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NOTES

A PITFALL OF JUDICIAL DEFERENCE: EQUAL PROTECTION OF THE LAWS FAILS WOMEN IN *LEWIS V. THOMPSON**

In times of social and economic crisis, lawmakers sometimes seek a quick fix to underlying systemic problems by restricting the rights of our immigrant population.¹ A recent example of this type of ill-conceived public policy is a provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996² ("Welfare Reform Act") that denies noncitizens federal need-based funding for prenatal care.³ Congress declared that this restriction serves an important national objective of curbing public expenditures.⁴ Limiting noncitizen women's access to adequate prenatal care, however, actually *increases* federal spending on medical care for their

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¹ See, e.g., Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 305 (1986) ("In times of trouble, . . . fears tend to focus on particular groups of cultural outsiders as a source of danger. It becomes convenient to make scapegoats of 'them'—the people who look different from 'us' or whose language or behavior is foreign to our own."); see generally Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1048-52 nn.2-13 (1994) (noting measures restricting immigrants' rights).

² Welfare Reform Act, 8 U.S.C. §§ 1601-1646 (2000). With some narrow exceptions, the Welfare Reform Act denies federal public benefits to noncitizens living in the United States. See 8 U.S.C. § 1611(a). For the limited categories of noncitizens qualifying for federal benefits under the Welfare Reform Act, see 8 U.S.C. § 1641(b)(1)-(7).

³ In discussing the rights of "noncitizens," this Comment focuses on lawful immigrants as well as persons "permanently residing under color of the law" ("PRUCOL"). The Second Circuit defines the PRUCOL category as including persons "residing in the United States with the knowledge and permission of the [INS] and whose departure the [INS] does not contemplate enforcing." *Berger v. Heckler*, 771 F.2d 1556, 1160 (2d Cir. 1985) (alterations in original) (emphasis omitted). The Welfare Reform Act's residency classifications do not acknowledge PRUCOL status, and deny most federal benefits to most PRUCOL noncitizens.

⁴ See 8 U.S.C. § 1601(3)-(6).

citizen children.⁵ Congress' other justifications for this deprivation are equally implausible,⁶ but according to the Second Circuit, not too ludicrous.⁷ The Welfare Reform Act survived the Second Circuit's equal protection review in *Lewis v. Thompson*.⁸

Lewis ended over two decades of class action litigation in New York, brought by a group of immigrant women to challenge evolving federal welfare policies that denied them Medicaid funding for prenatal care.⁹ Before the Welfare Reform Act, the plaintiffs in *Lewis* triumphed over the federal agency that sought to restrict their Medicaid benefits by arguing, in part, that Congress intended for funding to result in expansive access to prenatal care services. By 1996, however, Congress' intentions changed. The Welfare Reform Act explicitly denies Medicaid funding to noncitizens for need-based prenatal care.¹⁰

Ultimately, the Second Circuit's unblinking deference to Congress' broad immigration policy goals caused the court to dismiss the *Lewis* plaintiffs' core equal protection argument. The Second Circuit, like other federal courts in similar cases,¹¹ relied on the Supreme Court's decision in *Mathews v. Diaz*¹² as license to forego a well-reasoned analysis of the plaintiffs' equal protection claim. In *Mathews*, the Court unanimously upheld a federal law that denied Medicare benefits to certain noncitizens, proclaiming that, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."¹³

⁵ See *infra* notes 62, 76-77, 105-06, 108, 151 and accompanying text.

⁶ The other relevant objectives of the Welfare Reform Act are to promote self-reliance among immigrants and to deter immigration. See 8 U.S.C. §§ 1601(2)(A), (2)(B)(5), (6); *infra* Part II.A.

⁷ See *infra* notes 117-18, 147 and accompanying text.

⁸ 252 F.3d 567 (2d Cir. 2001) [hereinafter *Lewis VII*].

⁹ The statutory framework for Medicaid is codified in 42 U.S.C. § 1396 (West 1992 & Supp. 2002). The Second Circuit and Eastern District of New York issued seven opinions in *Lewis* and assigned a number to each decision. For ease of reference, this Comment refers to particular decisions in *Lewis* by their court-appointed numbers. See *Lewis VII*, 252 F.3d 567 (2d Cir. 2001); *Lewis v. Grinker*, 965 F.2d 1206 (2d Cir. 1992) [hereinafter *Lewis V*]; *Lewis v. Grinker*, 111 F. Supp. 2d 142 (E.D.N.Y. 2000) [hereinafter *Lewis VI*]; *Lewis v. Grinker*, 794 F. Supp. 1193 (E.D.N.Y. 1991) [hereinafter *Lewis IV*]; *Lewis v. Grinker*, No. CV-79-1740, 1987 WL 8412 (E.D.N.Y. Mar. 6, 1987) [hereinafter *Lewis III*]; *Lewis v. Grinker*, 660 F. Supp. 169 (E.D.N.Y. 1987) [hereinafter *Lewis II*]; *Lewis v. Gross*, 663 F. Supp. 1164 (E.D.N.Y. 1986) [hereinafter *Lewis I*].

¹⁰ See *infra* notes 82, 112 and accompanying text.

¹¹ See discussion *infra* Part III.

¹² 426 U.S. 67 (1976).

¹³ *Id.* at 79-80.

Undoubtedly aware that *Mathews's* call for judicial deference would doom their equal protection claim, the *Lewis* plaintiffs attempted to raise the bar of equal protection review by shifting the court's focus to the Welfare Reform Act's impact on their citizen children.¹⁴

They succeeded with this strategy in the Eastern District of New York.¹⁵ In holding that the federal government must continue to fund prenatal care services for noncitizens, the district court's decision focused on the harm that the plaintiffs' children would suffer as a result of inadequate prenatal care.¹⁶ From a result-oriented perspective, the district court reached a humane decision. By framing its equal protection analysis around the fetus, however, the court evinced blatant disregard for the constitutional underpinnings of *Roe v. Wade*¹⁷ and provided a legal forum for the advocacy of fetal rights.¹⁸

¹⁴ If born in the United States, children of noncitizens are entitled to United States citizenship. See 8 U.S.C. § 1401 (2000). See *infra* note 19 for medical studies attributing the cause of physical and mental disabilities in children to inadequate prenatal care.

¹⁵ *Lewis VI*, 111 F. Supp. 2d 142 (E.D.N.Y. 2000); see also *Lewis IV*, 794 F. Supp. 1193 (E.D.N.Y. 1991); *Lewis III*, No. CV-79-1740, 1987 WL 8412 (E.D.N.Y. Mar. 6, 1987).

¹⁶ *Lewis VI*, 111 F. Supp. 2d at 186.

¹⁷ *Roe v. Wade*, 410 U.S. 113 (1973). In *Roe*, the Supreme Court held that the Constitution does not recognize fetuses as "persons." *Id.* at 157-59.

¹⁸ See *Lewis VI*, 111 F. Supp. 2d at 175, 179-84; *Lewis IV*, 794 F. Supp. at 1199-1200; *Lewis III*, 1987 WL 8412, at *7. The district court's reasoning lends credence to the role of fetal rights in legal decisionmaking and lawmaking. The ease with which the court disregarded the rights of the plaintiffs and upheld the rights of their fetuses is troubling, particularly considering current legislative measures advancing an anti-choice movement. For just one of many examples, members of the 107th Congress recently introduced the *Unborn Victims of Violence Act, A Shield of Protection to Unborn Children*. 107 S. 480, 107 H.R. 503, 107th Cong. (2001). The bill makes inflicting "bodily injury" on, or killing, a "child, who is in utero," a separate crime when a person physically assaults a pregnant woman. *Id.* Its proponents attempt to deflect attention away from the bill's anti-choice overtone by providing that criminal prosecution will not result from "conduct relating to an abortion for which the consent of the pregnant woman has been obtained or for which such consent is implied by law in a medical emergency," or for any action that the woman takes "with respect to her unborn child." *Id.* The bill defines "child in utero" as "a member of the species homo sapiens, at any stage of development, who is carried in the womb." *Id.*

Further illustrating the prominence of fetal rights in current national policy, moments after his inauguration, President George W. Bush quickly retracted financial aid for international health care and human rights organizations that, in addition to providing critical health services, counsel women on abortion. See, e.g., Elisabeth Bumiller, *U.N. Officials Press White House to Free Family-Planning Money*, N.Y. TIMES, Jan. 16, 2002, at A8.

