A Deference-Based Dilemma: The Implications of Lewis v. Thompson for Access to Non-Emergency Health Benefits for Undocumented Alien Children

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INTRODUCTION

One of the most intriguing social questions facing the United States at the beginning of the twenty-first century is how to handle the mass immigration of undocumented aliens. The issue has created an ongoing debate between political pundits and talking heads, demonstrations are seen both for and against illegal aliens, and minutemen build private barriers attempting to slow the flood of illegal immigration into the country. Fears and speculation abound as to what social, political, and economic consequences this immigration deluge will have upon the nation. Congress has attempted to stem illegal immigration by authorizing state denial of many government funded health benefits such as Medicaid. Many states have answered by passing regulations that deny Medicaid and other non-emergency benefits to undocumented or illegal aliens. Beyond the panic and politics are the illegal immigrants themselves. Are they criminals or just men and women in search of a better life for their children? This Note is designed to discuss just one small aspect of the present illegal immigration situation: When and under what circumstances are illegal immigrants entitled to constitutional protection under the Equal Protection Clause of the Fourteenth Amendment? This Note is especially concerned with the eligibility of non-citizen children to receive Medicaid and other non-emergency health benefits, and the process for determining the appropriate scope of review standard for the Welfare Reform Act and subsequent state statutes denying non-citizen children these benefits.

To examine these issues fully, it is imperative to note United States jurisprudential and legislative history in regards to non-citizens’ rights as well as the modern trends. American jurisprudence has changed a great deal since the early 1970s with respect to the protection given to illegal aliens under the Constitution. Moreover, both sides of the issue have compelling and passionate advocates claiming that their interests are more compatible with
economic and political development. In 2001, the Second Circuit encountered a case which it used as a springboard for addressing these issues. In *Lewis v. Thompson*, the court of appeals systematically examined the statutory and constitutional eligibility of illegal alien women and their children to receive Medicaid benefits.4

Part I of this Note will explain the scope and severity of the major illegal immigration issues currently plaguing the United States. Part II will explore the judicial development of the Equal Protection Clause of Fourteenth Amendment with respect to illegal alien access to publicly funded programs. Part III will examine the procedural history and rationale of the *Lewis* opinion. In conclusion, Part IV will analyze the *Lewis* holding and its implications for illegal alien children’s possible access to Medicaid and other non-emergency health care benefits.

I. THE IMPACT OF ILLEGAL IMMIGRATION

The bosom of America is open to receive not only the Opulent and respectable Stranger, but the oppressed and persecuted of all Nations and Religions.

—George Washington5

America has long been known throughout the world as a land of milk and honey. For instance, a well known political pundit once asked an Indian friend why he was so eager to come to America; his friend replied that he wanted to “live in a country where even the poor people are fat.”6 Immigration has historically been seen as a fundamental aspect of American culture, evidenced today by the fact that one in five residents of the United States is an immigrant or has at least one immigrant parent.7 However, the increasingly large number of undocumented immigrants has had a substantial effect on social, economic, and political institutions.

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4. 252 F.3d 567 (2d Cir. 2001).
5. Letter from General George Washington to the Members of the Volunteer Association and other Inhabitants of the Kingdom of Ireland who have lately arrived in the City of New York (Dec. 22, 1783), in *27 THE WRITINGS OF GEORGE WASHINGTON* 253, 254 (John C. Fitzpatrick ed., 1938).
A. The Modern Illegal Immigration Deluge

It is estimated that out of the approximately thirty-eight million immigrants in the United States, roughly one-third million are here illegally. Mexico is the largest source for unauthorized migration, contributing over seventy percent of the United States’ undocumented persons. Further, it is estimated that the net growth of illegal immigrants in the United States (new illegal immigration minus deaths, legalizations, and emigration) has been roughly 500,000 per annum since the 1990s. Because of the tremendous growth in the number of illegal immigrants, Congress and many U.S. citizens have begun to harbor fears that this population shift will adversely affect the U.S. economy. These fears range from the belief that illegal immigrants will take jobs otherwise filled by citizens, to the idea that everything from costs of education to demands on medical providers will increase beyond the nation’s capabilities. These fears were not without some merit, as most illegal immigrants are drawn to the United States by the numerous American businesses willing to employ cheap, compliant labor.

An added concern for many U.S. citizens involves the significant burden placed upon the government (and thus taxpayers) to provide essential social services to a new low-income group. Many citizens believe that the U.S. has a moral duty to protect the “unalienable rights” of the less fortunate within the


9. Yu, supra note 7, at 915.


14. Park, supra note 12, at 571 (2004) (noting that state and local governments are “often left with the financial burden of providing essential social services to a needy, indigent population”).
nation. Yet rarely is the tension between moral duty and economic responsibility as stark for Americans as it is within the debate over how governmental benefits should be allocated with respect to illegal aliens. Opponents of government-provided health care for illegal aliens argue that an unfair burden would be imposed upon citizen taxpayers who must finance such benefits. They argue that this will only drain the already limited financial pool from which public resources are derived, thus redistributing federal benefits from citizens to illegal aliens. Proponents of publicly funded health care argue that providing preventative care to illegal aliens will actually be more cost-efficient, as it will prevent the spread of communicable diseases and reduce the risk of transmission to citizens, and reduce the severity of eventual health problems within the immigrant community. The welfare reform packages of the mid-1990s contributed to the debate by further limiting government benefits available to illegal or unqualified aliens.

**B. Effect of Welfare Reform on Illegal Aliens’ Access to Federal Benefits**

During the mid-1990s, immigrants and welfare beneficiaries “sustained repeated political attacks from candidates seeking to capitalize on voter anxiety about job security and the decay of the nation’s welfare system.” The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA or Welfare Reform Act) and the Balanced Budget Act of 1997 were the resulting bills of the welfare reform period that have had a significant effect on

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17. See Neill, supra note 15, at 430 (noting that opponents of federally funded health benefits “often argue that it creates a significant drain on limited local public resources”); see also Madeleine Pelner Cosman, Illegal Aliens and American Medicine, 10 J. AM. PHYSICIANS & SURGEONS 6, 6 (2005).


19. Costich, supra note 16, at 1058 (“Because immigrants are less likely than U.S. citizens to have health insurance, and because they often come from regions where communicable diseases are more common than in the U.S., denying them access to diagnosis and treatment of these diseases makes it not only likely that they will suffer readily avoidable consequences themselves, but that they will increase citizens’ exposure.”).

20. Id. at 1048.

immigration restrictions.\(^{22}\) In enacting these bills, Congress intended to break the cycle of welfare dependency among the poor by restricting eligibility for benefits and by promoting work-based incentives.\(^{23}\) Congress determined that the number of illegal immigrants entering the country was becoming a political, social, and economic problem and noted that “[c]urrent eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable of assuring that individual aliens do not burden the public benefits system.”\(^{24}\) Through subsequent statutory changes, Congress has “attempted to devolve its federal immigration power and thereby evade the constitutional prohibition on state anti-immigrant discrimination.”\(^{25}\)

These welfare statutes have performed several functions in regards to immigration, including making distinctions among different groups of aliens in the provision of federal benefits, altering existing Medicaid programs, and delegating authority to the states to regulate important aspects of immigrant access to public benefits.\(^{26}\)

The PRA authorized the denial of benefits depending on whether or not an alien falls within an enumerated class of “qualified aliens,” including “legal permanent residents, asylees, refugees, those granted withholding of deportation, and those paroled for at least one year.”\(^{27}\) Immigrants who are not qualified, a group which includes illegal aliens, are ineligible for most federal and state benefits.\(^{28}\) As a result, the PRA has had a particularly strong effect in


\(^{23}\) Dave et al.

\(^{24}\) 8 U.S.C. § 1601(4) (2000). Congress explicitly described its national policy toward immigrants by stating: “It continues to be the immigration policy of the United States that . . . aliens within the Nation’s borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations . . . .” 8 U.S.C. § 1601(2).


\(^{26}\) Dave et al., supra note 2, at 222–23.

\(^{27}\) Id. at 225; see also 8 U.S.C. § 1641(b)(1)–(7) (defining which aliens are “qualified” under the statute).

\(^{28}\) Dave, supra note 2, at 225. Qualified aliens remain eligible for many non-means-tested public benefit programs, including: Adoption Assistance, Administration on Developmental Disabilities, Adult Programs/Payments to Territories, Agency for Health Care Policy and Research Dissertation Grants, Child Care and Development Fund, Clinical Training Grant for Faculty Development in Alcohol & Drug Abuse, Foster Care, Health Profession Education and Training Assistance, Independent Living Program, Job Opportunities for Low Income Individuals, Low Income Home Energy Assistance Program, Medicare, Medicaid, Mental Health Clinical Training Grants, Native Hawaiian Loan Program, Refugee Cash Assistance, Refugee Medical Assistance, Refugee Preventive Health Services Program, Refugee Social Services Formula Program, Refugee Social Services Discretionary Program, Refugee Unaccompanied
preventing illegal alien children from receiving publicly funded health benefits. The PRA did allow a number of federal means-tested programs to remain available for qualified alien children; however, unqualified alien children (including illegal alien children) receive no special protections. Moreover, prior to the PRA, it was possible for states to afford these undocumented children state-funded benefits; yet now these states must “enact subsequent laws to ‘affirmatively’ provide undocumented immigrants with such state or locally-funded services if they wish to continue providing them.” So after the passage of the PRA, illegal alien children were only expressly eligible for emergency care, immunizations, and treatment for certain communicable diseases.

