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Comments: Immigrants, Health Care, and the Constitution: Medicaid Cuts in Maryland Suggest That Legal Immigrants Do Not Deserve the Equal Protection of the Law

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IMMIGRANTS, HEALTH CARE, AND THE CONSTITUTION: MEDICAID CUTS IN MARYLAND SUGGEST THAT LEGAL IMMIGRANTS DO NOT DESERVE THE EQUAL PROTECTION OF THE LAW

I. INTRODUCTION

Effective July 1, 2005, nearly 4,000 children and pregnant women, who were legal permanent residents of the United States, became ineligible for Medicaid coverage.¹ This change in eligibility terminated the health care coverage of those immigrants who resided in the United States for fewer than five years.² The restriction was part of Governor Robert L. Ehrlich, Jr.'s efforts to contain Medicaid costs for the fiscal year 2006, and became a part of his Budget Bill, which was presented to the Maryland General Assembly in January 2005.³ In April, the Legislature approved the budget.⁴ This budgetary cut represents a mere .0875 percent in savings from the total Medical Assistance Program budget.⁵ As such, this denial of health care coverage to immigrant children and pregnant women in Maryland has sparked negative reactions by many of the State's legislators, health care experts, and the legal community.⁶

In October 2005, the Legal Aid Bureau filed a lawsuit in Montgomery County Circuit Court on behalf of twelve children whose medical coverage was terminated on July 1, 2005 as a result of the budgetary cuts.⁷ The Plaintiffs in *Perez v. Ehrlich* are children residing in either Montgomery, Prince George's, or Anne Arundel Counties who relied on Medicaid to cover the costs of extensive medical treatment for serious illnesses or the routine medical care, screenings, and immunizations which children typically require.⁸ The complaint filed by the Legal Aid Bureau against the Governor alleges that the cuts improperly discriminate

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1. John Wagner, *Hearings Planned on Cuts to Medicaid*, WASH. POST, July 9, 2005, at B6.
 2. *Id.*
 3. *Id.*
 4. *Id.* Although legislators "earmarked" \$1.5 million so that Ehrlich would continue to cover health care services for pregnant women enrolled in Medicaid, it was at the Governor's discretion to do so. *Id.* Pursuant to the Maryland Constitution, legislators cannot add money to the budget, although they can reduce or strike out items. See MD. CONST. art. III, § 52 (General Assembly has express power only to strike or reduce appropriations in the Budget Bill).
 5. Complaint at 6-7, *Perez v. Ehrlich*, No. 265850-V (Montgomery County Cir. Ct. filed Oct. 26, 2005). Seven million in Medicaid funding was cut from a Medical Assistance budget of over four billion. *Id.*
 6. See Wagner, *supra* note 1; see also Kelly Brewington, *Md. is Sued on Children's Behalf*, BALT. SUN, Oct. 27, 2005, at 6B; see *infra* Part VI(B)(1)(b)(vi).
 7. See Complaint, *supra* note 5.
 8. *Id.* at 2-5.

on the basis of alienage and violate the equal protection rights afforded to the Plaintiffs under the Maryland Declaration of Rights, Article 24.⁹ The complaint further asserts that the State's budgetary cut must be examined under a "strict scrutiny" test, and that the discriminatory act does not survive such an analysis because it is not justified by a compelling state interest.¹⁰ Fortunately for the Plaintiffs, the Court of Appeals recently ruled in their favor and upheld a preliminary injunction that reinstated their Medicaid benefits.¹¹ This remedy, however, is only temporary, as the overall constitutionality of the restrictions is still being litigated.

The State of Maryland is not alone in trying to find ways to deal with the rising costs of Medicaid in the past decade.¹² In 1996, for example, the federal government under the Clinton administration passed the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), which eliminated federal funding of Medicaid for legal immigrants who entered the United States on or after August 22, 1996, or who had resided in the country for fewer than five years.¹³ PRWORA also authorized states to determine whether to provide Medicaid coverage to legal immigrants once the five-year period expired.¹⁴ As a result of the changes to eligibility for federally-funded welfare programs, many states opted to continue to use state funds to insure legal immigrants who became ineligible under the federal law.¹⁵ Maryland was one such state which became concerned about the gaps in health care coverage for segments of its population and, consequently, passed the Welfare Innovation Act of 1997.¹⁶ Through this Act, the State formalized its commitment to provide

9. *Id.* at 7.

10. *Id.*

11. *See Ehrlich v. Perez*, 2006 Md. LEXIS 691 (Md. Oct. 12, 2006). The injunction, which ordered the State to restore the benefits until the final disposition of the case and to reimburse Plaintiffs retroactively for their medical expenses, was originally granted in January 2006 by the Circuit Court for Montgomery County. *Id.* at *19. The State subsequently filed with the Circuit Court a Notice of Appeal to the Court of Special Appeals and a Motion for Stay Pending Appeal. *Id.* The Circuit Court granted a stay as to the payment of retrospective benefits but denied a stay as to the remainder of the injunction. *Id.* In March 2006, the Court of Appeals issued a writ of certiorari to the Court of Special Appeals. *Id.* at *20. Although the Court of Appeals upheld the preliminary injunction issued by the Circuit Court, in so far as medical benefits were to be reinstated as of October 26, 2005, the date the complaint was filed, the Court of Appeals modified the injunction to exclude reimbursement for the costs of Plaintiffs' medical coverage from July 1, 2005 to October 26, 2005. *Id.* at *72-73.

12. *See infra* Part II(B).

13. *See infra* Part III(B).

14. *See infra* Part III(B).

15. *See infra* Part III(C).

16. MD. CODE ANN. HEALTH-GEN. § 15-103(a)(2)(viii) (LexisNexis 2005).

medical care to legal immigrant children and pregnant women who arrived in the United States on or after August 22, 1996.¹⁷

Other states, however, opted to deny access to health care services for legal immigrants residing in the country for fewer than five years.¹⁸ As in Maryland, this raised constitutional challenges in state courts.¹⁹ State courts have applied one of the standards applicable to an equal protection challenge in order to reach a decision on the constitutionality of the state act or statute.²⁰ While some courts have applied the less strict rational basis standard to evaluate the constitutionality of the state's actions, others have applied the heightened test of strict scrutiny.²¹

This Comment analyzes the issues in *Perez v. Ehrlich* and then concludes that Maryland courts should apply the strict scrutiny standard to the recent Medicaid eligibility restrictions undertaken by Governor Ehrlich because the restrictions discriminate on the basis of alienage. Also, this Comment provides a constitutional analysis of the Governor's discriminatory act and concludes that a Maryland court should declare it unconstitutional, as the State does not have a compelling interest sufficient to pass the strict scrutiny test. In reaching this conclusion, it is necessary to discuss many topics which affect the policies enacted by states today, including Maryland, in cutting segments of the immigrant population from Medicaid eligibility. Thus, Part II of this Comment provides an overview of Medicaid, its development over many decades, and Maryland's own reforms to its Medicaid program in recent years.

Part III discusses federal Medicaid law, including the Personal Responsibility and Work Opportunity Reconciliation Act, also known as the Welfare Reform Act of 1996, which induced major cuts to Medicaid eligibility in state programs, including Maryland's. Part IV provides background on immigration policy in the United States. A discussion of immigrants' rights and the Supreme Court's treatment of federal and state discrimination against noncitizens follows in Part V. Part VI explores the constitutional issues raised by restrictions to Medicaid eligibility which target segments of the immigrant population in both Maryland and other jurisdictions. This section includes an analysis

17. *Id.*; see also *infra* Part III(C)(1).

18. See *infra* Part III(C).

19. See *infra* Part VI.

20. See *infra* Part VI.; see also WILLIAM A. KAPLIN, AMERICAN CONSTITUTIONAL LAW 268-70 (2004). To survive the rational basis test, a classification need only be "rationally related to a legitimate state interest." *Id.* at 268. Under intermediate scrutiny, the classification needs to be "substantially related" to an important state interest. *Id.* at 270. According to strict scrutiny, the classification must be "narrowly tailored" to a compelling state interest. *Id.*

21. See *infra* Part VI(A).

of how the courts in Maryland should approach the equal protection issue in *Perez v. Ehrlich* through application of the strict scrutiny test. Included in this equal protection analysis is a discussion of the impacts that such Medicaid cuts have on the health care system in general, the health of the uninsured, and the resulting concerns raised by legislators and the health care community.