Pregnant women receive prenatal care for the benefit of their own health, but most certainly to ensure fetal health.¹⁹ Further, as medical data indicate, inadequate prenatal care increases a child's risk of suffering serious and long-lasting physical and mental disabilities.²⁰ Although the plaintiffs did not explicitly argue that the Constitution protected their children while *in utero*,²¹ the Second Circuit recognized the implication of their argument. In rejecting the plaintiffs' equal protection claim raised on behalf of their children, the court soundly reasoned that "[i]n our view, recognition of a newborn child's constitutional challenge to the prior denial of care *in utero* is foreclosed by *Roe v. Wade* just as clearly as would be a constitutional claim asserted on behalf of a fetus."²² The Second Circuit held, however, that as soon as these children were born, their right to federally funded medical treatment vested immediately.²³

It might seem inevitable that the courts would consider the plaintiffs' children in their equal protection analyses, since children are arguably the main beneficiaries of prenatal care. Yet, the fundamental equal protection issue in *Lewis* did not implicate the plaintiffs' children, and neither the district court nor the circuit court should have oriented its analysis around the equal protection rights of fetuses. Instead, their analyses

¹⁹ See, e.g., *Lewis III*, 1987 WL 8413, at *7-8 (discussing statistics on the relationship between inadequate prenatal care and "low birth weight . . . mental retardation, birth defects, growth and development problems, blindness, autism, cerebral palsy, and epilepsy"); see also Maureen Hack et al., *Outcomes in Young Adulthood for Very-Low-Birth-Weight Infants*, NEW ENG. J. MED., Jan. 17, 2002, at 149, 156 (linking low birth weight with neurological deficiencies causing, among other problems, "poor school achievement that . . . persist[s] into young adulthood"); Marie C. McCormick & Douglas K. Richardson, *Premature Infants Grow Up*, NEW ENG. J. MED., Jan. 17, 2002, at 197, 198 (arguing that improved prenatal and neonatal care should reduce incidence of low birth weight); John L. Sullivan & Katherine Luzuriaga, *The Changing Face of Pediatric HIV-1 Infection*, NEW ENG. J. MED., Nov. 22, 2001, at 1568 ("In 2001, the combination of routine prenatal screening for HIV-1 and antiretroviral therapy in mothers and infants has markedly reduced the incidence of mother-to-child transmission."); Robert McDuffie et al., *Effect of Frequency of Prenatal Care Visits on Perinatal Outcome Among Low-Risk Women*, JAMA, Mar. 20, 1996, at 847, 851 ("Observational studies of mothers receiving adequate prenatal care have demonstrated fewer preterm births, higher birth weights, fewer low-birth-weight and very low-birth-weight neonates, and fewer stillbirths and neonatal deaths compared with mothers receiving inadequate prenatal care.") (citations omitted).

²⁰ See *supra* note 19.

²¹ *Lewis VII*, 252 F.3d at 585.

²² *Id.* The court concluded, "*Roe's* preclusion of a Fourteenth Amendment right for a fetus would evaporate if a child could assert a constitutional claim for prebirth injury." *Id.*

²³ *Id.* at 589-92.

should have focused on whether denying pregnant noncitizens federal need-based funding for prenatal care is logically related to Congress' purported welfare and immigration policy goals. Both courts hastily rejected the plaintiffs' equal protection claim²⁴ by assuming that Congress could deny noncitizens funding for prenatal care under its "broad power"²⁵ over the realm of immigration and naturalization policy. Yet, the deprivation of funding for prenatal care is wholly irrelevant, indeed counterproductive, to the Welfare Reform Act's objectives.

Although entrenched precedent supports the judiciary's deferential review of equal protection claims brought by noncitizens against the federal government,²⁶ *Lewis* calls into question the legitimacy of such extreme deference to Congress. When one frames the plaintiffs' constitutional claim in a broader context of the Supreme Court's equal protection jurisprudence, particularly considering the Court's requirement that strict scrutiny apply to state alienage classifications, justifications for the courts' closer review emerge.²⁷ Furthermore, because it is implausible that the Welfare Reform Act provisions challenged in *Lewis* implicate immigration or naturalization concerns, Congress likely exceeded the bounds of its constitutional authority in creating a citizenship requirement for need-based funding for prenatal care services.

This Comment argues that the Second Circuit's unyielding deference to congressional immigration policy deprived the *Lewis* plaintiffs of their equal protection rights. The premise underlying this argument is that the federal judiciary should not automatically cast aside its ultimate authority to review discriminatory legislative acts in all cases where Congress purports to act under the aegis of its immigration powers.

Part I provides an overview of the *Lewis* litigation as the case traveled between the Eastern District of New York and the Second Circuit over the course of twenty years. In Part II, this Comment argues that both courts overlooked the core equal protection claim in *Lewis*, by focusing on fetuses, rather

²⁴ That is, the claim that withholding funding for prenatal care based on citizenship status violates the *plaintiffs'*—not their children's—equal protection rights.

²⁵ *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976).

²⁶ *See, e.g., id.*; *see also* discussion *infra* Part III.

²⁷ *See, e.g., Graham v. Richardson*, 403 U.S. 365 (1971); *infra* Part II.B.

than engaging in an appropriate analysis of the challenged law's basis as it applied to the plaintiffs. First, this Part analyzes the relationship between Congress' immigration policy goals and the Welfare Reform Act provisions that deny noncitizens prenatal care. Second, it explores components of the Supreme Court's equal protection jurisprudence that provide additional avenues for reviewing the plaintiffs' claim with greater scrutiny than the *Lewis* courts' exceedingly deferential rational basis review. Finally, Part III briefly considers the constitutional boundaries of Congress' power to deny funding for prenatal care based on citizenship status. It concludes that the Second Circuit wrongly presumed that Congress' power over immigration and naturalization automatically confers authority to deprive noncitizens need-based funding for prenatal care.²⁸

I. TWO DECADES OF CLASS ACTION LITIGATION IN *LEWIS V. THOMPSON*

When Congress enacted the Medicaid statute in 1965, it made no mention of a citizenship requirement.²⁹ In 1973,

²⁸ In 2001, the 107th Congress proposed legislation that would modify the Welfare Reform Act by giving individual states an option to provide prenatal care services through the federal Medicaid program to pregnant women lawfully residing in this country. See S. 1244, 107th Cong. § 5 (July 25, 2001), H.R. 1143, 107th Cong. § 2 (Mar. 21, 2001). This legislation is pending congressional approval. Its enactment, however, would not settle the broader issue of extreme judicial deference to Congress in cases where the equal protection rights of noncitizens are at stake. Furthermore, in authorizing states to determine whether to provide welfare benefits to lawfully residing noncitizens, the proposed bills stand on shaky constitutional footing. See *Graham*, 403 U.S. at 382 ("Congress does not have the power to authorize the individual States to violate the Equal Protection Clause."). Indeed, the New York Court of Appeals recently declared unconstitutional under both the state and federal constitutions a state law denying state Medicaid benefits to PRUCOLs. See *Aliessa v. Novello*, 96 N.Y.2d 418, 754 N.E.2d 1085, 730 N.Y.S.2d 1 (2001). After Congress enacted the Welfare Reform Act, New York passed a statute terminating Medicaid coverage for many noncitizens previously covered by the state. *Id.* at 427. The *Novello* court determined that the Welfare Reform Act, in giving states the option to provide benefits to noncitizens, "impermissibly authorizes each State to decide whether to disqualify many otherwise eligible aliens from State Medicaid." *Id.* at 436. See also Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (arguing that the Welfare Reform Act withstands rational basis review, but that Congress cannot devolve power to states by allowing them to choose whether to adopt the Welfare Reform Act's alienage classifications).

²⁹ See, e.g., *Lewis VII*, 252 F.3d 567, 571 (2d Cir. 2001). Medicaid is a "cooperative federal/state cost-sharing program designed to enable participating states to furnish medical assistance to persons whose income and resources are insufficient to meet the costs of necessary medical care and services." *Lewis I*, 663 F. Supp. 1164, 1174 (E.D.N.Y. 1986) (quoting *DeJesus v. Perales*, 770 F.2d 316, 318 (1985)).

without Congress' approval, the Department of Health Education and Welfare—now the Department of Health and Human Services ("HHS")—changed its Medicaid distribution policy to require that recipients be either citizens, or "permanently residing in the United States under color of law" ("PRUCOL").³⁰ In 1979, plaintiff representative Lydia Lewis filed a class action lawsuit to challenge this agency regulation as it pertained to all Medicaid benefits, including funding for prenatal care.³¹ The initial incarnation of this class included noncitizens who were "living outside the color of the law," also known as non-PRUCOL, or, in common vernacular, as "illegal aliens."³² Over the next two decades, as federal law concerning public benefits evolved, sometimes in direct response to the *Lewis* litigation,³³ the plaintiff class reshaped its membership and claims.³⁴ Most recently, the plaintiffs challenged their disqualification from Medicaid for prenatal care under the Welfare Reform Act.³⁵ The following case history tracks the development and outcomes of the *Lewis* litigation. Sections A through E briefly convey the pre-Welfare Reform Act holdings, while Sections F and G concentrate on the post-Welfare Reform Act litigation.

A. *Lewis I*³⁶

In *Lewis I*, the Eastern District of New York certified a plaintiff class comprised of "all aliens residing in New York State who have applied or attempted to apply for Medicaid but have been or would be denied on the basis of their alienage."³⁷ The plaintiffs asserted that the Medicaid statute prohibited a HHS policy that denied them Medicaid coverage.³⁸ The court agreed, determining that HHS overstepped the bounds of its authority by imposing a citizenship restriction on the

³⁰ *Lewis I*, 663 F. Supp. at 1178; see also *supra* note 3.

³¹ *Lewis I*, 663 F. Supp. at 1177.

³² *Id.* at 1166.

³³ See *Lewis II*, 660 F. Supp. 169, 172-73 (E.D.N.Y. 1987).

³⁴ See *id.* at 173.

³⁵ See *Lewis VII*, 252 F.3d 567 (2d Cir. 2001); *Lewis VI*, 111 F. Supp. 2d 142 (E.D.N.Y. 2000).

³⁶ 663 F. Supp. 1164.

³⁷ *Id.* at 1170-71.