The PRA also had a significant effect on transforming the Medicaid system. Prior to the PRA’s passage, Medicaid eligibility was limited to the “deserving poor,” generally considered to be the aged, blind, disabled, and children and their caretaker relatives. However, after the PRA, these traditional categories no longer defined Medicaid eligibility. Today Medicaid covers four main groups, including: (1) pregnant women, (2) Minors Program, Refugee Voluntary Agency Matching Grant Program, Repatriation Program, Residential Energy Assistance Challenge Option, Social Services Block Grant. United States Department of Health and Human Services, Summary of Immigrant Eligibility Restrictions Under Current Law, as of 10/04/2004, http://aspe.hhs.gov/hsp/immigration/restrictions-sum.htm (last visited Jan. 15, 2008).


30. Id. at 1274 (noting that the PRA explicitly exempts a number of federal means-tested benefits for qualified children from its provision that even qualified immigrants may not receive federal means-tested benefits for the first five years after their entry into the country, including “school lunch programs, child nutrition programs, foster care assistance, student assistance under the Higher Education Act of 1965 and the Public Health Service Act, means-tested programs under the Elementary and Secondary Education Act of 1965, and Head Start” (citations omitted)).

31. Chang, supra note 29, at 1275–76 (noting that “approximately half of the states have enacted affirmative legislation to provide qualified immigrant children with health care benefits lost through the Act. Yet few have extended these measures to undocumented immigrant children.” (citations omitted)); see also 8 U.S.C. § 1621(d).

32. 8 U.S.C. §§ 1161(b)(1), 1621(b); see also Chang, supra note 29, at 1276. These emergencies include, among others, “medical assistance for emergency conditions, short-term, non-cash, in-kind emergency disaster relief, assistance under the National School Lunch Act and the Child Nutrition Act of 1966, immunizations, and various education programs.” Dave et al., supra note 2, at 227.


34. Id. at 773.

35. Id. at 774.

36. Id. at 774 (noting that “now every state Medicaid program must cover all pregnant women in families with incomes of up to 133 percent of the poverty level” and that “[i]n 2000, Medicaid paid for 1.46 million births, 36 percent of the births in the United States . . . .”).
children,\(^37\) (3) low-income elderly and disabled Medicare recipients,\(^38\) and (4) disabled children and adults.\(^39\) This functional change in traditional categories of Medicaid eligibility has had a significant impact on both citizen and immigrant eligibility for public health benefits.\(^40\)

Besides barring “unqualified aliens” from receiving public benefits and changing the very structure of eligibility for these benefits, the welfare reform laws also give states far greater freedom in determining the extent to which they will restrict benefits.\(^41\) Consequently, the PRA’s changes “compelled nearly every state legislature to rewrite vast swaths of state law.”\(^42\) It granted states full discretion to determine the eligibility of immigrants for “federal TANF, Social Services Block Grant, and Medicaid benefits, as well as state public assistance benefits.”\(^43\) Despite their new found autonomy, states were reluctant to restrict immigrant eligibility for public benefits.\(^44\) This devolution of immigration power to the states raises several Constitutional issues, including whether Congress violated the Equal Protection Clause when it authorized the denial of “eligibility for public benefits to a class of noncitizens,” and whether a state “impermissibly encroach[es] on exclusive federal authority over immigration” by exercising discretion over benefit eligibility.\(^45\)

Part II of this Note will examine the jurisprudential history of Equal Protection Clause challenges relating to the denial of benefits to immigrants. It will begin by examining the traditional divergent standards of review between federal and state alienage classifications via the *Graham v. Richardson*\(^46\) and *Mathews v. Diaz*\(^47\) decisions. Part II will conclude by analyzing the procedure the Supreme Court used in determining the applicability of a “heightened

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37. *Id.* at 774 (“States must currently cover all children under age six with family incomes below 133 percent of the poverty level and children under age 19 in families with incomes up to 100 percent of the poverty level . . . .”).

38. Furrow, *et al.*., *supra* note 33, at 775 (“Medicaid has become a Medicare supplement policy for low-income elderly and disabled Medicare recipients, so-called ‘dual eligibles.’”).

39. *Id.* (“Though the 1996 Welfare Reform Act cut back on SSI eligibility for children, it also provided that children formerly eligible for SSI could continue to receive Medicaid.”).

40. *See id.* at 774–75.


42. Wishnie, *supra* note 25, at 514.

43. Dave *et al.*, *supra* note 2, at 231.

44. *See id.*

45. *Id.; see also* Wishnie, *supra* note 25, at 512 (“Devolution in general, and devolution of the immigration power in particular . . . . were central to congressional design of the PRA.”).

46. 403 U.S. 365 (1971).

47. 426 U.S. 67 (1976).
scrutiny” scope of review standard in *Plyler v. Doe*\(^{48}\) and *Kadrmas v. Dickinson Public Schools*.\(^{39}\)

**II. JUDICIAL ATTEMPTS TO DEFINE THE CONSTITUTIONAL RIGHTS OF ILLEGAL ALIENS**

The Court makes no attempt to disguise that it is acting to make up for Congress’ lack of ‘effective leadership’ in dealing with the serious national problems caused by the influx of uncountable millions of illegal aliens across our borders.\(^{50}\)

The Fourteenth Amendment demands that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”\(^{51}\) The illegal immigration quandary introduces numerous Equal Protection Clause issues. These issues can be broken into two main subsections: (1) the divergent standards of review between federal and state classifications based on citizenship; and (2) the Constitutional issues that arise from treating illegal or undocumented aliens differently from resident aliens and U.S. citizens.

**A. Divergent Standards of Review**

In *Graham v. Richardson*, the United States Supreme Court examined the scope of review standard that should be applied when a state classifies people based on alienage.\(^{52}\) In *Graham*, the plaintiff brought suit against the Commissioner of Arizona’s Department of Public Welfare, seeking welfare benefits which were allegedly due.\(^{53}\) The plaintiff claimed that she met all requirements for eligibility for Assistance to Persons Permanently and Totally Disabled (APTD) benefits except for the fifteen-year residency requirement.\(^{54}\) The plaintiff claimed that this residency requirement “violate[d] the Equal Protection Clause” and that “the regulation of aliens has been pre-empted by Congress.”\(^{55}\) In a unanimous opinion, the *Graham* Court noted that

It has long been settled, and is not disputed here, that the term “person” in [the context of the Equal Protection Clause] encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens

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52. Wishnie, supra note 25, at 505 (“In *Graham*, the Court examined alienage restrictions in Arizona and Pennsylvania welfare statutes.”).
54. Id. at 367.
55. Id. at 368.
and aliens to the equal protection of the laws of the State in which they reside.56

The Court explained that “[a]liens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.”57 The Court reasoned that since aliens pay taxes and may be called into the armed forces, they should likewise be eligible to receive welfare benefits.58 Consequently, the Graham Court held that “a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate[s] the Equal Protection Clause.”59

Only five years after the Graham decision, the Supreme Court again considered a provision restricting the benefits for resident aliens in Mathews v. Diaz, but this time dealing with Medicare, a federal statute.60 In Mathews, all plaintiffs were resident aliens lawfully admitted to the United States less than five years prior to the suit.61 All would have been eligible for the Medicare Part B supplemental medical insurance program, but were denied enrollment because they were not citizens or permanent residents, nor had they resided in the United States for five years.62 The Court noted that “[t]he fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship . . . .”63 The Court decided that since “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens,” the restriction should be upheld unless it was “wholly irrational.”64

The main distinction between the holdings of Graham and Mathews was that the Supreme Court had many reservations about treading into the traditionally congressional area of immigration power.65 The Mathews Court

56. Id. at 371 (citing Takahashi v. Fish & Game Comm’n, 334 U.S. 410, 420 (1948); Truax v. Raich, 239 U.S. 33, 39 (1915); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).
57. Id. at 372 (citation omitted).
58. Graham, 403 U.S. at 376.
59. Id.; see also Wishnie, supra note 25, at 505–06 (“[T]he Court then rejected the asserted state interests in preserving scarce fiscal resources for citizens as insufficiently compelling to justify the alienage classifications.”).
60. Wishnie, supra note 25, at 506.
62. Id. at 70–71.
63. Id. at 77–78.
64. Id. at 79–80, 83.
65. Id. at 81–82 (noting that decisions made by Congress or the President in the area of immigration and naturalization deserve “a narrow standard of review”); see also Wishnie, supra note 25, at 506–07 (“[T]he Court sounded the classic themes of the plenary power doctrine: Regulation of immigration ‘may implicate our relations with foreign powers,’ and the judicial
noted that the two cases “involve[d] significantly different considerations,” because the “Fourteenth Amendment’s limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization.” Consequently, ever since the Mathews ruling, “state alienage classifications have been subjected to strict scrutiny and generally invalidated, whereas federal alienage classifications have been reviewed for rationality and generally upheld.”

As evidenced by the Graham and Mathews rulings, the Supreme Court has developed a relatively consistent stance to maintain divergent standards of review for federal and state alienage classifications. Federal statutes concerning alien restrictions will be reviewed under a “rational basis” scope of review standard, while state statutes limiting alien rights will usually be reviewed under a “strict scrutiny” scope of review standard. Part II.B of this Note will examine the constitutional issues that arise from treating illegal or undocumented aliens differently from their citizen counterparts, chiefly concentrating on the disparate treatment of undocumented or illegal alien children.