This Comment ultimately concludes that the courts in Maryland should apply a strict scrutiny test to the recent cuts in Medicaid funding affecting legal immigrants and declare those cuts unconstitutional. Furthermore, this Comment emphasizes that the State of Maryland would be better served by policies less restrictive of the immigrant population's access to health care coverage.

II. BACKGROUND ON MEDICAID

A. *Origins of Medicaid and Its Functions*

Medicaid is a welfare program which is funded jointly by the federal and state governments in order to provide health care coverage to the poor.²² The program was enacted into law in 1965 and implemented in 1966 as an accompaniment to Medicare.²³ The creation of both programs stemmed from a concern for certain categories of the population whose health care needs were not being met, primarily due to the connection between health insurance and employment.²⁴ While Medicare was designed to protect retired workers who could not afford private health insurance and who needed the coverage due to age-related health problems, Medicaid was designed to assist low-income persons who lacked coverage due to unemployment or to lack of access to such benefits even when employed.²⁵

Medicaid and Medicare also differ in their sources of funding and methods of administration.²⁶ While Medicare is solely a federal program, Medicaid is the product of federal and state cooperation.²⁷ Once a state voluntarily establishes a program

22. DEAN M. HARRIS, *HEALTHCARE LAW AND ETHICS* 108 (1999).

23. MARK R. DANIELS, *MEDICAID REFORM AND THE AMERICAN STATES* 3 (1998).

24. CHARLES J. DOUGHERTY, *AMERICAN HEALTH CARE: REALITIES, RIGHTS AND REFORMS* 164 (1988). In the United States, commercial health insurance is generally linked to employment. *Id.* Thus, it became evident that the health care and insurance markets were failing the elderly, the retired, and the poor, who were either no longer employed or could not afford private health insurance. *Id.* at 165.

25. *Id.* at 164-65.

26. See HARRIS, *supra* note 22.

27. *Id.*

which meets the federal standards,²⁸ the federal government provides funding to the state through a system of matching grants.²⁹ The state then administers the program, establishing its own eligibility requirements, range of health care services available to eligible participants, and the amount providers will be paid for such services.³⁰ In short, Medicaid is a compilation of fifty-one different programs.³¹ Although each program is unique, federal guidelines require all participating states to provide certain basic services, and states can elect to provide other services.³² However, there are restrictions imposed by the federal government on services that states may not elect to cover with Medicaid program funds.³³

With regard to eligibility for Medicaid, low-income participants include both those who are “categorically” eligible because they receive certain types of public assistance, such as Temporary Assistance for Needy Families (“TANF”), and those who are “medically needy” because they have incurred high medical expenses.³⁴ In addition, some nursing home residents qualify for Medicaid to cover their nursing home care once their own insurance policies or savings have been exhausted.³⁵

B. Expansion of Medicaid’s Eligibility Requirements and the Subsequent Funding Crisis

When the Medicaid program was first developed, it was intended that participants would receive services identical to those received by patients holding private health insurance.³⁶ Thus, participants chose their own doctors, and the doctors agreed not to hold the patients responsible for the payment.³⁷ The Medicaid

28. *Id.*

29. *See* DANIELS, *supra* note 23. The federal government’s matching grants provided to the states cover from 50% to 70% of program costs. *Id.*

30. *See id.*; TERESA A. COUGHLIN ET AL., MEDICAID SINCE 1980, at 8 (1994).

31. COUGHLIN ET AL., *supra* note 30. In addition to the 50 states, the District of Columbia administers its own Medicaid program. *Id.*

32. *Id.* at 9. Some of the services that states are required to offer include hospital care, physician services, nursing home care, and preventive health services for children. *Id.* States, through their Medicaid programs, can opt to provide such services as prescription drugs, care facilities for the mentally retarded, dental, optometric, podiatric, and chiropractic care. *Id.*

33. *See* HARRIS, *supra* note 22, at 110. Under the Hyde Amendment, states are prohibited from using Medicaid funds to pay for abortions. *Id.* The Supreme Court in *Harris v. McRae*, 448 U.S. 297, 316 (1980), held that it “simply does not follow that a woman’s freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.”

34. HARRIS, *supra* note 22, at 109.

35. *Id.* at 109-10.

36. DANIELS, *supra* note 23.

37. *Id.* at 4.

program then reimbursed the health care provider on a reasonable cost basis.³⁸ Because health care providers often received less from Medicaid than they would from a third-party insurer, the providers began opting not to accept Medicaid patients.³⁹ In response, Congress enacted a federal law that changed the payment system under Medicaid, and later repealed the same federal law in order to adapt to concerns about payment reimbursements.⁴⁰ As access to health care providers decreased and costs of treatment increased, in part because participants were seeking expensive emergency treatments rather than preventive care, many states developed managed care programs through which they could better control participants' use of health care services.⁴¹ Maryland implemented a large-scale managed care plan, known as HealthChoice, in 1997, in efforts to cope with a budgetary crisis resulting from increased enrollment in Medicaid and health care inflation.⁴²

C. Maryland's Medicaid Reform

During the early 1990s, the national recession prompted a decrease in state revenues and an increase in state spending.⁴³ During this period of economic decline, the number of Maryland residents eligible for Medicaid increased significantly.⁴⁴ During a five year span from 1989 to 1994, Maryland's Medicaid budget doubled, and the Maryland government sought ways to reduce Medicaid spending.⁴⁵ By 1995, Maryland's Department of Health and Mental Hygiene ("DHMH") supported a move towards a comprehensive managed care program, rather than a continuation

38. HARRIS, *supra* note 22, at 113.

39. DANIELS, *supra* note 23, at 4.

40. HARRIS, *supra* note 22, at 113. In 1981, Congress passed the Boren Amendment, under which states devised their own Medicaid reimbursement systems, but they had to abide by a federal standard of reasonable rates. *Id.* Under the federal standard, states had to pay enough for a hypothetical and efficient provider to recover its costs, even if the individual provider did not actually recover costs after reimbursement. *Id.* The Boren Amendment was repealed in 1997, however, following the onset of successful lawsuits by providers against the states to force them to pay Medicaid rates pursuant to the federal standards. *Id.* Consequently, the rates of reimbursement set by states must no longer conform to the standards set forth under the Boren Amendment, nor can providers sue states to enforce those standards. *Id.*

41. DANIELS, *supra* note 23, at 4. Most hospital emergency rooms accepted Medicaid patients; thus it became a more convenient source of treatment for Medicaid participants. *Id.*

42. *See id.* at 135, 137; *infra* Part II(C).

43. DANIELS, *supra* note 23, at 136.

44. *Id.*

45. *Id.* at 137. For example, the Maryland Access to Care ("MAC") program was created in 1991, which sought "to improve access to primary and preventive services, encourage more appropriate use of services, improve continuity of care, increase provider participation, and reduce Medicaid expenditures." *Id.* at 139.

of specialized programs.⁴⁶ Senate Bill 694, which was signed by Governor Parris N. Glendening in May of 1995, directed the DHMH to plan for comprehensive reforms in Maryland's Medicaid program.⁴⁷

In January of 1996, Senate Bill 750, the product of the DHMH's efforts, was introduced to the Maryland General Assembly and sought an expansion of Medicaid managed care.⁴⁸ After several amendments, Senate Bill 750 was passed and a new managed care program was to be established beginning in 1997.⁴⁹ As planned, the new program, known as HealthChoice, was to provide better health care services to Medicaid participants while costing less than the then-existing set of programs in Maryland.⁵⁰

Managed care is a type of program in which participants receive health care services in a coordinated manner, thus avoiding unnecessary services.⁵¹ There are various types of managed care programs, yet all share in the goal of reducing health care spending while maintaining the quality of care.⁵² Notwithstanding such goals, there is significant concern that managed care programs actually limit patients' access to health care.⁵³

III. FEDERAL LAW ON MEDICAID AND ITS EFFECTS ON THE LAWS IN OTHER JURISDICTIONS

A. Trends in Federal Law

Historically, eligibility for Medicaid was linked to federal and state welfare policies.⁵⁴ Thus, states were required to cover the "categorically needy," such as those receiving assistance through

46. *Id.* at 147-48. The High Cost User Initiative was one such program. *Id.* at 140. In 1994, the Maryland General Assembly approved the program in 1994, which was designed to cope with the concern that a small proportion of patients generated a majority of Medicaid health care costs. *Id.* at 140, 144.

