based on alienage for public school teachers); *see also*, ROTUNDA & NOWAK, *supra* note 75, § 18.12.

90. ROTUNDA & NOWAK, *supra* note 75, § 18.12. Indeed, the PRWORA provisions of Title IV have been upheld when challenged based largely on the fact that they are federal laws enacted under Congress's immigration and naturalization powers and are, therefore, subject only to a rational basis of review. *See* Lewis v. Thompson, 252 F.3d 567 (2d Cir. 2001); City of Chicago v. Shalala, 189 F.3d 598 (7th Cir. 1999).

91. *Id*.

92. *Id*. at 81 n.17 (citing Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952)).

power over immigration and naturalization."[93] Furthermore, the Court held that the statute would only be subject to a rational basis of review. Therefore, when the federal government discriminates based on alienage under their immigration and naturalization power, they are only subject to rational basis review, which translates into giving great deference to the legislaturel.[94] In fact, these classifications will usually be upheld unless they are found to be "arbitrary and invidious classification[s] designed only to burden a disfavored group of persons."[95] However, as stated above, this is not true of the states.

Therefore, if Congress were able to devolve their immigration and naturalization powers to the states, then naturally the judicial deference of rational basis review would be devolved as well and the states could discriminate based on alienage.

The *Aliessa* case came down to which standard of review to apply and this question hinged solely upon whether Congress could devolve its immigration power (and virtual immunity from judicial review) to the states thereby authorizing them to violate the Equal Protection Clause. If Congress cannot devolve this power, then New York's Social Services Law section 122 would fall under the first category of alienage classifications and be subject to strict scrutiny. But if they could devolve this power, then the states would only be subject to the rational basis test when enacting laws in furtherance of that power.[96]

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93. *Id*. at 86–87. The court further stated:

> [A] division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business. Furthermore, whereas the Constitution inhibits every State's power to restrict travel across its own borders, Congress is explicitly empowered to exercise that type of control over travel across the borders of the United States.

Id. at 85.

94. The rationale for the different standards and for holding federal laws only to rational basis of review is that "at the federal level, equal protection norms must be balanced against the deference traditionally accorded to exercises of the federal immigration power, in light of the foreign affairs implications of immigration lawmaking." Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protectionism, and Federalism*, 76 N.Y.U. L. REV. 493, 496 (2001).

95. *Id*.

96. As intimated in *Graham v. Richardson*, however, it must be reiterated that Congress may be able to require a state to discriminate based on alienage, if it requires the states to do so uniformly. 403 U.S. 365, 383 n.14 (1971) ("We have no occasion to decide whether Congress, in the exercise of the immigration and naturalization power, could itself enact a statute imposing on aliens a uniform nationwide residency requirement as a condition of federally funded welfare benefits."). In fact, the *Graham* Court did state that if the federal statute, enacted pursuant to Congress's immigration powers "were to be read so as to authorize discriminatory treatment of aliens at the option of the States, *Takahashi* demonstrates that serious constitutional questions [would be] presented." *Id*. at 382. The Court went on to state that "[a]lthough the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization, Congress

b. Inconsistent immigration policy. Congress is given charge to "regulate Commerce with foreign Nations"[97] and to "establish an [sic] *uniform* Rule of Naturalization."[98] The absolute power over immigration and naturalization was invested in the federal government from the birth of the nation. But with that power came the requirement that the rule and therefore the use of the power be for attaining a uniform rule or policy. Naturally, if the states were given the discretion to discriminate based on alienage, there could not be a uniform immigration policy.

Furthermore, because each state would be given wide discretion over the methods by which they will discriminate based on alienage, under the guise of immigration power, the privileges and immunities clause[99] may be implicated, especially if the statutes employed durational residency requirements, which normally have been found unconstitutional based on the "fundamental right to travel freely as guaranteed by the Privileges and Immunities Clause of the United States Constitution."[100] These possible problems relating to inconsistent immigration policies and privileges and immunities problems also create limitations to the ability to devolve the immigration powers and are discussed in the next section.

does not have the power to authorize the individual States to violate the Equal Protection Clause." *Id*. However that was not the issue in *Aliessa*, where PRWORA authorized the states to adopt divergent policies.

97. U.S. CONST. art. I., § 8, cl. 3.

98. *Id*. cl. 4.

99. *Id*. art. IV, § 2.

100. Doe v. Comm'r of Transitional Assistance, 773 N.E.2d 404, 411 (Mass. 2002) (citing Saenz v. Roe, 526 U.S. 489, 509–10 (1999); Shapiro v. Thompson, 394 U.S. 618 (1969)).