B. Equal Protection: A Question of Deference

In Plyler v. Doe, the Supreme Court recognized the importance of providing free access to primary and secondary public education to all children, including children born abroad and brought into the United States illegally. In Plyler, the plaintiffs were children who could not establish that they had been legally admitted into the United States, and were thus undocumented aliens. After initially allowing non-citizen children to attend school free of charge, the school adopted a policy “requiring undocumented children to pay a ‘full tuition fee’ in order to enroll.” A further issue was the fact that the state of Texas refused “to reimburse local school boards for the education of children who cannot demonstrate that their presence within the United States is lawful.” The Plyler court held that the plaintiffs in this case

branch is ill-equipped to apply other than a ‘narrow standard of review of decisions made by the Congress or the President in the area of immigration.’” (citations omitted)).

66. Mathews, 426 U.S. at 84, 86–87; see also Wishnie, supra note 25, at 507.
67. Wishnie, supra note 25, at 507 (citations omitted).
68. Id.
69. Id.
70. 457 U.S. 202, 230; see also Chang, supra note 29, at 1278 (noting that in Plyler, the Supreme Court “recognized access to free public primary and secondary education as undocumented immigrant children’s constitutional right under Fourteenth Amendment equal protection”).
71. Plyler, 457 U.S. at 206.
72. Id. at 206 n.2.
73. Id. at 215.
could claim the benefit of the Equal Protection Clause, but also noted that this “only begins the inquiry.”

In order to properly apply the Equal Protection Clause to the situation before it, the Court had to decide by which scope of review standard the statute in question should be judged. The first, the most common, and the most deferential standard used to judge the validity of a state action is the assurance that the statute bears some rational and “fair relationship to a legitimate public purpose.” However, the Court noted that if it applied so deferential a standard to every state classification, it would not be faithful to its obligations under the Fourteenth Amendment. Therefore, the Court noted that a second standard exists for states’ classifications “that disadvantage a ‘suspect class,’ or that impinge upon the exercise of a ‘fundamental right.’” Under this “strict scrutiny” approach, the State is required to “demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.” This approach was created in order to protect against “legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control.” However, in Plyler, the Court utilized a third standard, thus permitting the Court to “evaluate the rationality of legislative judgment with reference to well-settled constitutional principles.” This intermediate or “heightened scrutiny” standard is appropriate only when “concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and [the Court’s] cases.”

In Plyler, the Court rejected the idea that illegal aliens were a “suspect class.” The Court reasoned that “alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who

74. Id.
75. Id. at 216 (“A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill.”).
76. Plyler, 457 U.S. at 216.
77. Id.
78. Id. at 216–17 (footnotes omitted).
79. Id. at 217. The Court further explained that certain groups “have historically been relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” Id. at 216 n.14 (internal quotation marks omitted).
80. Id. at 216 n.14.
81. Plyler, 457 U.S. at 218 n.16.
82. Id.
83. Id. at 219 n.19 (“Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime.”).
has sufficiently manifested his allegiance to become a citizen of the Nation.\(^8\) Yet the Court made special note of illegal alien children, considering them to be special members of an underclass who “can affect neither their parents’ conduct nor their own status.”\(^9\) Moreover the Court stated that “no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent.”\(^10\) The Court further distinguished the denial of the right of education from the denial of other rights by reasoning that “[b]y denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”\(^11\) Consequently, the Supreme Court derived a “heightened scrutiny” test under which a state must demonstrate the rationality of its statute by showing that it furthers a “substantial state interest.”\(^12\) The Supreme Court held that the State of Texas did not meet this heightened standard, and that financial incentive is not a substantial enough interest to justify denying these children a free public education.\(^13\) Therefore, the Supreme Court ordered that the children be allowed to attend Texas public schools free of charge.\(^14\)

The Supreme Court revisited the matter of “heightened scrutiny” review in *Kadrmas v. Dickinson Public Schools*.\(^15\) In an opinion authored by Justice O’Connor, the Court set forth a test to determine when the “unique circumstances” language of *Plyler* would apply.\(^16\) In *Kadrmas*, the plaintiffs were a Dickinson schoolchild and her mother.\(^17\) Soon after the Dickinson School Board began charging a bus service fee, the plaintiffs brought an action claiming that the fee violated their Equal Protection rights by placing a greater obstacle to education in the path of the poor than it did in the path of wealthy.\(^18\) The Court had previously rejected the suggestion that “statutes having different effects on the wealthy and the poor should on that account alone be subjected

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84. Id.
85. Id. at 220 (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977)).
87. Id. at 223.
88. Id. at 230 (“If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.”).
89. Id.
90. Id. at 230.
92. Id. at 459; see also *Plyler*, 457 U.S. at 239 (Powell, J., concurring) (“[I]n these unique circumstances, the Court properly may require that the State’s interests be substantial and that the means bear a ‘fair and substantial relation’ to those interests.”).
94. Id. at 458.
to strict equal protection scrutiny." After rejecting the strict scrutiny approach, the Court then turned to the questions of whether Plyler’s “unique circumstances” existed and whether the “heightened scrutiny” test was appropriate for the facts presented in Kadrmas. Since the plaintiff was not “penalized by the government for illegal conduct by her parents” and since there was no “creation and perpetuation of a subclass of illiterates,” the Court held that the “unique circumstances” of Plyler did not exist. As a result, neither the strict scrutiny nor heightened scrutiny standard was applicable, and it was necessary for the plaintiffs to satisfy the increased burden of demonstrating that the statute was arbitrary and irrational.

Consequently, through Kadrmas, the Court has developed a two-pronged test to determine whether a specific set of facts satisfies the “unique circumstances” language of Plyler. This test involves determining (1) whether a statute punishes an under-protected group for the illegal conduct of others beyond its control and (2) whether a statute creates a risk of severe and enduring consequences for the under-protected group. If both of these factors are met, then it is proper to judge the statute under the “heightened scrutiny” standard of Plyler. Part III will examine the Lewis court’s analysis in determining whether the denial of prenatal care and automatic eligibility for Medicaid to illegal alien mothers and their children violated statutory or Equal Protection principles. Part III will also explain the way in which the Lewis court decided scope of review issues through the use of the Kadrmas test.

III. LEWIS V. THOMPSON: A FRAMEWORK IS INTRODUCED

It is not better to leave even written laws ever unchanged.

—Aristotle

Judge Jon O. Newman of the Second Circuit Court of Appeals authored the opinion in Lewis v. Thompson. The opinion begins with a detailed background summarizing the facts and procedural history of Lewis, which is

95. Id.
96. See id. at 459.
97. Id. at 459–60.
99. Lewis v. Thompson, 252 F.3d 567, 591 (2d Cir. 2001) (“[T]he Supreme Court has noted that it has not extended Plyler beyond its ‘unique circumstances.’”).
100. See id.
101. Id.
103. Lewis, 252 F.3d at 569.
very briefly outlined below. The opinion then discusses the social and economic costs of denying prenatal care to mothers and their unborn children, and subsequently provides a rather detailed legislative history of Medicaid’s relationship with respect to both illegal alien mothers and their children. Next, the court examined the statutory and constitutional challenges to the denial of prenatal care. Finally, the Lewis court discussed the constitutional challenges to the denial of automatic eligibility for Medicaid assistance to the citizen children of illegal immigrant mothers.

A. Procedural History of Lewis

Lewis v. Thompson was the last of a long line of appeals and reviews of an injunction involving the non-emergency care provisions of the Medicaid statute. In Lewis, the Second Circuit Court of Appeals ruled on the statutory and constitutional implications of the State of New York’s denial of Medicaid coverage for prenatal care to an illegal immigrant mother and the denial of automatic eligibility for her citizen child. Plaintiff Lydia Lewis filed the initial claim on behalf of “a putative class initially certified to include ‘all aliens residing in the State of New York who have been denied Medicaid on the basis of their alienage.’” The principal claim of the plaintiff was that “the denial of all Medicaid services on the basis of alienage was either contrary to the Medicaid statute or unconstitutional as a denial of equal protection.”

The Lewis court began its opinion by explaining the complex statutory history of Medicaid, noting that the statute is “one of the most intricate ever drafted by Congress.” Medicaid is defined as a “co-operative federal/state cost-sharing program designed to enable participating states to furnish medical assistance to persons whose income and resources are insufficient to meet the costs of necessary medical care and services.” Though state participation in Medicaid is optional, once a state participates, it must comply with federal

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104. See id. at 569–79 (tracing the development of Medicaid legislation from its founding to the present time and noting key Acts such as the Omnibus Budget Reconciliation Act of 1981, the Deficit Reduction Act of 1984, the amended Omnibus Budget Reconciliation Act of 1986, and the Welfare Reform Act of 1996).

105. Id. at 579–81.

106. Id. at 582–87.

107. Id. 587–92.

108. Lewis, 252 F.3d at 569 (“T]he prenatal care provisions of the Medicaid statute are among the most . . . intricate ever drafted by Congress.” (internal quotation marks omitted)).

109. Id. at 572.

110. Id. The class was later amended to include “‘all aliens residing in New York State who have applied or attempted to apply for Medicaid but have been or would be denied on the basis of their alienage.’” Id. at 572 n.8.