47. *Id.* at 149.

48. *Id.* at 152.

49. *Id.* at 153.

50. *Id.*

51. *Id.* at 5.

52. *Id.* Health Maintenance Organizations (HMOs) and Preferred Provider Organizations (PPOs) are two types of managed care programs. *Id.*

53. See MaryCarroll Sullivan, *Ethical Considerations in Managed Care*, 66 UMKC L. REV. 757, 759-61 (1998) (explaining that managed care involves a system of "gatekeepers" whereby the patient must work through a chain of people before seeing a primary care physician, and it is only through communication with this chain of people that referral to a specialist, if needed, can be granted); see also Deborah W. Larios, *Barbarians at the Gate? An Essay on Payor Liability in an Era of Managed Care*, 65 TENN. L. REV. 445, 447 (1998) (elaborating on the "gatekeeper" idea and explaining that requiring prior approval of treatment and uniquely classifying certain treatments as "experimental," which managed care programs will not cover, have contributed to limitations to access for managed care participants).

54. COUGHLIN ET AL., *supra* note 30, at 36.

Aid to Families with Dependent Children ("AFDC") and Social Security Income ("SSI").⁵⁵ States also could elect to cover the "medically needy"—those who become eligible for AFDC or SSI after paying for high medical expenses.⁵⁶ If a state extended coverage to the "medically needy," it was obligated to provide coverage for pregnant women and children.⁵⁷ In addition, federal law did not impose any restrictions on states' provisions of Medicaid benefits to legal immigrants.⁵⁸ Furthermore, congressional mandates in the 1980s sought to expand Medicaid eligibility for several groups, including pregnant women and children.⁵⁹ Many states, out of concern for infant mortality and poor child health, took advantage of the new mandates and options.⁶⁰

B. *The Personal Responsibility and Work Opportunity Reconciliation Act*

In 1996 there were drastic changes to the eligibility requirements of welfare programs.⁶¹ President Clinton signed PRWORA,⁶² also known as the Welfare Reform Act.⁶³ This law was designed to break the cycle of welfare dependency among the poor by restricting eligibility for federal benefits and by instituting employment-oriented requirements to promote self-reliance.⁶⁴ Among the changes, the new law abolished the AFDC program and replaced it with TANF, for which the eligibility requirements were more stringent.⁶⁵

55. *Id.* To qualify for cash assistance through AFDC, the income and assets of families with children had to fall below a certain amount, which differed from state to state. *Id.* SSI, a federally funded program, provides cash assistance to the poor, the elderly, and the disabled. *Id.* at 40.

56. *Id.* at 44.

57. *Id.*

58. John P. Collins, Jr., *Developments in Policy: Welfare Reform*, 16 YALE L. & POL'Y REV. 221, 224 (1997).

59. See COUGHLIN ET AL., *supra* note 30, at 47. The Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984), required states to expand Medicaid coverage to pregnant women and children who met the AFDC income criteria, but whose family structure made them ineligible. *Id.* Also, under the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874 (1986), states were given the option to extend Medicaid coverage to pregnant women and children with incomes above the AFDC level, but below the federal poverty level, regardless of family structure. *Id.*

60. COUGHLIN ET AL., *supra* note 30, at 52.

61. Audrey Singer, *Welfare Reform and Immigrants*, in IMMIGRANTS, WELFARE REFORM, AND THE POVERTY OF POLICY 21, 21 (Philip Kretsedemas & Ana Aparicio eds., 2004).

62. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

63. Singer, *supra* note 61.

64. Collins, *supra* note 58, at 221.

65. *Id.* at 241-42.

In addition, the new law imposed restrictions on the eligibility of immigrants in all federally funded welfare programs.⁶⁶ PRWORA conditioned eligibility for immigrants on both immigration status and timing of arrival in the United States.⁶⁷ The new law made distinctions for eligibility purposes based on immigration status as either “qualified” or “unqualified.”⁶⁸ Qualified immigrants include those who are legal permanent residents, asylees, and refugees.⁶⁹ According to PRWORA, states are authorized to restrict federal and state public benefits to legal immigrants, and legal immigrants are not eligible for federal means-tested programs for five years following their arrival in the United States.⁷⁰ In addition, PRWORA stipulates that states have the option of providing Medicaid coverage to qualified aliens once the five-year period has lapsed.⁷¹ Despite the changes and restrictions imposed by PRWORA, the new law does not affect emergency Medicaid coverage, including labor and delivery for low-income residents whether they are of qualified status or not.⁷²

C. PRWORA's Impact on State Laws

Notwithstanding PRWORA's congressional authorization to restrict the eligibility of both immigrants who arrived before and after the new law was enacted, forty-nine states and the District of Columbia elected to extend Medicaid coverage to those legal immigrants who were present in the United States prior to the law's enactment.⁷³ In addition, most states chose to provide Medicaid benefits to qualified immigrants who completed the five-year period, despite the new law's authorization to the contrary.⁷⁴ Furthermore, seventeen states, several of which had the highest populations of legal immigrants, decided to spend their own funds to assist immigrants who became ineligible for federal services under PRWORA, thus continuing state-funded coverage for immigrants who entered the United States on or after August 22,

66. See Singer, *supra* note 61, at 22.

67. *Id.* States were authorized to factor into their restrictions on benefits whether immigrants were lawfully residing in the United States as of August 22, 1996, or whether they arrived after that date. *Id.* at 23.

68. Collins, *supra* note 58, at 225.

69. *Id.*

70. See Stacey M. Schwartz, *Beaten Before They Are Born: Immigrants, Their Children, and a Right to Prenatal Care*, ANN. SURV. AM. L. 695, 709 (1997); see also Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, § 403(a), 110 Stat. 2105, 2265 (1996). Medicaid is considered a federal means-tested benefit. See Singer, *supra* note 61, at 26.

71. See Schwartz, *supra* note 70.

72. Tanya Broder, *State and Local Policies on Immigrants and Public Benefits: Responding to the 1996 Welfare Law*, 31 CLEARINGHOUSE REV. 503, 512 (1998).

73. *Id.* at 512-13; see also Singer, *supra* note 61, at 28.

74. Broder, *supra* note 72, at 504; see also Singer, *supra* note 61, at 28.

1996.⁷⁵ Maryland, for example, opted to preserve Medicaid coverage for immigrant pregnant women and children who would otherwise be barred from coverage due to the five-year residency requirement.⁷⁶ New York, however, quickly incorporated the new federal law into its laws and passed New York Social Services Act § 122, which denied benefits to many previously eligible immigrants residing in the state.⁷⁷

In addition to changes in eligibility following the enactment of PRWORA, states took different approaches in the range of health care services they provided. Some opted to provide coverage and services comparable to Medicaid, while others, such as Maryland, limited health care coverage to pregnant women and children.⁷⁸

1. Maryland's New Law Pledges a Continuation of Medicaid Coverage

In 1997, the Maryland Legislature renewed its commitment to provide medical coverage for persons affected by PRWORA.⁷⁹ The new statute provided that the State, subject to budgetary limitations, would provide "medical care and other health care services for all legal immigrant children under the age of 18 years and pregnant women who meet Program eligibility standards and who arrived in the United States on or after August 22, 1996, the effective date of the federal Personal Responsibility and Work Opportunity Reconciliation Act."⁸⁰ Although PRWORA authorized every state to deny welfare benefits to legal immigrants, in accordance with the new federal guidelines, Maryland, through the Welfare Innovation Act of 1997, opted to continue coverage for such persons.⁸¹

IV. IMMIGRATION POLICY AND REGULATION

A. *Brief History of Immigration Law in the United States*

The first century of United States' history was characterized by an open door policy of immigration, whereby immigrants were viewed as a source of labor and capital in an unsettled country.⁸²

75. Broder, *supra* note 72, at 504, 513.

76. *See id.* at 513.

77. *See* Karin H. Berg, Note, *May Congress Grant the States Power to Violate the Equal Protection Clause?*, *Aliessa v. Novello and Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 17 *BYU J. PUB. L.* 297, 301-02 (2003).

78. Broder, *supra* note 72, at 513.

79. *See* MD. CODE ANN. HEALTH-GEN. § 15-103(a)(2)(viii) (LexisNexis 2005).