³⁸ *Id.* at 1174. The plaintiffs also argued that the agency regulation violated their due process rights. *Id.* Siding with the plaintiffs on their statutory claim, the court never reached the constitutional question. *Id.* at 1174.

distribution of Medicaid funds without congressional approval.³⁹

The district court issued an injunction against HHS, requiring the agency to provide Medicaid coverage for the plaintiff class.⁴⁰ Notably, while the plaintiffs demanded Medicaid funding for all medical services, the district court commented that each level of Medicaid coverage also included benefits for pregnant women.⁴¹

B. Lewis II⁴²

Responding to the district court's holding in *Lewis I*,⁴³ Congress enacted the Omnibus Budget Reconciliation Act of 1986 ("OBRA '86").⁴⁴ OBRA '86 provided statutory authority for the residency restriction that HHS sought in *Lewis I*, by imposing a PRUCOL requirement for Medicaid eligibility.⁴⁵ OBRA '86 restricted Medicaid eligibility to noncitizens who were "either lawful permanent residents or otherwise permanently residing in this country under color of law."⁴⁶ Armed with this new legislation, HHS moved to lift the injunction against its practice of denying Medicaid benefits to non-PRUCOL immigrants.⁴⁷

OBRA '86 clearly denied non-PRUCOL immigrants Medicaid eligibility. Therefore, the district court vacated the injunction.⁴⁸ It sought to lessen the sting of this new law, however, by emphasizing that Congress' broad and inclusive definition of PRUCOL embraced "all of the categories [of permanent residency] recognized by immigration law, policy, and practice."⁴⁹

³⁹ *Id.* at 1174, 1183.

⁴⁰ *Id.* at 1184.

⁴¹ *Lewis I*, 663 F. Supp. at 1176-77.

⁴² 660 F. Supp. 169 (E.D.N.Y. 1987).

⁴³ *Id.* at 172-73.

⁴⁴ *Id.* at 170; see The Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874 (1986).

⁴⁵ 660 F. Supp. at 170.

⁴⁶ *Id.* OBRA '86 allowed for emergency care services regardless of PRUCOL status.

⁴⁷ *Id.*

⁴⁸ *Id.* at 170-74.

⁴⁹ *Id.* at 173.

C. Lewis III⁵⁰

After OBRA '86, the plaintiff class argued that the Medicaid statute still required HHS to provide prenatal care to non-PRUCOL women.⁵¹ The district court agreed.⁵² Empirical data convinced the court that inadequate prenatal care causes "irreparable harm" to both pregnant women and their children.⁵³ Furthermore, the court was influenced by HHS's established practice of providing Medicaid benefits for prenatal care to otherwise ineligible women "if the child would be eligible [for Medicaid] when born."⁵⁴

Backing away from this practice, HHS argued that it could no longer assume that unqualified pregnant women would actually deliver their children in this country after reaping the benefits of prenatal care.⁵⁵ The court dismissed this argument as lacking "common sense."⁵⁶ In reaching its decision to require Medicaid funding for prenatal care services, the district court relied on a "longstanding" understanding between HHS and its New York State counterpart that Medicaid's provisions for "individuals under the age of 21" included the unborn.⁵⁷ Absent a clear statutory directive otherwise, the court issued a preliminary injunction against HHS, requiring the agency to provide prenatal care funding for all financially

⁵⁰ No. CV-79-1740, 1987 WL 8412 (E.D.N.Y. Mar. 6, 1987).

⁵¹ *Id.* at *2.

⁵² *Id.* at *9-10. The plaintiffs also challenged HHS's definition of "permanently residing under color of law" as too narrow. *Id.* at *2. Finding the phrase "PRUCOL" broad and vague, the district court held that HHS possessed authority to require INS's knowledge and approval of an immigrant's presence before approving Medicaid disbursements. *Id.* at *11. The court, however, noted that if INS delays and lack of cooperation unduly hampered the plaintiffs' ability to achieve PRUCOL status, they could raise a procedural due process claim. *Id.* at *12.

⁵³ *Id.* at *7-8. The court cited studies indicating that "death rates of newborns whose mothers did not receive prenatal care were four times higher than the death rates of newborns whose mothers received some prenatal care," impressed the court, as did statistics correlating inadequate prenatal care with "low birth weight . . . mental retardation, birth defects, growth and development problems, blindness, autism, cerebral palsy, and epilepsy." *Id.* at *7.

⁵⁴ *Id.* at *8.

⁵⁵ *Lewis III*, 1987 WL 8412, at *8.

⁵⁶ *Id.*

⁵⁷ *Id.* at *9. HHS argued that the Supreme Court's holding that the unborn are not dependent children for purposes of the federal program, Aid to Families with Dependent Children, precluded Medicaid funding for prenatal care. *Id.* at *9 (discussing *Burns v. Alcalá*, 420 U.S. 575 (1975)). The court found *Burns* inapposite, noting that the Supreme Court's decision was somewhat influenced by expansive health care provisions for pregnant women in another federal program. *Id.* at *9 & n.15.

qualified pregnant women, regardless of their residency status.⁵⁸

D. Lewis IV⁵⁹

Four years after its *Lewis III* decision, the district court considered the plaintiff class' right to prenatal care at greater length and made its preliminary injunction against HHS permanent.⁶⁰ Both the *Lewis* class and HHS agreed that "[c]hildren who do not receive prenatal care are . . . far more likely to be born with severe and debilitating mental and physical deformities."⁶¹ Both parties also agreed that "from a cost effectiveness perspective prenatal care is far superior to subsequent treatment of preventable birth defects."⁶² Despite these agreements, HHS argued that "qualified pregnant women" under the Medicaid statute required PRUCOL status.⁶³ Rejecting HHS's argument, the district court interpreted the Medicaid statute as authorizing prenatal care coverage for non-PRUCOL women.⁶⁴

Departing from its reasoning in *Lewis III*, the court acknowledged that *Roe v. Wade* foreclosed interpretation of the phrase "individuals under the age of 21" as including the unborn, since "[t]he unborn are not 'persons' under the Constitution."⁶⁵ The court's analysis of the Medicaid statute, however, "reveal[ed] that the fetus is entitled to receive aid

⁵⁸ *Id.* at *9.

⁵⁹ 794 F. Supp. 1193 (E.D.N.Y. 1991).

⁶⁰ *Id.* at 1195. The plaintiffs also challenged HHS's practice of denying Medicaid to undocumented immigrant children. Since both parties disagreed on INS procedures regarding immigrant children, the court ordered a separate hearing on this issue. *Id.* at 1206.

⁶¹ *Id.* at 1196.

⁶² *Id.* The court cited a House Budget Committee report that stated, "each dollar spent on prenatal care could save over three dollars in reduced health care costs for the care of low birth weight infants." *Id.* at 1201.

⁶³ *Id.* at 1197. HHS argued that the plain meaning of OBRA '86, together with changes to statutory provisions for other federal aid programs that exclude coverage provisions for the "unborn," allowed it to deny non-PRUCOL women prenatal care funding. *Id.* at 1198. The court rejected this argument, reasoning that while Congress abandoned express coverage provisions for the "unborn," it simultaneously expanded coverage for pregnant women in another federal aid program. *Id.* The court stated: "Congress appears, as a matter of legislative style, to have chosen to use the pregnant women eligibility group as the vehicle for providing Medicaid coverage of prenatal care," rather than identifying the intended aid-recipient as the unborn. *Id.*

⁶⁴ *Lewis IV*, 794 F. Supp. at 1200. The court noted that the Medicaid statute "does not directly address the issue of coverage for the unborn children of alien women not themselves eligible for Medicaid." *Id.* at 1198.

⁶⁵ *Id.* at 1198 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

through its mother, even where the mother, prior to pregnancy, is not herself, by reason of her status with INS, eligible for aid.”⁶⁶

The Medicaid statute defined “qualified pregnant women” as all pregnant women who would meet the financial qualification requirements “if their unborn children were already born and were living with them at the time of payment.”⁶⁷ The court determined that this “constructive infant”⁶⁸ approach demonstrated Congress’ focus on the “needs of the unborn child[,] . . . not the parent.”⁶⁹ The court further found that Congress’ “concentration of attention is upon the children or unborn children, and the mother becomes a convenient means through which this aid to the child can be furnished. . . . Non-PRUCOL pregnant aliens serve simply as the conduit for delivering the aid to their children.”⁷⁰

Interpreting the Medicaid statute to include coverage for prenatal care, the court declined to rule on the plaintiffs’ equal protection claim, thereby avoiding “substantial constitutional questions of considerable difficulty.”⁷¹

E. Lewis V⁷²

In 1992, the Second Circuit upheld the district court’s injunction against HHS.⁷³ Unlike the lower court, however, it agreed with HHS that the plain meaning of the amended Medicaid statute required PRUCOL status.⁷⁴ Yet, the court ultimately determined that Congress intended for a continuous allocation of prenatal care funding for non-PRUCOL women.⁷⁵

The court regarded *Lewis* as a unique case in which the law’s purpose should trump its plain meaning. Relying on Medicaid’s legislative history, the court found that providing prenatal care for non-PRUCOL women supported “the clearly

⁶⁶ *Id.* at 1199.

⁶⁷ *Id.* at 1198-99. The court explained: “Given the current constitutional problems surrounding the rights of fetuses, it makes perfect sense that Congress should choose this more indirect route toward supplying [fetuses] with aid.” *Id.* at 1200 n.3.

⁶⁸ *Id.* at 1200.

⁶⁹ *Lewis IV*, 794 F. Supp. at 1199.

⁷⁰ *Id.* at 1200-01.

⁷¹ *Id.* at 1202.

⁷² 965 F.2d 1206 (2d Cir. 1992).

⁷³ *Id.* at 1208.

⁷⁴ *Id.* at 1215.

⁷⁵ *Id.*

expressed Congressional purpose of curbing expenditures.”⁷⁶ The court cited a congressional report that stated, “every dollar spent on prenatal care saves between two and ten dollars in future medical care costs.”⁷⁷ Impressed by Congress’ desire to expand rather than contract prenatal care access, the court interpreted OBRA ‘86 in derogation of its plain meaning.⁷⁸ Thus, if Congress wanted to restrict prenatal care funding, it would have to enact unequivocal legislation to accomplish that end.

