CROSSING THE BORDER OF PLENARY POWER: THE VIABILITY OF AN EQUAL PROTECTION CHALLENGE TO TITLE IV OF THE WELFARE LAW

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I. INTRODUCTION

On August 22, 1996, President Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the "Welfare Law").[1] This law restructured many government entitlement programs.[2] Title IV of the Welfare Law placed strict restrictions on legal aliens' access to public benefits.[3] The Balanced Budget Act of 1997 (the "Budget Act")[4] restores some of the benefits denied legal aliens by the Welfare Law. However, the Budget Act still leaves in place most of Title IV's original restrictions.

These restrictions, on their face, treat legal aliens differently from citizens[5] and, thus, raise equal protection concerns. This Note addresses one concern in particular: Will an equal protection challenge to Title IV, as modified

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1. Pub. L. No. 104–193, 110 Stat. 2105 (codified as amended in scattered sections of 8 U.S.C. and 42 U.S.C.).

2. *See id.* The Welfare Law includes statutes that address a wide range of topics, including: block grants for temporary assistance for needy families, supplemental security income, child nutrition programs, food stamps, and commodity distribution. *Id.*

3. *See* 8 U.S.C. §§ 1183a, 1612–1613, 1622, 1631–1632 (Supp. II 1996). An "alien" is defined as "any person not a citizen or national of the United States." *Id.* § 1101(a)(3) (1994). For the purposes of this Note, the term "legal alien" is given the same definition as "qualified alien," the specific term used in Title IV to include aliens who, under the Immigration and Naturalization Act, are: (1) lawfully admitted for permanent residence, (2) granted asylum, (3) admitted as refugees, (4) paroled into the United States for a period of at least one year, (5) having their deportation withheld, or (6) granted conditional entry. *Id.* § 1641(b) (Supp. II 1996).

4. Pub. L. No. 105–33, 111 Stat. 251 (1997).

5. That is, the restrictions only apply to legal aliens and not to citizens. Note that such classifications based on alienage are distinct from race and national origin classifications. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1465–68 (1988).

by the Budget Act,[6] succeed in the United States Supreme Court? Such a legal challenge will face substantial doctrinal obstacles because Congress, not the states, drafted the Welfare Law. The Supreme Court generally upholds congressional classifications based on alienage under rational basis review.[7] This Note suggests how a litigant might proceed (and succeed) despite these obstacles and overturn at least some of the provisions of Title IV.[8]

Part II of this Note highlights two categories of restrictions in Title IV following the Budget Act that affect the rights of legal aliens. Part II also describes Title IV's potential impact on legal aliens in order to demonstrate the significance of a legal challenge. Part III explains judicial scrutiny generally and then identifies the doctrinal obstacle, rational basis review, that a challenger to Title IV will face. Part IV offers three strategies to obtain heightened judicial review despite this obstacle. This Note concludes that if the challenger to Title IV persuades the Court to apply heightened scrutiny, the Court may hold some, if not all, of the provisions unconstitutional.

II. TITLE IV OF THE WELFARE LAW: RESTRICTIONS REMAINING AFTER THE BUDGET ACT AND THEIR IMPACT

This section provides a brief overview of the major restrictions in Title IV that affect legal aliens after the passage of the Budget Act and the forecasted impact of such restrictions on legal aliens.[9]

A. Legal Aliens' Access to Benefits Prior to the Welfare Law

Prior to the Welfare Law, legal aliens had access to most public benefits, though some had to wait several years before receiving public assistance. Legal aliens—who were not refugees or asylees—were eligible for public benefits after living in the country for three to five years.[10] Refugees and asylees, from the

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6. This Note focuses primarily on the Budget Act's major modifications to the Welfare Act that affect legal aliens. Specifically, this Note will not address in detail other modifications in the Budget Act, including changes to the refugee status of Cuban, Haitian, and Amerasian immigrants. *See* Balanced Budget Act of 1997 §§ 5302(c), 5306, 111 Stat. at 599–602.

7. See *infra* Part III.B.

8. This Note only focuses on Title IV as a potential violation of the Equal Protection Clause. See *Shvartsman v. Callahan*, No. 997–C–5229 (N.D. Ill. filed July 24, 1997), for an argument that Title IV violates the Due Process Clause.

9. See Charles Wheeler & Josh Bernstein, *New Laws Fundamentally Revise Immigrant Access to Government Programs: A Review of the Changes, in* IMMIGRANTS AND THE '96 WELFARE LAW 1 (National Immigrant Law Ctr., Los Angeles, Cal. 1996) [hereinafter, Wheeler & Bernstein, *New Laws*], for a much more comprehensive description of Title IV. *See also* Charles Wheeler & Josh Bernstein, *Welfare Bill Impacts Immigrants the Hardest*, BENDER'S IMMIGR. BULL., Sept. 1996, at 3.

10. Michael Fix & Wendy Zimmerman, *When Should Immigrants Receive Public Benefits, in* 18 IN DEFENSE OF THE ALIEN 75, 76 (Lydio F. Tomasi ed., 1995).

moment of their entry into the United States, received public benefits similar to those available to naturalized citizens.[11]

In theory, the sponsor, who is the person who petitioned for the admission of the alien into this country, was available to support the alien.[12] In practice, the sponsor could refuse to provide for the alien he sponsored without affecting the alien's access to public benefits.[13] Even though the government could deport legal aliens who relied on public benefits, such deportation rarely occurred.[14]

B. Title IV's Restrictions After the Budget Act

Title IV's restrictions on legal aliens'[15] access to welfare benefits consist of (1) provisions that restrict legal aliens' access to federal public benefits and (2) provisions that permit the states to limit legal aliens' access to state public benefits.

1. Federal Public Benefit Restrictions

Restrictions in Title IV, as modified, are threefold: Food Stamp and Supplemental Security Income ("SSI") restrictions, other means-tested benefit restrictions, and "sponsor-deeming" restrictions.[16]

a. SSI and Food Stamps

Title IV makes most legal aliens ineligible for SSI and Food Stamps.[17] Three groups of legal aliens are not restricted from these benefits under Title IV: refugees and asylees in the country less than five years; veterans and members of the United States Armed Forces; and lawful permanent residents who have worked, or can be credited as having worked, at least ten years for Social Security purposes.[18]

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11. *Id.*

12. *Id.* During aliens' first few years in the United States, the income of their sponsors was considered available to support them. *Id.*

13. *Id.* at 87.

14. *Id.* at 76–77.

15. Title IV actually refers to legal aliens as "qualified aliens." *See supra* note 3.

16. 8 U.S.C. §§ 1183a, 1612–1613, 1631–1632 (Supp. II 1996)

17. 8 U.S.C. § 1612(a)(1), (3) (Supp. II 1996). SSI is a need-based program, consisting of a monthly stipend, available to low-income persons who are 65 years or older, blind, or disabled. 42 U.S.C. §§ 1381–1383 (1994); Wheeler & Bernstein, *New Laws*, *supra* note 9, at 2. The food stamp program, which provides coupons to low-income persons to buy food at participating stores, is the major food assistance program in the United States for the poor. *See* 7 U.S.C. §§ 2011–2036 (1994 & Supp. II 1996); Wheeler & Bernstein, *New Laws*, *supra* note 9, at 2.