80. *Id.*

81. *See id.*

82. *See* Dave McCurdy, *The Future of U.S. Immigration Law*, 20 *J. LEGIS.* 3, 4 (1994); Meredith K. Olafson, Note, *The Concept of Limited Sovereignty and the*

As the 1800s ended, increased immigration was viewed negatively and Congress began expanding its restrictions on immigration.⁸³ By the early 1900s, the United States sought to restrict immigration of certain groups thought to be inferior to the earlier immigrant groups.⁸⁴ Thus, Congress implemented a quota system to control the racial and ethnic composition of the country.⁸⁵ By the 1950s, there was a movement towards a more liberal immigration policy, and in 1965, the long-standing quota system was removed.⁸⁶

As times have changed, Congress has continued to enact immigration policies that reflect the needs of the country. In the 1990s, for instance, Congress passed several laws affecting immigration in response to an anti-immigrant sentiment in the country.⁸⁷ One such provision was PRWORA.⁸⁸

V. IMMIGRANTS' RIGHTS

A. *The Rights of Noncitizens*

Competing values in the United States are often viewed as the source of the tension that surrounds the determination of which rights to allocate immigrants.⁸⁹ At times, the idea of the United States as an immigrant nation has conflicted with the idea that rights and resources should be allocated to citizens only.⁹⁰ Thus, while noncitizens enjoy many of the protections offered by the Constitution, they cannot claim all of the privileges that citizens

Immigration Law Plenary Power Doctrine, 13 GEO. IMMIGR. L.J. 433, 434-35 (1999).

83. See Olafson, *supra* note 82, at 535. The first major restrictions on immigration were known as the Chinese exclusion laws, which sought to keep Chinese immigrants out, as they were viewed as "a less worthy . . . stock of potential Americans." McCurdy, *supra* note 82.
84. See McCurdy, *supra* note 82, at 4-5. Italian, Slavic, and Jewish immigrants were among the groups viewed as "inferior" by immigrants from Anglo-Saxon backgrounds. See DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL 9 (West Group, 15th ed. 2005).
85. McCurdy, *supra* note 82, at 5.
86. *Id.* The Immigration Act of 1965 weakened the preference for European immigration by establishing higher immigrant limits for countries outside the Western Hemisphere. *Id.*
87. See Anti-terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996); see also Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).
88. Pub. L. No. 104-193, 110 Stat. 2105 (1996).
89. See VICTOR ROMERO, ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA 161-62 (2005).
90. *Id.* According to Romero, these competing values comprise a dichotomy between the theories of personhood and membership. *Id.* For a detailed discussion of how the Supreme Court has applied these theories to immigration issues, see ROMERO, *supra* note 89, at 161-78.

can claim.⁹¹ The rights to vote and run for federal elective office, for example, are available to citizens only.⁹² However, there are certain general protections offered by the Constitution which noncitizens residing in the United States can claim.⁹³ For instance, the Constitution does not distinguish between citizens and noncitizens in providing due process and equal protection, as the Fifth and Fourteenth Amendments extend to all "persons."⁹⁴ In addition, noncitizens are guaranteed the freedoms of speech, religion, and association.⁹⁵ Nevertheless, legislation discriminating against immigrants and noncitizens has been created at both the federal and state levels.⁹⁶ To a large extent, this has included restrictions on the rights and activities of lawful permanent residents.⁹⁷

B. Federal Discrimination of Noncitizens

The Supreme Court has deferred to Congress' decisions regarding immigration, even stating that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."⁹⁸ For this reason, the Fifth Amendment's guarantee of due process has not always been extended to legal permanent residents, although the Constitution, itself, does not distinguish between citizens and noncitizens.⁹⁹ Furthermore, the Court's treatment of federal discrimination on the basis of alienage is in contrast with its equal protection jurisprudence concerning discrimination on the basis of race, national origin, and ethnicity, as the Court has recognized Congress' plenary power over immigration and thus has often refrained from applying heightened scrutiny.¹⁰⁰

Discrimination based on race, national origin, and ethnicity is considered "suspect" and merits strict judicial scrutiny.¹⁰¹ "Strict scrutiny" is one of the three standards of review applied to equal protection cases, and is the most heightened form of judicial scrutiny.¹⁰² The middle level is "intermediate scrutiny," and is

91. DAVID COLE, ENEMY ALIENS 212-13 (2003).

92. *Id.*

93. *Id.*

94. *Id.* at 212; see also ROMERO, *supra* note 89, at 1.

95. See COLE, *supra* note 91, at 217.

96. See ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 39-50 (1985).

97. *Id.* at 29-30. Noncitizens "enjoy decent, but scarcely equal, treatment." *Id.* at 30.

98. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (stating that "the power over aliens is of a political character and therefore subject only to narrow judicial review").

99. See *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) and discussion *infra* notes 105-06.

100. See HULL, *supra* note 96, at 47; see also KAPLIN, *supra* note 20, at 276 n.13.

101. KAPLIN, *supra* note 20, at 276.

102. *Id.* at 267.

primarily applied to gender discrimination.¹⁰³ The lower tier is known as “rational basis scrutiny” and is applied to classifications which do not merit review on a higher tier.¹⁰⁴

Where federal, rather than state, discrimination is based on alienage, the Supreme Court has held that the Due Process Clause of the Fifth Amendment, which embodies the concept of equal justice, has not been violated, although a similar state act would violate the Fourteenth Amendment’s guarantee of equal protection.¹⁰⁵ The Court in *Hampton v. Mow Sun Wong* reasoned that while states may not be able to justify discriminating on the basis of citizenship, and likely must undergo a heightened scrutiny in order to abide by the protections of the Fourteenth Amendment, the federal government is not as restrained if there are overriding national interests for its discriminatory actions.¹⁰⁶ And where such overriding national interests existed, only a legitimate interest was needed for the act to be considered constitutional.¹⁰⁷

In *Mathews v. Diaz*,¹⁰⁸ the Supreme Court again assessed the constitutionality of a federal statute that affected noncitizens.¹⁰⁹ There, the Court addressed the issue of whether discrimination *within* a class of aliens was permitted.¹¹⁰ The Court concluded that the classification based on alienage was constitutional, as “it is unquestionably reasonable for Congress to make an alien’s

103. *Id.* In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court reviewed the admissions policy of a publicly-funded college, which admitted only males, and applied the intermediate scrutiny standard.

104. See KAPLIN, *supra* note 20, at 267-68. For example, the Supreme Court in *City of Cleburne v. Cleburne Living Ctr.* applied the rational basis test to legislation drawing a distinction between the mentally retarded and others. 473 U.S. 432, 432 (1985).

105. See *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

106. The Supreme Court, in *Hampton*, held that “there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.” *Id.* at 100-01. The *Hampton* Court reviewed a federal regulation that excluded noncitizens from employment in the federal civil service. *Id.* at 90. The Court invalidated the law, as it was a deprivation of due process, and established the standard under which the law should be reviewed. *Id.* at 116-17.

107. *Id.* at 103. The Supreme Court stated that “[w]hen the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest.” *Id.* The *Hampton* Court found that the government’s alleged interests were not sufficient to validate the discriminatory law. *Id.* at 116-17.

108. 426 U.S. 67 (1976).

109. *Id.*

110. *Id.* at 79-80. Plaintiffs in this case challenged the constitutionality of a federal statute that made eligible for enrollment in a Medicare supplemental medical insurance program residents of the United States who were 65 years or older, but that limited eligibility to citizens and lawful permanent residents who had resided in the United States for a minimum of five years. *Id.* at 69-70.

eligibility depend on both the character and the duration of his residence. [And] neither requirement is wholly irrational"¹¹¹ Thus, the *Diaz* Court applied a minimum rational basis standard to a federally enacted statute based on alienage.¹¹²

C. *The Supreme Court's Treatment of State Discrimination of Noncitizens*

Unlike the Supreme Court's treatment of federal laws that discriminate on the basis of alienage, the Court has been somewhat inconsistent in its application of standards of review to state laws which discriminate on the basis of alienage.¹¹³ As far back as 1886, the Court in *Yick Wo v. Hopkins*¹¹⁴ held that "[T]he [F]ourteenth [A]mendment to the [C]onstitution is not confined to the protection of citizens."¹¹⁵ The Court further held that the rights of Chinese immigrants were not less because they were aliens.¹¹⁶

Notwithstanding its protection of noncitizens under *Yick Wo*, the Supreme Court began to lessen the constitutional protections afforded to noncitizens as the twentieth century began.¹¹⁷ The Court upheld state laws which discriminated against lawful permanent residents for several reasons.¹¹⁸ For instance, in *Heim v. McCall*,¹¹⁹ the Court held that public resources could be withheld from noncitizens if a "special public interest" was involved.¹²⁰ Also, the Court upheld state laws which discriminated on the basis of alienage if the resource was viewed as "common property" of the citizens of the state.¹²¹ Moreover, the Court

111. *Id.* at 83.