111. Id. at 572.

112. Id. at 569.

113. Lewis, 252 F.3d at 569 (quoting deJesus v. Perales, 770 F.2d 316, 318 (2d Cir. 1985)).
Three main categories of beneficiaries are eligible for Medicaid: the “mandatory categorically needy,” “the optional categorically needy,” and the “optional medically needy.” Participating states need only cover the “mandatory categorically needy” but may cover the other two groups if they so desire. The State of New York began participating in the Medicaid program in 1965 and chose to extend coverage to all three eligibility categories. However, for some time it was unclear whether Medicaid granted coverage for pregnant women or prenatal care. In 1975, the Supreme Court held that “states were not required to offer prenatal care, but left open the possibility that states were nonetheless permitted to offer such care.” The Medicaid statute was also initially silent on the availability of Medicaid to aliens. In 1973, Congress amended the Social Security Act in order to explicitly deny social security benefits to aliens. Consequently, the State of New York issued an additional regulation denying Medicaid eligibility to any alien who was not a permanent resident or otherwise permanently residing in the United States under color of law. Thus by 1979, although the Medicaid statute was silent as to prenatal care and aliens, the State of New York interpreted the statute to “permit states to offer prenatal care to pregnant women, but not to permit states to offer any aid to non-PRUCOL aliens.”

Over the course of the next decade, many changes and revisions were made to the Medicaid statute. In 1981 Congress passed the Omnibus Budget Reconciliation Act of 1981 (OBRA ‘81), which ended the practice of allowing states to give Aid to Families with Dependant Children (AFDC) money to pregnant women on the theory that their fetuses were “dependent children,” yet continued to authorize states to provide pregnant women with AFDC funding during the last three months of pregnancy if they would be eligible upon the birth of their child. Three years after OBRA ‘81, Congress made Medicaid coverage of needy pregnant women mandatory by adding “qualified pregnant

114. Id. at 569.
115. Id. at 570.
116. Id. (citing 42 U.S.C. § 1396a(a)(10)(A)(i)). This category principally includes individuals already receiving some other need-based government benefit, most commonly Aid to Families with Dependent Children (AFDC). Id. at 570 (citing 42 U.S.C. § 1396a(a)(10)(A)(i)(I)).
117. Id. at 570.
118. Burns v. Alcala, 420 U.S. 575, 584–86 (1975); Lewis, 252 F.3d at 571 n.5.
119. Lewis, 252 F.3d at 571.
120. Lewis, 252 F.3d at 571.
121. Pub. L. No. 92-603, 86 Stat. 1329, 1471 (1972); Lewis, 252 F.3d at 571.
122. Lewis, 252 F.3d at 571.
123. Id. at 572. PRUCOL aliens are those aliens Permanently Residing in the United States Under Color of Law. Id. at 571 & n.7.
124. Id. at 572. The Lewis court noted that “[t]he concept that underlies deeming a woman eligible for government benefits if she would be eligible upon the birth of her child has become known as ‘constructive birth.’” Id.
women or children” to the list of the “mandatory categorically needy” through the Deficit Reduction Act of 1984. One year later, Congress again expanded Medicaid funding for pregnant women via the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA ‘85) which “broke the link between AFDC and Medicaid,” thus “permitting a pregnant woman to receive Medicaid assistance even if she would be ineligible for AFDC for some non-financial reason upon the birth of her child.”

On July 14, 1986, Judge Sifton of the United States District Court for the Eastern District of New York handed down the initial ruling in Lewis I, holding that the State of New York’s regulation “barring non-PRUCOL[127] aliens from receiving any Medicaid benefits violated the Medicaid statute.” Shortly after the ruling in Lewis I, Congress passed OBRA ‘86, which amended the Medicaid statute to “bar aid to non-PRUCOL aliens for any condition short of a medical emergency.” After the new alienage restrictions were executed, the State of New York moved to vacate the Lewis I injunction. The State’s motion was promptly rejected by the district court on April 23, 1987. After an additional attempt by New York to abandon its prenatal care program for non-PRUCOL aliens, the District Court issued a permanent injunction forbidding the denial of care. On January 31, 1992, the Second Circuit affirmed the district court’s decision on appeal, concluding that “this was one of those ‘rare and exceptional’ circumstances where legislative intent and purpose should prevail over clear statutory text.”

125. Id. at 573.
126. Id. (citing 42 U.S.C. § 1396d(n)(1)(C) (2000)).
127. See 42 C.F.R. § 435.408 (defining PRUCOL and listing sixteen non-exclusive examples of PRUCOL aliens).
128. Lewis, 252 F.3d at 573 (citing Lewis v. Gross (Lewis I), 663 F. Supp. 1164, 1184 (E.D.N.Y. 1986)).
129. Id. at 573–74 (internal footnote omitted); see also The Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874, 2058 (1986). OBRA ’86 defines a medical emergency as

- a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably result in—(A) placing the patient’s health in serious jeopardy, (B) serious impairment to bodily functions, or (C) serious dysfunction of any bodily organ or part.

Id.
130. Lewis, 252 F.3d at 574.
131. Id. The district court concluded that members of the plaintiff class were still entitled to retroactive relief. Lewis v. Grinker (Lewis II), 660 F. Supp. 169, 174 (E.D.N.Y. 1987).
132. Lewis, 252 F.3d at 575–76 (concluding that since the child will be an American citizen at birth, “even a non-PRUCOL mother will be eligible for AFDC upon the birth of her child, and therefore will be a ‘qualified pregnant woman’ for purposes of Medicaid”).
133. Id. at 576–77 (citing Lewis v. Grinker (Lewis V), 965 F.2d 1206, 1222 (2d Cir. 1992)). The Second Circuit followed a different path than the district court, by instead focusing on the
In the 1996 Welfare Reform Act, Congress imposed “sweeping restrictions on aliens’ access to federally sponsored government aid” which dramatically altered the landscape of this case once again. Under the Welfare Reform Act, “an alien who is not a qualified alien (as defined in section 1641 of this title) is not eligible for any Federal public benefit (as defined in subsection (c) of this section).” Consequently, the Welfare Reform Act expanded the class of aliens ineligible for Medicaid and restricted the use of Medicaid funds to only “medical care that is strictly of an emergency nature,” a category that was interpreted to not include prenatal care. After the passage of the Welfare Reform Act, the State of New York attempted once more to convince the district court to reverse its injunction, but was once again refused. On appeal, the court of appeals was asked to consider (1) whether the Welfare Reform Act’s denial of prenatal care to unqualified aliens had a rational basis and therefore did not violate equal protection and (2) whether the denial of automatic eligibility for Medicaid coverage at birth denied aliens’ already born citizen children equal protection.

congressional legislative history.  Id. at 576. The Second Circuit noted that “any attempt to impute to Congress an intent to deny prenatal care in these circumstances would be premised on the questionable assumption that Congress believed the law to have been settled against treating fetuses as ‘individuals under the age of 21’ entitled to Medicaid assistance in their own right.” Id. at 576 n.16.

134.  Id. at 577.
135.  Id. at 577 (quoting 8 U.S.C. § 1611(a) (2000)). A “qualified alien” is narrowly defined as
an alien who, at the time the alien applies for, receives, or attempts to receive a Federal public benefit, is— (1) an alien who is lawfully admitted for permanent residence under the Immigration and Nationality Act . . . , (2) an alien who is granted asylum under section 208 of such Act . . . , (3) a refugee who is admitted to the United States under section 207 of such Act . . . , (4) an alien who is paroled into the United States under section 212(d)(5) of such Act . . . for a period of at least 1 year, (5) an alien whose deportations is being withheld under section 243(h) of such Act . . . , (6) an alien who is granted conditional entry pursuant to section 203(a)(7) of such Act . . . as in effect prior to April 1, 1980[,] or (7) an alien who is a Cuban and Haitian entrant (as defined in section 501(e) of the Refugee Education Assistance Act of 1980).

137.  Id. at 578–79 (noting that the district court had concluded that the heightened scrutiny standard of Plyler was applicable and had found that the State had not met its burden of “demonstrating substantial government purposes for the denial,” therefore violating the Equal Protection Clause of the Fourteenth Amendment).
138.  Id. at 583–84, 587–92.
B. Implications of Welfare Reform for Prenatal Care

Judge Newman began the court’s analysis with the policy considerations of publicly funded prenatal care. The court noted that children without access to prenatal care are at a much greater risk for disease and disability during their lives than children who have received prenatal care. Moreover, studies indicated that prenatal care is “vastly more cost-efficient than is treating the medical ailments that result from a lack of prenatal care.” These studies estimated that “$2 to $10 can be saved in medical treatment costs for every dollar spent on preventative prenatal care.” Additionally, the record indicated that “the costs of furnishing prenatal care for the more than 13,000 annual births to undocumented pregnant women in New York would be almost completely recouped” by the cost savings of their increased level of health at birth. Finally, the lack of prenatal care may result in substantial public health costs. The court noted that during the 1980s, “the infant mortality rate in this country was the highest among 22 industrialized countries.” Indeed, after Congress increased the access of the poor to prenatal care, the rate of infant mortality steadily improved.

