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CONSTITUTIONAL LAW — EQUAL PROTECTION — NEW YORK  
COURT OF APPEALS HOLDS THAT STATE MAY RESTRICT LEGAL  
ALIEN ACCESS TO DISABILITY BENEFITS. — *Khrapunskiy v. Doar*,  
909 N.E.2d 70 (N.Y. 2009).

Over the past decade, several states have responded to tightened budgets by proposing measures that restrict legal immigrants' access to public benefits.<sup>1</sup> In defending the constitutionality of such measures, states have cited Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act<sup>2</sup> (PRWORA).<sup>3</sup> Title IV restricts legal alien access to a variety of federal benefits<sup>4</sup> but leaves states free to set their own eligibility criteria.<sup>5</sup> The statute's open-ended delegation to states has created a vexing constitutional problem for courts by testing the limits of the prevailing two-track system of judicial review for state and federal alienage measures.<sup>6</sup> Recently, in *Khrapunskiy v. Doar*,<sup>7</sup>

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<sup>1</sup> See, e.g., Abby Goodnough, *Massachusetts Adjusts a Cut, Providing Some Health Care for 30,000 Immigrants*, N.Y. TIMES, July 30, 2009, at A19 (describing the Massachusetts legislature's decision to cut \$90 million of funding for subsidized health care coverage of indigent legal immigrants "to help close a gaping deficit").

<sup>2</sup> Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended primarily in scattered sections of 42 U.S.C.). Title IV was included as part of federal welfare reform to ensure that the "availability of public benefits not constitute an incentive for immigration to the United States," 8 U.S.C. § 1601(2)(B) (2006), and that "individual aliens not burden the public benefits system," *id.* § 1601(4).

<sup>3</sup> See, e.g., *Ehrlich v. Perez*, 908 A.2d 1220, 1231 (Md. 2006) (noting that Maryland defended eliminating subsidized health insurance for certain alien children by arguing that PRWORA "prescribed a uniform rule for the treatment of an alien sub-class" that the state could follow).

<sup>4</sup> The statute divides aliens into two classes, granting and withholding different benefits from each. Aliens who are not "qualified" under the terms of the statute, 8 U.S.C. § 1611(a), are denied "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, [or] unemployment benefit" funded by the federal government, *id.* § 1611(c)(1)(B). "Qualified" aliens, including asylees, refugees, and those admitted for permanent residence, 8 U.S.C. § 1641 (2006 & Supp. II 2008), are denied Supplemental Security Income (SSI) and food stamp benefits, *id.* § 1612(a)(1), (3), unless they fall within specified exceptions, *see id.* § 1612(a)(2).

<sup>5</sup> 8 U.S.C. § 1622(a) (2006) ("Notwithstanding any other provision of law . . . a State is authorized to determine the eligibility for any State public benefits of an alien who is a qualified alien . . ."); *see also id.* § 1621(d) (authorizing States to enact laws extending "any State or local public benefit" to aliens not lawfully present within the United States).

<sup>6</sup> Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 796–97 (2008) (indicating that courts subject federal alienage laws to rational basis review, while subjecting state alienage laws that restrict legal aliens' economic benefits to strict scrutiny review). This two-track system stems from the Supreme Court's determination that an equal protection analysis "involves significantly different considerations [when] it concerns the relationship between aliens and the States rather than between aliens and the Federal Government." *Mathews v. Diaz*, 426 U.S. 67, 84–85 (1976). After the passage of Title IV, this scheme has been thrown into confusion, with some courts applying strict scrutiny and others applying rational basis review to state alienage classifications. *See* Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1607–08 (2008) (noting that these conflicting holdings "place Equal Protection doctrine at a crossroads," *id.* at 1608).

<sup>7</sup> 909 N.E.2d 70 (N.Y. 2009).

the New York Court of Appeals sidestepped this doctrinal uncertainty by refusing to apply equal protection analysis to the New York State legislature's decision to restrict alien access to state disability payments.<sup>8</sup> The court's evasion was constitutionally unjustified. The court should have reached an equal protection analysis and applied strict scrutiny to the restrictive state alienage measure. This approach likely would have changed the outcome of the case.<sup>9</sup>

In response to the creation of the federal Supplemental Security Income (SSI) program in 1974,<sup>10</sup> New York replaced its existing program of disability benefits with a new state-funded supplement, Additional State Payments for Eligible Aged, Blind and Disabled Persons<sup>11</sup> (ASP). Though ASP was initially extended to both U.S. citizens and lawful aliens,<sup>12</sup> the New York legislature amended the program's eligibility requirements in 1998<sup>13</sup> to exclude legal aliens rendered ineligible for SSI by Title IV. Lead plaintiff Boris Khrapunskiy was one of several indigent, elderly refugees who failed to obtain citizenship within seven years of arrival and whose SSI and ASP benefits were terminated as a result.<sup>14</sup> These refugees and other ineligible legal immigrants sued as a class,<sup>15</sup> arguing that the state's restrictions on alien access to ASP vi-

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<sup>8</sup> *Id.* at 76–77.