112. *Id.* In reaching its conclusion that the federal discrimination based on alienage was constitutional, the Supreme Court distinguished the federal discrimination from the state discrimination at issue in *Graham v. Richardson*, 403 U.S. 365 (1971), which also had conditioned benefits on citizenship and length of residency. *Mathews*, 426 U.S. at 84-85 (discussing *Graham*); see also *infra* Part V(C) for a discussion of *Graham*.

113. See generally HULL, *supra* note 96, at 39-46.

114. 118 U.S. 356 (1886).

115. *Id.* at 369. The Supreme Court invalidated a local California ordinance requiring any person owning and operating a laundry business to meet certain safety regulations and to obtain the consent of a board. *Id.* at 374. The Court found that a large number of Chinese immigrants were denied consent for no legitimate reason. *Id.* The Court held that the public administration that enforced the law was denying equal protection of the law to noncitizens and violating the Fourteenth Amendment. *Id.*

116. *Id.* at 368.

117. See HULL, *supra* note 96, at 39-40.

118. See *id.*

119. 239 U.S. 175 (1915).

120. *Id.* at 191-92, 194; see also *Graham v. Richardson*, 403 U.S. 365 (1971). At issue in *Heim* was a state law requiring public works employees to be citizens. *Id.* at 176.

121. *Patsone v. Pennsylvania*, 232 U.S. 138, 146-47 (1914) (validating a state law that allowed only citizens to hunt wildlife and carry firearms).

permitted the exclusion of noncitizens from positions that were political in nature.¹²² Thus, for several decades, the Court gave deference to state discriminatory laws.

It is noteworthy that in the midst of upholding laws discriminating against noncitizens, the Supreme Court in *Takahashi v. Fish & Game Commission*,¹²³ invalidated a state law which discriminated on the basis of alienage.¹²⁴ The Court reviewed and declared unconstitutional a California statute which banned the issuance of commercial fishing licenses to any person ineligible for citizenship.¹²⁵ At that time, Japanese persons were ineligible for citizenship in the United States.¹²⁶ The state contended that it had the power to bar aliens from fishing as a means of conserving fish for its citizens, thus creating a “special public interest.”¹²⁷ However, the Court rejected the state’s “special public interest” argument and held that it was not sufficient to validate the law’s discriminatory nature.¹²⁸ In curbing the state’s discriminatory actions towards legal immigrants, the Court emphasized that “[t]he Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide ‘in any state’ on an equality of legal privileges with all citizens under non-discriminatory laws.”¹²⁹ The Court further held that “the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.”¹³⁰

Moving forward several decades to 1971, the Supreme Court, in *Graham v. Richardson*,¹³¹ continued protecting the interests of noncitizens from state discriminatory actions by applying a more stringent standard of review.¹³² In *Graham*, the Court analyzed whether the Equal Protection Clause of the Fourteenth Amendment prevented the State of Arizona from conditioning welfare benefits either upon the beneficiary’s possession of United States citizenship, or, if not a citizen, upon the beneficiary’s having resided in the country for a certain number of years.¹³³ The Court

122. *Foley v. Connelie*, 435 U.S. 291, 299-300 (1978) (upholding a state statute requiring police officers to be citizens).

123. 334 U.S. 410 (1948).

124. *Id.* at 422.

125. *Id.* at 413-14, 422.

126. *Id.* at 412.

127. *Id.* at 417-18.

128. *Id.* at 421.

129. *Id.* at 420.

130. *Id.* The Court stated that although Congress, drawing on its powers over immigration and naturalization, has the power to specially classify groups of people, the states do not have the same authority. *Id.*

131. 403 U.S. 365 (1971).

132. *Id.* at 372.

133. *Id.* at 366.

applied strict scrutiny and concluded that the state's desire to preserve limited welfare benefits for its citizens did not justify discriminating against noncitizens; thus, the statute violated the Equal Protection Clause.¹³⁴ The *Graham* Court's protection of aliens and application of a strict standard of review was upheld in subsequent years.¹³⁵ Furthermore, *Graham* is particularly important to this Comment's analysis of the proper standard of review to apply to the Medicaid cuts currently affecting legal immigrant children and pregnant women in Maryland, as the state actions at issue in both cases are similar.¹³⁶

VI. CONSTITUTIONAL CHALLENGES TO MEDICAID LAWS AT THE STATE LEVEL

A. *What Constitutional Standard to Apply*

Since the enactment of PRWORA, which authorizes states to discriminate against noncitizens in providing welfare benefits, state courts facing constitutional challenges to their laws have reached different results on statutes which draw distinctions based on alienage.¹³⁷ In addition, state courts have differed in their application of standards of review.

For instance, the Massachusetts Supreme Judicial Court, in *Doe v. Commissioner of Transitional Assistance*,¹³⁸ applied the rational basis test to and upheld a state law which created a residency requirement for a supplemental aid program created to benefit noncitizens.¹³⁹ The *Doe* Court's decision relied heavily on the fact that because the supplemental aid program was only available to noncitizens, and not to citizens, there was no distinction between citizens and noncitizens to compel the application of a strict scrutiny test.¹⁴⁰

134. *Id.* at 372, 376.

135. See *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Examining Bd. of Eng'rs, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976); *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973).

136. See *infra* Part VI(B).

137. See Michael Fix & Jeffrey Passel, *The Scope and Impact of Welfare Reform's Immigrant Provisions*, URB. INST. (Assessing the New Federalism, Washington, D.C.), Jan. 2002, at 11.

138. 773 N.E.2d 404 (Mass. 2002). In this case, Plaintiffs filed suit seeking a declaration that the six-month residency requirement violated the Equal Protection Clauses of the Fourteenth Amendment and the Massachusetts Declaration of Rights. *Id.* Plaintiffs contended that the statute violated the equal protection rights of legal immigrants by imposing the residency requirement on some legal immigrants while not imposing it on other legal immigrants. *Id.* at 414.

139. *Id.* at 407, 414.

140. *Id.* at 414. The court stated that "the appropriate standard of review in these circumstances depends on the nature of the classification that creates the distinction between the subgroup of aliens." *Id.* The court concluded that

In contrast, the New York Court of Appeals in *Aliessa v. Novello*¹⁴¹ applied the strict scrutiny test to a state welfare law which denied Medicaid to some noncitizens.¹⁴²

New York's highest court was charged with analyzing the constitutionality of Social Services Law § 122,¹⁴³ which denied state Medicaid benefits to plaintiffs based on their status as legal aliens.¹⁴⁴ Plaintiffs were legal residents of the United States who suffered from serious illnesses, and who would have qualified for state Medicaid benefits prior to the enactment of Social Services Law § 122.¹⁴⁵ Plaintiffs filed suit seeking a declaration that this provision violated the Equal Protection Clauses of both the New York State Constitution and the United States Constitution.¹⁴⁶ Before reaching the New York Court of Appeals, a lower court held that Social Services Law § 122 did not improperly discriminate on the basis of alienage; thus, it did not violate the Equal Protection Clauses of the United States Constitution nor the New York State Constitution.¹⁴⁷ To reach its conclusion, the lower court applied the rational basis standard of review, drawing from its holding in a prior case that state action was subject to rational review and not strict scrutiny where the state acted pursuant to federal immigration legislation.¹⁴⁸

The Court of Appeals of New York disagreed with the lower court and applied strict scrutiny to the new law, finding that the classification was based on alienage.¹⁴⁹ The court concluded that the state provision was subject to heightened scrutiny because it was a product of the federal law which impermissibly authorized states to adopt divergent laws on eligibility for federal and state funded Medicaid.¹⁵⁰ The court drew from language in the *Graham*

because the classification was Massachusetts residency, the proper standard of review was rational basis. *Id.*

141. 754 N.E.2d 1085 (N.Y. 2001).