F. Lewis VI⁷⁹

The Welfare Reform Act of 1996⁸⁰ required HHS to deny Medicaid funding for prenatal care services to all non-PRUCOL, and nearly all PRUCOL, women.⁸¹ The district court quickly determined that the text and legislative history of the Welfare Reform Act precluded a statutory argument for the plaintiffs’ continued Medicaid eligibility.⁸² Therefore, the court addressed the plaintiffs’ claim that this deprivation violated their rights, and the separate claim that this law violated their children’s rights, to equal protection of the laws.

⁷⁶ *Id.* at 1219.

⁷⁷ *Lewis V.*, 965 F. 2d at 1219 (citing H.R. REP. NO. 99-727, at 98, reprinted in 1986 U.S.C.C.A.N. 3607, 3688).

⁷⁸ *Id.* The court’s holding freed it from the responsibility of deciding whether the plaintiffs could assert an equal protection claim on behalf of their children. However, the court noted that interpreting the Medicaid statute to deny prenatal care funding could raise a constitutional problem. *See id.* at 1217-20. Since a child is automatically eligible for Medicaid if their mother is covered, a non-PRUCOL woman’s child would not receive automatic coverage under HHS’s interpretation of the statute. While the court did not directly address the constitutional issue, it noted that “[s]uch discrimination against the citizen child on the basis of the alien status of the parent would raise serious equal protection questions.” *Id.* at 1217.

⁷⁹ 111 F. Supp. 2d 142 (E.D.N.Y. 2000).

⁸⁰ 8 U.S.C. §§ 1601-1646 (2001).

⁸¹ *See id.* §§ 1611, 1612, 1641. The court noted that the Welfare Reform Act’s limited eligibility categories rendered the PRUCOL classification obsolete. *Lewis VI*, 111 F. Supp. 2d at 151-52 & n.11.

⁸² *Lewis VI*, 111 F. Supp. 2d at 155-64. Supporting its conclusion, the court referred to a House of Representatives Conference Report stating that, “[t]he allowance for emergency medical services under Medicaid is very narrow. . . . *The conferees do not intend that emergency medical services include prenatal care or delivery care assistance that is not strictly of an emergency nature.*” *Id.* at 157 (quoting 1996 U.S.C.C.A.N. 2649, 2767-68) (emphasis in original). Regarding the plaintiffs’ reliance on congressional intent to save money and to promote the health of children, the court stated, “Congress’ broad purposes cannot be used to trump the plain language of a statute bolstered by a relatively clear expression of intent from the legislative history of the statute under interpretation.” *Id.* at 161.

The court recognized the plaintiffs' standing to raise an equal protection claim on their own behalf, reasoning that "they will bear the primary economic, social, and emotional burdens of caring for these children."⁸³ The court also granted them standing to raise an equal protection claim on behalf of their children, finding that "the injuries that will be sustained by their citizen children as a result of [the Welfare Reform Act] involves disparate treatment of United States citizens."⁸⁴

HHS challenged the plaintiffs' standing to raise either claim, arguing under *Roe v. Wade* that, "[s]ince a fetus is not a person, or in being, it does not itself have standing and *a fortiori* neither does the mother."⁸⁵ Swiftly rejecting the notion that the plaintiffs' claims necessarily implicated fetal rights, the court dismissed HHS's standing challenge: "Whether or not plaintiffs may assert an equal protection claim on behalf of their unborn children, they clearly may assert an equal protection claim on behalf of their already-born citizen children, and it is essentially on that claim that they are entitled to prevail in this lawsuit."⁸⁶

The court agreed with HHS that it should apply deferential rational basis review to the plaintiffs' claim, based on a settled understanding that Congress "has broad plenary authority over matters of immigration and naturalization, and in exercising this authority, Congress has the power to treat aliens differently from citizens."⁸⁷ Relying on *Mathews v. Diaz*,⁸⁸ and without addressing the merits of the plaintiffs' claim, the court deferred to Congress, holding that the Welfare Reform Act's discrimination against the plaintiffs was supported by a rational basis.⁸⁹

As for the equal protection claim that the plaintiffs brought on behalf of their children, the district court applied intermediate scrutiny.⁹⁰ This heightened standard of review

⁸³ *Id.* at 164.

⁸⁴ *Id.* at 165.

⁸⁵ *Id.*

⁸⁶ *Id.* (footnote omitted).

⁸⁷ *Lewis VI*, 111 F. Supp. 2d at 169, 170-72 (citing *Mathews v. Diaz*, 426 U.S. 67 (1976)). HHS also cited challenges to the Welfare Reform Act in other jurisdictions where courts applied deferential rational basis review. *Id.* at 173.

⁸⁸ 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

⁸⁹ *Id.* at 182.

⁹⁰ *Lewis VI*, 111 F. Supp. 2d at 174-75.

required the challenged Welfare Reform Act provisions to be "substantially related to a legitimate congressional objective,"⁹¹ which "further[s] 'some substantial goal' in comparison to its costs to the Nation."⁹² The court elevated the standard of review based on *Plyler v. Doe*,⁹³ an unusual case where the Supreme Court applied intermediate scrutiny to a state law denying illegal immigrant children access to public education. The district court reasoned that, like the challenged law in *Plyler*, the Welfare Reform Act's residency classifications "will result in the imposition of severe and lifelong burdens on a discrete class of innocent citizen children unaccountable for their disabling status."⁹⁴ Convinced that the government should not punish children for the actions of their parents, the court analogized discrimination against the children in *Lewis* to an "archaic corruption of the blood" long opposed by the Supreme Court.⁹⁵

HHS argued that a denial of prenatal care serves the "compelling government interest" of removing an incentive for illegal immigration.⁹⁶ While the court agreed that Congress might legitimately enact laws to discourage illegal immigration, it rejected HHS's claim that prenatal care funding creates an incentive for illegal immigration as "highly speculative."⁹⁷ The court found that a "much more plausible scenario"⁹⁸ is one where immigrant women, denied prenatal care services, found themselves "unable or unwilling to leave despite the unavailability of prenatal care."⁹⁹

Secondly, HHS claimed that the denial of prenatal care furthered the Welfare Reform Act's goal of promoting self-

⁹¹ *Id.* at 182 (citations omitted).

⁹² *Id.* at 182-83.

⁹³ 457 U.S. 202 (1982).

⁹⁴ *Lewis VI*, 111 F. Supp. 2d at 170. While other federal courts rejected application of the *Plyler* standard to Welfare Reform Act challenges, the court distinguished *Lewis* on the grounds that it involved citizen children, rather than noncitizens. *Id.* at 180.

⁹⁵ *Id.* at 179 (quoting *King v. Smith*, 392 U.S. 309, 336 n.5 (1968)). The court discussed at length "the long line of cases in which the [Supreme] Court has subjected federal and state legislative classifications that impose disabilities on innocent children on the sole basis of the conduct of their parents to more rigorous judicial review." *Id.* at 176.

⁹⁶ *Id.* at 184.

⁹⁷ *Id.* (quoting *Lewis V*, 965 F.2d 1206, 1214 (2d Cir. 1992)). Furthermore, the court responded that "[a]s the Supreme Court observed in *Plyler*, the dominant incentive for illegal entry in most states is the availability of employment." *Id.*

⁹⁸ *Id.* at 184.

⁹⁹ *Lewis VI*, 111 F. Supp. 2d at 184.

sufficiency, thereby reducing a burden on the public benefits system.¹⁰⁰ Rejecting this argument, the court stated that most women denied prenatal care by the Welfare Reform Act were unable to afford any type of private medical care.¹⁰¹ Since the correlation between inadequate prenatal care and physical harm to newborns was “not disputed,”¹⁰² the court reasoned that mothers would be forced to dedicate a significant amount of time and money to the care of their injured children, which would “prevent [these women] from leading economically productive lives.”¹⁰³

Finally, HHS argued that a denial of prenatal care served the compelling government interest of decreasing public expenditures.¹⁰⁴ The court also rejected this argument, firmly stating that it is “undisputed that routine prenatal care is more cost-effective than treating preventable birth defects and low birth weight after a child’s birth.”¹⁰⁵ Additionally, the court was persuaded by well documented evidence that “[t]he nation will be forced to bear the significant medical costs of caring for these citizen children after their birth.”¹⁰⁶ Therefore, the court concluded that the cost-saving aspects of prenatal care “far outweigh the speculative benefits on which”¹⁰⁷ HHS relied.¹⁰⁸

Convinced that prenatal care is vital to a child’s health, the court contradicted its earlier statement that the children’s equal protection claim need not implicate the rights of fetuses, stating: “Although prenatal care is provided through the mother, it is clear that prenatal care is provided principally for

¹⁰⁰ *Id.* at 184-85.

¹⁰¹ *Id.* at 185.

¹⁰² *Id.*

¹⁰³ *Id.* at 185 (quoting *Lewis IV*, 794 F. Supp. 1193, 1202 (E.D.N.Y. 1991)).

¹⁰⁴ *Lewis VI*, 111 F. Supp. 2d at 185.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 183 n.54. The court continued:

Moreover, of those children who survive, many will be denied the opportunity to lead productive or fulfilling lives in this country as a result of the handicaps related to the birth defects they will sustain and, as a result, will be forced to depend upon a variety of social welfare programs.

Id.

