

ALIESSA AND EQUAL PROTECTION FOR IMMIGRANTS

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INTRODUCTION

“All of our people all over the country—except the pure-blooded Indian—are immigrants or descendants of immigrants, including even those who came over here on the Mayflower.” This sound reminder was delivered to Americans by President Franklin D. Roosevelt in a 1944 campaign speech. Over 50 years later, Congress, a body comprised of those descendants of immigrants, has enacted a bill which eliminates Medicaid coverage for many legal immigrants. New York State has followed Congress’ lead.¹

So observed New York State Supreme Court Justice Sheila Abdus-Salaam as she began her legal analysis of New York’s 1997 abolition of state-funded medical assistance coverage for lawful United States immigrants.² The critical constitutional question confronting Justice Abdus-Salaam was a first in American jurisprudence: namely, whether a state’s discriminatory policies against lawful immigrants are countenanced under the Equal Protection

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1. *Aliessa v. Whalen*, 694 N.Y.S.2d 308, 309 (Sup. Ct. 1999) (citing JOHN BARTLETT, *FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES, AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE* 973 (Emily Morison Beck ed., 14th ed. 1968)) (footnote omitted), *modified in part on reconsideration*, Index No. 403748/98 (N.Y. Sup. Ct. June 29, 1999), *aff’d in part and rev’d in part sub nom. Aliessa v. Novello*, 712 N.Y.S.2d 96 (App. Div. 2000), *rev’d sub nom. Aliessa ex rel. Fayad v. Novello*, 754 N.E.2d 1085 (N.Y. 2001) (citation omitted).

2. In these comments, the term “lawful immigrant” means a lawful immigrant who has not become a United States citizen.

Clause of the United States Constitution when they are specifically authorized by the Congress.

The court “regrettably” held that they are.³ In June 2001, however, in a landmark decision, New York State’s highest court held that states may not discriminate against lawful immigrants on the basis of alienage without violating the equal protection guarantees of the federal Constitution, notwithstanding congressional authorization to do so.⁴

Before 1997, New York’s medical assistance program had provided health care coverage to equally needy United States citizens and lawful immigrants without distinction since the program’s inception in 1966.⁵ In 1996 though, under the rubric of “welfare reform,” Congress expressly authorized the fifty states to refuse to provide state-funded cash and medical assistance benefits to many categories of lawful immigrants, even though states provide such benefits to United States citizens.⁶ Spurred by congressional blessing, New York State dramatically altered its medical assistance program in August 1997 by prohibiting many categories of legal immigrants from receiving state-funded medical assistance for five years.⁷

Thus, the stage was set for the nation’s first legal battle over the constitutionality of congressionally authorized state discrimination

3. *Aliessa v. Whalen*, Index No. 403748/98, slip op. at 4, 7 (N.Y. Sup. Ct. June 29, 1999). In reaching her conclusion, Justice Abdus-Salaam felt constrained to follow *Alvarino v. Wing*, 690 N.Y.S.2d 262 (App. Div. 1999), which had been decided the previous month. In *Alvarino*, the intermediate appeals court rejected, with little analysis, plaintiffs’ equal protection challenge to New York State’s state-funded food stamp program that excluded certain categories of lawful immigrants. *Id.* at 263. In *Aliessa ex rel. Fayad v. Novello*, 754 N.E.2d 1085 (N.Y. 2001) (“*Aliessa*”), which reversed the First Department’s *Aliessa* decision, the Court of Appeals’ legal analysis did not mention the lower court’s *Alvarino* decision, *Alvarino v. Wing*, 684 N.Y.S.2d 845 (Sup. Ct. 1998).

4. *Aliessa ex rel. Fayad*, 754 N.E.2d at 1098–99.

5. See N.Y. SOC. SERV. LAW § 366 (McKinney 1996).

6. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104–193, §§ 411–412, 110 Stat. 2105 (codified as amended at 8 U.S.C. §§ 1621–1622 (2000)). PRWORA also banned *federally funded* cash and medical assistance benefits for many categories of lawful immigrants for a five-year period. *Id.* §§ 401–403, 8 U.S.C. §§ 1611–1613 (2000). Relying on the Congress’s paramount constitutional right to regulate immigration, the Supreme Court has consistently upheld the Congress’s right to discriminate against lawful immigrants in the provision of federally funded benefits. *E.g.*, *Mathews v. Diaz*, 426 U.S. 67, 82–83 (1976) (holding that “it is unquestionably reasonable for Congress to make an alien’s eligibility depend on both the character and the duration of his residence”).