18. 8 U.S.C. §§ 1612(a)(2)(A)–(C), 1645 (Supp. II 1996). The ten-year work requirement actually consists of "forty qualifying quarters." *Id.* § 1612(a)(2)(B)(ii). The

The Budget Act reduces the severity of this restriction by restoring SSI and its derivative Medicaid eligibility to all legal immigrants who were receiving SSI and to all "qualified" legal aliens who were lawfully in the United States on the date of the Welfare Law's enactment.[19] The Budget Act also extends the refugee and asylee exemption from five to seven years.[20]

b. Federal Means-Tested Public Benefits

Title IV makes most legal aliens ineligible for federal, "means-tested" benefits until they live legally in the United States for five years.[21] Recently published definitions by the Social Security Administration and the Federal Department of Health and Human Services indicate that these federal benefit restrictions specifically refer to SSI and food stamps, already denied most legal aliens, as well as Temporary Assistance for Needy Families ("TANF") and Medicaid.[22]

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alien herself does not need to work ten years. An alien is credited with the qualifying quarters of coverage worked by a parent if the alien is under the age of eighteen, or the qualifying quarters worked by a spouse while married to the alien. 8 U.S.C. § 1645. Qualifying quarters are not credited if earned while a parent or spouse is receiving a federal, means-tested public benefit. *Id.*; *see also* Wheeler & Berstein, *New Laws*, *supra* note 9, at 2–4.

19. Balanced Budget Act of 1997, Pub. L. No. 105–33, § 5301, 111 Stat. 251, 597–98; *see also Balanced Budget Act Restores SSI to Many Legal Immigrants*, IMMIGR. RTS. UPDATE (National Immigration Law Ctr., Los Angeles, Cal.), Aug. 29, 1997, at Special Memo [hereinafter *Balanced Budget Act Restores SSI*].

20. Balanced Budget Act of 1997 § 5302, 111 Stat. at 598; 8 U.S.C. § 1612(b)(2)(A); *see also Balanced Budget Act Restores SSI*, *supra* note 19, at Special Memo.

21. 8 U.S.C. § 1613. Exceptions are made for refugees and asylees, veterans, members of the armed forces, and their families. *Id.* § 1613(b).

22. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 62 Fed. Reg. 45256, 45258 (1997); *see also HHS and SSA Define "Means-Tested Federal Public Benefit" for Immigrants Under the 1996 Welfare Bill*, IMMIGR. & WELFARE UPDATE (National Immigration Law Ctr., Los Angeles, Cal.), Aug. 29, 1997, at U–1, U–1 [hereinafter *HHS and SSA Define "Means-Tested Federal Public Benefit"*]. TANF, formerly Aid to Families with Dependent Children ("AFDC"), provides money to states for cash payments, vouchers, social services, or other assistance to low income families with children. *See* 42 U.S.C.A. §§ 601–618 (West 1991 & West Supp. 1997); Wheeler & Bernstein, *New Laws*, *supra* note 9, at 5. "Medicaid provides reimbursement for doctors' services, hospital care, and prescription drugs to participating providers who care for low-income persons." *Id.*

As of August, 1997, the Clinton administration had yet to decide whether the new children's health initiative, financed under the Budget Act, will also fall within the federal, means-tested public benefit restrictions. *HHS and SSA Define "Means-Tested Federal Public Benefit," supra*, at U–1. Means-tested benefits still available to legal aliens include medical assistance, short-term noncash emergency disaster relief, benefits under the National School Lunch and Child Nutrition Acts, immunization assistance, and other limited programs. *See* 8 U.S.C. § 1613(c).

Title IV also grants states the discretion to bar most legal aliens from federal means-tested public benefits administered at the state level, including Medicaid, Title XX social services block grants, and TANF.[23]

c. Sponsorship and Deeming

Even after an alien has been in the country five years, the federal government may continue to prevent him from receiving federal, means-tested public benefits through "alien sponsor-deeming."[24] Title IV permits the federal government to define the alien's income as that of his sponsor to determine whether the alien is eligible for welfare programs.[25] The government may deem the sponsor's income as the alien's until the alien, or a spouse or parent of the alien, has worked in the country for ten years.[26] Title IV makes the sponsor's "affidavit of support"[27] a legally enforceable contract under which the sponsor agrees to financially support the alien, and the government can sue the sponsor if the alien becomes a public charge.[28]

2. State Benefit Restrictions

The state restrictions mimic the federal restrictions. Title IV grants states the power to limit most legal aliens' access to state public assistance, with similar exceptions for refugees and asylees, veterans, members of the armed forces, and

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23. 8 U.S.C. § 1612. Title XX of the Social Security Act provides block grants to the states for a wide variety of purposes, including child care, in-home care for disabled persons, programs to combat domestic violence, and programs for abused and neglected children. *See* 42 U.S.C. § 1397 (1994); Wheeler & Bernstein, *New Laws*, *supra* note 9, at 5.

24. 8 U.S.C. §§ 1183a, 1631 (Supp. II 1996); *see also HHS and SSA Define "Means-Tested Federal Public Benefit,"* *supra* note 22, at U–1; Wheeler & Bernstein, *New Laws*, *supra* note 9, at 16.

25. 8 U.S.C. § 1183a. The sponsor is the person petitioning for the admission of the alien. Two categories of aliens require a sponsor to become legal immigrants: (1) those who are eligible for immigration because of their relationship to a citizen or legal permanent resident of the United States and (2) those who are admitted for employment by a United States' employer. DAVID CARLINER ET AL., THE RIGHTS OF ALIENS AND REFUGEES 61 (1990).

26. 8 U.S.C. § 1631(b)(2)(A). Aliens who qualify for the ten-year exemption—battered women and children, and certain persons who need assistance to avoid hunger or homelessness—are exempted from this deeming requirement. *Id.* § 1631(e)–(f); Wheeler & Bernstein, *New Laws*, *supra* note 9, at 16–17.

27. The affidavit of support is the document the sponsor signs attesting to the fact that "at the time of [the alien's] application for admission into the United States...he is not likely at any time to become a public charge." Department of State, Form DSL–845: Evidence Which May Be Presented to Meet the Public Charge Provisions of the Law, *reprinted in* HAROLD R. KAPNER & IRVING E. FIELD, NOT FOR ILLEGAL ALIENS ONLY: HOW TO GET A GREEN CARD 68, 68 (1978).

28. 8 U.S.C. § 1183a(a).

legal aliens who have worked in the United States legally for ten years.[29] States can deem the sponsor's income and resources as the alien's when determining whether a particular alien qualifies for state welfare benefits.[30] The states have the right to sue a sponsor if the alien he sponsors becomes a public charge.[31] States cannot restrict legal aliens' access to emergency medical assistance, short-term, noncash emergency disaster relief, immunizations, and certain community-based programs.[32]

C. Impact of the Restrictions

Title IV of the Welfare Law will significantly impact the lives of many legal aliens. So far, about one million legal aliens nationwide have begun to lose their eligibility for food stamps as a result of Title IV.[33] Nonrefugee or asylee aliens who became legal after the passage of the Welfare Law are ineligible for SSI and food stamps for at least the first ten years after achieving that status. It is estimated that these restrictions will affect over three-fourths of the legal aliens currently receiving TANF. Specifically, TANF benefits for about 252,000 families headed by legal aliens—in which many of the children are United States citizens by birth—could be reduced, and TANF benefits for 62,000 families could be eliminated entirely.[34] The process of attributing the sponsor's income to the alien may restrict legal aliens' access to an even wider range of public assistance programs.[35]

Title IV's restrictions will affect certain areas of the country more than others. For example, California and New York, where over half of all legal aliens live, will be left with large populations of legal aliens in need.[36]

Those hardest hit by Title IV will be those who cannot pass the citizenship exam even after being legal aliens for many years. This group includes