Despite the public policy considerations raised by the plaintiffs, the court agreed with the Government that the Welfare Reform Act “should be read to deny federally-sponsored prenatal care to unqualified aliens.” The terms of the statute are straightforward, as it states that a non-qualified alien “is not eligible for any Federal public benefit” unless she meets one of the exceptions. The court noted that the only exception that may apply is the exception that “permits aid necessary to treat an ‘emergency medical condition.’” However, the statute defines “emergency medical condition” narrowly, and thus makes clear that “conventional prenatal care is not within

139. Id. at 579.
140. Id. (noting that “[c]hildren who are denied prenatal care are substantially more likely to be born premature and with debilitating physical and mental disabilities, are more likely to be plagued by an array of life-threatening diseases throughout their lives, and have a much shorter life expectancy.”). Prenatal care “usually consists of a series of routine visits to a doctor, who monitors the health of the mother and the fetus and counsels the mother on steps she can take to ensure the birth of a healthy child.” Id.
141. Lewis, 252 F.3d at 579 (further noting that “[i]f problems are observed during prenatal monitoring, it is less expensive to intervene while the woman is pregnant than to treat the child’s resulting life-long disabilities.”).
142. Id.
143. Id.
144. Id.
145. Id.
146. Lewis, 252 F.3d at 579.
147. Id. at 580.
148. 8 U.S.C. § 1611(a) (2000); Lewis, 252 F.3d at 580.
149. Lewis, 252 F.3d at 580 (citing 8 U.S.C. § 1611(b)(1)(A)).
The plaintiffs stressed legislative purpose and asserted that since prenatal care saves the state money in the long run, and the principal purpose of the Welfare Reform Act was to reduce federal spending, it was within the “general congressional purpose” to allow spending in this area. The Lewis court rejected this assertion, stating that it could not “ignore clear text and clear intent on a specific topic to achieve a more general congressional purpose.”

The plaintiffs further argued that “even an illegal alien mother should be entitled to receive prenatal care as a ‘qualified pregnant women’ under [42 U.S.C. § 1396d(n)(1)].” The plaintiffs contended that this section defined a “qualified pregnant women” to include a woman who would satisfy the requirements of the former AFDC program if her “unborn fetus were born.” Under the old AFDC program, a woman was eligible if her child was eligible. Thus, the plaintiffs argued that illegal immigrant mothers have a statutory entitlement in anticipation of their future citizen children. The court rejected this argument as well, reasoning that the plaintiffs’ argument would be valid only if “the Medicaid statute regarded the unborn fetus as itself eligible for medical assistance.” Instead, the court interpreted the statute as considering the pregnant women to be the recipients of care, not the future citizen child. Thus, according to the Lewis court, section 1396d(n)(1) is clearly trumped by the new alienage restrictions which “deny eligibility to ‘an alien who is not a qualified alien’ ‘[n]otwithstanding any other provision of law.’” The Welfare Reform Act was specific where OBRA ’86 was not, giving a “clear indication that Congress was aware of the consequences of a literal reading of its blanket alienage restrictions to preclude prenatal care.” After the Lewis court interpreted the Welfare Reform Act to express a congressional intent to deny prenatal care to unqualified aliens, it turned its attention to whether these statutory restrictions were constitutional.

150. Id.
151. Id. at 580–81.
152. Id. at 581.
153. Id. at 581 & n.24 (“The Welfare Reform Act ended AFDC, but still tied eligibility for Medicaid assistance to the eligibility standards of AFDC as they existed before AFDC was eliminated.”).
154. Lewis, 252 F.3d at 581.
155. Id. (“[T]he alienage eligibility restrictions in the AFDC statute, which apply only to the child, are inapposite since an alien mother’s child born in this country is a United States citizen.”).
156. Id.
157. Id.
158. Id.
159. Lewis, 252 F.3d at 581 (alteration in original) (quoting 8 U.S.C. § 1611(a) (2000)).
160. Id.
C. Constitutional Challenges to Denial of Prenatal Care

In making its determination as to the constitutionality of the denial of prenatal care to unqualified aliens, the Lewis court separated the challenge into two issues concerning (1) unqualified pregnant women and (2) the unborn fetus.161

1. Constitutionality as Applied to Unqualified Pregnant Women

The Lewis court was quick to note that it would use a “rational basis” test as the appropriate level of scrutiny with regards to illegal alien women.162 The court referred to the Supreme Court’s holding in Mathews v. Diaz, which upheld the government’s “broad power over naturalization and immigration.”163 Because rational basis scrutiny applied, the government had “no obligation to produce evidence . . . or empirical data[,]” and instead could “base its statutes on rational speculation.”164 Under this test, there “need only be a rational relationship between the disparity of treatment and some legitimate governmental purpose.”165 The court further noted that “[a]lthough no court of appeals has yet considered the Welfare Reform Act’s denial of prenatal care to unqualified aliens,” most courts had found the “deprivation of other government benefits to unqualified aliens” to survive rational basis scrutiny.166

In Lewis, the court found that Congress had enacted the legislation in order to remove “the incentive for illegal immigration provided by the availability of public benefits.”167 Evidence of the ability of government-funded prenatal care to encourage illegal immigration was not required; it was sufficient that the proposition be “reasonably conceivable.”168 Accordingly, the court held that “[a]lthough it seems likely that many alien women will illegally immigrate to obtain the benefit of citizenship for their children, undeterred by ineligibility for prenatal care in the event of pregnancy, Congress is entitled to suppose that

161. Id. at 582.
162. Id.
163. Id.; see also Mathews, 426 U.S. 67, 79–80 (1976) (noting that Congress can validly enact laws for aliens that “would be unacceptable if applied to citizens”).
164. Lewis, 252 F.3d at 582 (internal quotation marks omitted).
165. Id. (internal quotation omitted).
166. Id. at 583; see also Aleman v. Glickman, 217 F.3d 1191, 1201–04 (9th Cir. 2000) (holding the denial of food stamps to certain divorced aliens survived rational basis scrutiny).
168. Lewis, 252 F.3d at 583 (internal quotation omitted).
the denial of care will deter some of them."\(^{169}\) Since congressional discretion in regards to immigration is extremely broad, its supposition satisfied rational basis review.\(^{170}\) Thus, the Welfare Reform Act’s denial of prenatal care survived rational basis scrutiny with regards to illegal immigrant mothers.\(^{171}\)

2. Constitutionality as Applied to the Fetus

An unborn child, or fetus, is not a “person” under the Fourteenth Amendment and thus “cannot validly claim a denial of equal protection."\(^{172}\) The court explained that if “a fetus lacks constitutional protection to assure it an opportunity to be born, we see no basis for according its constitutional protection to assure it enhanced prospects of good health after birth.”\(^{173}\) Legislation may create for the child “a cause of action to obtain compensation for the consequences of prenatal injury,” but a “legislative benefit does not imply a constitutional requirement.”\(^{174}\) The Lewis court noted that as a general matter, “only immutable characteristics are entitled to heightened protection under the Equal Protection Clause.”\(^{175}\) While in utero, the fetus has “no constitutional right to equal protection,” and the “Equal Protection clause cannot retroactively create a claim that was not cognizable before birth.”\(^{176}\) The Lewis court then considered the plaintiffs’ contention that “the born child, who indisputably is a citizen entitled to equal protection of the laws,” can claim Medicaid coverage from the moment of birth.\(^{177}\)

\(^{169}\) Id. at 584 ("[I]t is reasonable for Congress to believe that some aliens would be less likely to hazard the trip to this country if they understood that they would not receive government benefits upon arrival . . . .").

\(^{170}\) Id.

\(^{171}\) Id.

\(^{172}\) Id. at 585; see, e.g., Abele v. Markle, 351 F. Supp. 224, 228–29 (D. Conn. 1972) ("[I]t is difficult to imagine how a statute permitting abortion could be constitutional if the fetus had fourteenth amendment rights."); see also Roe v. Wade, 410 U.S. 113, 158 (1973).

\(^{173}\) Lewis, 252 F.3d at 586.

\(^{174}\) Id. ("Roe’s preclusion of a Fourteenth Amendment right for a fetus would evaporate if a child could assert a constitutional claim for prebirth injury.").

\(^{175}\) Id.; see also Lyng v. Castillo, 477 U.S. 635, 638 (1986) (noting that close relatives are not a suspect class because “they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group”). Claims asserted by a person for harm sustained in a previous status rarely if ever arise in an equal protection context. Lewis, 252 F.3d at 586.

\(^{176}\) Lewis, 252 F.3d at 587.

\(^{177}\) Id. at 586. The so-called “automatic eligibility” provision of the statute was added in DRA ’84. Id. at 587.
D. Denial of Citizen Child’s Automatic Eligibility for Medicaid Benefits

Under the current law, “a newborn child of a mother receiving Medicaid is automatically eligible for Medicaid-sponsored care at birth . . . .” The court acknowledged the importance of this automatic eligibility, stating that it “is important because it assures immediate care, unfettered by paperwork and bureaucratic hurdles, at a critical time in the child’s life.” The State argued that because unqualified alien mothers cannot satisfy the requirement of “‘receiving medical assistance under a State plan on the date of the child’s birth,’” no citizen child of an unqualified mother is automatically eligible. The court rejected this outcome, stating that “[a]lthough all alien and citizen mothers are equally prevented from obtaining automatic coverage,” only children of unqualified mothers “have been denied automatic eligibility at birth because their mothers were prohibited” by law from obtaining Medicaid benefits. The State argued that the child of an alien mother is not disadvantaged since the child may obtain retroactive Medicaid coverage to the date of birth if the child is eligible in its own right. The court rejected this argument as well, holding that although retroactive coverage “eases the financial problem,” it does not “solve the medical problem of not receiving immediate medical services for the child . . . .” The court concluded that it could not interpret the statute to permit automatic Medicaid coverage at birth for citizen children of alien mothers, since Congress was obviously “willing to risk incurring the added costs of treating children denied prenatal care because of the alienage of their mothers” in order to deter illegal immigration.