7. N.Y. SOC. SERV. LAW § 122 (Consol. 1998).

against lawful immigrants.⁸ Public interest lawyers and immigrants' advocates throughout New York State began to receive complaints from low-income immigrants whose Medicaid coverage had been terminated suddenly after the New York State Department of Social Services implemented New York's new immigrant-related Medicaid coverage rules on September 12, 1997.⁹ In 1998, representing several seriously ill immigrants who faced immediate termination of medical coverage solely as a result of their immigrant status, two legal services colleagues and I commenced a class action in state court in New York City to enjoin New York's new discriminatory Medicaid policy.¹⁰

Some two and a half years later, after the litigation had journeyed through the judicial system, the New York State Court of Appeals unanimously ruled that the federal Constitution's Equal Protection Clause prohibits states from discriminating against lawful immigrants in the provision of state-funded benefits, notwithstanding the Congress's explicit imprimatur.¹¹ The court's analysis lays the framework for challenging the constitutionality of other states' policies and programs that discriminate against state residents solely on account of their immigration status.

These comments will focus on the federal and state legislation leading to the New York Court of Appeals' historic decision, the court's legal analysis, and the enormously significant implications of the court's decision.

I. FEDERAL AND STATE LEGISLATION LEADING TO ALIESSA

A. *New York State's Medicaid Program*

Unlike the constitutions of many other states, New York State's constitution mandates New York to protect and promote the health

8. As discussed *infra* note 70 and accompanying text, in *Graham v. Richardson*, 403 U.S. 365 (1971), the Supreme Court disputed an assertion that the federal law at issue authorized states to discriminate against lawful immigrants. Not until *Aliessa* had any state or federal court reviewed the constitutionality of state discrimination against lawful immigrants in state-funded programs pursuant to specific congressional authorization.

9. N.Y.S. Department of Social Services, GIS Message 97 TA/DC022, at <http://www.wnyc.net/pb/docs/gis97tadc022.pdf> (Sept. 12, 1997).

10. My co-counsel in *Aliessa* were New York City lawyers Elisabeth R. Benjamin, Esq., M.S.P.H., of the Legal Aid Society of New York, and Constance P. Carden, Esq., of the New York Legal Assistance Group.

11. *Aliessa ex rel. Fayad v. Novello*, 754 N.E.2d 1085, 1094–99 (N.Y. 2001).

of all its residents, and particularly those in need. Article XVII of the New York State Constitution provides:

The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature from time to time may determine The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.¹²

Since 1966, New York State has met its obligations under these provisions by providing health insurance to indigent and low-income New Yorkers through its medical assistance program, commonly known as Medicaid.¹³ New York's Medicaid program pays for necessary medical, dental, and remedial health care for New Yorkers who meet the financial and categorical eligibility requirements.¹⁴

New York's Medicaid program is funded in two ways. First, like every other state in the country, New York participates in the federally funded Medicaid program that was created by Congress in 1965.¹⁵ Under this program, the federal government matches the funds contributed by a participating state to provide medical coverage to specified categories of the state's low-income residents. The categories of low-income residents who are entitled to receive federally funded medical coverage include the elderly, blind, disabled, pregnant women, children, single parent families, and families in which there is a parental deprivation.¹⁶

Second, New York provides state-funded Medicaid to low-income residents of New York State who are not categorically eligible for federally funded Medicaid. State-funded Medicaid is provided to New York residents between the ages of 21 and 65 who are not certified blind or disabled, who are caring for minor children, and whose income and resources are below New York State's cash assistance levels.¹⁷

12. N.Y. CONST. art. XVII, §§ 1, 3.

13. N.Y. SOC. SERV. LAW § 363 (McKinney 2001).

14. N.Y. SOC. SERV. LAW § 365-a(2) (McKinney 2001).

15. Social Security Amendments of 1965, Pub. L. 89-97, § 121, 79 Stat. 286, 343 (codified as amended at 42 U.S.C. § 1396a (1996)).

16. 42 U.S.C. § 1396a(a)(10)(A) (1996).

17. N.Y. SOC. SERV. LAW § 366(1) (McKinney 2001).

B. Federal Personal Responsibility and Work Opportunity Act of 1996

Until 1996, lawful immigrants to the United States, including Lawful Permanent Residents and noncitizen residents who permanently reside in the United States under color of law (PRUCOL), were eligible for federally funded Medicaid if they satisfied the federal financial and categorical requirements.¹⁸ On August 22, 1996, President Bill Clinton signed into law one of his major programmatic achievements, the federal Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),¹⁹ which “end[ed] welfare as we know it.”²⁰ Among its other accomplishments, PRWORA restricts immigrants’ eligibility for certain federally funded public assistance benefits, such as Supplemental Security Income, Food Stamps, Temporary Assistance to Needy Families, and Medicaid.

Specifically, under title IV of PRWORA, many categories of lawful immigrants are rendered ineligible for federally funded Medicaid for five years or more, depending on their immigrant status.²¹ Title IV also bars federally funded Medicaid coverage for immigrants who are not classified as “[Q]ualified [A]liens.”²² Qualified Aliens who were lawfully residing in the United States before August 22, 1996, are, in large part, entitled to federally funded Medi-

18. Immigrants who are “PRUCOL,” or “Permanently Residing Under Color of Law,” are aliens who reside in the United States with the knowledge and/or permission or acquiescence of the United States Immigration and Naturalization Service. The United States General Accounting Office defines PRUCOL as “an umbrella term used for aliens who are legally residing in the United States but who do not fit into other alien categories.” U.S. General Accounting Office, Medicaid: Demographics of Nonenrolled Children Suggest State Strategies, GAO/HEHS-98-93 at 6 (1998). See *Farjam v. Comm’r*, 1995 WL 500477 (E.D.N.Y. 1995).

19. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

20. *Aliessa ex rel. Fayad v. Novello*, 754 N.E.2d 1085, 1090 (N.Y. 2001).

21. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, §§ 401-403.

22. “Qualified Aliens” are a statutorily defined subset of legal immigrants residing in the United States. “Qualified Aliens” include Lawful Permanent Residents (generally known as “green card holders”), designated refugees, immigrants who have been paroled into the United States for at least one year, immigrants whose deportation is withheld, conditional entrants, Cuban or Haitian entrants, and immigrants who are victims of domestic violence. See 8 U.S.C. § 1641(b)-(c) (2000). All other aliens, including PRUCOLs, are not “Qualified Aliens.” See 8 U.S.C. § 1641 (2000). Aliens who are not “Qualified Aliens” are ineligible for conventional federally funded Medicaid, and are entitled to limited Emergency Medicaid that covers only immediate trauma care. See 42 U.S.C. § 1396b(v) (2000); *Greenery Rehab. Group, Inc. v. Hammon*, 150 F.3d 226, 227-28 (2d Cir. 1998).

caid.²³ On the other hand, Qualified Aliens who entered the United States on or after August 22, 1996, are largely ineligible for federally funded Medicaid for five years,²⁴ or more, if a state elects to extend the ineligibility period.²⁵

Title IV of PRWORA also renders Non-Qualified Aliens, including PRUCOLs, ineligible for state-funded Medicaid unless a state enacts, after August 22, 1996, a new law that "affirmatively provides for such eligibility."²⁶ Similarly, Title IV gives states the option to grant or deny state-funded Medicaid to Qualified Aliens who are not eligible for federally funded Medicaid, subject to certain exceptions.²⁷

Finally, regardless of any federal or state restrictions, Title IV requires states to provide federally funded Emergency Medicaid to both Qualified Aliens (during their ineligibility periods) and to Non-Qualified Aliens.²⁸

C. *New York State's Welfare Reform Act of 1997*

Until August 4, 1997, New York residents who did not satisfy the federal Medicaid Act's categorical requirements, including most lawful immigrants, were eligible for state-funded Medicaid if they otherwise satisfied New York's financial eligibility requirements. These residents included financially eligible single and married adults without children who had never been eligible for federally funded Medicaid.²⁹

On August 4, 1997, the New York State Legislature adopted the Welfare Reform Act of 1997 that radically restructured New York's public assistance program and drastically modified New York's Medicaid program.³⁰ Taking advantage of PRWORA, the Legislature amended New York's Medicaid program to deny state-funded Medicaid coverage to lawful immigrants who, because of PRWORA, are ineligible for federally funded Medicaid coverage solely as a result of their immigrant status.³¹ Instead, New York's Welfare Re-

23. 8 U.S.C. § 1612(b) (2001).

24. 8 U.S.C. § 1613(a) (2001).

25. 8 U.S.C. § 1612(b)(1) (2001).

26. 8 U.S.C. § 1621(d) (2001).

27. 8 U.S.C. § 1622(a), (b) (2001).

28. 8 U.S.C. §§ 1611(b)(1)(A), 1613(c)(2)(A), 1621(b)(1) (2001).

29. N.Y. SOC. SERV. LAW § 366 (McKinney 1996).

30. 1997 N.Y. Laws 436.

31. N.Y. SOC. SERV. LAW § 122 (Consol. 1998). New York's 1997 Welfare Reform Act provided state-funded Medicaid coverage to three categories of lawful immigrants who are denied federally funded Medicaid coverage: (1) PRUCOL immigrants who were already living in nursing homes or in certain designated resi-

form Act enabled these New York immigrants to receive only extremely limited Emergency Medicaid, which covers only emergency care for immediate, life-threatening medical conditions.³²

II. EQUAL PROTECTION ANALYSIS IN *ALIESSA*

In the fall of 1998, my colleagues and I³³ filed a state court class action³⁴ alleging that New York's refusal to provide state-funded Medicaid coverage to otherwise eligible lawful immigrants, solely on account of their immigrant status, violated their constitutional right to equal protection under law.³⁵ The *Aliessa* litigation was brought by twelve lawful immigrants residing throughout New York State who migrated to New York from various countries, including Bangladesh, Belorussia, Ecuador, Greece, Guyana, Haiti, Italy, Malaysia, the Philippines, Syria, and Turkey.³⁶ The named immigrant plaintiffs were either Lawful Permanent Residents or

dential treatment facilities, and who were receiving Medicaid on August 4, 1997 (the enactment date of New York's Welfare Reform Act); (2) PRUCOL immigrants who were diagnosed with AIDS and who were receiving Medicaid on August 4, 1997; and (3) lawful immigrants who were paroled into the United States for less than one year but who legally resided in the United States for more than five years. N.Y. SOC. SERV. LAW § 122(1)(c), (d) (Consol. 1998).