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29. *Id.* § 1622 (Supp. II 1996).
30. *Id.* § 1632 (Supp. II 1996).
31. *Id.* § 1183a(a)(1)(B).
32. *Id.* § 1621(b) (Supp. II 1996).
33. George Zoros, *Outlook: Let's Help Immigrants Who Play by the Rules*, HOUS. CHRON., Aug. 24, 1997, § Outlook, at 4, *available in* 1997 WL 13058199.
34. Fix & Zimmerman, *supra* note 10, at 81.
35. *Id.* at 80.
36. *Id.* at 83. For example, California and New York account for two-thirds of the excluded TANF recipients and three-quarters of TANF savings. *Id.* As a result, these and other states have already begun to implement safety-net programs for legal aliens. *See California and New York Enact Food Stamp Programs; N.J. Governor Announces Nutrition Program*, IMMIGR. & WELFARE UPDATE (National Immigration Law Ctr., Los Angeles, Cal.), Aug. 29, 1997, at U–3, U–3 to U–4 (describing programs in California, New York, New Jersey, Maryland, Massachusetts, Minnesota, Nebraska, Rhode Island, Washington, Colorado, and Florida).

those who may benefit the most from welfare: the elderly and the ill,[37] who lack either the physical capacity or language skills[38] to take the exam; and the children of legal aliens who cannot become citizens until they are eighteen.[39]

III. JUDICIAL SCRUTINY AND THE DOCTRINAL HURDLE A CHALLENGE TO TITLE IV WILL FACE

Whether a Title IV[40] challenge will succeed depends largely on the standard of review the Court uses to evaluate the statute. Section A, below, describes judicial review under equal protection analysis generally. Then, section B identifies the level of scrutiny the Court usually applies when evaluating alienage classifications—rational basis review.

A. Standard of Review Under the Equal Protection Clause, Generally

The equal protection guarantees of the Fifth[41] and Fourteenth Amendments mandate that governments, at the local, state, and federal levels, treat similar people in a similar manner.[42] In other words, a law that classifies people,[43] or draws lines between people based on some characteristic, cannot be

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37. Fix & Zimmerman, *supra* note 10, at 85. For many elderly immigrants, SSI is the only way to obtain health insurance. *Id.* at 79. Refugees, because of their special needs, are also much more likely to use welfare than other immigrant groups. *Id.* at 77, 79.

The elderly often require SSI because they have not been in the United States long enough to work the specific number of years required to receive Social Security or because they did not work for employers who paid social security taxes. *Id.*

38. Certain legal aliens may be exempt from the English-language requirement, depending on their age and the length of their stay in the United States. *See* 8 U.S.C. § 1423(b) (1994); 8 C.F.R. § 312.1 (1997).

39. To become a citizen of the United States, one must be at least 18 years old. 8 C.F.R. § 316.2(a)(1) (1997).

40. All references hereinafter to Title IV are presumed to include the changes made by the Budget Act.

41. The Fourteenth Amendment states specifically that "[n]o *state* shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. (emphasis added). Federal laws are thus challenged not as violations of the Equal Protection Clause but as violations of the Due Process Clause of the Fifth Amendment. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 595–96 (5th ed. 1995).

42. NOWAK & ROTUNDA, *supra* note 41, at 595–96.

43. This Note focuses almost exclusively on laws that facially classify people—that is, laws that, on their own terms, classify people for different treatment. *Id.* at 621. In such cases, there is no question of proof of the different treatment, and a court can immediately "proceed to test the validity of the classification by the appropriate standard." *Id.* Laws that classify only in their application, or only in the burdens they impose on different classes of persons, require more proof before the U.S. Supreme Court will adopt an increased standard of review. *Id.* Further, even upon such proof, Supreme Court decisions demonstrate the Court's reluctance to invalidate a law using strict scrutiny without clear evidence of an intent to discriminate on the part of the government. *See id.* at

"based upon impermissible criteria or arbitrarily used to burden a group of individuals."[44] Thus, to be constitutional, a classification must relate to a specific government purpose and that purpose must be permissible.[45] What relationship—between the classification and the government's purpose—is necessary and what purpose is permissible depend on the standard of review the Court uses when evaluating the classification.[46]

The Supreme Court has formally adopted three standards of review in equal protection cases: rational basis review, intermediate scrutiny, and strict scrutiny.[47] The most limited standard of review is the rational basis test.[48] Under this test, the Supreme Court will usually defer to the legislature's choice of goals and determination that the classification relates to these goals.[49] The Court will accord the statute a "strong presumption of validity"[50] and will uphold the statutory classification "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[51] While the Court upholds most classifications judged by this standard, this is not true in every case.[52]

In comparison, under strict scrutiny, the Court rigorously challenges a law.[53] Under strict scrutiny, the Court requires the government to prove that its classification is narrowly tailored to a compelling government interest.[54] The

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621–36; *see also* Shaw v. Reno, 509 U.S. 630 (1993); McClesky v. Kemp, 481 U.S. 279 (1987); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976).

Nevertheless, this Note relies on the reasoning of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), which involved a facially neutral law that discriminated in its application against Chinese aliens. *Yick Wo* is useful to analyze facially nonneutral laws because there the application of the challenged law made the discriminatory intent so clear that the Court had no need to require further proof of intent. *Id.* at 362; *see also infra* notes 108–13 and accompanying text.

44. NOWAK & ROTUNDA, *supra* note 41, at 597.

45. *Id.*

46. *Id.* at 600.

47. *Id.* at 601–02.

48. *Id.* at 601.

49. *Id.*

50. Heller v. Doe, 509 U.S. 312, 319 (1993).

51. FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

52. *See infra* text accompanying notes 81–100.

53. Strict scrutiny is usually, though not always, fatal to the classification. TRIBE, *supra* note 5, at 1451. The only Supreme Court cases to uphold laws that explicitly classifyied individuals on the basis of race involved the treatment of Americans of Japanese origin during World War II. *See* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). Tribe suggests that these decisions are far from the norm, representing "the nefarious impact that war and racism can have on institutional integrity and cultural health." TRIBE, *supra* note 5, at 1452. Affirmative action laws that classified based on race have also been upheld under what the Court purported to be strict scrutiny. *See id.* at 1452 n.2 (citing Sheet Metal Workers' Local 28 v. EEOC, 478 U.S. 421, 482–83 (1986) (Brennan, J., plurality opinion)).

54. NOWAK & ROTUNDA, *supra* note 41, at 602.

Supreme Court applies strict scrutiny when a state action targets a suspect class or involves a fundamental right.[55] A person challenging a law as a violation of the Equal Protection Clause has the best chance of success if the Court applies this rigorous test.

When a plaintiff is not a member of a suspect class, she may still be able to get intermediate scrutiny if the Court finds the right at risk to be important but not fundamental, or if the Court views the classification resulting from the legislation as "sensitive" but not necessarily suspect.[56] If the Court applies an intermediate standard of review, it will uphold the law if it finds that the classification has a substantial relationship to an important government interest.[57]

B. The Obstacle to a Challenge of Title IV: Rational Basis Review

The Court generally reviews congressional laws that affect legal aliens under the rational basis standard.[58] Legal alien classifications invoke a more limited standard of review—than, say, classifications based on race—because aliens have a tenuous relationship to the United States.[59] Legal aliens have yet to establish a permanent commitment and may retain the obligations and benefits of citizenship in another nation.[60] Moreover, another nation continues to have a legitimate interest in their treatment by the U.S. government.[61] Thus, the Court considers the question of legal aliens' rights a political question, one better left to Congress' discretion.[62]

Commentators and the Court often refer to the minimal scrutiny applied to immigration legislation as the plenary power doctrine.[63] This doctrine comes from Article I of the Constitution, which gives Congress "the power to...establish a uniform Rule of Naturalization."[64]

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55. Graham v. Richardson, 403 U.S. 365, 375 (1971); TRIBE, *supra* note 5, at 1454. The central concern of strict scrutiny is to root out any action by government that is tainted by "prejudice against discrete and insular minorities." *Id.* at 1452 (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (dictum)). This aspect of *Carolene Products* has been developed into the theory of judicial construction of suspect classes. *Id.* Originally, cases limited suspect classification to instances of prejudice against racial and ancestral groups, but the Court has extended the guarantee to alienage as well. *Id.* at 1466; *see infra* text accompanying notes 108–22.