After interpreting the statute unfavorably for the plaintiffs, the court then focused on the equal protection issue. In doing so, the court concentrated on what standard of scrutiny was appropriate in regards to the children of illegal immigrant mothers. The court first pointed out that the highly deferential or rational basis standard that is usually “appropriate in matters of immigration” was not applicable here, because the claim was brought on behalf of a citizen child. Since the denial of automatic eligibility was imposed on the children “solely because of the unqualified alien status of

178. Id.
179. Id. at 588.
180. Id. (quoting 42 U.S.C. § 1396a(a)(4) (2000)).
181. Lewis, 252 F.3d at 588.
182. Id. at 588.
183. Id. at 588–89.
184. Id. at 589.
185. Id. at 589–90.
186. Lewis, 252 F.3d at 590–91.
187. Id. at 590; see also Lake v. Reno, 226 F.3d 141, 148 (2d Cir. 2000).
their mothers,” the Lewis court held that a heightened scrutiny standard of review was appropriate.\textsuperscript{188}

In comparing the situation in Plyler to the facts before it, the Lewis court noted that on the one hand, denial of “public education . . . is more burdensome than the brief postponement of obtaining Medicaid coverage,” while on the other hand “the Plaintiffs’ claim is stronger in that here it is asserted on behalf of citizen children, whereas the claimants in Plyler were alien children.”\textsuperscript{189} In order to determine what conditions constitute the “unique circumstances” of Plyler, the Lewis court decided to use a test formulated by the United States Supreme Court in Kadrmas v. Dickinson Public Schools.\textsuperscript{190} Under this two-prong test, in order for a heightened or intermediate scrutiny approach to be appropriate, the statute in question must (1) penalize children for the illegal conduct of their parents and (2) risk significant and enduring adverse consequences to the children.\textsuperscript{191}

In Lewis, the court found that “the first circumstance [of the Kadrmas test] fully applies” because the citizen children were only denied automatic eligibility because of their mothers’ illegal status.\textsuperscript{192} The court then found that, like the claim in Plyler, a social welfare benefit unrelated to immigration had “been denied on a discriminatory basis that violates the Equal Protection Clause.”\textsuperscript{193} This denial, coupled with the increased risk of prolonged adverse health risks resulting from the denial of prenatal care, functioned to satisfy the second prong of the Kadrmas test.\textsuperscript{194} Therefore, the Lewis court held that the “unique circumstances” of Plyler existed, and thus the heightened scrutiny standard was applicable.\textsuperscript{195}

Under heightened scrutiny review, the statute must further “some substantial goal of the State.”\textsuperscript{196} Here, the court concluded that denying citizen children of illegal immigrant mothers a social welfare benefit, in this case automatic eligibility for Medicaid, did not further any substantial goal of the state, especially when considering the financial and medical benefits automatic eligibility would make available.\textsuperscript{197} Consequently, the Lewis court held that the citizen children of the plaintiff class were protected under the Equal

\begin{footnotesize}
\begin{enumerate}
\item[188.] Lewis, 252 F.3d at 591. The court also made clear that “citizen claimants with an equal protection claim deserving of heightened scrutiny do not lose that favorable form of review simply because the case arises in the context of immigration.” Id.
\item[189.] Id.
\item[190.] See id.
\item[192.] Lewis, 252 F.3d at 591.
\item[193.] Id.
\item[194.] See id.
\item[195.] Id.
\item[196.] Plyler v. Doe, 457 U.S. 202, 224 (1982); Lewis, 252 F.3d at 591.
\item[197.] Lewis, 252 F.3d at 591.
\end{enumerate}
\end{footnotesize}
Protection Clause and were entitled to receive the same automatic eligibility that the citizen children of legal mothers receive. 198

Lewis dealt mainly with the statutory and equal protection issues involved in denying prenatal care and automatic eligibility for Medicaid to illegal mothers and their citizen children. Though not explicitly at issue, Lewis also provided a framework and test to determine whether illegal or unqualified alien children are entitled to publicly funded health benefits. Part IV will examine the current denial of health benefits to non-citizen children within the framework of Lewis, determine that a heightened scrutiny standard is appropriate, and recommend a future course of action for Congress and the courts.

IV. IMPLICATIONS OF THE LEWIS V. THOMPSON DECISION FOR HEALTH CARE ACCESS FOR UNQUALIFIED NON-CITIZEN CHILDREN

The law, in its majestic equality, forbids the rich as well as the poor to sleep under the bridges, to beg in the streets, and to steal bread. 199

—Anatole France

Lewis v. Thompson is the leading federal appellate case examining the constitutionality of denying Medicaid benefits to illegal aliens. 200 The Lewis court held that denial of publicly funded prenatal care with respect to unqualified pregnant mothers or their unborn children survived rational basis scrutiny. 201 The analysis of prenatal care in Lewis is useful if only to show that courts and legislatures have struggled with the notion of placing a lifetime of hardship on innocent or unborn children. 202 If not for the preclusive effect of the term “person” not encompassing a fetus in utero, the Lewis court’s rationale suggests that it may have decided the prenatal issue differently in order to protect the future children. 203 Additionally, the Lewis court held that the denial of Medicaid benefits for citizen children of unqualified alien mothers failed to survive a heightened scrutiny analysis. 204 Thus, since Lewis

198. Id. at 591–92.
199. Id. at 588 n.32 (quoting ANATOLE FRANCE, LE LYS ROUGE, 118 (1894)).
200. Cases examining similar issues include Soskin v. Reinertson, 353 F.3d 1242, 1257 (10th Cir. 2004) (holding a new law denying optional Medicaid coverage for legal aliens did not violate the Equal Protection Clause), and Aliessa v. Novello, 754 N.E.2d 1085, 1098 (N.Y. 2001) (holding statute denying Medicaid benefits to non-qualified aliens did not satisfy strict scrutiny review and thus violated the Equal Protection Clause).
201. See supra notes 162–177 and accompanying text.
202. See supra notes 139–146 and accompanying text.
203. Lewis, 252 F.3d at 587 (noting that a child may have had a valid claim but since it was “in utero . . . . the fetus had no constitutional right to equal protection”).
204. See supra notes 195–198 and accompanying text.
considered the rights of both unqualified alien adults and their citizen children, the case is a sufficient springboard to understanding the constitutional rights of unqualified alien children (or non-citizen children brought to the United States by illegal alien parents), an issue no court has yet examined. *Lewis* does not simply give a framework, but also a test, taking both the “unique circumstances” language of *Plyler v. Doe* and its applicable test in *Kadrmas v. Dickinson Public Schools*, and subsequently applying this test to the denial of health benefits to the citizen children of illegal immigrants.

Under the *Lewis* analysis of automatic eligibility, it seems certain that future courts would uphold the *statutory* interpretation that the Welfare Reform Act denies Medicaid benefits to any unqualified non-citizen child. The statute is very clear; it states that Medicaid benefits (both prenatal care and automatic eligibility at birth) will be denied to any “alien who is not a qualified alien” “*n*otwithstanding any other provision of law.”\(^{205}\) However, a *constitutional* analysis may bring about very different results. In fact, although not explicitly at issue in *Lewis*, the case seems to suggest that the denial of Medicaid benefits to even non-citizen children would be invalidated on equal protection grounds.

Using the *Lewis* court’s application of the *Kadrmas* test to citizen children as a guide, this Note will now examine the constitutional question of whether the denial of publicly funded health benefits to unqualified, non-citizen children violates the Equal Protection Clause of the Fourteenth Amendment. Part IV begins by explaining why the traditional divergent standard of review for federal and state classifications does not apply. This Note will then show how the denial of health benefits to non-citizen children satisfies the “unique circumstances” of *Plyler* by examining each prong of the *Kadrmas* test with regards to the eligibility of non-citizen children to receive publicly funded health benefits.\(^{206}\) Part IV will conclude by arguing that denying non-citizen children health benefits has not had the intended effect, but rather has extremely disadvantaged a subclass of innocent children.

A. The Traditional Divergent Standard of Review Analysis Does Not Apply

In order to determine whether the denial of Medicaid and other non-emergency health benefits to unqualified, non-citizen children violates the Equal Protection Clause, it is necessary to decide whether the statute is entitled to additional deference. Because the denial was authorized by congressional statute and immigration has historically been the domain of Congress, extra deference may be appropriate. As noted earlier, in the cases of *Graham v. Richardson* and *Mathews v. Diaz*, federal statutes concerning alien restrictions


\(^{206}\) It should also be noted that the Supreme Court has held that since undocumented immigrants are not a suspect class and since public health care via Medicaid is not a fundamental right, a strict scrutiny approach is not appropriate. See Chang, *supra* note 29, at 1279.
will normally be reviewed under a rational basis standard, while state statutes limiting alien rights will usually be reviewed under a strict scrutiny standard. 207 Since the Welfare Reform Act is a congressional statute intended to deter immigration, it would seem to be subject to rational basis scrutiny. 208 Yet in Lewis, the court held that a heightened scrutiny test was appropriate in some instances, despite the fact that the statute was enacted by Congress. 209 Lewis is easily distinguished, however, because in that case the automatic eligibility provision dealt specifically with the citizen children of undocumented aliens, rather than the aliens themselves. 210 Thus the key issue becomes whether a heightened level of scrutiny is appropriate for the current denial since it involves non-citizen children as well as congressional authorization via the Welfare Reform Act.