32. N.Y. SOC. SERV. LAW § 122(1)(c) (Consol. 1998).

33. *See supra* note 10 and accompanying text.

34. The decision to litigate *Aliessa* in state court rather than federal court was not a facile one. A federal action would have been possible because plaintiffs' state constitutional claims could have been raised as supplemental claims under 28 U.S.C. § 1367(a) (1994) in conjunction with their federal constitutional claim. On the one hand, litigating in federal court was an appealing option because historically, the federal judiciary in New York State has been more receptive to federal constitutional claims than the state judiciary has been. On the other hand, plaintiffs' counsel believed that their state constitutional Article XVII claim was possibly stronger than their equal protection claims. *See supra* note 12 and accompanying text, and *infra* note 35 and accompanying text. But because federal courts are often averse to interpreting a state's constitutional provisions, it was possible they would abstain from deciding plaintiffs' Article XVII state constitutional claim. In the end, plaintiffs' counsel concluded that their odds of prevailing on at least one of their constitutional claims were better within the state judicial system.

35. *Aliessa v. Whalen*, Index No. 403748/98 (Abdus-Salaam, J.). Plaintiffs also alleged that New York's discriminatory Medicaid policy violated their right to care and support under Article XVII of the New York State Constitution. While not germane to this discussion, it is nonetheless noteworthy that the court of appeals found that New York's immigrant-related Medicaid restrictions violated plaintiffs' state constitutional rights under Article XVII. *Aliessa ex rel. Fayad v. Novello*, 754 N.E.2d 1085, 1092-93 (N.Y. 2001).

36. *Aliessa ex rel. Fayad*, 754 N.E.2d at 1088.

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PRUCOLs.³⁷ All suffered from potentially life-threatening illnesses.³⁸ But for the operation of New York's discriminatory Welfare Reform Act, each would have qualified for "Medicaid benefits funded solely by the state."³⁹

The first named plaintiff's story strikingly demonstrates the untenable position confronting New York's low-income lawful immigrants when their Medicaid was terminated. Mohamed Aliessa, forty-four years old when the lawsuit was filed, was a lawful PRUCOL immigrant from Syria who has lived in New York City with his wife and two United States citizen children for many years.⁴⁰ Until late 1997, Mr. Aliessa earned a living (on which he paid taxes) by driving a livery.⁴¹ In December 1997, however, Mr. Aliessa's life changed when, while working, he was struck by a car.⁴²

Mr. Aliessa was rushed to Bellevue Hospital in New York City, where he received emergency care.⁴³ As a result of his accident, he suffered a severe head injury and severe brain damage, paralysis of his right side, and constant spasms in his left side. In early 1998, after stabilizing Mr. Aliessa, Bellevue transferred him to a nursing home because he needed assistance to perform virtually all daily living activities, intensive physical and speech therapy, and the intense medical monitoring that is available at a nursing home.⁴⁴ Simply put, Mr. Aliessa needed the medical care provided at the nursing home to survive.⁴⁵

Because he had no health insurance and no income, Mr. Aliessa obtained Medicaid coverage to pay for his hospitalization and, at first, for his nursing home care.⁴⁶ On May 8, 1998, however, the Medicaid agency sent Mr. Aliessa a written notice that his Medicaid would be discontinued, effective May 25, 1998, solely because of his immigration status and the operation of New York's 1997

37. *Id.*

38. *Id.*

39. *Id.*

40. Plaintiff-Appellant Brief in Support of Appeal to the New York Court of Appeals at 4, *Aliessa ex rel. Fayad*, 754 N.E.2d 1085 (N.Y. 2001) (docket # 403748/98).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 4-5.

46. *Id.*

Welfare Reform Act.⁴⁷ Mr. Aliessa's Medicaid was continued only because of subsequent judicial intervention.⁴⁸

The story of 61 year-old Abdul Monir, another named plaintiff, is also illustrative. Mr. Monir is a retired farmer from Bangladesh.⁴⁹ In February 1998, Mr. Monir and his wife entered the United States as Lawful Permanent Residents to live in Brooklyn, New York, with their daughter, son-in-law, and two grandchildren, all of whom are United States citizens.⁵⁰

Several months after his arrival, Mr. Monir was rushed to Coney Island Hospital and treated for renal failure.⁵¹ The hospital diagnosed Mr. Monir with end stage renal disease and informed his family that he would require dialysis three times a week for the remainder of his life.⁵² The hospital found that Mr. Monir also suffers from diabetes, hypertension, high blood pressure, and a burst ulcer, for which he needs insulin and other medications.⁵³ Without dialysis and prescription medications, Mr. Monir's life would be in jeopardy.