2. Limitations on the delegation of immigration and naturalization powers[101]

Although it is not expressly granted in the Constitution, the power to regulate immigration has also been deemed to be solely delegated to the federal government.[102] There are four main sources from which this power is derived, three constitutional sources and one extra-constitutional source. These sources are the "Naturalization Clause, the Foreign Affairs Clause, the Foreign Commerce Clause, and the extra-constitutional theory of inherent sovereignty."[103] These sources and their histories illustrate that the immigration power has been delegated almost exclusively to the federal government, which leads to the conclusion that the power is exclusively national and therefore not delegable.[104] The New York Court of Appeals relied on the Naturalization Clause and its uniformity requirement to reach its conclusion; however, any of the sources would have led to the same conclusion. Since the court of appeals focused on one constitutional argument, this note will focus on that argument, but will also discuss the possibility of the same result

101. Since the New Deal Era, it has been accepted that Congress can delegate some of its regulatory powers to agencies and other branches of the federal government. Sarah Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 942–43 (2000). In fact, this delegation of powers, originally seen as a "constitutional offense under the nondelegation principle of separation of powers," is now generally recognized as promoting efficiency. *Id.* at 942. Although the nondelegation issue has recently resurfaced, the Supreme Court laid it again to rest in *Whitman v. American Trucking Ass'ns Inc*. 531 U.S. 457, 473 (2001), where the Court overruled a lower court holding that Congress delegated too much authority to the Environmental Protection Agency. The Court reiterated the constitutionality of Congress's ability to delegate some of its regulatory powers as long as they do not delegate their legislative powers. *Id*.

But *Aliessa* dealt with Congressional delegation to a state, not merely to an administrative agency, which takes it out of the nondelegation arena. Furthermore, Congress was delegating its immigration and naturalization policymaking powers not merely its regulatory powers. The Supreme Court has not had the opportunity to determine whether the immigration power is capable of being devolved. In fact, it has not had a chance even to "evaluate what government powers, if any are exclusively national," and therefore not transferable. If the immigration power is exclusively national, Congress could not devolve it to the states. The question, therefore, comes down to whether the immigration power is exclusively national.

102. Barbara A. Arnold, *The New Leviathan: Can the Immigrant Responsibility Act of 1996 Really Transfer Federal Power Over Public Benefits to State Governments?*, 21 MD. J. INT'L. L. & TRADE 225, 232 (1997).

103. Wishnie, *supra* note 94, at 532 (footnotes omitted); *see also* Aliessa v. Novello, 754 N.E.2d 1085, 1095–96 (2001). For a thorough discussion of all four possible sources of the immigration and naturalization powers, see Wishnie, *supra* note 94, at 532–52.

104. *But see* Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SURV. AM. L. 357 (2002), and Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997).

through the other arguments, both constitutionally based and extra-constitutionally based.[105]

a. Power to establish a uniform rule of naturalization. The United States Constitution provides that Congress has power to "establish a uniform Rule of Naturalization."[106] This power is plenary and the Supreme Court has stated "over no conceivable subject is the legislative power of Congress more complete."[107] But can Congress devolve this power? The *Aliessa* court focused on this constitutional grant of power in its analysis, but it primarily focused on the word "uniform." In fact, "the textual requirement that there be a single naturalization rule that is 'uniform . . . throughout the United States' long has been understood to establish an exclusively federal power, on which states may neither exercise nor impede."[108] To get to this same result, the *Aliessa* court relied on precedent and analyzed the type of power the PRWORA was authorizing New York to use.

Normally Congress can direct the states to implement national immigration objectives, which may even entail the states discriminating based on alienage. The Supreme Court has determined that "when Federal welfare programs are jointly administered with the States, Congress may direct the States to implement national immigration objectives as long as the 'Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass.'"[109] With this power, it appears that the portion of Title IV requiring the States to withhold federal benefits from different classes of aliens is within the immigration power of Congress. However, Title IV went one step further. It expressly gave the states power to create their own policy when it came to state-funded welfare benefits and even authorized the states to base eligibility upon U.S. citizenship.[110] New York took Congress's initiative and after enacting section 122, began to discriminate against legal aliens by requiring otherwise eligible

105. *See* Wishnie, *supra* note 94, at 532–52 (discussing the immigration power as an exclusive power stemming from the Foreign Affairs Clause and the Foreign Commerce Clause). These last three sections are drawn heavily and exclusively from Wishnie. *Id*.

106. U.S. CONST. art. I, § 8, cl. 4. For a detailed and thoughtful discussion regarding why the naturalization powers are nondevolvable, see *id*. at 532–37.