<sup>9</sup> *Cf.* *Aliessa v. Novello*, 754 N.E.2d 1085, 1098 (N.Y. 2001) (applying strict scrutiny to strike down post-PRWORA restrictions on alien access to New York State Medicaid benefits).

<sup>10</sup> Social Security Amendments of 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1329, 1465–78 (codified as amended at 42 U.S.C.A. §§ 1381–1383c (West 2003 & Supp. 2009)). SSI was established to provide public assistance to “individuals who have attained age 65 or are blind or disabled.” 42 U.S.C. § 1381 (2006).

<sup>11</sup> 1974 N.Y. Laws 2763–81 (codified as amended at N.Y. SOC. SERV. LAW §§ 207–212 (McKinney 2003 & Supp. 2009)).

<sup>12</sup> Prior to the 1998 amendments, ASP benefits were extended to indigent elderly, blind, or disabled residents of the state, whether “citizen[s] of the United States or . . . alien[s] who ha[ve] not been determined by an appropriate federal authority to be unlawfully residing in the United States.” *Khrapunskiy v. Doar*, No. 404175/04, 2005 WL 2242849, at \*2 (N.Y. Sup. Ct. Aug. 11, 2005) (citing 1974 N.Y. Laws 2766, amended by 1998 N.Y. Laws 2871, § 8 (codified as amended at N.Y. SOC. SERV. LAW § 209(1)(a)(iv))).

<sup>13</sup> The New York legislature rewrote section 209(1)(a)(iv) of the New York Social Services Law to extend eligibility only to an individual who “is a resident of the state and is either a citizen of the United States or is not an alien who is or would be ineligible for federal supplemental security income benefits solely by reason of alien status.” 1998 N.Y. Laws 2871, § 8.

<sup>14</sup> *See Khrapunskiy*, 2005 WL 2242849, at \*1, \*6.

<sup>15</sup> *See id.* at \*5. In addition to humanitarian-based immigrants, the plaintiff class also included: (a) immigrants “permanently residing under color of law” who were not receiving SSI when PRWORA was passed, and (b) qualified immigrants who entered the United States after PRWORA but cannot yet be credited with forty qualifying quarters of earnings or are not honorably discharged veterans or members of the armed services. *Khrapunskiy v. Doar*, 852 N.Y.S.2d 40, 47 n.1 (App. Div. 2008) (Catterson, J., dissenting) (citing 8 U.S.C. § 1612 (2006 & Supp. II 2008)).

olated the Equal Protection Clause of the United States Constitution, as well as provisions of the New York State Constitution.<sup>16</sup>

Judge Solomon of the Supreme Court of New York County invalidated the legislative amendment on state constitutional and equal protection grounds.<sup>17</sup> In upholding plaintiffs' equal protection challenge, Judge Solomon cited *Graham v. Richardson*,<sup>18</sup> which held that state classifications based on alienage are "inherently suspect and subject to close judicial scrutiny"<sup>19</sup> because aliens are a "prime example of a 'discrete and insular' minority."<sup>20</sup> The Appellate Division of the Supreme Court affirmed, rejecting the State's contention that a lesser standard of review should apply because New York was merely following a "uniform immigration rule"<sup>21</sup> articulated by Congress in PRWORA.<sup>22</sup> The court found that New York was not compelled by federal mandate to change ASP eligibility criteria but rather freely "cho[se] its own policy with respect to . . . benefits for resident, indigent legal aliens."<sup>23</sup> Hence, New York could not benefit from the rational basis standard of review accorded to federal alienage classifications.<sup>24</sup>

The Court of Appeals reversed.<sup>25</sup> Writing for the majority, Judge Jones held that "[i]n conforming the New York statute to mirror the federal law, the State did not create a classification drawn along suspect lines."<sup>26</sup> Rather than proceed with an equal protection analysis, however, the court held that such an analysis was unnecessary, because ASP is not a "state program of aid."<sup>27</sup> The court observed that public assistance to the indigent elderly, blind, and disabled underwent a "federal takeover" in 1974<sup>28</sup> and that ASP was created simply because

<sup>16</sup> See *Khrapunskiy*, 909 N.E.2d at 73. The New York State Constitution provides that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state . . . in such manner and by such means, as the legislature may from time to time determine." N.Y. CONST. art. XVII, § 1.