After stabilizing his condition, the hospital took steps to discharge Mr. Monir to the community. Because he had no income or resources, and because his daughter could not afford to pay for his ongoing medical care, Mr. Monir applied for Medicaid coverage on March 28, 1998. On June 4, 1998, solely because of his immigrant status, the Medicaid agency denied Mr. Monir's application.⁵⁴ Only by virtue of the trial court's intervention was Mr. Monir able to return home with Medicaid coverage to pay for his critically needed medical care.⁵⁵

Without Medicaid coverage, the lives of Mr. Aliessa, Mr. Monir, and the other named and unknown class plaintiffs were in serious jeopardy. Because of the gravity of plaintiffs' circumstances, as well as their state and federal constitutional claims, all the litigants believed it was likely that the issues would be resolved ultimately by New York's highest court, if not the United States Supreme Court. Nonetheless, it was enormously encouraging when, on May 17,

47. *Id.*

48. *Aliessa ex rel. Fayad*, 754 N.E.2d 1085, 1092-93 (N.Y. 2001).

49. Plaintiff-Appellant Brief in Support of Appeal to the New York Court of Appeals at 5, *Aliessa ex rel. Fayad*, 754 N.E.2d 1085, (N.Y. 2001) (docket # 403748/98).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 5-6.

1999, the trial court found in plaintiffs' favor on both their state and federal constitutional claims.⁵⁶

Three days later, plaintiffs' counsels' elation was shattered when the same appellate court that would be reviewing the *Aliessa* trial court's decision categorically rejected nearly identical constitutional claims in *Alvarino v. Wing*, an earlier lawsuit that challenged New York's newly created state-funded food stamp program for some, but not all, lawful immigrants.⁵⁷ Within days, the *Aliessa* defendant predictably moved for a modification of the trial court's decision in light of *Alvarino*. On June 29, 1999, the trial court issued a decision reaffirming her state constitutional ruling on plaintiffs' behalf, but "regrettably" reversing her earlier favorable equal protection ruling due to *Alvarino*'s controlling precedent.⁵⁸ In a terse opinion issued on July 27, 2000, the intermediate appeals court rejected plaintiffs' state and federal constitutional claims in their entirety.⁵⁹

56. *Aliessa v. Whalen*, 694 N.Y.S.2d 308, 314 (Sup. Ct. 1999).

57. 690 N.Y.S.2d 308 (App. Div. 1999). New York's state-funded food stamp program for certain lawful immigrants was created in response to PRWORA's elimination of federally funded food stamps for most immigrants. See *supra* notes 19–20 and accompanying text.

Working in consultation with *Aliessa* counsel, *Alvarino* counsel elected not to pursue an appeal of the First Department's decision to the New York Court of Appeals because the underlying facts in *Aliessa* were far more compelling than those in *Alvarino*. At least three factors contributed to counsels' analysis. First, although New York's state-funded food stamp program deprives some lawful immigrants of food stamps, it provides food stamps to "those most likely to need help, that is, the elderly, the infirm and minors" who were present when New York's Welfare Reform Act was adopted. *Alvarino v. Wing*, 684 N.Y.S.2d 845, 848 (Sup. Ct. 1998). Second, although denying food stamps to certain categories of lawful immigrants, New York State's post-PRWORA Welfare Reform Act provides safety net assistance, which could be used to purchase food, to all needy lawful immigrants. N.Y. SOC. SERV. LAW § 122(1)(c). Third, unlike its state-funded Medicaid program, New York had never had a state-funded food stamp program prior to its post-PRWORA immigrant food stamp program. This program was codified in N.Y. SOC. SERV. LAW § 95(10) (Consol. 1998). Consequently, both *Aliessa* and *Alvarino* counsel agreed that their clients would be better served if the Court of Appeals were to analyze plaintiffs' state and federal constitutional claims first in the context of the *Aliessa* facts.

Given the force and breadth of the court of appeals' analysis in *Aliessa*, some advocates believe that New York's restricted state-funded food stamp program may be vulnerable to a successful challenge in new litigation. See *infra* text accompanying notes 89–90.

58. *Aliessa v. Whalen*, Index No. 403748/98, slip op. at 4 (N.Y. Sup. Ct. June 29, 1999). Notably, Justice Abdus-Salaam "urge[d] the Appellate Division to reconsider its ruling in *Alvarino*." *Id.* at 5.

59. *Aliessa v. Novello*, 712 N.Y.S.2d 96, 99 (App. Div. 2000).

Nearly a year later, on June 5, 2001, the New York Court of Appeals reversed the decision below, and held that despite congressional permission, the Equal Protection Clause bars a state from discriminating against lawful immigrants solely because of their immigrant status.⁶⁰ The court's 7-0 decision in *Aliessa ex rel. Fayad v. Novello* was the first in the nation to analyze the constitutionality of congressional delegation of discretion to the states to choose to implement discriminatory state policies. In its decision of first impression, New York's high court concluded that the United States and New York Constitutions bar Congress from doing so. Accordingly, the court ruled that New York's discriminatory state-funded Medicaid program infringed plaintiffs' constitutional right to equal protection of the laws.⁶¹