107. Aliessa v. Novello, 754 N.E.2d 1085, 1096 (*quoting* Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

108. Wishnie, *supra* note 94, at 533; *see also* Michael T. Hertz, Limits to the Naturalization Power, 64 GEO. L.J. 1007, 1025 (1976).

109. Aliessa v. Novello, 754 N.E.2d 1085, 1096 (*quoting* Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982)); *see also* Mathews v. Diaz, 426 U.S. 67 (1976).

110. *See* 8 U.S.C. § 1622(a) (2000).

aliens to wait five years to be eligible for state medical assistance.[111] The *Aliessa* court held this grant of power to be outside Congress's power.

In making this determination, the court relied heavily on *Graham v. Richardson*. In *Graham*, the Supreme Court determined that a state law that discriminated based on alienage was unconstitutional under a strict scrutiny review.[112] The Court also discussed Congress's wide discretion over immigration policy. However, it alluded to the notion that Congress could not delegate those same powers to the states.[113] In fact, it stated that "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause."[114] The *Graham* Court also stated that a "Federal statute authorizing 'discriminatory treatment of aliens at the option of States' would present 'serious constitutional questions.'"[115]

Furthermore, *Graham* held that allowing Congress to authorize states "to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene [the] explicit constitutional requirement of uniformity."[116] Applying *Graham* directly to the *Aliessa* facts, the New York Court of Appeals found that "in administering their own programs, the States are free to discriminate in either direction [to withhold Medicaid or grant it]—producing not uniformity, but potentially wide variation based on localized or idiosyncratic concepts of largesse, economics and politics."[117]

Relying upon *Graham* and the inherent exclusivity of the power granted by the Naturalization Clause compounded with its uniformity requirement, the court correctly decided that Congress could not transfer its immigration and naturalization power to the state. Because the court correctly determined that Congress could not transfer this power to the state, subjecting section 122 to strict scrutiny was also appropriate.

But perhaps Congress foresaw this problem. In 8 U.S.C. § 1601(7), Congress plainly stated that the problems Title IV was created to resolve were "compelling government interest[s]." With a compelling government interest, the states should be able to justify their classifications under strict scrutiny; however, the uniformity issue would still be lurking and as the Supreme Court states in dicta in *Graham*, "Congress does not have the power to authorize the individual States to

111. *See* N.Y. Social Services Law § 122(1)(b)(ii) (Consol. 2001).
112. 403 U.S. 365 (1971).
113. *Id*. at 382.
114. *Id*.
115. Aliessa v. Novello, 754 N.E.2d 1085, 1097 (N.Y. 2001).
116. Graham v. Richardson, 403 U.S. 365, 382 (1971).
117. Aliessa v. Novello, 754 N.E.2d at 1098.

violate the Equal Protection Clause,"[118] even by supplying them with a compelling interest.

Another possible pitfall in the *Aliessa* court's analysis is that it did not consider what the term uniformity means. Uniformity could be interpreted in one of two ways. In the tax arena, the Supreme Court has held uniformity to equate to geographic uniformity, which requires uniformity of laws throughout the nation.[119] Uniformity could also be construed to require "only uniform federal incorporation of divergent state rules," which interpretation the Supreme Court has applied in the context of bankruptcy.[120] But federal power over bankruptcy is concurrent with the states, not exclusive. Therefore, if the *Aliessa* court relied on the precedent construing the Naturalization Clause to equate to geographic uniformity, similar to the interpretation of uniformity in the tax arena, then they again made the correct decision.[121]

Overall, even though the Supreme Court has not spoken on the exact issue presented to the *Aliessa* court, the New York Court of Appeals correctly relied on available precedent, which, when applied to the facts, appeared to be in line with the Supreme Court's lead.[122]

b. Other potential arguments also prohibiting the devolution of naturalization and immigration powers. Although the *Aliessa* court relied on the naturalization powers to determine that in enacting PRWORA Congress exceeded its constitutional powers, there are other theories that the court could have relied on and which would have provided the same result.

(1) Constitutionally-based prohibitions:[123] The Foreign Affairs Clauses and the Foreign Commerce Clause.[124] The Foreign Affairs Clauses include the following grants of power to the legislature and the federal government (the President): 1) "To define and punish piracies and felonies committed on the high seas, and offenses against the law of

118. *Graham*, 403 U.S. at 382 (citing Shapiro v. Thompson, 394 U.S. 618, 641 (1969)).

119. Collins, *supra* note 13, at 239.

120. *Id*. In the bankruptcy arena the court has "reasoned that the Federal bankruptcy statute incorporated divergent state law in a uniform manner, and therefore, '[t]he general operation of the law is uniform although it may result in certain particulars differently in different states.'" Wishnie, *supra* note 94, at 536 (alteration in original) (citing Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 190 (1902)).