56. TRIBE, *supra* note 5, at 1613.

57. NOWAK & ROTUNDA, *supra* note 41, at 603.

58. *Id.* at 743.

59. *See id.* at 752–53.

60. *Id.*

61. *Id.*

62. *See id.* at 743.

63. Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, STAN. L. & POL'Y REV., Summer 1996, at 35, 42.

64. *Id.* at 43 (citing U.S. CONST. art I, § 8, cl. 4).

The plenary power doctrine is illustrated in the following two cases, which span the past century. In *Chae Chan Ping v. United States*,[65] the Court questioned the validity of an 1888 congressional act[66] prohibiting Chinese-American laborers from reentering the United States. Though these Chinese laborers were residents of the United States, the *Chae Chan Ping* Court stated that Chinese aliens should not be treated as equals to citizens: "Those laborers are not citizens...; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy."[67] The Court reasoned that since Congress had the power under the Constitution to declare war without judicial scrutiny, it also had the power to refuse to admit Chinese laborers: "The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice...."[68] Thus, the Court deferred entirely to Congress in evaluating the law. The Court also refused to consider Congress' motives in writing the act. In reality, the law was the direct outcome of a nationwide movement blaming Chinese immigrants for an economic downturn.[69] Nevertheless, the Court stated that it was "not a censor of the morals of other departments of the government; it [was] not invested with any authority to pass judgment upon the motives of their conduct."[70]

Nearly one hundred years later, in *Mathews v. Diaz*,[71] the Court held that a classification restricting legal aliens' access to federal medical benefits was subject only to rational basis scrutiny.[72] The congressional legislation conditioned legal aliens' eligibility for participation in a federal medical insurance program on both continuous residence in the United States for a five-year period and admission as a permanent resident.[73] The Court again reasoned that Congress had the power to make distinctions between immigrants and citizens.[74] Justice Stevens, writing for the Court, pointed to many areas of federal law that, at least implicitly, gave Congress this power. First, the Constitution did not guarantee the advantages of citizenship to all people.[75] Moreover, constitutional and statutory provisions supported a "legitimate distinction between citizens and aliens" and justified

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65. 130 U.S. 581 (1889).
66. Act of Oct. 1, 1888, ch. 1064, 25 Stat 504.
67. *Chae Chan Ping*, 130 U.S. at 603.
68. *Id.* at 604.
69. Wu, *supra* note 63, at 43.
70. *Chae Chan Ping*, 130 U.S. at 602–03
71. 426 U.S 67 (1976).
72. *Id.* at 81–83.
73. *Id.* at 69–70.
74. *Id.* at 78 n.12.
75. *Id.* at 78.

differential attributes and benefits.[76] For example, privileges and immunities apply only to citizens, the right to vote applies only to citizens, representatives must be citizens for seven years, senators must be citizens for nine years, and the president must be a natural citizen.[77] In addition, federal statutes, like Title VII, distinguish between aliens and citizens, place prohibitions on the employment of legal aliens, and provide for disparate treatment.[78] Finally, Stevens noted that Congress regularly makes rules in the area of naturalization and immigration that would be unacceptable if applied to citizens only.[79] Therefore, the *Mathews* Court subjected the law to only a rational basis review and held it constitutional.

To the extent Title IV restricts legal aliens' access to federal benefits, the Court could uphold the legislation under the rational basis test. Even those sections that address state benefit restrictions may be categorized as within Congress' control over national immigration policy. Thus, the restrictions in Title IV at the state and federal level may trigger only rational basis review. There is the possibility, therefore, that the Court would defer entirely to Congress' plenary power over immigration legislation and hold Title IV constitutional in its entirety.[80]

IV. HOW A LITIGANT CAN GET JUDICIAL ATTENTION DESPITE THE PLENARY POWER: CHALLENGES TO COMPLETE DEFERENCE

However, a challenger still has weapons in her arsenal against Title IV. This Note suggests three arguments: (1) provisions in Title IV are not rational, (2) certain provisions are classifications by the states and therefore subject to elevated scrutiny, and (3) Congress exceeded its power by giving states the discretion to restrict state welfare benefits.

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76. *Id.* Stevens cited several federal statutes that distinguished between aliens and citizens, including: 10 U.S.C. § 5571 (1970) (repealed 1980) and 22 U.S.C. § 1044(e) (1970) (repealed 1980) (both statutes addressing prohibitions and restrictions on government employment of aliens); 10 U.S.C. § 2279 (1970) (repealed 1993) and 12 U.S.C. § 72 (1970) (amended 1978, 1980, and 1994) (both statutes addressing prohibitions and restrictions on private employment of aliens); 26 U.S.C. § 931 (1970 & Supp. IV) (amended 1976, 1977, 1984, and 1986) and 46 U.S.C. § 1171(a) (1970) (amended 1981) (both statutes excluding aliens from benefits available to citizens). *Mathews*, 426 U.S. at 78 n.12.

77. *Mathews*, 426 U.S. at 78 n.12.

78. *Id.*

79. *Id.* at 80.

80. A district court has already upheld part of Title IV using the rational basis standard. Abreu v. Callahan, 971 F. Supp. 799, 807–08, 816–19 (S.D.N.Y. 1997) (applying the holding in *Mathews* to hold that section 402 of Title IV, 8 U.S.C. § 1612 (Supp. II 1996), was rationally related to traditional justifications for alienage classifications: to encourage naturalization and self-sufficiency, to achieve fiscal savings, and to remove an incentive to immigrate to the United States).

A. Strategy One: Certain Provisions of Title IV Are Irrational

In the worst case scenario, the Court will subject all of Title IV to the rational basis test. However, in some circumstances when a law is irrational, the Court will hold it unconstitutional, even under a rational basis test.

1. A Rational Basis Test with Bite

When a law is blatantly prejudicial against a vulnerable group, the law will be held unconstitutional even under the rational basis test. For example, in *City of Cleburne v. Cleburne Living Center*,[81] the Court held unconstitutional a city zoning law that required a group home for the mentally retarded to obtain a special permit.[82] The Court did not consider the mentally retarded to be a suspect or a quasi-suspect class deserving elevated scrutiny.[83] Nevertheless, applying only a reasonableness standard, the Court held that the zoning ordinance was irrational.[84] The Court reasoned that the zoning law was prejudicial because it applied only to mentally retarded group homes and not to other group facilities, like apartment houses, boarding and lodging houses, sororities, or fraternities.[85]

Similarly, in *Romer v. Evans*,[86] the Court, applying only a reasonableness standard, held unconstitutional a state constitutional amendment that imposed unique political constraints on homosexuals.[87] Specifically, the Court held that an amendment to the Colorado Constitution prohibiting all legislative, executive, or judicial action designed to protect homosexual persons was irrational because its purpose was "to make [homosexuals] unequal to everyone else."[88] Although the Court implicitly refused to consider homosexual people to be members of a suspect or quasi-suspect class,[89] it reasoned that this kind of discrimination is "obnoxious to the constitutional provision."[90] Once again the rational basis test proved fatal to a challenged law.