¹⁰⁷ *Id.*

¹⁰⁸ Additionally, the court referred to a New York State Department of Health finding that the preventative nature of prenatal care for undocumented noncitizens alone “saves an estimated \$14.7 million just in the costs of providing initial hospitalization for these babies.” *Id.* at 154. The court noted further that these savings did not take into account “the extraordinary additional costs of providing lifelong medical care or the lifelong expense of special education for babies born with severe birth defects.” *Id.* at 154.

the benefit of the fetus.”¹⁰⁹ Finding HHS’s reasons for denying the plaintiff class prenatal care “wholly insubstantial” in relation to the costs exacted by this deprivation, the court upheld its injunction against HHS to vindicate the equal protection rights of the plaintiff class’ children.¹¹⁰

G. Lewis VII¹¹¹

The Second Circuit concurred with the district court’s holding that the only possible interpretation of the Welfare Reform Act was that it excluded the plaintiffs from Medicaid-eligibility for prenatal care.¹¹² It also agreed that a denial of prenatal care did not violate the plaintiffs’ equal protection rights.¹¹³

The court relied on the “indisputable teaching of *Mathews v. Diaz*,”¹¹⁴ and applied a “highly deferential standard” of review to the plaintiffs’ equal protection claim.¹¹⁵ It explained that, under rational basis review, the plaintiffs must “negative every conceivable basis which might support” the law.¹¹⁶ Applying this test, the court found that the Welfare Reform Act’s first rationale, deterrence of illegal immigration, provided enough basis for discrimination against the plaintiffs.¹¹⁷ While recognizing that “the record discloses no evidence that a prospective illegal immigrant considers the unavailability of prenatal care in deliberating whether to illegally enter the country,” the court reiterated that “such evidence is not required to satisfy rational basis analysis.”¹¹⁸

¹⁰⁹ *Lewis VI*, 111 F. Supp. 2d at 154. The court initially stated that the children’s disparate impact claim was based on their inability to receive automatic Medicaid eligibility at their birth, as the Medicaid statute provides that a child born to a mother who receives Medicaid is entitled to automatic Medicaid coverage. *Id.* at 166, 175. Yet, the court explained its holding by focusing on the harm suffered by the children due to inadequate prenatal care.

¹¹⁰ *Id.* at 185-86.

¹¹¹ 252 F.3d 567 (2d Cir. 2001).

¹¹² *Id.* at 580. The court found that the Welfare Reform Act unequivocally excluded federal benefits and non-emergency Medicaid assistance for non-PRUCOL as well as “a sizeable class of PRUCOL” immigrants. *Id.* at 578.

¹¹³ *See id.* at 584.

¹¹⁴ *Id.* at 582 (citing *Mathews v. Diaz*, 426 U.S. 67 (1976)).

¹¹⁵ *Id.* (quoting *Lake v. Reno*, 226 F.3d 141, 148 (2d Cir. 2000)).

¹¹⁶ *Lewis VII*, 252 F.3d at 582 (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 583 (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)). The court also referred to other challenges to the Welfare Reform Act in different federal jurisdictions where courts held that the Welfare Reform Act survived rational basis scrutiny. *Id.*

The Second Circuit next considered the Welfare Reform Act's constitutionality as it applied to the plaintiffs' children.¹¹⁹ As in the earlier *Lewis* opinions, the Second Circuit recognized the health and economic impacts of inadequate prenatal care.¹²⁰ Yet, the plaintiffs' contention that their citizen children could challenge the law failed to persuade the court.¹²¹ Unconvinced by the plaintiffs' attempt to deflect attention away from the fetus, the court stated, "[i]f, as *Roe v. Wade* instructs, a fetus lacks constitutional protection to assure it an opportunity to be born, we see no basis for according it constitutional protection to assure enhanced prospects for good health after birth."¹²² Thus, the circuit court reversed the district court and sustained the Welfare Reform Act's categorical exclusion of the plaintiff class from Medicaid eligibility for need-based prenatal care funding.¹²³

While the court did not recognize the plaintiffs' or their children's rights to prenatal care,¹²⁴ it required HHS to develop automatic coverage procedures for the plaintiffs' children so that they could receive immediate medical care upon birth.¹²⁵

Twenty-three years after instituting this class action, the *Lewis* plaintiffs lost their right of equal access to need-based federal funding for prenatal care. Throughout the *Lewis*

¹¹⁹ *Id.* at 584-85 (determining that the plaintiffs had third party standing to raise an equal protection claim on behalf of their infant children).

¹²⁰ *Id.* at 579-80.

¹²¹ *Lewis VII*, 252 F.3d at 586.

¹²² *Id.* Responding to the plaintiffs' argument that a majority of states provide tort law causes of action for wrongful death caused by prenatal injuries, the court stated that "a legislative benefit does not imply a constitutional requirement." *Id.* The court distinguished a Ninth Circuit case that recognized a child's constitutional claim for deprivation of family relationship when his father was killed while he was *in utero*, on the grounds that in the instant case, "the alleged deprivation . . . was suffered while the fetus was *in utero*. At that moment the fetus had no constitutional right to equal protection, and the born child's subsequent protection by the Equal Protection Clause cannot retroactively create a claim that was not cognizable before birth." *Id.* at 587 (discussing *Crumpton v. Gates*, 947 F.2d 1418 (9th Cir. 1991)). The court emphasized that in *Crumpton*, the alleged deprivation began once the child was born, and no earlier. *Id.*

¹²³ *Id.* at 587.

¹²⁴ *Id.* at 591-92. Here the court expressed its comfort with applying a higher standard of review to the children's equal protection claim under *Plyler v. Doe*, 457 U.S. 202 (1982), because the children were citizens and the discrimination they suffered resulted from their mothers' classification as unqualified noncitizens under the Welfare Reform Act. *Lewis VII*, 252 F.3d at 590-92. The court even suggested that the children's lack of automatic Medicaid eligibility based on their mothers' status "might be the rare case where the equal protection claim would prevail" under rational basis review, but it did not reach a decision on these grounds. *Id.* at 590.

¹²⁵ *Lewis VII*, 252 F.3d at 592.

litigation, both the district and circuit courts consistently found that denying pregnant noncitizens funding for prenatal care actually costs more money than it saves, and strongly rejected the notion that a deprivation of prenatal care might deter immigration or engender self-reliance. Despite these findings, both courts held that the Welfare Reform Act's residency classification survived rational basis review. If the courts had correlated their findings on the effects of inadequate prenatal care with the law's stated objectives, they would have found that the Welfare Reform Act's means lack a rational relationship to its ends.

II. UPHOLDING EQUAL PROTECTION OF THE LAWS WITH MEASURED DEFERENCE

A. *Reconsidering Lewis Under the Rational Basis Test*

The Supreme Court has applied the standard of rational basis review in myriad ways,¹²⁶ but essentially has required a "rational relationship between the disparity of treatment and some legitimate governmental purpose."¹²⁷ At one end of the rational basis spectrum, the Court has required the relationship between a law's means and ends to be "at least debatable"¹²⁸ or only based on "rational speculation."¹²⁹ At the opposite end of this spectrum, the Court has questioned the legitimacy of the government's interests by more closely analyzing the relationship between the law's means and ends.¹³⁰ Under even the most deferential application of rational basis review, the exclusionary residency classifications of the Welfare Reform Act at issue in *Lewis* violate the equal protection component of the Fifth Amendment's Due Process Clause.¹³¹

¹²⁶ The Court, however, has sometimes insisted that the rational basis test is uniform and unvarying. See, e.g., *infra* notes 180-83 and accompanying text.

¹²⁷ *Heller v. Doe*, 509 U.S. 312, 320 (1993).

¹²⁸ *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). See generally *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955) (upholding statute requiring an optometrist's prescription in order to replace eye glass lenses: "[T]he law need not be in every respect logically consistent with its aims to be constitutional").

¹²⁹ *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

¹³⁰ See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985); *Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

¹³¹ The Fifth Amendment provides that no person shall "be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V. The Fifth Amendment's due process guarantee requires that the federal government act within

The preamble to the Welfare Reform Act provides Congress' "statements concerning national policy with respect to welfare and immigration"¹³² and identifies the law's three objectives: (1) to promote the noncitizen's self-reliance;¹³³ (2) to provide a disincentive for immigration;¹³⁴ and (3) to ensure that noncitizens do not burden public welfare programs.¹³⁵

The first stated objective of the residency requirements for public benefits under the Welfare Reform Act is to encourage "aliens . . . [to] rely on their own capabilities."¹³⁶ When the district court considered this objective in relation to the means by which Congress sought to reach it, the court strongly asserted that there is no connection between a denial of prenatal care and the promotion of self-sufficiency.¹³⁷ Although the court entertained the possibility of this connection under heightened review of the children's equal protection claim, the force with which it dismissed HHS's argument indicates the weakness of this rationale.¹³⁸ Finding that most women who depend on government funding for need-based prenatal care are unable to afford adequate private medical care, the court concluded that the "time and resources"¹³⁹ the disqualified mothers must spend caring for their injured children would render them unable to attain self-sufficiency.¹⁴⁰

At no point did either court express how the law's end related to its means in their consideration of the plaintiffs' equal protection claim. Yet, in considering the children's equal protection claim, the district court emphatically stated that the ends and means do not relate.¹⁴¹ With as much ease and justification under rational basis review, the court could have determined that depriving indigent women prenatal care bears

the constraints of the Fourteenth Amendment's Equal Protection Clause. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.").

¹³² 8 U.S.C. § 1601 (2000).

¹³³ *Id.* § 1601(1), (2)(A), (5).

¹³⁴ *Id.* § 1601(2)(B), (6).

¹³⁵ *Id.* § 1601(3), (4).

¹³⁶ *Id.* § 1601(2)(A).

¹³⁷ *Lewis VI*, 111 F. Supp. 2d 142, 185 (E.D.N.Y. 2000).

¹³⁸ See *id.*

¹³⁹ *Id.* (quoting *Lewis IV*, 794 F. Supp. 1193, 1202 (E.D.N.Y. 1991)).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

no rational relationship to the promotion of self-sufficiency. As plentiful data on the devastating and debilitating effects of inadequate prenatal care (wholly accepted by the courts) indicate, the suggestion that a deprivation of prenatal care will lead to self-sufficiency is preposterous.¹⁴²

Likewise, it is inconceivable that denying women prenatal care relates to the Welfare Reform Act's second objective of deterring illegal immigration. In enacting this welfare reform, Congress stated that "[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits."¹⁴³ Both courts found it implausible that an opportunity to access prenatal care might spur immigration.¹⁴⁴ Yet, the courts ultimately threw these findings to the wind, deferring to Congress' policy objective.