121. *Id*. at 535–37.

122. For another discussion on the problems stemming from a lack of uniformity that may accompany immigration law devolution, see Victor C. Romero, *Devolution and Discrimination*, 58 N.Y.U. ANN. SURV. AM. L. 377 (2002).

123. This section will only give a brief overview of these two clauses because these two grants of immigration and naturalization powers are thoroughly discussed in Wishnie's article. *See supra* note 94. Further, this discussion is drawn heavily from Wishnie's article as well.

124. *Id*. art. I, § 8, cl. 3.

nations"; [125] 2) "To declare war, grant letters of marque and reprisal, and make rules concerning captures on the land and water";[126] and 3) the President "shall have power, by and with the advice and consent of the Senate, to make treatises . . . , and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers . . . ."[127] Professor Wishnie,[128] argues that the history of the interpretation of these sections, combined with the constitutional prohibition on the states that "no State shall enter into any Treaty, Alliance, or Confederation; grant letters of Marque and Reprisal,"[129] makes clear that the foreign affairs powers are, in almost all cases, exclusively within the realm of the federal government.[130] There have been arguments that the Compact Clause[131] grants the states some authority in the foreign affairs realm; however, Wishnie points out that even with this power, it is only a "limited, conditional grant of foreign affairs power to the states . . . that . . . represents a small portion of the foreign affairs powers expressly contemplated by the constitutional text, and an even smaller portion of those now understood to comprise the foreign affairs powers of the modern nation."[132] Wishnie concludes that "if the immigration power arises from the Foreign Affairs Clauses, then it may be exercised exclusively by the federal government and may not be devolved to the states."[133]

The foreign commerce clause grants the legislature the authority to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[134] Wishnie also discusses the devolvability of the immigration powers through this grant of foreign powers to Congress.[135] He notes that at first glance, the Foreign Commerce Clause could be interpreted similar to the Interstate Commerce Clause, which was a grant of concurrent jurisdiction over commerce between the federal government and the states.[136] However, Wishnie rejects that argument and explains that the Court, in looking at this clause, has found that its grant of authority to Congress is an "'exclusive and absolute'

125. U.S. CONST. art I, § 8, cl. 10.
126. *Id*. art I, § 8, cl. 11.
127. *Id*. art II, § 2, cl. 2
128. Assistant Professor of Clinical Law, New York University.
129. Wishnie, *supra* note 94, at 540 (*quoting* U.S. CONST. art I, § 10, cl. 1).
130. *Id*. at 537-44. *But see* Chang, *supra* note 104.
131. U.S. CONST. art I, § 10.
132. Wishnie, *supra* note 94, at 543.
133. *Id*. at 544.
134. U.S. CONST. art I, § 8, cl. 3.
135. Wishnie, *supra* note 94, at 544-48.
136. *Id*. at 544-45.

power over foreign commerce."[137] He also establishes possible avenues wherein the states could possibly share this power with the federal government; however, he concludes that the power is not devolvable:

> Yet there are reasons to conclude that Congress may not devolve its power to regulate foreign commerce to the states, nor any immigration power that may arise from it. Certainly any argument for devolvability would contradict the Court's longstanding conviction that the foreign commerce power is the "exclusive and absolute" domain of the federal government. The argument also would contradict the more modern characterization of the power to regulate foreign commerce as merely an aspect of the broad power to regulate foreign affairs, the devolution of which, as discussed above, should not be tolerated. Finally, it is noteworthy that even opponents of "dormant foreign commerce preemption" have not suggested that states possess an independent power to regulate foreign commerce; theirs is the narrower claim that a state's otherwise constitutional regulation of all commerce should not be invalidated simply because the regulation also applies to international commerce.[138]

Therefore, the *Aliessa* court could have also used either of these two arguments to support its conclusion that the federal immigration powers are not devolvable to the states, and therefore, Congress went beyond its grant of powers in enacting PRWORA by granting the states the ability to discriminate based on alienage.

(2) Extra-constitutionally-based prohibition: Inherent authority. The New York Court of Appeals chose to rely solely on one constitutional argument to reason that Congress could not devolve its immigration power. Because of the success of this argument, the court did not need to rely on the other available constitutional possibilities, the foreign commerce clause or the foreign affairs clauses. But the court also bypassed the fourth argument, which is grounded in extra-constitutional theory and case law: the inherent sovereign power.