<sup>17</sup> *Khrapunskiy*, 2005 WL 2242849, at \*4-5.

<sup>18</sup> 403 U.S. 365 (1971); see *Khrapunskiy*, 2005 WL 2242849, at \*5 (citing *Graham*, 403 U.S. 365).

<sup>19</sup> 403 U.S. at 372.

<sup>20</sup> *Id.* (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

<sup>21</sup> *Khrapunskiy v. Doar*, 852 N.Y.S.2d 40, 45 (App. Div. 2008) (emphasis omitted) (citing *Aliessa v. Novello*, 754 N.E.2d 1085, 1098 (N.Y. 2001)).

<sup>22</sup> *Id.* at 46.

<sup>23</sup> *Id.* at 45; see *id.* at 46.

<sup>24</sup> See *Khrapunskiy v. Doar*, No. 404175/04, 2005 WL 2242849, at \*5 (N.Y. Sup. Ct. Aug. 11, 2005) (citing *Aliessa*, 754 N.E.2d at 1098); cf. *Khrapunskiy*, 852 N.Y.S.2d at 45-46.

<sup>25</sup> *Khrapunskiy*, 909 N.E.2d at 77.

<sup>26</sup> *Id.* at 76.

<sup>27</sup> *Id.* at 77.

<sup>28</sup> *Id.* at 72. In furtherance of the point that "public assistance to that class of individuals was relinquished to the federal government," *id.* at 77, the court noted that the federal Social Security Administration jointly manages SSI and ASP payments, providing these to recipients via a "single check," *id.* at 74.

“Congress required the states to provide a mandatory minimum supplement”<sup>29</sup> to SSI, subject to penalties to a state’s Medicaid funding.<sup>30</sup> Because ASP was not an independent “program of benefits which excluded plaintiffs,” the court concluded that there was no basis for an equal protection challenge.<sup>31</sup>

In a dissent joined by Chief Judge Lippman, Judge Ciparick argued that the majority’s characterization of ASP as a federally dominated addendum to SSI was belied by relevant legislative history demonstrating that the program was created to “mitigate the omissions and inequities” of SSI.<sup>32</sup> Moreover, the majority’s argument failed to address the “essential issue” — whether the legislature acted on permissible grounds in excluding alien residents previously eligible for ASP.<sup>33</sup> Relying primarily on *Graham* and the Court of Appeals’s own precedent in *Aliessa v. Novello*,<sup>34</sup> the dissent concluded that an equal protection analysis was appropriate, that strict scrutiny should be applied,<sup>35</sup> and that the New York legislature had “improperly imported federal restrictions on alien eligibility for benefits”<sup>36</sup> in violation of the Equal Protection Clause.<sup>37</sup>

The majority in *Khrapunskiy* erred in refusing to conduct an equal protection analysis. While engagement with such an analysis would have steered the court into uncertain doctrinal waters, the court should have confronted this challenge squarely through a careful, constitutionally adequate reinterpretation of Title IV. Such a reading would have reaffirmed the appropriateness of applying strict scrutiny to state alienage measures, turning the case for the plaintiffs.

The majority erroneously disposed of the case by reasoning that “levels of scrutiny are inapplicable and there is no basis for an equal

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<sup>29</sup> *Id.* at 72.

<sup>30</sup> *Id.* at 75 (citing 42 U.S.C. § 1382g (2006)).

<sup>31</sup> *Id.* at 76.

<sup>32</sup> *Id.* at 79 (Ciparick, J., dissenting) (quoting Memorandum of Governor Wilson (June 15, 1974), in 1974 N.Y. Sess. Laws 2142 (McKinney) (signing statement upon approving chapters 1080 and 1081 of the 1974 New York laws)). The signing statement cited by the dissent further noted that SSI “completely failed to meet the special needs of this group.” *Id.* (internal quotation marks omitted) (quoting Memorandum of Governor Wilson, *supra*). In supporting plaintiffs’ state constitutional claims, the dissent argued that “[t]here is simply no evidence that the State viewed the availability of SSI as extinguishing its underlying obligation to these specially needy residents.” *Id.*

<sup>33</sup> *Id.* at 81.