In *Lewis VI*, the district court declared that immigrant women denied funding for prenatal care would probably be "unable or unwilling to leave despite the unavailability of prenatal care."¹⁴⁵ Like the district court, the Second Circuit admitted "it seems likely that many alien women will illegally immigrate to obtain the benefit of citizenship for their children, undeterred by ineligibility for prenatal care in the event of pregnancy."¹⁴⁶ However, the circuit court further stated that "[i]n the realm of immigration, where congressional discretion is extremely broad, this supposition, *even if dubious*, satisfies rational basis review."¹⁴⁷ Notably, the court failed to explain how "rational speculation" links the law's objectives to its discriminatory requirements.¹⁴⁸ Its silence in this regard endorses Congress' irrational assertion rather than rational speculation.¹⁴⁹

¹⁴² See *supra* notes 138-41 and accompanying text.

¹⁴³ 8 U.S.C. § 1601(6) (2000).

¹⁴⁴ See *Lewis VII*, 252 F.3d 567, 584-85 (2d Cir. 2001); *Lewis VI*, 111 F. Supp. 2d at 184; see also Linda S. Bosniak, *supra* note 1, at 1145 n.396 (quoting statement of Mexico's consul general in Los Angeles that public benefits do not encourage immigration, but, rather, "[t]he demand for low-cost labor brings immigrant workers seeking better incomes for their families").

¹⁴⁵ *Lewis VI*, 111 F. Supp. 2d at 184.

¹⁴⁶ *Lewis VII*, 252 F.3d at 584.

¹⁴⁷ *Id.* (emphasis added).

¹⁴⁸ *Id.*

¹⁴⁹ See Richard A. Boswell, *Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. REV. 1475, 1506-07 (1995) (arguing that restrictions on public benefits fail to address the "root causes" of immigration).

Denying prenatal care services to noncitizens actually undermines the Welfare Reform Act's final stated objective of relieving a "burden" on the public welfare system.¹⁵⁰ In addition to simple logic, voluminous data forces the conclusion that some money spent on prenatal care saves much more money on the remedial health care necessitated by inadequate prenatal care.¹⁵¹ Indeed, before Congress enacted the welfare reform laws in 1996, both courts upheld the plaintiffs' right to federal funding for prenatal care as a matter of sound economic policy.¹⁵²

The courts' reliance on congressional fiscal reports in the pre-Welfare Reform Act litigation makes their acceptance of Congress' post-Welfare Reform Act assertion that restricting prenatal care unburdens the public coffers particularly unjustifiable. In the earlier phase of the *Lewis* litigation, both courts approvingly cited a House Budget Committee Report finding that "each dollar spent on prenatal care could save over three dollars in reduced health care costs for the care of low birth weight infants."¹⁵³ Additionally, in *Lewis VI*, the district court again found it "undisputed that routine prenatal care is more cost-effective than treating preventable birth defects and low birth weight after a child's birth."¹⁵⁴ The courts should have applied their strong belief in the "undisputed" benefit of providing prenatal care toward their rational basis review of the plaintiffs' claim. Doing so, they would have found that the deprivation of prenatal care lacks a rational relationship to the Welfare Reform Act's objectives.

B. *Justifications for Higher Equal Protection Review*

The facts accepted by the courts in *Lewis* force a conclusion that denying prenatal care to noncitizens violates their equal protection rights. The *Lewis* courts found, however,

¹⁵⁰ 8 U.S.C. § 1601(4) (2000).

¹⁵¹ See, e.g., *Lewis V*, 965 F.2d 1206, 1218 (2d Cir. 1992); *Lewis VI*, 111 F. Supp. 2d 142, 165 (E.D.N.Y. 2000); *Lewis IV*, 794 F. Supp. 1193, 1201 (E.D.N.Y. 1991); see also, Boswell, *supra* note 149, at 1478 ("Ineligible aliens most often defer medical treatment until their problems have become life threatening and thereby more costly."); Stacey M. Schwartz, Note, *Beaten Before They Are Born: Immigrants, Their Children, and a Right to Prenatal Care*, 1997 ANN. SURV. AM. L. 695 (1997) (discussing the cost effectiveness of prenatal care).

¹⁵² See *Lewis V*, 965 F.2d at 1218-19; *Lewis IV*, 794 F. Supp. at 1201.

¹⁵³ *Lewis V*, 965 F.2d at 1219 (paraphrasing 1986 U.S.C.A.N. 3607, 3688); *Lewis IV*, 794 F. Supp. at 1201 (quoting 1986 U.S.C.A.N. 3607, 3688).

¹⁵⁴ *Lewis VI*, 111 F. Supp. 2d at 185.

that *Mathews v. Diaz*¹⁵⁵ foreclosed the possibility of truly testing the discriminatory law's underlying basis.

In *Mathews*, the Supreme Court unanimously upheld restrictive federal residency classifications that denied certain noncitizens supplemental medical insurance benefits.¹⁵⁶ The Court explained that "a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify . . . benefits for one class not accorded to the other"¹⁵⁷ Thus, Congress may create rules for noncitizens "that would be unacceptable if applied to citizens."¹⁵⁸ The Court adopted a deferential standard for reviewing alienage classifications, one that would call for the invalidation of such laws only if they were "wholly irrational."¹⁵⁹ The *Lewis* courts' reliance on *Mathews*, however, was misplaced. Two additional, albeit somewhat doctrinally inconsistent, strains of equal protection jurisprudence confer authority for more exacting review of the discriminatory classifications at issue in *Lewis*.

In a 1971 case, decided before *Mathews*, the Supreme Court held unconstitutional state residency classifications that denied welfare benefits to immigrants.¹⁶⁰ In *Graham v. Richardson*,¹⁶¹ the Court declared that "classifications based on alienage, like those based on nationality or race, are *inherently suspect* and subject to *close judicial scrutiny*."¹⁶² Applying strict scrutiny, the Court held that the state's proposed "justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens."¹⁶³ Recognizing that noncitizens "like citizens pay taxes and may be called into the armed forces," the Court found the states' discrimination unjustifiable.¹⁶⁴ Therefore, when a state

¹⁵⁵ 426 U.S. 67 (1976).

¹⁵⁶ *See id.*

¹⁵⁷ *Id.* at 78-79.

¹⁵⁸ *Id.* at 80.

¹⁵⁹ *Id.* at 83.

¹⁶⁰ *Graham v. Richardson*, 403 U.S. 365 (1971).

¹⁶¹ *Id.*

¹⁶² *Id.* at 372 (emphasis added). In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Supreme Court held that the Fourteenth Amendment protects noncitizens residing within the United States. Ten years later, the Court applied the Fifth Amendment Due Process Clause to noncitizens, in *Wong Wing v. United States*, 163 U.S. 228 (1896).

¹⁶³ *Graham*, 403 U.S. at 376 (internal quotes omitted).

¹⁶⁴ *Id.* (internal quotes omitted). On these same grounds, in *Sugarman v. Dougall*, 413 U.S. 634, 639, 645 (1973), the Court invalidated New York's statutory scheme that denied all noncitizens eligibility for competitive civil service jobs.

seeks to discriminate against a noncitizen, the Court requires the state to advance a "substantial purpose"¹⁶⁵ by means "precisely drawn in light of the acknowledged purpose."¹⁶⁶

While the *Graham* Court based its holding, in part, on preemption grounds,¹⁶⁷ it embraced an equal protection methodology grounded in the premise that "[a]lliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate."¹⁶⁸ In a later case, the Court justified heightened scrutiny with the rationale that alienage and national origin "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others."¹⁶⁹

Long before the Court deemed state law alienage classifications suspect, in 1938, Justice Stone expressed concern that restrictions on a minority group's participation in the political process made them particularly vulnerable to infringements of their constitutional rights.¹⁷⁰ Skeptical of "statutes directed at particular religious, . . . national, . . . or racial minorities,"¹⁷¹ Justice Stone suggested that "prejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry."¹⁷²

Yet, while the Court considers state alienage classifications "suspect,"¹⁷³ this classification gives way under

¹⁶⁵ *Sugarman*, 413 U.S. at 643.

¹⁶⁶ *Id.*

¹⁶⁷ *Graham*, 403 U.S. at 377-80. The Court reiterated that Congress has "broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." *Id.* at 377 (quoting *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948)).

¹⁶⁸ *Id.* at 372 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)).

¹⁶⁹ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

¹⁷⁰ See *Carolene Prods.*, 304 U.S. at 152-53 n.4. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980), for a refinement of Justice Stone's view known as the "representation-reinforcement" theory. This theory recognizes that minority groups and the disenfranchised, like the plaintiffs in *Lewis*, may lack means of effectively shaping, and responding to, the political process. Therefore, when a legislative act further marginalizes these groups or compromises their constitutional rights, the judiciary should closely scrutinize the challenged law, thereby filling a gap in the democratic process. See *id.*

¹⁷¹ *Carolene Products*, 304 U.S. at 153 n.4.