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81. 473 U.S. 432 (1985).
82. *Id.* at 450.
83. *Id.* at 447–48.
84. *Id.* at 450.
85. *Id.*
86. 116 S. Ct. 1620 (1996).
87. *Id.* at 1629.
88. *Id.*
89. Thus, the Court only required a rational basis: "[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Id.* at 1627.
90. *Id.* at 1628 (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37–38 (1928)). Compare *Palmore v. Sidoti*, 466 U.S. 429 (1984), in which the Court held it unconstitutional for the lower court to use concern for private racial prejudices in its determination of whether a child could remain in the custody of her white mother, whose new husband was African American. Specifically, the Court held that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.*

Likewise in *Plyler v. Doe*, the Court held unconstitutional, under a reasonableness test, a state statute that classified illegal aliens.[91] The Texas law in question authorized school districts to deny admission to children of illegal aliens.[92] Even though the Court did not recognize the children of illegal aliens—illegal aliens themselves—as members of a suspect class, it held that the children were members of a special underclass because they did not choose to enter the United States as illegal immigrants, as did their parents.[93] The Court reasoned:

> At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their "parents have the ability to conform their conduct to societal norms," and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status."[94]

Further, the *Plyler* Court reasoned that education, though not a constitutional right, was an important right. Since a special class and an important right were at stake, the Court did not just defer to the state. Instead, it held that the discriminatory law could "hardly be considered rational unless it further[ed] some substantial goal of the State."[95] Applying this test, the law was held to be unconstitutional.[96]

Some cases suggest that even *federal* alienage classifications must meet a minimum level of rationality. For example, in holding the alienage classification constitutional, the *Mathews* Court considered the reasonableness of the five-year line drawn by the federal law: "those who qualify under the test...may *reasonably* be presumed to have a greater affinity with the United States than those who do not."[97] In *Hampton v. Mow Sun Wong*,[98] the Court struck down a United States

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at 433. Thus, this case supports the proposition that the Court carefully considers discriminatory biases, even when it will not evaluate them expressly under the test of strict scrutiny.

91. Plyler v. Doe, 457 U.S. 202 (1982).

92. *Id.* at 205

93. *Id.* at 219–20. The state's alleged goal was the "preservation of the state's limited resources for the education of its lawful residents." *Id.* at 227. But the Court's analysis showed that the means used did not achieve these ends. *Id.* at 227–30. The Court first observed that the statute did not mitigate the harsh economic effects that would result from an influx of immigrant children. *Id.* at 228. Second, the statute would not stem the tide of illegal immigrants. *Id.* Third, the statute would not improve the overall quality of education in the state. *Id.* at 229. Finally, the Court dismissed the claim that the illegal children would be less likely to use their education to productive social or political use than legal children. *Id.* at 229–30. Thus, the statute flunked the means-end test of intermediate scrutiny, and the Supreme Court held the statute unconstitutional. *Id.* at 230.

94. *Id.* at 220 (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977)).

95. *Id.* 224.

96. *Id.* at 224–30.

97. Mathews v. Diaz, 426 U.S. 67, 83 (1976) (emphasis added).

98. 426 U.S. 88 (1976).

Civil Service Commission regulation that barred resident aliens from employment in the federal civil service because the federal government did not clearly demonstrate how the legislation was related to foreign policy.[99] Thus, the Court may require that a federal classification based on alienage be related to some extent, albeit de minimus, to Congress' plenary power.[100]

2. Application to Provisions of Title IV

Taken together, these cases suggest that, in some circumstances, the Court will bend its rule of congressional deference to protect especially harmful abuses of government power against society's most defenseless groups—even when the government power is federal. Children, the aged, and the infirm are members of a defenseless and innocent class like the illegal immigrant children in *Plyler*. They did not choose to be dependent legal aliens. Furthermore, like education, the right to welfare benefits is an important right, certainly as important as education.[101] Finally, the Court should be as suspicious of private prejudice against legal aliens as it was suspicious of prejudice against the mentally retarded in *Cleburne* and against homosexual people in *Romer*. At a minimum, the Court should require that the provisions denying this class of legal aliens access to welfare benefits be rationally related to either the government's stated goal or the government's plenary power over immigration.

A challenger to Title IV can argue that many of the provisions are not rationally related to the government's goal. The stated goal of Title IV is to minimize dependency among aliens:

> It continues to be the immigration policy of the United States that—
>
> (A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors....
>
> (B) the availability of public benefits do not constitute an incentive for immigration to the United States.[102]

Just as the Court in *Plyler* reasoned that denying education to illegal immigrant children did not substantially serve the government's interest, "to

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99. NOWAK & ROTUNDA, *supra* note 41, at 753.

100. Nowak and Rotunda suggest that the law in *Hampton* was struck down because the federal executive branch overreached its power to classify aliens. *Id.* If Congress had established this employment restriction, the authors suggest that the Supreme Court would have assumed that it was within Congress' power to delegate in the area of foreign policy and would have only required a rational basis to uphold the law. *Id.* Thus, *Hampton* may only suggest that *noncongressional* federal legislation must demonstrate that it is related in some degree to foreign policy.

101. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (Welfare "benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates *important* rights." (emphasis added)).

102. 8 U.S.C. § 1601(2) (Supp. II 1996).

protect itself from an influx of illegal immigrants,"[103] a litigant could argue that denying SSI, Food Stamps, other means-tested federal benefits, and state benefits to legal aliens who are children, elderly, or infirm will not rationally prevent or decrease dependency. Without these benefits, children, the aged, and the infirm will sink further into dependency. Restricting all legal aliens' access to benefits will not prevent such aliens from requiring public assistance. Further, requiring sponsors to shoulder financial responsibility for the aliens they sponsor, even when that alien is too infirm, old, or young to work, may push sponsors, many of whom are probably immigrants themselves, into dependency.

Further, some of the provisions in Title IV do not rationally relate to Congress' plenary power over immigration. *Mathews v. Diaz*,[104] however, may undercut this argument. In *Mathews*, the Court held that restricting access to federal benefits to those legal aliens who have been in the country at least five years was rationally related to Congress' plenary power because it distinguished aliens with a greater affinity for the United States from those with a lesser affinity.[105] However, unlike the length of stay classification in *Mathews*, Title IV's ten-year work requirement does not similarily distinguish between aliens more committed to living in the United States and those aliens less committed. Someone who has worked only nine years in this country may have lived here many years and may be very committed to remaining. In fact, length of work restrictions may reflect other factors, such as the health or age of the alien. Such restrictions are completely arbitrary and potentially irrational.

B. Strategy Two: Argue the Court Should Apply Heightened Scrutiny to State Classifications in Title IV

A litigant challenging Title IV could also argue that some of the provisions deserve elevated scrutiny because they entail state classifications based on alienage. Unless the law involves a political function, state laws that discriminate on the basis of alienage raise judicial eyebrows.[106]

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103. Plyler v. Doe, 457 U.S. 202, 228 (1982); *see also supra* notes 91–96 and accompanying text.

104. 426 U.S. 67 (1976).

105. *Id.* at 80.