<sup>34</sup> 754 N.E.2d 1085 (N.Y. 2001).

<sup>35</sup> *Khrapunskiy*, 909 N.E.2d at 81 (Ciparick, J., dissenting) (defending the assertion that aliens are a suspect class by noting that, while “[l]awful resident aliens benefit our country in a great many ways as they contribute to our economy, serve in the Armed Forces and pay taxes[,] . . . they cannot vote, which puts them in a weaker position” (citing *Aliessa*, 754 N.E.2d at 1095)).

<sup>36</sup> *Id.* at 80.

<sup>37</sup> *Id.* at 81.

protection challenge”<sup>38</sup> because ASP is not a “state program of aid.”<sup>39</sup> The court’s characterization or labeling of an indisputably governmental action does not permit the court to dispense with the requirements of the Constitution. The legislature’s action was attributable either to the state, in which case the Equal Protection Clause of the Fourteenth Amendment applied,<sup>40</sup> or to the federal government, in which case the action was subject to the similar requirements of the Due Process Clause of the Fifth Amendment.<sup>41</sup> In either case, an equal protection analysis was appropriate and necessary.

Had the court reached an equal protection analysis, it would have faced a harder question — what level of scrutiny to apply to the state legislature’s action. In the decades before Title IV, answering this question would have been a significantly easier task. In *Mathews v. Diaz*,<sup>42</sup> the U.S. Supreme Court held that there is no “political hypocrisy”<sup>43</sup> in subjecting federal alienage measures to rational basis review while submitting identical state measures to strict scrutiny.<sup>44</sup> But Title IV “threw a wrench” into this “existing equal protection dichotomy.”<sup>45</sup> Some courts have applied rational basis review to measures taken under Title IV’s penumbra,<sup>46</sup> following Supreme Court dicta suggesting that states may “follow the federal direction” where Congress has, “by *uniform rule*,” prescribed standards for the treatment of an alien subclass.<sup>47</sup> Other courts — including the New York Court of Appeals —

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<sup>38</sup> *Id.* at 76 (majority opinion).

<sup>39</sup> *Id.* at 77.

<sup>40</sup> See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); cf. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (“[A]ction inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.”).

<sup>41</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (per curiam).

<sup>42</sup> 426 U.S. 67 (1976).

<sup>43</sup> *Id.* at 86.

<sup>44</sup> *Id.* at 85–87 (holding that, while a federal classification between citizens and aliens may be a “routine and normally legitimate part of . . . business,” a comparable state classification likely “has no apparent justification,” *id.* at 85, 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,” *id.* at 86–87).

<sup>45</sup> Stumpf, *supra* note 6, at 1606.

<sup>46</sup> See, e.g., *Soskin v. Reinertson*, 353 F.3d 1242, 1255 (10th Cir. 2004); *Avila v. Biedess*, 78 P.3d 280, 286 (Ariz. Ct. App. 2003), *depublished by* 85 P.3d 474 (Ariz. 2004); *Doe v. Comm’r of Transitional Assistance*, 773 N.E.2d 404, 409 (Mass. 2002).

<sup>47</sup> *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982) (emphasis added) (citing *De Canas v. Bica*, 424 U.S. 351 (1976)); see also *Sudomir v. McMahon*, 767 F.2d 1456, 1466 (9th Cir. 1985) (arguing that a relaxed standard of review is appropriate where a state law employs “both a federal classification and a uniform federal policy regarding the appropriate treatment of a particular subclass of aliens,” because “[i]t would make no sense to say that Congress has plenary power in the area of immigration and naturalization and then hold that the Constitution impels the states to refrain from adhering to the federal guidelines”).

have insisted that strict scrutiny continues to apply to restrictive state alienage measures.<sup>48</sup>

The *Khrapunskiy* majority might have embraced the argument that rational basis review applies because Title IV prescribes a “uniform rule”<sup>49</sup> of “federal immigration policy”<sup>50</sup> for states to follow. This argument looks attractive insofar as it allays potential constitutional difficulties that Title IV might otherwise present. The Constitution provides that Congress shall have power to “establish a *uniform* Rule of Naturalization.”<sup>51</sup> If Title IV is a “pure immigration law[]”<sup>52</sup> over which the federal government has plenary authority,<sup>53</sup> its nonuniform delegation to the states may run afoul of this requirement.<sup>54</sup> The application of rational basis review to state measures under the uniform rule theory has the advantage of jettisoning this constitutional concern.