¹⁷² *Id.*

¹⁷³ The Supreme Court applies a political function exception to strict scrutiny

its contrary approach to federal classifications, whereby suspect status vanishes entirely.¹⁷⁴ Attempting to reconcile these inconsistent approaches, the *Mathews* Court explained that "it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens."¹⁷⁵ This justification fails to explain why federal alienage classifications are less suspect than state classifications.¹⁷⁶ Laying aside that nagging question, however, the argument still stands that courts need not apply strict scrutiny to federal laws to give effect to *Graham's* holding that discrimination against noncitizens demands judicial attention. As the Supreme Court recently stated in *Zadvydas v. Davis*,¹⁷⁷ in the arena of its immigration and naturalization, Congress' "power is subject to important constitutional limitations."¹⁷⁸

Furthermore, the Supreme Court has subjected discriminatory laws that affect rights or privileges to more rigorous scrutiny under rational basis review than the courts applied in *Lewis*.¹⁷⁹ Although the Court has stated that rational basis review consists of a single standard,¹⁸⁰ and that laws under this test are "presumed to be valid,"¹⁸¹ it has also probed

of state classifications that limit a noncitizen's participation in the state's political domain. See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982) ("[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives and constitutional responsibility for the establishment [and] operation of its own government, as well as the qualifications of an appropriately designated class of public office holders.") (quoting *Sugarman v. Dougall*, 413 U.S. 643, 648 (1973)).

¹⁷⁴ See *Mathews v. Diaz*, 426 U.S. 67 (1973). Note Justice Stevens's explanation that "it is not 'political hypocrisy' to recognize that the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization." *Id.* at 86-87.

¹⁷⁵ *Id.* at 84.

¹⁷⁶ See, e.g., Gerald M. Rosberg, *The Protection of Aliens From Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 294 (arguing that the federal government's authority over immigration policy "does not in any obvious way explain why the burden of justification on the federal government should be different from the burden on a state").

¹⁷⁷ 533 U.S. 678 (2001).

¹⁷⁸ *Id.* at 695. The Court noted that, in the realm of immigration and naturalization law, "Congress must choose 'a constitutionally permissible means of implementing' [its] power." *Id.* (quoting *INS v. Chadha*, 462 U.S. 919, 941-42 (1983)).

¹⁷⁹ See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985); *Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

¹⁸⁰ See, e.g., *Cleburne*, 473 U.S. at 442, 446.

¹⁸¹ *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976).

the underlying bases of laws that discriminate against discrete groups. In so doing, the Court has applied rational basis review but still held that a discriminatory law serves an illegitimate end,¹⁸² or employs irrational means to a legitimate end.¹⁸³

For example, in *City of Cleburne v. Cleburne Living Center, Inc.*,¹⁸⁴ the Court applied rational basis review in declaring unconstitutional a state law restricting land usage for group homes housing the mentally challenged. While finding that a state may legitimately differentiate between the mentally challenged and able, the Court closely scrutinized the law and was persuaded by contradictory evidence that belied each of the state's justifications for treating the two groups differently.¹⁸⁵

The Court has also engaged in searching review of classifications under federal law. In *Department of Agriculture v. Moreno*,¹⁸⁶ the Court invalidated a federal law that denied food stamps to households where the occupants were unrelated to one another by blood or marriage.¹⁸⁷ The Government asserted that Congress intended for the law to increase national nutrition standards. Seemingly influenced by legislative history indicating that disdain for "hippies" inspired the welfare restriction, the Court found the law "clearly irrelevant" to this purported objective.¹⁸⁸ Certainly, the Court did not consider the elevation of nutritional health an illegitimate legislative objective. By looking beyond Congress' bald assertions, however, the Court gleaned prejudice at the law's base. Had the courts in *Lewis* undertaken a similar level of analysis, they would have found that depriving pregnant noncitizens prenatal care funding is irrelevant, indeed counterproductive, to realizing the Welfare Reform Act's ends.¹⁸⁹

¹⁸² See, e.g., *Romer*, 517 U.S. 620.

¹⁸³ See, e.g., *Cleburne*, 473 U.S. 432; *Moreno*, 413 U.S. 528; *Lindsey v. Normet*, 405 U.S. 56 (1972).

¹⁸⁴ 473 U.S. at 448-50.

¹⁸⁵ *Id.*

¹⁸⁶ 413 U.S. 528 (1973).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 534. *But cf.* *Lyng v. Int'l Union*, 485 U.S. 360, 371 (1988) (upholding a denial of federal food stamp aid to households where a member is on strike and finding legitimate the "governmental objective of avoiding undue favoritism to one side or the other in private labor disputes").

¹⁸⁹ See discussion *supra* Part II.A (highlighting the *Lewis* courts' findings that denying immigrant women prenatal care will not promote self-sufficiency or deter immigration, but will increase costs).

Moreover, the grave impact of denying poor women funding for prenatal care should have given the Second Circuit pause. The court acknowledged the "substantial harm to the children of the alien mothers as a result of the [Welfare Reform] Act,"¹⁹⁰ but failed to consider how these mothers would bear the burden of caring for children who suffered from debilitating physical and mental conditions.¹⁹¹ The district court recognized this harm suffered by the plaintiffs, but only in relation to upholding their children's rights.¹⁹² This burden, disparately cast on a group of women for whom the Supreme Court would require extra solicitude if this were a case arising under state law,¹⁹³ should have commanded more of the Second Circuit's attention. When a federal law discriminates against an immigrant population in the distribution of welfare benefits, as in *Lewis*, courts should heed Justice Marshall's reminder that the rational basis test, "although deferential, 'is not a toothless one.'"¹⁹⁴

Extra solicitude is particularly warranted when the federal alienage classification fails to govern who may enter, and reside in, the country. When a federal alienage classification bears no relationship to Congress' immigration and naturalization goals, its underlying rationale becomes suspect. The *Lewis* courts found Congress' rationales for denying pregnant noncitizens need-based funding for prenatal care implausible.¹⁹⁵ Yet, neither court stopped to consider that Congress' plenary power over immigration and naturalization does not constitute a blanket grant of authority. Relying heavily and unwisely on *Mathews v. Diaz*,¹⁹⁶ the *Lewis* courts failed to check whether Congress acted within the scope of its constitutional authority, and thus, undermined their roles as guardians of constitutional rights.

¹⁹⁰ *Lewis VII*, 252 F.3d 567, 579 (2d Cir. 2001).

¹⁹¹ It appears that the plaintiffs argued that "a heightened level of scrutiny is appropriate to the extent that [they] are asserting the harm to the children they will bear," but they somehow hinged this claim on gender-based discrimination. See *id.* at 582. The Second Circuit's brief discussion of this claim makes its contours difficult to discern. However, the argument remains that the court failed to consider how the burden of caring for disabled children disparately impacted the *plaintiff mothers*.

¹⁹² See *Lewis VI*, 111 F. Supp. 2d 142, 164, 185 (2000).

¹⁹³ See *Graham v. Richardson*, 403 U.S. 365, 376 (1971).

¹⁹⁴ *Lyng v. Int'l Union*, 485 U.S. 360, 375 (1988) (Marshall, J., dissenting) (citations omitted).

¹⁹⁵ See discussion *supra* Part II.A.

¹⁹⁶ 426 U.S. 67 (1976).

III. REIGNING IN CONGRESS' PLENARY POWER

The Supreme Court held for the first time that the Fifth Amendment Due Process Clause protects noncitizens in *Wong Wing v. United States*.¹⁹⁷ Justice Field explained that “[a] resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.”¹⁹⁸ Unfortunately, the Court has failed to give full effect to this equal protection guarantee. Judicial review of federal laws that in any way involve immigration policy is so extremely deferential that courts virtually abandon their judicial role.¹⁹⁹ Applying *Mathews*, courts have provided little more than rubber stamp approval of laws that discriminate against immigrants.

Yielding to Congress’ assertion of power, the Second Circuit and district court discarded their findings that denying access to prenatal care will not engender self-reliance, deter immigration or save money. Binding their discussions with exhaustive quotation of *Mathews*, both courts gave the plaintiffs’ equal protection claim little more than a cursory review.²⁰⁰ Although the Second Circuit considered the federal government’s reasons for depriving noncitizens prenatal care “dubious,”²⁰¹ it never questioned Congress’ authority to discriminate against noncitizens on such flimsy grounds. Other federal courts have joined the Second Circuit in dispensing with thorough analysis, along with their judicial role as constitutional guardians, as soon as their ears caught the phrase “immigration policy.”

For example, in *Aleman v. Glickman*,²⁰² the Ninth Circuit rejected the equal protection claim of a sixty-two-year-

¹⁹⁷ 163 U.S. 228 (1896).

¹⁹⁸ *Id.* at 242 (Field, J., concurring in part and dissenting in part).

¹⁹⁹ *Mathews*, 426 U.S. at 80; see *Lewis VI*, 111 F. Supp. 2d 142, 170 (E.D.N.Y. 2000).

²⁰⁰ *Lewis VII*, 252 F.3d 567, 582-83 (2d. Cir 2001); *Lewis VI*, 111 F. Supp. 2d at 182. The district court, however, noted that *Lewis VI* differed from Supreme Court precedent, in that the plaintiffs’ claim “does not directly relate to Congress’ ‘broad power to determine which classes of aliens may lawfully enter the country.’ . . . [R]ather, the [challenged] provision concerns the provision of welfare benefits to aliens.” *Lewis VI*, 111 F. Supp. 2d at 181 (citing *Fiallo v. Bell*, 430 U.S. 787, 794 (1977)).

²⁰¹ *Lewis VII*, 252 F.3d at 583.

²⁰² 217 F.3d 1191 (9th Cir. 2000).

old noncitizen denied food stamps under the Welfare Reform Act after she divorced her citizen husband of nineteen years.²⁰³ Unlike the Second Circuit in *Lewis*, the Ninth Circuit at least recognized the force of Aleman's argument that congressional power over the allocation of public welfare benefits does not stem from the same source of congressional power over immigration policy.²⁰⁴ Like the Second Circuit, however, the Ninth Circuit applied *Mathews* and, therefore, remained impervious to the challenged law's irrational basis.²⁰⁵ The court expressed discomfort with its ultimate decision, but, compelled by *Mathews*, it dared not question the contours of congressional authority.