106. In several cases since *Graham* the Supreme Court has refused to apply strict scrutiny to state laws that prohibited aliens from becoming police officers, public school teachers, and probation officers. *See, e.g.*, Cabell v. Chavez-Salido, 454 U.S. 432, 445–46 (1982) (holding that California could rationally decide that probation officers were so endowed with the "sovereign's power to exercise coercive force...that they [must be] citizens"); Ambach v. Norwich, 441 U.S. 68 (1979) (upholding a New York law barring aliens from employment as public school teachers); Foley v. Connelie, 435 U.S. 291, 295 (1978) (holding that strict scrutiny should not be applied to laws that limit legal aliens "participation in [our] democratic political institutions," including the police force); *see also* TRIBE, *supra* note 5, at 1549 (discussing these cases). These cases created a political

1. Elevated Scrutiny of State Classifications Based on Alienage

The Supreme Court has subjected state alienage classifications[107] to various forms of elevated judicial scrutiny. In *Yick Wo v. Hopkins*,[108] one of the earliest cases in which the Supreme Court dealt with the rights of aliens,[109] the Court required that, at a minimum, a state law that classified on the basis of alienage be reasonable. The plaintiffs in *Yick Wo*, Chinese aliens who owned wooden laundry facilities, sued the city and county of San Francisco over ordinances that made it illegal to establish, maintain, or build a wooden laundry facility without having first obtained permission or consent from the board of supervisors.[110] Though neutral on its face, the ordinance was applied in a discriminatory manner against Chinese aliens.[111] The Court stated that the

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function exception to the standard of subjecting to strict scrutiny state laws that classify based on alienage. *Id.* at 1548–49. For example, in *Foley*, the Court held:

> it is clear that a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions. Similar considerations support a legislative determination to exclude aliens from jury service. Likewise, we have recognized that citizenship may be a relevant qualification for fulfilling those "important nonelective executive, legislative, and judicial positions," held by "officers who participate directly in the formulation, execution, or review of broad public policy."

Foley, 435 U.S. at 296 (citations omitted) (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)). Tribe suggests that, as a result of these and other cases limiting the use of heightened scrutiny of state classifications, the "tide finally turned against alienage as a suspect classification." TRIBE, *supra* note 5, at 1548.

While these cases limit its applicability, they probably do not extinguish heightened scrutiny entirely. Even after these cases, heightened scrutiny could still be applied to laws that restrict legal aliens' access to nonpolitical functions or activities. This continued presence of heightened scrutiny was reiterated in *Bernal v. Fainter*, 467 U.S. 216 (1984), where the Court required that the "political-function exception...be narrowly construed; otherwise the exception will swallow the rule and depreciate the significance that should attach to the designation of a group as a 'discrete and insular' minority for whom heightened judicial solicitude is appropriate." *Id.* at 222 n.7 (citing Nyquist v. Mauclet, 432 U.S. 1, 11 (1977)).

107. The cases chosen by this Note questioned laws that limited legal aliens' substantive rights. However, this section of the Note does not analyze Supreme Court cases that involved laws clearly unrelated to the right to public benefits, including laws that prohibit legal aliens from serving political and public functions and laws that restrict legal aliens' right to hold property. For a review of such cases, see NOWAK & ROTUNDA, *supra* note 41, at 745, 748.

108. 118 U.S. 356 (1886).

109. The case does not distinguish between legal and illegal aliens. However, as the Chinese residents in *Yick Wo* were lawfully permitted to live and work in the United States, they can probably be considered akin to legal aliens.

110. *Yick Wo*, 118 U.S. at 358–59.

111. *See id.* In particular, the plaintiffs demonstrated that all non-Chinese launderers, except one, who applied for an exemption under the ordinance received one. *Id.* at 359. However, the board denied the petitions of plaintiffs and 200 other Chinese

Fourteenth Amendment applies to all residents of the United States including aliens: "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens."[112] Thus, because the board administered the ordinance arbitrarily, it did not survive the Court's scrutiny.[113]

In *Graham v. Richardson*, the Supreme Court applied heightened scrutiny to two state laws that restricted the distribution of state welfare benefits to legal immigrants.[114] Specifically, a Pennsylvania law proscribed the distribution of benefits except to citizens, and an Arizona law limited the distribution of benefits to legal aliens who had resided in the United States fifteen years or more.[115] The *Graham* Court upheld the principle stated in *Yick Wo* that the Fourteenth Amendment applies to aliens as well as citizens: "[T]he term 'person'...encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside."[116] Further, the Court held that classifications based on alienage should be subjected to elevated scrutiny: "[C]lassifications based on alienage...are inherently suspect and subject to close judicial scrutiny."[117] The Court held that the states' rationales, maintaining fiscal integrity and limiting governmental expenses,[118] did not meet the requirements of elevated scrutiny.[119]

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launderers who "petitioned the board of supervisors for permission to continue their business in the various houses which they had been occupying and using for laundries for more than twenty years." *Id. Yick Wo* illustrates the rare case when a court will infer that a seemingly neutral statute is not neutral, based on the presence of statistical data regarding the statute's actual operation. TRIBE, *supra* note 5, at 1483.

112. *Yick Wo*, 118 U.S. at 369.

113. *Id.* at 373. The rationale advanced by the city and county defendants, and upheld in the lower courts, was that the board of supervisors could administer arbitrary power in order to protect the public against the danger of fire from wooden laundry buildings. *Id.* at 366. But the Court concluded that this rationale was not addressed by the legislation. *Id.* Instead, the legislation conferred upon the board of supervisors "a naked and arbitrary power to give or withhold consent...to persons." *Id.*

114. Graham v. Richardson, 403 U.S. 365, 372 (1971).

115. *Id.* at 366–68.

116. *Id.* at 371 (citing *Yick Wo*, 118 U.S. at 369).

117. *Id.* at 372.

118. The states justified their disparate treatment of aliens on the basis of the states' "special public interest" in favoring their own citizens over aliens in the distribution of limited welfare resources. *Id.* While recognizing circumstances when it had upheld state statutes that treat noncitizens differently from citizens under the special public interest doctrine, the Court refused to extend the doctrine to the distribution of welfare benefits. *Id.*

119. *Id.* at 375. The Court reasoned that aliens contributed to the state. *Id.* The Court concluded that, as "aliens may live within a State for many years, work in the State and contribute to the economic growth of the State," and pay the same amount of taxes as nonalien residents of the state, it was unreasonable to deny tax revenues to aliens. *Id.*

Finally, although it dealt with the rights of *illegal* aliens, *Plyler v. Doe* suggests the possibility of an intermediate level of scrutiny,[120] or at least a rational basis that bites, when a state law restricts aliens' access to important state rights.[121] As discussed above in Part IV.A.1, the Court in *Plyler* required that the classification be substantially related to the state's interest in order to be rational and constitutional.[122]

2. Application to Title IV

A litigant challenging Title IV, thus, should argue that the state benefit restrictions are in fact state classifications. In other words, argue that states, not Congress, make the ultimate decision whether to deny welfare to legal aliens, even though Congress has expressly sanctioned the denial of state benefits. As such, the Court should apply heightened scrutiny when evaluating these provisions.

Under this elevated scrutiny, many of the provisions giving states the discretion to classify aliens should be held unconstitutional. The various arguments that some provisions are irrational[123] should carry more weight with elevated scrutiny than with rational basis scrutiny. For example, in *Graham*, the Court held the classification to be unconstitutional because (1) it was not sufficiently compelling and (2) the alienage classification did not reasonably and appropriately relate to the government's justification.[124] A litigant challenging Title IV could make similar arguments.

a. The State's Interest Is Not Sufficiently Compelling

The drafters of the Welfare Law were aware of the possibility of a heightened scrutiny challenge. They included a provision stating that it is "a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy."[125] The drafters took care to describe the states' "compelling" interests as well:

> With respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits in this chapter, a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving *the compelling governmental interest* of

120. Michael Scaperlanda suggests that *Plyler* exemplifies the use of intermediate scrutiny of alien classification. Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 749–50 (1996).