One immigration scholar has noted that “[t]he rationale for the divergent standard is that, at the federal level, equal protection norms must be balanced against the deference traditionally accorded to exercises of the federal immigration power.” 211 However, through the 1996 Welfare Reform Act, Congress has attempted to devolve some of its plenary power over immigration to the states in such a way as to avoid constitutional prohibition of state alien restrictions. 212 In Graham, the Supreme Court held that congressional authorization of state denials of benefits to resident aliens appeared to violate Section Five of the Fourteenth Amendment. 213 However, the Supreme Court’s subsequent decision in Mathews suggests that since immigration is a field of constant economic and political change, its regulation is more appropriately left to the legislature than the judiciary, especially since the regulation of aliens is “intricately interwoven” with foreign relations. 214

The Welfare Reform Act suggests that states are permitted to deny illegal aliens and their children eligibility for Medicaid and other non-emergency

207. See supra notes 66–67 and accompanying text.
208. See supra notes 68–69 and accompanying text.
209. See supra note 188 and accompanying text.
210. See supra notes 180–181 and accompanying text.
211. Wishnie, supra note 25, at 496.
213. See supra notes 57–59 and accompanying text. “Section Five of the Fourteenth Amendment ‘grants Congress no power to restrict, abrogate, or dilute’ its equal protection guarantees. Dave et al., supra note 2, at 236 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966)). “The Court has also rejected the argument that state regulation authorized by federal legislation pursuant to the Commerce Clause is exempt from rational review under the Equal Protection Clause.” Id. at 236 n.102 (citing Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 880 (1985)).
214. Mathews v. Diaz, 426 U.S. 67, 81 & n.17 (“Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”).
health benefits, but does not require this denial. Thus, each state must pass its own regulations, within certain federal parameters, in order to put this denial into effect. If the Welfare Reform Act explicitly required the denial of publicly funded health benefits, it would seem that rational basis scrutiny would be appropriate, though not necessarily mandated. However, congressional authorization of state denial of benefits has different consequences with respect to judicial deference than explicit statutory denial. Further, the Welfare Reform Act not only attempts to determine and influence immigration policy, but also welfare policy, an area traditionally controlled by the states. Since the reason for granting Congress deference in regards to immigration is its “close relationship to foreign policy,” it may be proper to subject domestic welfare policy to a less deferential review standard.

Thus, since the Welfare Reform Act’s denial of health benefits concerns a joint exercise of federal and state power and considers both immigration and welfare policy issues, the traditional divergent standard of review analysis is, at best, questionable, and future courts should consider other factors. Justice Marshall noted in his concurrence in Plyler that varying levels of scrutiny depend upon “the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.” Accordingly, the courts in both Plyler and Lewis took a deeper look into which particular factors should be considered in determining whether a heightened level of scrutiny was appropriate when dealing with the regulation of immigrant benefits.

B. The Sins of the Father

Because of the many common characteristics shared by non-citizen children denied publicly funded health benefits and the children involved in both Plyler and Lewis, it seems that the present denial of Medicaid benefits ought to be given a heightened scrutiny standard of review. The heightened scrutiny standard of Plyler was deemed to be appropriate only under the

216. See id. § 1622(b).
217. Wishnie, supra note 25, at 569 (stating that “courts should heed the four words with which Justice Blackmun opened the Court’s modern alienage jurisprudence: ‘These are welfare cases.’”) (quoting Graham v. Richardson, 403 U.S. 365, 366 (1971)).
218. Dave et al., supra note 2, at 237.
“unique circumstances” that were present in that case. Under the Kadrmas test, the first harm that the statute must produce in order to fulfill these “unique circumstances” is “penalizing children for the illegal conduct of their parents.” It is evident that the Welfare Reform Act’s authorized denial of non-emergency health benefits for non-citizen children would satisfy this element of the Kadrmas test. Like the children in both Plyler and Lewis, non-citizen children are denied health benefits, including Medicaid or other non-emergency benefits, solely due to the fact that their parents have entered the country illegally.

While many U.S. citizens may be uncomfortable with reserving public health benefits (funded by American tax dollars) for non-citizens, it is important to realize that undocumented children have “no responsibility for their unlawful presence.” Thus, even though an argument could be made against comparing non-citizen children to the citizen children entitled to benefits under Lewis, in both cases the children were innocents who could “affect neither their parents’ conduct nor their own status.” Penalizing these children with inadequate or non-existing health care is an unfair and undeserved punishment. As the Plyler court noted, “[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.” Consequently, congressional attempts to control illegal immigration have resulted only in penalizing innocent non-citizen children through restrictions on their access to health care. Having seemingly satisfied the first element of the Kadrmas test, the next issue to be considered is whether the denial of publicly funded, non-emergency health benefits has created a risk of “significant and enduring adverse consequences” for non-citizen children and the nation.

C. A Lasting Adverse Impact

Like the children involved in Plyler and Lewis, non-citizen children are currently being denied a key government benefit, access to preventative health

220. Id. at 239 n.3 (Powell, J., concurring) (noting that the circumstances were unique since the children were “singled out by the State and then penalized because of their parents’ status.”).
223. Chang, supra note 29, at 1287.
225. Id. See also supra note 86 and accompanying text (noting that the Court found it unfair and unjust to penalize the child for the illegal activities of the parents).
In *Plyler*, the Court made sure to note that “public education is not a ‘right’ granted to individuals by the Constitution . . . . But neither is it merely some governmental ‘benefit’ indistinguishable form other forms of social welfare legislation.” The *Lewis* court echoed this sentiment with regards to publicly funded health care, noting that “a social welfare benefit, itself unrelated to immigration, has been denied on a discriminatory basis that violates the Equal Protection Clause.” The current denial of publicly funded health care to non-citizen children creates no less of a risk of severe and enduring consequences for these children than the risk created for the children of *Plyler* and *Lewis*.

While the children in *Plyler* were denied a public education and the citizen children in *Lewis* were simply denied automatic eligibility for Medicaid benefits, the current denial of Medicaid benefits for non-citizen children could lead to a much more lasting and severe outcome. The Welfare Reform Act currently authorizes the denial of all non-emergency public health benefits including Medicaid, Medicare, and State Children’s Health Insurance Program (SCHIP). Without these programs very few unqualified alien families would be able to afford adequate medical care for their children. As one scholar put it, “[a]dequate health care is vital to the very being of a child and is inextricably tied to all other determinants of a child’s ability to thrive, including education.” The American Academy of Pediatrics has advocated for providing health care to all children, noting that prevention and treatment programs for infants and children can increase their future level of health. Though education is important to a child becoming a productive member of society, it seems much more important for the child to have at least some minimal level of health. Without the benefits of health care early on, a child has little chance of becoming a healthy, productive member of society. Given the fact that most infectious diseases do not discriminate based on race or national origin, it seems unjust that non-citizen children should be deprived

227. See *Chang*, supra note 29, at 1272.
228. *Plyler*, 557 U.S. at 221.
229. *Lewis*, 252 F.3d at 591.
230. See 8 U.S.C. § 1611(a), (c) (2000); see also *Costich*, supra note 16, at 1053.
234. See infra notes 259–263 and accompanying text.
of preventative health benefits simply because they happened to be born abroad.\(^{235}\)

Since non-citizen children are currently punished for the “illegal conduct of their parents” and this punishment places a severe and enduring hardship on them for the rest of their lives, both prongs of the Kadrmass test are satisfied.\(^{236}\) Therefore a heightened scrutiny standard is appropriate for determining whether congressionally authorized, state-based denial of non-citizen children’s eligibility for Medicaid and other preventative health benefits violates Equal Protection Clause principles.

D. A Denial of Health Benefits to Non-Citizen Children Cannot Withstand Heightened Scrutiny

Under the heightened scrutiny standard of Plyler, a state must show that its statute furthers a substantial interest of the state.\(^{237}\) In its application of this standard, the Plyler court required not only that the statute further a substantial state interest, but also that the benefit to the state outweigh the resulting economic and social costs.\(^{238}\) The denial of Medicaid and other non-emergency health benefits to non-citizen children fails to satisfy this standard since it fails to deter immigration, fails to save government moneys, threatens the health of United States citizens, and unjustly punishes innocent children.

One of the explicit purposes of the Welfare Reform Act was to “remove the incentive for illegal immigration provided by the availability of public benefits.”\(^{239}\) However, there is much empirical research that indicates that denying health benefits to non-citizens does very little to deter immigration.\(^{240}\) The Lewis court noted that under a rational basis test, like the test used in the Lewis prenatal care analysis, evidence proving deterrence is not necessary; rather “it is sufficient that [the] proposition be ‘reasonably conceivable.’”\(^{241}\) However, under heightened scrutiny, some “credible evidence” must be presented by the state in order to show that a substantial government interest has been furthered.\(^{242}\) According to several recent immigration studies, the main incentive for illegal immigrants to enter the country is the promise of

\(^{235}\) Chang, supra note 29, at 1290–1291.

\(^{236}\) See supra notes 221–222 and accompanying text.

\(^{237}\) Plyler v. Doe, 457 U.S. 202, 230 (1982) (“[D]enial must be justified by a showing that it furthers some substantial state interest.”).

\(^{238}\) Id. (“[W]hatsoever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.”).


\(^{240}\) See generally, Chang, supra note 29; Neill, supra note 15; Park, supra note 12.