142. *Id.*

143. N.Y. SOC. SERV. LAW § 122 (McKinney 2006).

144. *See Aliessa*, 754 N.E.2d at 1088. This law was enacted under the New York State Welfare Reform Act of 1997 in response to and in furtherance of Congress' Personal Responsibility and Work Opportunity Reconciliation Act of 1996. *Aliessa v. Novello*, 274 A.D.2d 347, 347 (N.Y. App. Div. 2000). According to the new law, eligibility for Medicaid is dependent on whether the immigrant is qualified under PRWORA and whether the immigrant entered the country on or after August 22, 1999. *Id.* at 347-48. However, the new law stipulates that any immigrant who does not meet the federal definition of "qualified" can still receive Medicaid coverage for emergency services. *Id.* at 347.

145. *See Aliessa*, 754 N.E.2d at 1088.

146. *Id.* at 1088-89.

147. *Aliessa v. Novello*, 274 A.D.2d at 349.

148. *See id.* at 348 (referring to its decision in *Alvarino v. Wing*, 261 A.D.2d 255 (N.Y. App. Div. 1999)).

149. *Aliessa*, 754 N.E.2d at 1098-99.

150. *Id.*

case which stated that Congress does not have the power to authorize individual states to violate the Equal Protection Clause, and that allowing states to adopt different laws regarding citizenship requirements for eligibility for federally supported welfare programs would contravene Congress' power to establish a uniform rule of naturalization.¹⁵¹ Furthermore, the Court of Appeals of New York found that because the federal law authorized states to decide which aliens are eligible for state Medicaid, the federal law went "significantly beyond what the *Graham* court declared constitutionally questionable."¹⁵² For the above reasons, the court applied strict scrutiny to Social Services Law § 122 and found it to be a violation of both federal and state constitutions.¹⁵³

B. *An Equal Protection Argument in Maryland*

In light of the analyses and holdings of state courts on constitutional issues surrounding laws on welfare and Medicaid benefits, a question arises as to what level of scrutiny a Maryland court will apply to the recent restrictions on eligibility. The Maryland Court of Appeals' decision in *Perez*, while not definitive on the main constitutional issue, does indicate which standard of review should be applied to the merits of the case, since the first factor to consider when issuing a preliminary injunction is the likelihood that the plaintiff will succeed on the merits.¹⁵⁴ The court engaged in a lengthy discussion of past federal and state statutes that discriminated on the basis of alienage and mentioned which standards of review were applied to determine their constitutionality.¹⁵⁵ The court explained that "the State may not act independently in a discriminatory manner with regard to distributing State-funded medical benefits to lawful resident aliens unless it survives a strict scrutiny standard of review."¹⁵⁶ The court ultimately decided that the State's fiscal reasons for creating restrictions to Medicaid eligibility did not survive such a test.¹⁵⁷

Prior to discussing the proper scrutiny that a court should apply to the Medicaid eligibility restrictions, it is necessary to emphasize that Maryland extends to its residents a constitutional guarantee of equal protection.¹⁵⁸ Where legal classifications involve

151. *Id.* at 1095-96.

152. *Id.* at 1098.

153. *Id.*

154. 2006 Md. LEXIS *21.

155. *Id.* at *23-65.

156. *Id.* at *58.

157. *Id.* at *65-66.

158. See MD. CONST. art. 24 ("That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any

discrimination, however, they are not always unconstitutional, so long as the classification is reasonable in relation to the objectives of the law, and survives the scrutiny undertaken by the court.¹⁵⁹ Thus, the outcome in a Maryland court, as in any court, likely depends on the reasonableness of the classification of the act or statute.

Here, the budget cut has targeted only legal immigrant children and pregnant women, on the basis that they are not citizens of the United States nor have they resided in the country for more than five years.¹⁶⁰ Thus, a distinction has been drawn with regard to alienage. Typically, a classification based on alienage is considered “inherently suspect” and warrants application of the strict scrutiny test.¹⁶¹ Furthermore, as the Supreme Court in *Graham* stated, “Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.”¹⁶²

Moreover, the *Aliessa* case supports this Comment’s stance that a Maryland court should apply strict scrutiny. As mentioned previously, the courts in New York analyzed the constitutionality of New York Social Services § 122, which, like the recent distinction drawn in Maryland, qualified aliens for eligibility based on years of residency in the United States.¹⁶³ The *Aliessa* court, which relied on the *Graham* Court’s view that aliens are a class in need of heightened scrutiny, applied the strict scrutiny test to Social Services Law § 122.¹⁶⁴ In light of both the similarities between the New York law at issue in *Aliessa* and the budgetary cut in Maryland, and the class of people affected by the restraints, a Maryland court should apply the strict scrutiny test to the State’s cuts in Medicaid funding for legal immigrants.

1. Application of Strict Scrutiny

In order to survive a strict scrutiny analysis, the State must show that its discriminatory act is “narrowly tailored” to serve a

manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.”).

159. See JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 274-75 (West Group, 6th ed. 2005).

160. See *supra* Part I.

161. BARRON & DIENES, *supra* note 159, at 320. However, there is an exception to this strict scrutiny principal that allows aliens to be excluded from “political functions,” such as voting or jobs that are political in nature. *Id.* at 321. In such a case, only a rational basis is needed to overcome the discrimination based on alienage. *Id.*

162. *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (citations omitted).

163. See *supra* Part VI(A).

164. See *supra* Part VI(A).

“compelling state interest.”¹⁶⁵ In this sense, “the validity of the particular classification” is addressed by “focusing on closeness of the fit between the classification . . . and the government objective or interest.”¹⁶⁶ Thus, an analysis of the State’s budgetary cut can begin with whether there is a sufficient government interest.

a. Is There a Compelling Government Interest?

The recent cut to Medicaid, which has affected immigrant children and pregnant women, was part of an effort to decrease Medicaid costs.¹⁶⁷ The Supreme Court stated in *Graham* that the “justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens.”¹⁶⁸ The Supreme Court has presided over many cases in which the government has alleged a fiscal interest as the reason to distinguish between citizens and noncitizens, or even classes of citizens, and the Court has failed to find that financial constraints constitute a compelling interest.¹⁶⁹ Likewise, Maryland courts have addressed the issue of whether financial concerns can be justifications for discriminatory statutes, and they have concluded that it is not appropriate.¹⁷⁰

Moreover, in light of the State’s \$1 billion surplus for the fiscal year 2005, which was announced only weeks after the budgetary cuts took effect, the elimination of \$7 million in health care expenditures to the detriment of immigrant children and pregnant women is not prudent.¹⁷¹

Lastly, because the Welfare Innovation Act of 1997 was enacted to provide coverage for legal immigrant children and pregnant women who became ineligible after PRWORA was enacted, the Governor’s cuts have disenfranchised individuals who

165. See KAPLIN, *supra* note 20 and accompanying text.

166. KAPLIN, *supra* note 20, at 271. This is also known as “focusing on the degree of congruence between the means and the ends.” *Id.*

167. See Wagner, *supra* note 1.

168. *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (quoting *Leger v. Sailer*, 321 F. Supp. 250, 253 (1970)).

169. See Plaintiff’s Memorandum in Support for Preliminary Injunction, at 12-13 (citing *Plyer v. Doe*, 457 U.S. 202 (1982); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Shapiro v. Thompson*, 394 U.S. 618 (1969)).

170. See Plaintiff’s Memorandum in Support for Preliminary Injunction, at 13-14 (explaining that while a Maryland court has never dealt with a fiscal concern in relation to a statute discriminating on the basis of alienage, the Court of Appeals, in *Maryland v. Waldron*, 289 Md. 683, 724 (1981), held that financial savings does not serve as a sufficient justification even when non-suspect classes are involved).