121. *See supra* notes 91–96 and accompanying text.

122. *See supra* notes 91–96 and accompanying text.

123. *See supra* Part IV.A.2.

124. *Graham*, 403 U.S. at 375–76.

125. 8 U.S.C. § 1601(5) (Supp. II 1996).

> assuring that aliens be self-reliant in accordance with national immigration policy.[126]

A litigant can nevertheless argue that while Congress can surely state its reasons for passing legislation and explain why it thinks the legislation is compelling, this cannot insulate the legislation from judicial scrutiny. The Court need not accept Congress' rhetoric as fact. For example, in *Adarand Constructors, Inc. v. Pena*,[127] the Court did *not* accept the Small Business Association's presumption "that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities."[128] On the contrary, the Court required a showing that the government classification was tightly fit to the compelling government interest.[129] As the Court in *Adarand* did not accept the federal rationale at its face value, nor should it here. This point is even stronger where Congress is ascribing to the *states* their compelling purpose.

Further, the true rationale of Title IV is, arguably, fiscal savings.[130] The restrictions on legal aliens' access to benefits are expected to account for almost all of the savings generated by the Welfare Law.[131] Indeed, the Congressional Budget Office estimated that the restrictions in Title IV would save the government about $23 billion over five years. It is also estimated that "[r]eductions in AFDC benefits would save federal and state governments $810 million annually."[132] States with a high population of immigrants, now allowed to deny legal aliens' access to most state public programs, would experience the greatest reduction in public expenditures.[133]

Fiscal saving is not a compelling interest, at least at the state level. The Court, in *Graham*, specifically held: "Since an alien as well as a citizen is a 'person' for equal protection purposes, a concern for fiscal integrity is...[not] compelling."[134] The Court explained:

> A State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens.... The saving of welfare costs cannot justify an otherwise invidious classification.[135]

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126. *Id.* § 1601(7) (emphasis added).
127. 515 U.S. 200 (1995).
128. *Id.* at 205.
129. *Id.*
130. *See* Fix & Zimmerman, *supra* note 10, at 81.
131. *Id.*
132. *Id.*
133. *Id.* at 83.
134. Graham v. Richardson, 403 U.S. 365, 375 (1971).
135. *Id.* at 374–75 (quoting Shapiro v. Thompson, 394 U.S. 618, 633 (1969)).

Plyler also suggested that preservation of a state's resources did not justify a classification based on alienage.[136]

b. The Classification Does Not Advance the Compelling Interest

Moreover, the classification does not sufficiently advance the government's interest in minimizing alien dependency. As argued above in Part IV.A.2., provisions that give states the power to restrict legal aliens' access to welfare probably will not end the dependency of many, specifically the elderly, the ill, and the young.

Statistics reveal that legal aliens are *not* significantly more dependent than citizens. It is true that welfare use is generally higher among immigrants than among citizens.[137] Most welfare, however, is used only by two particular groups of immigrants, refugees and the elderly.[138] Together, these groups account for forty percent of the total welfare used by immigrants.[139] The reasons these groups need welfare are very particularized and are a function of age and health upon entry into the country.[140] In fact, as of 1994, though the number of nonrefugee immigrants using welfare has increased over the years, welfare use among working-age, nonrefugee immigrants is about the *same* as among citizens.[141] The increase can be explained in part by the 1986 Immigration and Nationalization Reform Act,[142] which increased the number of immigrants eligible for welfare by 2.6 million.[143] Still, poor immigrants are substantially *less* likely to avail themselves of welfare benefits than citizens at the same economic level.[144]

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136. *See supra* note 93.

137. Fix & Zimmerman, *supra* note 10, at 77.

138. *Id.*

139. *Id.*

140. *See supra* text accompanying notes 37–38.

141. Fix & Zimmerman, *supra* note 10, at 79.

142. Pub. L. No. 99–653, 100 Stat. 3655 (1986) (codified as amended in scattered sections of 8 U.S.C. and 12 U.S.C.).

143. Fix & Zimmerman, *supra* note 10, at 77. The Immigration and Nationality Act Amendments of 1986 ("INA") gave legal status to many illegal immigrants. As a result of the INA, those who had lived in the United States unlawfully since January 1, 1982, could apply for amnesty status. CARLINER ET AL., *supra* note 25, at 25. Nearly three million people applied for legal status under the general amnesty provision and other similar provisions of the Act. *Id.* at 24. Once given temporary legal resident status, these aliens were barred by the INA from receiving benefits from federally funded public assistance programs for the first five years of their residency. NANCY HUMEL MONTWIELER, THE IMMIGRATION REFORM LAW OF 1986: ANALYSIS, TEXT AND LEGISLATIVE HISTORY 63 (1987). The legalization period consisted of a one-year period beginning May 5, 1987. *Id.* at 57. Thus from 1992 through 1993, a large number of legal immigrants were eligible for public assistance. *Id.* Currently, more than 2.6 million immigrants are eligible for aid. Fix & Zimmerman, *supra* note 10, at 77.

144. Fix & Zimmerman, *supra* note 10, at 79.

Further, reducing legal aliens' rights to public funds will have one major effect that undermines the compelling interest entirely: it forces legal aliens to become citizens. Indeed, one commentator writes that the Welfare Law makes citizenship "the gateway" to public assistance.[145] Thus, in reducing the number of legal aliens dependent on public benefits, Title IV may just be increasing the number of *citizens* dependent on public benefits.

c. Better Alternatives Exist

Better alternatives exist to reduce legal aliens' dependency on public benefits. Congress can tighten immigration standards in order to prevent the entry of people, like the elderly and the ill, who may become dependent on public benefits. While this may not help to reunite families, at least legal aliens using public benefits will not be left without resources to survive. Congress could also monitor the distribution of benefits to ensure that people who could work do not receive public money.

It may be argued that the state's power to deem the sponsor's income as the alien's is the best way to reduce aliens' dependency. If the affidavit of support is a legally enforceable document, as it is under Title IV,[146] then, according to Michael Fix and Wendy Zimmerman, deeming the sponsor's income to be the alien's will serve three purposes.[147] First, it "disciplines" the sponsors by forcing them to be financially responsible to the aliens they sponsor.[148] Second, it enables the government to admit poor immigrants who have the potential to work and contribute to the economy.[149] Third, it "safeguards" taxpayers by allowing the state to sue the sponsor for the cost of public benefits used by the alien.[150]

However, unlike Title IV, Fix and Zimmerman suggest a five-year, rather than a ten-year program: "A five year deeming program will help accomplish the goals of family and sponsor responsibility, encourage integration by temporarily restricting access to welfare, and limit the burden imposed on the immigrant and his or her sponsor."[151] Fix and Zimmerman suggest a five-year deeming period specifically because five years is the period during which an alien can be deported for becoming a public charge, the period a legal alien has to wait before applying for citizenship, and was the period for which certain groups of immigrants were

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145. *Id.* at 85.

146. Section 423(a) of Title IV states, "No affidavit of support may be accepted by the Attorney General or by any consular officer...unless such affidavit is executed by a sponsor of the alien as a contract...that is legally enforceable against the sponsor by the sponsored alien, the Federal Government, [and] any State...." 8 U.S.C. § 1183a(a)(1) (Supp. II 1996).