In analyzing the constitutionality of New York's discriminatory state-funded Medicaid program, the court of appeals acknowledged that the Constitution gives Congress the power and authority to establish and implement policies and practices directed at immigrants.⁶² Under Supreme Court doctrine, Congress has considerable latitude to implement such policies and practices, including those that discriminate against lawful immigrants.⁶³ Thus, congressionally created federal policies that discriminate against lawful immigrants do not violate equal protection principles if there is a "rational basis" for the discriminatory policy or practice.⁶⁴

On the other hand, as the court emphasized, the Constitution does not afford similar judicial deference to state-created policies and practices that discriminate against lawful immigrants. On the contrary, as a general premise, the Supreme Court's strict scrutiny test, rather than its rational basis test, must be applied to determine whether a state's policies that discriminate against lawful immigrants violate the Equal Protection Clause of the Fourteenth Amendment.⁶⁵ The court painstakingly explained why a magnified

60. *Aliessa ex rel. Fayad*, 754 N.E.2d 1085, 1094–99 (N.Y. 2001).

61. The state defendant chose not to pursue an appeal to the United States Supreme Court.

62. *Aliessa ex rel. Fayad*, 754 N.E.2d at 1096.

63. *Id.*

64. *See id.* at 1094–95.

65. *Id.* Under strict scrutiny, a state policy will withstand an equal protection challenge "only when the State can show that the law 'furthers a compelling state interest by the least restrictive means practically available.'" *Id.* at 1094 (quoting *Bernal v. Fainter*, 467 U.S. 216, 227 (1984)). And because the strict scrutiny test is so stringent, a state rarely is able to satisfy this test. New York State conceded the unconstitutionality of its discriminatory Medicaid policy under the strict scrutiny test. *See id.* at 1095.

level of scrutiny must apply to discriminatory state policies directed against lawful immigrants:

Heightened scrutiny is premised on the Supreme Court's view of the political process. The Court generally accords States broad discretion to create classifications in implementing economic and social welfare policy. . . . Recognizing, however, that "discrete and insular minorities" can be shut out of the political process, the Court has applied a more searching inquiry to statutes that draw classifications aimed at these groups. . . . Lawful resident aliens benefit our country in a great many ways. Like citizens, they contribute to our economy, serve in the Armed Forces and pay taxes, including, of course, taxes that fund State Medicaid. Nevertheless, aliens may not vote, which has historically inhibited their ability to protect their interests.⁶⁶

Thus, without more, New York's discriminatory state-funded Medicaid policy would have to pass the strict scrutiny test to survive constitutional muster.

In this situation, however, there was more. Specifically, in Title IV of PRWORA, the Congress explicitly gave states the option to discriminate against certain classes of immigrants in the provision of state-funded benefits.⁶⁷ Accordingly, argued counsel for New York, the State's discriminatory state-funded Medicaid policy was exempt from strict scrutiny analysis because it was expressly authorized by the Congress acting pursuant to constitutionally mandated authority over immigration.⁶⁸ As the court framed the fundamental constitutional question, "[The issue] is whether title IV can constitutionally authorize New York to determine for itself the extent to which it will discriminate against legal aliens for State Medicaid eligibility."⁶⁹

The issue facing the *Aliessa* court had never before been confronted squarely by any state or federal court.⁷⁰ In doing so, the court discussed in depth the ostensible tension between two consti-

66. *Id.* at 1095 (citations omitted).

67. *See supra* notes 26–27 and accompanying text.

68. *Aliessa ex rel. Fayad v. Novello*, 754 N.E.2d 1085, 1095–96 (N.Y. 2001).

69. *Id.* at 1096.

70. In *Graham v. Richardson*, 403 U.S. 365, 382 (1971), the Supreme Court suggested, in dicta, that a federal statute authorizing "discriminatory treatment of aliens at the option of States" would present "serious constitutional questions." The *Graham* Court observed that a "congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene [the] explicit constitutional requirement of uniformity." *Id.* at 382. Because the

tutional doctrines: the Congress's exclusive broad authority to control and regulate matters of immigration, and the states' obligation to refrain from discriminating against lawful immigrants solely because of their immigrant status. The key to the answer, according to the court, was in the constitutional provision that imposes the only limitation on Congress's exclusive authority to control and regulate immigration—the "Naturalization Clause."⁷¹

The Naturalization Clause of the United States Constitution empowers the Congress to "establish [a] uniform Rule of Naturalization."⁷² As analyzed by the court, both the Supreme Court's limited commentary regarding this Clause, and the Clause's constitutional history, make it plain that when the Congress exercises its authority over matters of immigration, it must do so to foster "national immigration interests,"⁷³ and must therefore do so with directives that are to be uniformly applied throughout all the states.⁷⁴

Given this single, but critical, constitutional limitation on congressional authority over immigration, the New York State Court of Appeals concluded, "[i]n the name of national immigration policy, [title IV of PRWORA] impermissibly authorizes each State to decide whether to disqualify many otherwise eligible aliens from State Medicaid."⁷⁵ Under these circumstances, New York's discriminatory state-funded Medicaid policy "must be evaluated as any other State statute that classifies based on alienage"⁷⁶ – that is, under the lens of strict scrutiny.⁷⁷ Thus, concluded the court, New York's dis-

Court found that no such "congressional enactment" existed, the issue remained unresolved in that case.