171. Press Release, Governor Ehrlich Announces More Than \$1 Billion Surplus (July 19, 2005), available at http://www.gov.state.md.us/pressreleases/2005/20050719_1bill.html; see also *infra* note 175.

are legally entitled to the benefits.¹⁷² Thus, this State act can be viewed not only as discrimination based on alienage, but also a denial of equal protection to individuals who are legally entitled to the benefits.¹⁷³ Regardless of this distinction, the State of Maryland has not alleged a compelling interest sufficient to pass the strict scrutiny test.

b. A Plethora of Policy Concerns

The alleged fiscal concerns underlying the budgetary cut are not the only reasons why the restriction fails to pass strict scrutiny. There are a host of policy concerns which create a larger obstacle for the State to overcome in trying to justify the cuts to medical assistance. These include impacts on the health care system, impacts on the health of uninsured immigrants, and public health concerns. In addition, there are strong policy arguments with regard to the value of prenatal care and health care coverage for children. Lastly, the current opposition from legislators and health experts in Maryland illustrates the need to restore health care coverage to the immigrants who have been affected by the Governor's eligibility restrictions.

i. Impacts on the Health Care System

The denial of health care coverage to low-income immigrants has serious impacts on the health care system. Because emergency Medicaid coverage is still provided, regardless of immigration status,¹⁷⁴ immigrants are forced to seek emergency room care when they need medical assistance rather than make less costly visits to physicians.¹⁷⁵ Hospitals, including D.C. Children's Hospital, which serves more Maryland children than all but one hospital in Maryland, expect the amounts which it must absorb in uncompensated care to increase significantly.¹⁷⁶ In addition, in light of immigrants' rights to seek emergency, rather than preventive, care, and in light of the federal Emergency Medical Treatment and Active Labor Act ("EMTALA"), which requires hospitals to screen for and treat emergency conditions without first inquiring about a patient's insurance status, it is likely that the

172. See Opinion and Order Regarding Plaintiff's Request for Preliminary Injunction, at 13-14, *Perez v. Ehrlich*, No. 265850-V (Montgomery County Cir. Ct. Jan. 12, 2006).

173. *Id.*

174. Broder, *supra* note 72.

175. Walter A. Ewing, *Not Getting What They Paid For: Limiting Immigrants' Access to Benefits Hurts Families Without Reducing Healthcare Costs*, AM. IMMIGR. L. FOUND. (Immigration Policy Center, Washington, D.C.), June 2003, available at <http://www.aifl.org/ipc/BenefitsPrint.asp>.

176. Wagner, *supra* note 1.

demands on emergency departments will increase.¹⁷⁷ A potential consequence might be that those who go to the emergency department with insurance and true medical emergencies might encounter delays in screening and treatment because emergency rooms are faced with an overall increase in uninsured patients who cannot seek care elsewhere.

In addition to hospital emergency rooms, community clinics are likely to be affected, as immigrants who face linguistic and cultural barriers might be more inclined to seek care within their communities.¹⁷⁸ In Maryland, for instance, Montgomery, Prince George's, and Howard Counties feel the strain in trying to provide health care services to immigrants who have become ineligible for benefits.¹⁷⁹ Howard County's clinic, in particular, has predicted an increase in its prenatal care patients by more than twenty percent.¹⁸⁰ Thus, the concern remains that by curtailing access to non-emergency services, such as preventive and prenatal care, safety net facilities which already face staffing shortages and financial problems will be overburdened.¹⁸¹

Some politicians and health care experts have acknowledged that limiting access to health care benefits only increases costs to the public health system.¹⁸² In his proposal to expand Medicaid coverage for legal immigrants, U.S. Senator Bob Graham stated that, "the reality is that states will pay these costs regardless—by funding optional Medicaid programs or by paying for emergency room visits. Why not spend the money on the front end?"¹⁸³

ii. Impacts on the Health of the Uninsured

Recent figures by the U.S. Census Bureau show that immigrants were three times as likely as U.S.-born residents to lack health insurance.¹⁸⁴ Studies conducted after 1996 also revealed that the majority of noncitizens and their children were at high risk of being uninsured and faced serious gaps in receiving health care and

177. Tiana Mayere Lee, *An EMTALA Primer: The Impact of Changes in the Emergency Medicine Landscape on EMTALA Compliance and Enforcement*, 13 ANNALS HEALTH L. 145, 151, 166-67 (2004).

178. Lisa Cacari Stone & Ana Guillermina Quiroz-Gibson, *¿Puerta Abierta o Puerta Cerrada? Citizenship, Health Care, and Welfare Reform in New Mexico*, in IMMIGRANTS, WELFARE REFORM, AND THE POVERTY OF POLICY 72-73 (Philip Kretsedemas & Ana Aparicio eds., Praeger Publishers 2004).

179. Larry Carson, *Budget Cuts and Differing Priorities Could Hurt*, BALT. SUN, Sept. 25, 2005, at 1G.

180. *Id.*

181. Susan L. Ivey, *Health Services Utilization and Access to Care*, in IMMIGRANT WOMEN'S HEALTH 44, 53 (Elizabeth J. Kramer et al. eds., 1999).

182. *Id.* at 50-51, 53.

183. Ewing, *supra* note 175.

184. Stone & Guillermina Quiroz-Gibson, *supra* note 178, at 73.

public benefits.¹⁸⁵ This was the result of both the changes to eligibility for public benefits in 1996, and also the high costs of private health insurance.¹⁸⁶

Due to the many barriers in obtaining health care coverage, immigrants since 1996 have been hesitant to seek medical care or have missed screenings and treatment for health problems.¹⁸⁷ They often delay seeking care until it becomes an emergency, at which time they use the emergency room as a source of regular care.¹⁸⁸ Using the emergency room for regular care seriously affects both the quality and continuity of care that these immigrants receive, as emergency rooms are typically overcrowded and overburdened.¹⁸⁹

Moreover, the experience in some immigrant communities is that health care providers deny the same quality of medical care to uninsured immigrants as offered to insured citizens.¹⁹⁰ This has led some immigrant communities to distrust hospitals and to prefer community clinics, which can also affect the quality of medical care.¹⁹¹ Overall, policies that deter immigrants from utilizing Medicaid likely play a role in increasing disparities in access to health care.¹⁹²

iii. Public Health Concerns

The fundamental principles of public health emphasize the improvement of health across communities, and denying health care access to children, pregnant women, and persons at risk for communicable diseases based on their immigration status is contrary to this goal.¹⁹³ Immigrants are less likely to have health insurance than citizens, and are often more likely to be exposed to communicable diseases in their native countries than are citizens in the United States.¹⁹⁴ Tuberculosis is one such communicable disease which has substantially higher rates of incidents in foreign-

185. *Id.*

186. *See id.* at 72-74.

187. *Id.* at 74.

188. *Id.* at 78.

189. *Id.*

190. *See Ana Aparicio, Immigrants' Access to Public Health Care Systems in New York's "Post-reform" Era, in IMMIGRANTS, WELFARE REFORM, AND THE POVERTY OF POLICY 137, 150 (Philip Kretsedemas & Ana Aparicio eds., Praeger Publishers 2004).*

191. *See id.* at 150-51.

192. Namratha R. Kandula et al., *The Unintended Impact of Welfare Reform on the Medicaid Enrollment of Eligible Immigrants*, 39 HEALTH SERVS. RES. 1511 (2004).

193. Julia Field Costich, *Legislating a Public Health Nightmare: The Anti-immigrant Provisions of the "Contract with America" Congress*, 90 KY. L.J. 1043, 1069 (2001-2002).

194. *Id.* at 1058.

born persons than in U.S.-born residents.¹⁹⁵ There are forms of this disease which are latent and which tend not to show any symptoms.¹⁹⁶ Although, under PRWORA, all immigrants remain eligible for the immunization and treatment of communicable disease symptoms, few patients can self-diagnose the symptoms, such as cough, fatigue, and fever as related to communicable diseases like tuberculosis.¹⁹⁷ Thus, by denying immigrants access to preventive health care services, which could lead to early detection and treatment of dangerous diseases, the health of immigrants is compromised.¹⁹⁸ In addition, this may jeopardize the health of the citizens of the United States, whose exposure to such diseases increases.¹⁹⁹

Furthermore, the denial of prenatal care to low-income immigrants is counterproductive from a public health perspective.²⁰⁰ Because children born to immigrants in the United States are automatically eligible for publicly-funded benefits, the taxpayer becomes "responsible for the costs associated with the children's health conditions that could have been prevented through adequate prenatal care."²⁰¹ Thus, the costs to communities can be prevented or reduced by investment in preventive care, which is necessary to improve health in communities.²⁰²

iv. The Value of Prenatal Care

Prenatal care is broadly defined as including the "diagnosis of pregnancy; the medical, educational, social and nutritional services needed to enhance the health and well-being of the woman and fetus during pregnancy; and the counseling and assistance required to plan for labor and delivery, postpartum care for the mother, and pediatric care for the newborn."²⁰³ There is widespread agreement among practitioners and policy makers in the health care field that prenatal care is crucial to the health of the pregnant woman and her child.²⁰⁴ In addition, there is evidence that "prenatal care is especially important for women at increased medical or social

195. *Id.*

196. *Id.* at 1060.