147. Fix & Zimmerman, *supra* note 10, at 87.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 88.

barred from benefit use.[152] Unlike the proposed five-year period, Title IV's ten-year deeming period seems arbitarily fixed, that is, not rationally related to other periods relevant to the alien. Moreover, a ten-year deeming period will burden both the immigrant and the sponsor significantly more than would a five-year deeming period. Thus, the ten-year period may not be the best alternative.

d. Would the Provisions Survive Elevated Scrutiny?

If subjected to strict scrutiny, most of the state restrictions in Title IV should be held unconstitutional. First, the underlying interest, fiscal saving, is not compelling.[153] Second, even if minimizing dependency is considered the compelling interest, the alienage classifications do not reasonably advance this interest. In fact the classifications may encourage aliens to become citizens, thereby increasing the numbers of citizens dependent on public welfare. Finally, the provisions are not the most effective means of discouraging alien dependency.

C. Strategy Three: Attack Congress' Power to Give States the Right to Deny Equal Protection

Finally, even if the Court will not accept that the state benefit restrictions are *state* classifications, a litigant should argue that such restrictions are unconstitutional extensions of congressional power. That is, plenary power over alien legislation does not permit Congress to give states the discretion to classify legal aliens.

1. Within Congress' Plenary Power?

In *Sudomir v. McMahon*,[154] the Ninth Circuit held that Congress' plenary power over legal aliens gave it the authority to determine how states classify aliens. Specifically, the *Sudomir* court addressed the issue of whether California could deny Aid to Families with Dependant Children ("AFDC") to illegal aliens seeking asylum.[155] California justified its exclusion by arguing that it merely followed federal benefit restriction guidelines.[156] On appeal, the circuit court upheld the state exclusions under rational basis review, rationalizing that the state merely "followed the federal direction."[157] The court refused appellants' argument that the classifications should be held to strict scrutiny, and specifically held that a federal classification can authorize states to deny federal benefits to aliens.[158]

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152. *Id.*
153. Graham v. Richardson, 403 U.S. 365, 375 (1971).
154. 767 F.2d 1456 (9th Cir. 1985).
155. *Id.* at 1457.
156. *Id.* at 1458–61.
157. *Id.* at 1466.
158. *Id.* ("We...are unpersuaded that the federal classification, to which the states must adhere, is unconstitutional because it authorizes states to violate the Equal Protection Clause.... [T]he classification Congress has created is valid because of its plenary power over immigration." (citation omitted)).

2. The Limits of Congress' Power over State Alienage Classification

However, *Sudomir* only expressly permitted federal classification of *federal* benefits administered at the state level. It did not directly address Congress' power to permit states to limit aliens' access to state benefits, as provided by Title IV.[159] Indeed, the Supreme Court has suggested that congressional legislation granting states the discretion to determine alienage classifications for state and federal classifications may exceed congressional power.

In *Shapiro v. Thompson*,[160] the Court expressly stated that Congress cannot grant states the right to violate the Equal Protection Clause.[161] Otherwise, the Court reasoned, Congress might be allowed to authorize the states to build segregated schools:

> Perhaps Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools. But could it seriously be contended that Congress would be constitutionally justified in such authorization by the need to secure state cooperation? Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause.[162]

Graham reiterated *Shapiro*'s limitation on Congress' power.[163] *Graham* further suggested that Congress cannot constitutionally give states the discretion to determine citizenship requirements for *federally* supported welfare programs as well.[164] To the *Graham* Court, this discretion would contravene Congress' plenary power which required it to establish a uniform rule of naturalization.[165]

Following *Shapiro* and *Graham*, a litigant could argue that Congress' plenary power does not give states the right to violate the Equal Protection Clause. The Title IV provisions permitting states to classify aliens are unenforceable extensions of congressional power insofar as the provisions permit states to classify aliens in the distribution of welfare benefits—a classification already held an unconstitutional violation of Equal Protection under *Graham*.[166]

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159. This power was granted to Congress by 8 U.S.C. §§ 1622, 1632 (Supp. II 1996).

160. 394 U.S. 618 (1969).

161. *Id.* at 641 ("Congress is without power to enlist state cooperation in a joint federal state program by legislation which authorizes the States to violate the Equal Protection Clause.").

162. *Id.* (citing Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966)).

163. Graham v. Richardson, 403 U.S. 365, 382 (1971).

164. *Id.*

165. *Id.*

166. *See supra* notes 114–19 and accompanying text.

The Court's recent decision in *City of Boerne v. Flores*[167] offers further support for this argument. *Flores* held that the Religious Freedom Restoration Act ("RFRA"), which mandated that state, as well as federal, violations of religious freedom be subjected to strict scrutiny, exceeded Congress' enforcement power under Section 5 of the Fourteenth Amendment.[168] Indeed, such congressional power would trample on the Constitution itself. "If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts,...alterable when the legislature shall please to alter it.'"[169] Therefore, the Court held that Congress could not determine what level of scrutiny the Court should apply to evaluate state action that denied individuals religious freedom.[170] The Court reasonsed that, while Section 5 of the Fourteenth Amendment gives Congress the power to *enforce* the Fourteenth Amendment, it does not give Congress "the power to *determine* what constitutes a constitutional violation."[171]

Flores suggests another way to challenge Congress' power to pass the state provisions of Title IV. In effect, through these provisions, Congress is attempting to determine the level of scrutiny the Court should apply when evaluating state alienage classifications. Under *Flores*, this predetermination of scrutiny is unconstitutional. Congress cannot drape itself over the states to promote its own national immigration policy by blunting the Court's ability to police state power through strict scrutiny.

Thus Congress' suggestion that the state welfare provisions are constitutional extensions of its plenary power or already pass the test of strict scrutiny is not dispositive of the matter. The provisions that give states the discretion to classify aliens, if not per se unenforceable extensions of congressional power, should at least be considered state classifications and reviewed under applicable heightened scrutiny.

V. CONCLUSION

While a litigant challenging Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996[172] will face the daunting obstacle of Congress' plenary power over immigration legislation, this Note suggests that this obstacle may not be insurmountable. First, even if the Court subjects all of Title IV's provisions to rational basis review, a litigant can argue for a more rigorous

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167. 117 S. Ct. 2157 (1997).

168. *Id.* at 2170.

169. *Id.* at 2168 (omission in original) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

170. *See id.* at 2164.

171. *Id.* (emphasis added).

172. Pub. L. No. 104–193, 110 Stat. 2105 (codified as amended in scattered sections of 8 U.S.C. and 42 U.S.C.).

rational basis test, on the grounds that the provisions affect important interests and a defenseless class of persons. Second, a litigant can argue that the state benefit restrictions should be subjected to heightened scrutiny. Finally, a litigant can argue that Congress exceeded its power in giving states discretion in the distribution of state welfare benefits, and in purporting to grant them the power to violate the Equal Protection Clause.

If the Court reviews certain provisions under either rational basis with bite, or an even higher level of scrutiny, it may hold some of the provisions unconstitutional. Under a *Plyler*-type rational basis test, the Court could hold the provisions that affect the welfare rights of children, the aged, and the infirm to be irrational. Under the *Graham*-type heightened scrutiny, the Court could hold state benefit restrictions unconstitutional.

This fear of judicial review may compel Congress to change even more aspects of the law. If the recent Balanced Budget Act[173] is an indication of more reforms, legal aliens who want to challenge Title IV of the Welfare Law may be able to threaten litigation yet sit back and await the reforms. If the Budget Act marks the end of reform, legal aliens may need to turn to the courts.

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173. Pub. L. No. 105–33, 111 Stat. 251 (1997).