Every federal court that has entertained equal protection challenges to discrimination under the Welfare Reform Act has sanctioned its inequity under the rational basis test.²⁰⁶ These courts never questioned the precedent on which their holdings relied, and have concluded with little difficulty that "the decision to discriminate among aliens in the provision of welfare benefits is a decision that lies within Congress' plenary power over immigration."²⁰⁷

The courts deferentially bow to Congress by mistaking meaningful judicial review for interference with national immigration policy.²⁰⁸ Shrinking under "the blinding power of the word 'plenary,'"²⁰⁹ the federal courts are failing to recognize that Congress' plenary power over immigration and naturalization ends where its laws no longer implicate immigration and naturalization policy. As Lawrence Tribe has argued:

[o]utside the context of entry, stay, and naturalization, congressional authority to . . . draw lines . . . among aliens in the distribution of benefits, loses its clear connection to considerations of national

²⁰³ *Id.* at 1201. Widowed, but not divorced, noncitizens are entitled to public benefits under the Welfare Reform Act. *See id.* at 1195.

²⁰⁴ *See id.* at 1199.

²⁰⁵ *Id.* at 1197.

²⁰⁶ *See Chicago v. Shalala*, 189 F.3d 598 (7th Cir. 1999); *Rodriguez v. United States*, 169 F.3d 1342 (11th Cir. 1999); *Kiev v. Glickman*, 991 F. Supp. 1090 (D. Minn. 1998); *Abreu v. Callahan*, 971 F. Supp. 799 (S.D.N.Y. 1997). *But cf. Aliessa v. Novello*, 96 N.Y.2d 418, 754 N.E.2d 1085, 730 N.Y.S.2d 1 (2001) (applying strict scrutiny to a state law enacted pursuant to the Welfare Reform Act and declaring the law unconstitutional under both the federal and state constitutions).

²⁰⁷ *Rodriguez*, 169 F.3d at 1349.

²⁰⁸ *Id.* (quoting *Mathews v. Diaz*, 426 U.S. 65, 82 (1976)).

²⁰⁹ T. Alexander Aleinikoff, *Here and There: Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 869 (1989).

sovereignty and foreign policy; outside those limited contexts courts should thus feel freer to limit congressional power.²¹⁰

The Constitution does not explicitly or clearly define Congress' "broad power" over immigration and naturalization.²¹¹ Nor must the Constitution be read to authorize Congress' power to discriminate against noncitizens residing in this country with the government's permission. As one scholar proposed, analysis of Congress' authority to deprive noncitizens access to federal public benefits based on alienage classifications should move beyond *Mathews* and ask:

To what extent do national concerns with protecting the boundaries of territory and membership properly structure the status of noncitizens currently residing in the national territory and participating in national life?²¹²

Advancing several justifications for elevated constitutional protection of noncitizens' rights, some scholars argue that the Constitution limits the vast power *Mathews* accords Congress.²¹³ Although academics propose multiple theories for constraining *Mathews*'s "unbridled discretion,"²¹⁴ they share common normative ground in demanding equitable

²¹⁰ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 5-18, 975 (3d ed. 2000). The Ninth Circuit recognized this argument in *Aleman v. Glickman*, 217 F.3d 1191, 1195 (9th Cir. 2000). However, the court expressed its resignation: "Although this argument may have some logical merit, it is foreclosed by *Diaz*." *Id.*

²¹¹ U.S. CONST. art. I, § 8, cl. 3 (providing power "[t]o regulate Commerce with foreign Nations"); U.S. CONST. art. I, § 8, cl. 4 (providing for Congress' authority "[t]o establish an uniform Rule of Naturalization"); U.S. CONST. art. I, § 8, cl. 10 (providing for the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations"); U.S. CONST. art. I, § 8, cl. 11 (authorizing power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"); U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation"); U.S. CONST. art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports"); U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with . . . a foreign Power"); U.S. CONST. art. II, § 2, cl. 2 (requiring "two-thirds of the Senators present concur" on the Executive's treaty-making, and the "Advice and Consent of the Senate" for appointment of ambassadors).

²¹² Bosniak, *supra* note 1, at 1055-56.

²¹³ See, e.g., TRIBE, *supra* note 210; Aleinkoff, *supra* note 209; Bosniak, *supra* note 1, at 1056; Gerald Rosberg, *Strangers to the Constitution: Immigrants in American Law: Discrimination Against the "Nonresident" Alien*, 44 U. PITT. L. REV. 399 (1983); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965 [hereinafter *Polishing the Tarnished Golden Door*].

²¹⁴ Scaperlanda, *Polishing the Tarnished Golden Door*, *supra* note 213, at 1031.

treatment of individuals whom Congress has admitted into the national community.²¹⁵ *Mathews* rejected the notion that the Constitution's prohibition against disparate treatment curbs Congress' power to discriminate against noncitizens legally residing in this country.²¹⁶ The Court's imperviousness to the fact that the distribution of public benefits often fails to implicate national foreign policy, however, places *Mathews*'s logical underpinnings on untenable grounds.

Courts diminish the Constitution's guarantee of equal protection of the laws by "wrongly assum[ing] that every federal regulation based on alienage is necessarily sustainable as an exercise of the immigration power."²¹⁷ Professor Linda Bosniak challenges the Court's sweeping assumptions in *Mathews* by questioning what the Court took for granted: "whether discriminatory treatment of aliens is to be understood as a legitimate exercise of the government's power to regulate membership or as an illegitimate violation of their rights as persons."²¹⁸

Indeed, when addressing alienage classifications that restrict a noncitizen's participation in a state's political life, the Court distinguishes the state's power to regulate membership from its power to discriminate against noncitizens in the distribution of welfare benefits.²¹⁹ In *Cabell v. Chavez-Salido*,²²⁰ it explained:

[T]he Court has confronted claims distinguishing between the economic and sovereign functions of government. This distinction has been supported by the argument that although citizenship is not a relevant ground for the distribution of economic benefits, it is a relevant ground for determining membership in the political community.²²¹

²¹⁵ See, e.g., MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 55-61 (1983) (arguing that allowing individuals to reside and work within national borders, but denying those individuals equal political and social benefits, creates a caste-like society); Scaperlanda, *Polishing the Tarnished Golden Door*, *supra* note 213, at 1028 (arguing that the Court's concept of national sovereignty in *Mathews* is outmoded, "since nation-states have agreed that even sovereigns must abide by extra-sovereign obligations in the realm of human rights").

²¹⁶ *Mathews v. Diaz*, 426 U.S. 67, 78-79 (1976).

²¹⁷ Aleinikoff, *supra* note 209, at 869.

²¹⁸ Bosniak, *supra* note 1, at 1137-38.

²¹⁹ See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982).

²²⁰ *Id.*

²²¹ *Id.* at 438.

Contrasted with its treatment of federal laws, the Court's closer embrace of equal protection for noncitizens under state laws, in cases like *Graham v. Richardson*,²²² has produced doctrinal inconsistencies and yielded unstable constitutional protections. Since alienage classifications are "suspect" under state law, courts should at least approach challenges to federal classifications of noncitizens with sensitivity to the type of power Congress actually wields under the guise of its immigration authority.

When the Court invalidates a state law that discriminates against noncitizens in the distribution of public benefits, but upholds the very same federal law under lopsided equal protection review, one cannot help but question whether Congress' power over immigration and naturalization justifies the disparate results. A cynic might note that Congress could attempt to broaden its power base, after failing to apply its immigration powers effectively, by taking advantage of the judiciary's deference.²²³ In the case of *Lewis*, however, a more plausible rationale for Congress' discrimination against noncitizen women is its desire to appear responsive to a perceived national welfare crisis.

The Second Circuit expressed no discomfort in relying on *Mathews* to deny the *Lewis* plaintiffs their right to federal funding for prenatal care. Assuming an extraordinarily deferential position from the outset of its inquiry, the court skirted a critical level of analysis. The court presumed that Congress' immigration and naturalization power authorizes it to deny noncitizens, lawfully residing in this country, need-based funding for prenatal care. This presumption is without merit. If the Second Circuit had evaluated the actual sources of

²²² 403 U.S. 365 (1971); see also *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) ("Our standard of review of statutes that treat aliens differently from citizens requires a greater degree of precision.").

²²³ In *Plyler v. Doe*, 457 U.S. 202 (1982), the Court hinted at this possibility in discussing the plight of illegal immigrants:

Sheer incapability or lax enforcement of the laws barring entry into this country . . . has resulted in a substantial "shadow population" of illegal immigrants—numbering in the millions—within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.

Id. at 218-19. However, the Court later reiterated that in the realm of the federal government's power over immigration and naturalization, "[t]he obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field." *Id.* at 219 n.19.

congressional power under the full lens of equal protection jurisprudence, it may have found its deferential posture both inappropriate and uncomfortable.

CONCLUSION

Lewis demonstrates that the sweeping expanse of immigration powers engendered by *Mathews* can swallow the Equal Protection Clause whole. If the courts had not used *Mathews* as license to forego actual consideration of the plaintiffs' equal protection claim, they would have held that denying immigrant women prenatal care funding is wholly unrelated to the Welfare Reform Act's objectives. Peering into the chasm in this law's logic, a more plausible explanation for restricting federal funding in this case emerges: Immigrant women make an easy target in the war against welfare. *Lewis* reminds us that when courts lower the bar of judicial review to a subterranean level, turning a blind eye toward the possibility of constitutional transgressions, they impoverish the Constitution's protections.

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