197. *See Broder, supra* note 72, at 514.

198. *See id.*

199. *See id.*

200. Costich, *supra* note 193, at 1061.

201. *Id.* at 1061-62.

202. *See id.* at 1069-70.

203. INST. OF MED., PRENATAL CARE: REACHING MOTHERS, REACHING INFANTS 24 (Sarah S. Brown ed., 1988).

204. Schwartz, *supra* note 70, at 697-98.

risk.”²⁰⁵ Moreover, evidence reveals both medical and economic values to prenatal care.²⁰⁶

With regard to its medical value, studies have linked insufficient prenatal care to many health risks, including low birth-weight, premature delivery, birth defects, and sexually transmitted diseases such as HIV.²⁰⁷ These health problems can affect the child not only at birth and through infancy, but also throughout childhood.²⁰⁸ For example, low birth-weight infants are susceptible to serious birth defects which can lead to future learning and behavioral problems, heart problems, and poor vision.²⁰⁹

In terms of its economic value, health care experts agree that prenatal care is cost-effective.²¹⁰ Studies have revealed that every dollar spent on prenatal care can save \$3.38 in direct health care costs for low birth-weight infants in the first year of life.²¹¹ In addition, for every dollar invested in preventive care, \$4.63 can be saved in long-term costs, which include health care, childcare, and special education.²¹² For example, a low birth-weight baby with a mental or physical handicap will require a lifetime of costly care, such as disability and other social programs.²¹³ Furthermore, adequate prenatal care can help reduce indirect costs to society, such as lost productivity and wages of individuals who are incapable of reaching their full potential.²¹⁴

v. Children Need Effective Health Care Coverage

There is significant evidence that healthy children will become healthy adults; thus there are social, ethical, and economic incentives to ensure that children are as healthy as possible.²¹⁵ The health of children is affected by laws and policies created by the federal and state governments, including eligibility for publicly-funded insurance.²¹⁶ Health insurance, itself, has played a role in children’s health policy and their access to and use of health care services.²¹⁷ In contrast to all other industrialized nations, there

205. INST. OF MED., *supra* note 203, at 18.

206. *See id.* at 17-18; *see also* Schwartz, *supra* note 70, at 698-704.

207. Schwartz, *supra* note 70, at 698.

208. *See id.*

209. *Id.* at 700.

210. *Id.* at 703; *see also* INST. OF MED., *supra* note 203, at 18.

211. Schwartz, *supra* note 70, at 703; INST. OF MED., *supra* note 203, at 18.

212. *See* Stone & Guillermina Quiroz-Gibson, *supra* note 178, at 79.

213. Schwartz, *supra* note 70, at 704.

214. *Id.*

215. NAT’L RESEARCH COUNCIL & INST. OF MED., CHILDREN’S HEALTH, THE NATION’S WEALTH 13 (2004).

216. *Id.* at 87.

217. *Id.* at 88-89.

remains a large proportion of uninsured children in the United States.²¹⁸ Because Medicaid coverage has historically provided otherwise uninsured children with access to health care, Medicaid has been associated with better birth outcomes and lower rates of preventable illness.²¹⁹ Thus, one can draw a parallel between Medicaid coverage for children and improved health.

With regard to immigrant children, the American Academy of Pediatrics has advocated the provision of health care to all children, regardless of immigration status.²²⁰ Young children of immigrant parents are more likely to be uninsured, in fair or poor health, and lack a usual place to receive preventive care.²²¹ Recent studies have shown that new immigrants do not typically have access to employer-sponsored health benefits, and if they do, they often cannot afford dependent coverage.²²² It follows that recent changes in welfare policy which affect eligibility for publicly-funded health programs have impaired the access of immigrant children to necessary health services.²²³ Given the correlation between low incomes, lack of health insurance coverage, and lack of access to health care services, public coverage of health care is critical for children in immigrant families.²²⁴

vi. Maryland Legislators and Health Experts Speak Out

Many Maryland lawmakers and government officials were quick to oppose the Governor's plan to cut Medicaid funding for legal immigrant children and pregnant women.²²⁵ Some state lawmakers lobbied the Governor to restore \$1.5 million to continue coverage of pregnant women already enrolled in prenatal care programs.²²⁶ In July 2005, following the announcement of a surplus, the Governor complied with this request.²²⁷ Comptroller William Donald Schaefer was one such Maryland official who pressured the Governor to restore funding for immigrant health care.²²⁸ In addition, Montgomery County Executive Douglas Duncan issued a letter to the Governor indicating how many

218. *Id.* at 89.

219. *Id.*

220. Costich, *supra* note 193, at 1064.

221. Randy Capps et al., *The Health and Well-Being of Young Children of Immigrants*, URB. INST. (Foundation for Child Development, Washington, D.C.), 2004, at 25.

222. Costich, *supra* note 193, at 1065.

223. *Id.*

224. See Capps et al., *supra* note 221, at 25, 28.

225. See John Wagner, *Ehrlich Pressed to Cancel Cuts in Medicaid*, WASH. POST, Oct. 5, 2005, at B8.

226. Andrew A. Green, *Ehrlich Cuts Health Care for Children of Immigrants*, BALT. SUN, June 22, 2005, at 1A.

227. Wagner, *supra* note 225.

228. *Id.*

Montgomery County immigrants would be affected by the cuts and calling the cuts “unconscionable.”²²⁹ More recently, the Maryland Legislature has proposed a bill which would restore at least \$7 million in funding for health care services of legal immigrant children and pregnant women for the 2007 fiscal year.²³⁰ In addition, this bill seeks the inclusion of at least \$7 million, for fiscal years 2008 and beyond, into the Medical Assistance Program budget in order to provide medical assistance to this segment of the immigrant population.²³¹

Moreover, several health care professionals have advised legislators of the consequences of Medicaid cuts to immigrant children and pregnant women.²³² Howard County’s Health Officer Peggy Borenstein has stated that cutting funding for prenatal care is counterproductive and that the Health Department would have difficulty in continuing its provision of prenatal care to immigrant women without more help from the State.²³³ Also, Montgomery County Health Officer Dr. Ulder Tillman has emphasized that, by removing preventive care, immigrants will be forced to use emergency rooms, which in turn increases health care costs in the country.²³⁴ Dr. Tillman also stated that failing to provide prenatal care for women does not make “good medical or public health sense.”²³⁵

VII. CONCLUSION

The State of Maryland, by removing a segment of the legal immigrant population from Medicaid eligibility, has violated the equal protection rights guaranteed by the Maryland Declaration of Rights, Article 24, and has adopted an unfair and unhealthy attitude towards immigrant children and pregnant women.²³⁶ Based on Supreme Court jurisprudence, including *Graham v. Richardson*, and also law in other states, as evidenced by *Aliessa v. Novello*, the Maryland courts should analyze *Perez v. Ehrlich*, by applying the strict scrutiny standard.²³⁷ Accordingly, a Maryland court should find that the Governor’s budgetary cut does not pass the strict scrutiny test, as the State does not allege an interest so compelling as to justify the discrimination against noncitizens.²³⁸

229. See Green, *supra* note 226.

230. H.D. 89, 2006 Leg., 421st Sess. (Md. 2006).

231. *Id.*

232. See Carson, *supra* note 179.

233. *Id.*

234. See Kelly Brewington, *Help Pledged on Health Care for Immigrants*, BALT. SUN, June 23, 2005, at 1B.

235. *Id.*

236. See *supra* Part I.

237. See *supra* Parts V(C) and VI(A).

238. See *supra* Part VI(B)(1)(a).

Inclusive in this balancing of state and individual interests are many factors which make it unfair and counterproductive to preclude those who are already disadvantaged from basic health care coverage.²³⁹ For these reasons, the Maryland courts, by way of *Perez v. Ehrlich*, should deem the restrictions imposed on immigrant children and pregnant women unconstitutional. Such a holding would adhere to equal protection jurisprudence concerning discrimination against immigrants and is vital to ensuring a healthy and productive immigrant population in the State.

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239. See *supra* Part VI(B)(1)(b).