\(^{241}\) Lewis v. Thompson, 252 F.3d 567, 583 (2001).

\(^{242}\) See Plyler, 457 U.S. at 229 (explaining that the state must offer “credible supporting evidence” to support its claim of furthering a substantial state interest).
employment, not education or health care for their children.\textsuperscript{243} Many illegal immigrants are so afraid of deportation that they do not even apply for public benefits at all.\textsuperscript{244} Not only has Congress chosen the wrong benefits to deny, but it has also failed to produce any substantial decrease in illegal immigration. Empirically, the growth rates of illegal immigration have continued to rise steadily despite the statutory restrictions.\textsuperscript{245} Indeed, as the \textit{Lewis} court suggested, the limits of “rational speculation” are surely approached if one considers that illegal immigration will be deterred by the denial of health benefits to children.\textsuperscript{246}

Additionally, the denial of Medicaid and other preventive medical care for non-citizen children is simply not cost-efficient. Many scholars have argued that allowing non-citizen access to preventive health care will actually lower overall health expenditures.\textsuperscript{247} Although the Welfare Reform Act authorizes the denial of many publicly funded health benefits, it still requires emergency services to be provided to unqualified aliens.\textsuperscript{248} It is estimated that emergency care can cost up to four to ten times as much as preventive care.\textsuperscript{249} Consequently, state governments are much better off paying the small costs of preventive care early, rather than increasingly high costs of emergency care in the future.\textsuperscript{250} For example, children with low-birth weights who are denied access to medical care have an increased risk of becoming mentally or physically disabled.\textsuperscript{251} One estimate lists the lifetime health care costs for a disabled child at up to $400,000.\textsuperscript{252} In fact, treating the effects of preventable illness makes up 90\% of all healthcare costs in the United States.\textsuperscript{253} Thus, it is clear that “preventive care is the solution . . . not the problem.”\textsuperscript{254}

\textsuperscript{244} See \textit{Chang}, supra note 29, at 1283.
\textsuperscript{245} See \textit{supra} note 10 and accompanying text.
\textsuperscript{246} \textit{Lewis}, 252 F.3d at 590; see also \textit{Heller v. Doe}, 509 U.S. 312, 320 (1993).
\textsuperscript{247} \textit{Chang}, supra note 29, at 1292.
\textsuperscript{248} See \textit{supra} note 149 and accompanying text.
\textsuperscript{249} \textit{Park}, supra note 12, at 581 (“[I]t costs less for health facilities to treat symptoms and conditions before they degenerate into emergencies that necessitate more elaborate procedures and care.” (internal quotations and citations omitted)).
\textsuperscript{250} See, e.g., \textit{Neill}, supra note 15, at 430 (suggesting that preventive care “is less costly because it enables physicians to treat conditions before they degenerate into emergencies that necessitate more elaborate procedures and care”).
\textsuperscript{251} \textit{Id.} at 434.
\textsuperscript{252} \textit{Id.}
\textsuperscript{254} See \textit{Neill}, supra note 15, at 432.
It is also evident that denying health care to undocumented children can create serious adverse health consequences for the rest of the country.\textsuperscript{255} By deflecting the treatment of non-citizen children until an emergency situation arises, these children could expose numerous other individuals to communicable diseases.\textsuperscript{256} For example, the rate of tuberculosis and many other infectious diseases is ten to thirty times higher in the country of origin for many immigrants than in the United States.\textsuperscript{257} Diseases such as tuberculosis can remain dormant for long periods of time thus making detection improbable without continuous access to medical treatment and care.\textsuperscript{258} However, if access to preventative medical care is given, doctors will be able to protect U.S. citizens from the dangers of diseases which originate abroad by eliminating infectious diseases before they can spread. For these reasons, it is in the interests of Congress to make sure diseases within the illegal immigrant community are diagnosed and treated early in order to preserve the health of both immigrants and U.S. citizens. This objective cannot be accomplished unless the current statutory denial of publicly funded preventative health care to unqualified non-citizen children is altered or revoked.

Finally, the denial of health benefits to non-citizen children constructively punishes these children for the crimes of their illegal alien parents and greatly reduces their chance to live healthy, productive lives. Recent studies have shown that low-income illegal aliens are twice as likely to be uninsured as low-income citizens.\textsuperscript{259} Thus, without government aid, most undocumented children have virtually no access to medical care.\textsuperscript{260} As a result, one in five children of undocumented parents is currently in poor or fair health and was not able to visit a doctor within the past year.\textsuperscript{261} The Lewis court noted that access to medical care during the first year of life can reduce the incidence of life-threatening illness by more than \textit{40\%}.\textsuperscript{262} However, the lack of health care

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\item \textsuperscript{255} Costich, \textit{supra} note 16, at 1044.
\item \textsuperscript{256} Chang, \textit{supra} note 29, at 1290.
\item \textsuperscript{257} Id. at 1284 (citing Matthew T. McKenna et al., The Epidemiology of Tuberculosis Among Foreign-Born Persons in the United States, 1986 to 1993, 332 NEW ENG. J. MED. 1071, 1074 (1995)).
\item \textsuperscript{258} Id.
\item \textsuperscript{260} See \textit{supra} note 231 and accompanying text.
\item \textsuperscript{261} Naderer Pourat et al., UCLA Center for Health Policy Research, \textit{Demographics, Health, and Access to Care of Immigrant Children in California: Identifying Barriers to Staying Healthy}, (2003), http://www.nlc.org/ciwc/tbls_other-mats/Imm_Children_HA_Fact_Sheet.pdf.
\item \textsuperscript{262} Lewis v. Thompson, 252 F.3d 567, 591 n.35 (2001) (citing Sue R. Broyles et al., \textit{Comprehensive Follow-up Care and Life Threatening Illnesses Among High-Risk Infants: A Randomized Controlled Trial}, 284 J. AM. MED. ASS’N 2070, 2074 (2000)).
\end{itemize}
at an early age can have dramatic consequences including learning difficulties, decreased future earnings, and even premature death.263

For all of these reasons, the denial of publicly funded health care benefits for non-citizen children, through the Welfare Reform Act and subsequent state regulation, fails to further a substantial state interest. The benefit to the regulating state is minimal, while non-citizen children, taxpayers, and the nation’s health are all put at a significant risk of lasting harm. Congress authorized this denial under the guise of deterring illegal immigration by eliminating incentives and reducing the cost of publicly funded welfare benefits. However, it seems that denying health benefits to unqualified alien children has failed to live up to congressional expectations. The authorization to deny health benefits to undocumented children has had no significant effect on slowing illegal immigration, nor has the denial succeeded in reducing welfare expenditures.264 As no substantial interest of the state has been furthered, the denial of publicly funded health benefits to undocumented children fails to satisfy heightened scrutiny review and thus violates the equal protection rights of millions of innocent children.

CONCLUSION

Unfortunately, the “unique circumstances” of Plyler exist once again. Non-citizen children are being punished for the illegal conduct of their parents, and the possible consequences are lasting and severe. In Plyler, the Supreme Court considered it necessary to protect the innocent children involved and help them obtain access to a public education.265 After the Lewis decision, it seems only a matter of time until future courts attempt to protect non-citizen children as well through the application of heightened scrutiny review. The initial congressional plan of deterrence and cost-efficiency has been frustrated, while the growth of illegal immigration has continued to accelerate.266 The courts have often been forced into the role of “moral compass” for the nation, and the current situation demands similar attention. Yet despite the necessity of future court action, the courts should not reverse congressional and state legislation only to replace it with their own rulings. The rise in illegal immigration is of pressing concern to many citizens, and its regulation has ripple down effects for foreign policy, national security, and the welfare

263. See Alberto Palloni, Reproducing Inequalities: Luck, Wallets, and The Enduring Effects of Childhood Health, 43 DEMOGRAPHY 587, 587, 593 & n.3 (2006) (discussing how social stratification leads to poor health which contributes to these consequences).
264. See supra notes 8–10 and accompanying text.
265. See supra notes 87–90 and accompanying text.
266. See, e.g., Plyler v. Doe, 457 U.S. 202, 230 (1982). The Court could not understand “what the State hope[d] to achieve by promoting the creation and perpetuation of a subclass . . . surely adding to the problems and costs of unemployment, welfare, and crime.” Id.
Since immigration is so closely tied to the public interest, it must be the people, through their duly elected representatives, who determine the future of immigration policy in the United States. Thus, future courts should hesitate before assuming the burden of determining the appropriateness of congressionally authorized denial of health care benefits to unqualified alien children in order to allow Congress and state legislatures to make the changes necessary to bring about other means of deterrence not as threatening to notions of justice and equal protection.

In considering the issues of illegal alien children and access to health care, it is important to consider that “we are talking about some of the most powerless people in society [children].” The United States has always valued its children, and has often assumed the role of protector for those who cannot protect themselves. Cost-benefit analyses can measure a great deal, but they fail to quantify the social costs of ignoring the basic principles of inalienable rights on which the United States was founded. After all costs, present and future, social and economic, are carefully evaluated, unqualified alien children should be accorded access to the public health benefits necessary to allow them the opportunity to live long, productive lives.

DAVID J. DETERDING*

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267. See supra notes 14–18 and accompanying text.

268. Dave et al., supra note 2, at 250.

269. See id. at 243–44 (suggesting that under the common law doctrine of parens patriae or “parent of the country” the state or sovereign acts as a guardian of persons under legal disability such as children).


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