Similar to PRWORA, the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C. (2001)), granted temporary residency status to certain immigrants who applied within a limited time period, and authorized states to disqualify such lawful temporary residents from state-funded benefits for five years. 8 U.S.C. § 1255a(h)(1)(B)(1988). Wisconsin exercised this option statutorily, *see* Wis. STAT. § 49.45(27) (Supp. 1993), and New York exercised this option administratively, N.Y. Dep't of Soc. Servs., 88 ADM-22, 3 (May 18, 1988). No legal challenges were ever brought against these state directives, and the five-year period that immigrants would have had to wait for benefits under IRCA has long since passed. *See* Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 595 n.22 (1994).

71. U.S. CONST. art. I, § 8, cl. 4.

72. *Id.*

73. *Aliessa* ex rel. *Fayad*, 754 N.E.2d at 1098.

74. *See id.* at 1096-98.

75. *Id.* at 1098.

76. *Id.*

77. *Id.*

criminary state-funded Medicaid policy “violates the Equal Protection Clauses of the United States and New York State Constitutions insofar as it denies State Medicaid to otherwise eligible PRUCOLs and lawfully admitted permanent residents based on their status as aliens.”⁷⁸

III. IMPLICATIONS OF *ALIESSA* EX REL. *FAYAD* V. *NOVELLO*

Some commentators have observed that in recent years, there has been an emerging push for the devolution of immigration law and policy-making to the states.⁷⁹ After September 11, 2001, the day our American world changed, this trend will likely continue as states are called upon to respond to perceived and real threats from noncitizens. The *Aliessa* decision stands as a beacon of caution against federal delegation of discretionary options to the states with respect to the creation and implementation of state policies regulating and controlling lawful immigrants. Minimally, *Aliessa*’s analysis means that other provisions of PRWORA that are relied upon to justify state discrimination against lawful immigrants in the provision of public benefits are constitutionally suspect.⁸⁰

For example, a PRWORA provision, not discussed by the *Aliessa* court, authorizes states to deny state-funded cash assistance benefits to lawful immigrants who are ineligible for federally-funded cash assistance benefits.⁸¹ In 1997, under its delegated powers, Massachusetts enacted a new state-funded “Supplemental Transitional Aid to Families with Dependent Children” program to provide cash assistance benefits to needy lawful immigrants with children who were newly ineligible for federally funded cash assistance benefits.⁸² To be eligible for Supplemental Transitional Aid, lawful immigrants had to have resided in Massachusetts for six

78. *Id.* at 1098–99.

79. E.g., Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997).

80. As of March 1, 2002, only one court has cited *Aliessa* in a case challenging state discrimination against lawful immigrants. In *Kurti v. Maricopa County*, 33 P.3d 499, 506 (Ariz. Ct. App. 2001), the court invalidated a discriminatory policy in Arizona’s state-funded Medicaid program on equal protection grounds. Although it referenced *Aliessa*, the *Kurti* court found it unnecessary to reach the issues decided by *Aliessa* because the state statutes at issue did not mirror federal law. *Id.* at 502 n.5.

81. 8 U.S.C. § 1624 (2001).

82. See 1997 Mass. Legis. Serv. ch. 43, § 210 (West).

months.⁸³ In contrast, citizens and other legal immigrants eligible for federally funded cash assistance benefits are not subjected to any waiting period. Advocates for needy lawful immigrants sued in state court to challenge the state law's six-month restriction, arguing that it discriminates against lawful immigrants in derogation of the Equal Protection Clause.

In *Doe v. Commissioner*, decided in August 2002, the Massachusetts Supreme Judicial Court rejected the plaintiff's equal protection claim, ruling instead that the rational basis test applied to Massachusetts's discriminatory policy.⁸⁴ The Massachusetts high court carefully distinguished *Aliessa* by noting that New York's challenged law had terminated state-funded Medicaid benefits to lawful immigrants, while Massachusetts' challenged law had created a new state-funded program exclusively for immigrants. As the court noted, "it is undisputed that the Massachusetts Legislature was not required to establish the [Supplemental Transitional Aid] program."⁸⁵ Ironically, days before the court issued *Doe*, the Massachusetts Legislature eliminated the disputed program altogether, purportedly due to budgetary constraints.⁸⁶

Similarly, in response to PRWORA's termination of federally funded food stamp benefits, New York State created a state-funded food stamp program restricted to certain categories of lawful immigrants.⁸⁷ An equal protection challenge to New York's discriminatory state-funded food stamp program, decided before the court of appeals' decision in *Aliessa*, was unsuccessful before the intermediate appeals court.⁸⁸ In light of *Aliessa*, advocates filed subsequent litigation, currently underway, that challenges New York's discriminatory state-funded food stamp program.⁸⁹

Likewise, other PRWORA provisions that give states the option to discriminate against lawful immigrants that were not at issue in *Aliessa* are constitutionally questionable in light of *Aliessa*. Title IV of PRWORA gives states the option to extend the ineligibility period for federally funded benefits beyond the mandatory five years,⁹⁰ and the option to terminate eligibility for federally funded

83. *See id.*, §210(c)(3).