This theory of Congress's supreme and plenary power in the area of immigration policy and legislation was expounded in *United States v. Curtiss-Wright Export Corporation.*[139] In *Curtiss-Wright*, the Court determined that the source of foreign policy power is inherent in the sovereign power of the nation.[140] In fact, relating to the redistribution of powers between the federal government and the states, Justice Sutherland

137. *Id.* at 546 (citing Buttfield v. Stranahan, 192 U.S. 470, 492 (1904); Bowman v. Chi. & Northwestern Ry. Co., 125 U.S. 465 (1888)).

138. Wishnie, *supra* note 94, at 548.

139. 299 U.S. 304 (1936).

140. Arnold, *supra* note 102, at 234.

stated that "the states severally never possessed international powers."[141] A limitation applies to this type of power. It can only be transferred from one sovereign to another sovereign.[142] Therefore, Congress acting on behalf of the nation could not transfer these inherent powers to the non-sovereign states.[143] To do so "would be to tear it from its source."[144] Therefore, although Congress has virtually unlimited power in this area, it cannot devolve those powers to the states. Using this theory, the New York Court of Appeals could have reached the same conclusion that Congress could not devolve its immigration power to New York or any state in the union.

3. Other options available to the Aliessa court

The *Aliessa* court appears to have gone out of its way to address the Equal Protection Clause in light of PRWORA. In doing so, they arrived at the result that section 122 should be subjected to strict scrutiny. However, they may have been able to avoid this entire discussion and still found section 122 unconstitutional under a rational basis of review because the Supreme Court, using rational basis review, has held some statutes unconstitutional that have been "blatantly prejudicial against a vulnerable group."[145]

Determining a statute unconstitutional under the rational basis of review is also possible where the right denied to a minority group is an *important* right.[146] In its opinion, the *Aliessa* court quoted the Supreme Court characterizing "ongoing medical care as a 'basic necessity of life.'"[147] In *Plyler v. Doe*, the Supreme Court declared that a Texas statute that "authorized school districts to deny admission" to alien children was unconstitutional.[148] In that decision, the court determined that even though education is not a constitutional right it was an important right.[149] Under this same reasoning, the court could have chosen not to take the road *not* traveled to determine whether Congress may authorize a state to discriminate against aliens, and instead

141. Wishnie, *supra* note 94, at 550 (*quoting Curtiss-Wright*, 299 U.S. at 316) (citation omitted).

142. *Id.* at 552.

143. *Id*.

144. *Id*.

145. Stacy Sulman Kahana, *Crossing the Border of Plenary Power: The Viability of an Equal Protection Challenge to Title IV of the Welfare Law*, 39 ARIZ. L. REV. 1421, 1432 (1997).

146. *Id*. at 1433.

147. Aliessa v. Novello, 754 N.E.2d 1085, 1093 (N.Y. 2001) (citation omitted).

148. Kahana, s*upra*, note 145, at 1433.

149. *Id*.

employed the rational basis of review and focus on the "important" right that section 122 denied rather than who authorized New York to deny it.

V. CONCLUSION

Faced with a difficult choice the New York Court of Appeals correctly decided to take on the issue to determine whether Congress could devolve its immigration powers to the states. Although the Federal Court of Appeals in two circuits have discussed the constitutionality of the PRWORA and even Title IV, they had only looked at Congress's powers to enact the act. They had not touched upon the issue of whether Congress could empower the states to discriminate against aliens. In this manner, the New York Court of Appeals took on a new issue. Many have applauded its holding. In fact, New York Governor Pataki said that they would not appeal this decision to the Supreme Court. Pataki also stated that New York would change the laws to reflect the court's holding.

The question now is whether other states that have adopted the federal classifications from Title IV into their state welfare benefits plans will follow suit after New York. This remains unclear. However, recently, an Arizona Court of Appeals discussed this issue, and although the facts did not require the state to determine whether Congress could devolve its power to the states, it did state that "such congressional authorization cannot excuse states from compliance with the mandates of equal protection."[150] Perhaps the tide is turning. Whether other states will adopt the New York Court of Appeals's reasoning or whether Title IV is eventually amended, based on precedent, the *Aliessa* court did correctly decide the issue at hand.

Karin H. Berg

150. Kurti v. Maricopa County, 33 P.3d 499, 505 (Ariz. Ct. App. 2001); *see also* Doe v. Comm'r of Transitional Assistance, 773 N.E.2d 404 (Mass. 2002) (distinguishing *Aliessa* because the Massachusetts statutes only supplemented the federal medical benefits and only discriminated between aliens, not citizens and aliens; therefore, "the operative classification for equal protection purposes in the setting of [the] case [was] not alienage, but residency").