84. *Doe v. Comm'r*, 773 N.E.2d 404 (Mass. 2002).

85. *Id.* at 411.

86. *See* Act of July 29, 2002, ch. 184, § 2, 2002 Mass. Adv. Legis. Serv. (LEXIS).

87. N.Y. SOC. SERV. LAW § 95(10)(b) (Consol. 1998).

88. *Alvarino v. Wing*, 690 N.Y.S.2d 262 (App. Div. 1999).

89. *See Teytelman v. Wing*, No. 02-402767 (N.Y. Sup. Ct. New York County filed June 24, 2002).

90. 8 U.S.C. § 1612 (2001).

benefits for certain refugees and asylees after seven years.⁹¹ Unlike the state-funded benefits under review in *Aliessa*, these provisions deal with the provision of federally funded benefits to lawful immigrants. Nevertheless, *Aliessa*'s constitutional analysis is equally applicable inasmuch as these provisions give states the option to discriminate against lawful immigrants in the provision of these benefits, in derogation of the Naturalization Clause.⁹²

Aliessa's reach may also extend beyond the realm of publicly-funded benefit programs. At least one commentator has argued that the "aggravated felony" provision of the Immigration and Naturalization Act,⁹³ which requires the deportation of noncitizens convicted of a number of crimes under federal or state law, violates the Constitution's Naturalization Clause because it results in nonuniform immigration consequences for state criminal convictions due to varying state standards and definitions.⁹⁴ According to a recent survey of case law, the Supreme Court has never directly addressed the meaning of the Clause's "uniform rule" directive, and there is a paucity of lower court decisions that have analyzed the rule.⁹⁵ With the *Aliessa* decision, the parameters of the "uniform rule" requirement continue to be shaped.

Whether *Aliessa*'s conclusion that the Constitution's "uniform rule" mandate prohibits the Congress from giving states the option to treat lawful immigrants differently than other states treat them is propitious, benign, or undesirable will continue to be a matter of ongoing scholarly discourse.⁹⁶ From the vantage point of a civil rights advocate, however, *Aliessa*'s analysis is heartening. Especially in times of economic stress, it is the nearly universal experience of advocates that states will take advantage of their options to eradicate or reduce life-sustaining public benefits for their disadvantaged residents. Particularly in times of international political stress, it is the nearly universal experience of advocates that states will take advantage of their options to restrict and marginalize noncitizens. Conversely, it is rarely, if ever, the experience of advo-

91. 8 U.S.C. § 1612(b)(1), (b)(2)(A)(i) (2001).

92. The *Aliessa* court observed that these specific provisions are "directly in the teeth of *Graham* [*v. Richardson*] insofar as [they] allow[] the States to 'adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs.'" *Aliessa ex rel. Fayad*, 754 N.E.2d 1085, 1098 (N.Y. 2001) (quoting *Graham v. Richardson*, 403 U.S. 365, 382 (1971)) (emphasis added in *Aliessa*).

93. 8 U.S.C. §1101(a)(43) (2001).

94. See Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. REV. 1696, 1703 (1999).

95. *Id.* at 1705-06.

96. See *supra* notes 79-80 and accompanying text.

cates that states will take advantage of their options to provide more resources to low-income residents than to other residents, or that states will take advantage of their options to provide more resources to noncitizens than to citizens.

In short, the flexibility that the devolution of immigration authority from the Congress to the states may offer will operate, more likely than not, to the detriment of lawful immigrants, and low-income immigrants in particular. Clearly, *Aliessa*'s strict interpretation of the Constitution's "uniform rule" doctrine means that the Congress cannot permit a single state to exempt its immigrant residents from whatever draconian measures the Congress may decide to impose on them. Nevertheless, the odds are surely greater that if even a small number of states balk, the Congress will be hard-pressed to mandate states to impose compulsory discriminatory policies against every state's lawful immigrant residents in the context of a state's funded programs and policies.

CONCLUSION

In *Aliessa*, the New York Court of Appeals was both the first and the highest bench in the country to analyze the constitutionality of a congressional attempt to give states the option to discriminate against lawful immigrants. In doing so, the *Aliessa* court emphatically reaffirmed that lawful noncitizens must be treated as a protected class for constitutional equal protection purposes. Furthermore, the *Aliessa* court compellingly concluded that the Constitution does not permit the Congress to authorize states to discriminate against protected classes of persons, including lawful immigrants, in violation of the Equal Protection Clause. For these reasons, the importance of *Aliessa* should not be underestimated.

How *Aliessa* will affect future federal and state attempts to regulate lawful immigrants will be determined by future Congresses, future state legislatures, and future courts. That the *Aliessa* decision means that thousands of lawful immigrants, who pay taxes and contribute to the well-being of New York State, continue to be eligible for the same Medicaid benefits that citizens are entitled to have, is a profoundly gratifying reality today.

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