However, had the *Khrapunskiy* majority applied this reasoning, it would have run up against the New York Court of Appeals’s earlier arguments directly refuting the uniform rule theory as applied to Title IV.<sup>55</sup> In *Aliessa*, the court found that Title IV left states “free to discriminate in either direction,” producing “potentially wide variation based on localized or idiosyncratic concepts of largesse, economics and

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<sup>48</sup> See *Aliessa v. Novello*, 754 N.E.2d 1085, 1098 (N.Y. 2001); see also *Ehrlich v. Perez*, 908 A.2d 1220, 1243 (Md. 2006); *Op. Conn. Att’y Gen. No. 2004-002* (Feb. 24, 2004), <http://www.ct.gov/ag/cwp/view.asp?A=1770&Q=281996>.

<sup>49</sup> *Plyler*, 457 U.S. at 219 n.19.

<sup>50</sup> *Avila*, 78 P.3d at 286 (holding that state laws mirroring PRWORA’s access restrictions reflect and further a “uniform national policy” regarding immigration); see also *Soskin*, 353 F.3d at 1255 (arguing that states effectuate national immigration policy rather than “just a parochial state concern” when exercising the limited “measure of discretion” provided by Title IV).

<sup>51</sup> U.S. CONST. art. I, § 8, cl. 4 (emphasis added).

<sup>52</sup> *Stumpf*, *supra* note 6, at 1607.

<sup>53</sup> See, e.g., *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”).

<sup>54</sup> See Ellen M. Yacknin, *Aliessa and Equal Protection for Immigrants*, 58 N.Y.U. ANN. SURV. AM. L. 391, 403 (2002) (arguing that PRWORA contravenes the “single, but critical, constitutional limitation on congressional authority over immigration” set forth in the Naturalization Clause, which curtails the ability of the federal government to delegate to the states); see also Huntington, *supra* note 6, at 801 (noting that the constitutionality of Title IV’s delegation to states to determine alien eligibility for benefits “remains contested”); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 532–33 (2001) (noting that, in addition to the Naturalization Clause, “the Foreign Affairs Clauses, the Foreign Commerce Clause, and extraconstitutional theories of inherent national sovereignty” constitute alternative sources of power for the federal government to regulate immigration, *id.* at 530, but arguing that these sources are equally “incapable of transfer” to the states, *id.* at 532 (quoting *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889)) (internal quotation marks omitted)); *cf.* *Graham v. Richardson*, 403 U.S. 365, 382 (1971) (“A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene [the] explicit constitutional requirement of uniformity.” (emphasis added)).

<sup>55</sup> *Aliessa v. Novello*, 754 N.E.2d 1085, 1096–98 (N.Y. 2001).

politics.”<sup>56</sup> Title IV undeniably gives states the discretion to retain, boost, or slash benefit programs for aliens. Far from articulating a uniform rule of immigration policy, the statute creates a system of “immigration federalism,”<sup>57</sup> engendering “experimentation”<sup>58</sup> and “regulatory competition”<sup>59</sup> among the states. Following this logic, state alienage measures should not be able to bootstrap onto the rational basis review afforded to federal classifications.

The *Khrapunskiy* court could have honored its reasoning in *Aliessa* while allaying concerns about the constitutional validity of Title IV. Two overlooked interpretive options might have assisted the court in this task. First, the court could have construed Title IV as a welfare rather than an immigration statute. Such an interpretation is plausible, if not airtight,<sup>60</sup> because of the placement of the Title within the broader 1996 federal welfare reform act, whose overall design was to “end welfare as we know it and transform our broken welfare system.”<sup>61</sup> Read thusly, Title IV’s invitation to the states does not need to square with the uniformity requirements of the Naturalization Clause, since the statute’s concerns are primarily other than immigration. Second, and relatedly, the court could have reviewed the legislature’s alienage classification in isolation from Title IV, as an independent exercise of state police power to legislate in the areas of public health, safety, and welfare.<sup>62</sup> This approach avoids the implication that state authority to pass alienage measures derives from a nonuniform, hence potentially unconstitutional, delegation of federal immigration power.

Either of these interpretive options would have allowed the court to review the legislature’s retraction of ASP benefits without contorting the language of Title IV or raising constitutional concerns with the federal scheme. Critically, however, neither option would have permitted the application of rational basis review to the state’s action. If

<sup>56</sup> *Id.* at 1098; see also *Ehrlich v. Perez*, 908 A.2d 1220, 1241 (Md. 2006) (arguing that PRWORA’s “laissez faire federal approach to granting discretionary authority to the States” did not “prescribe a single, uniform or comprehensive approach” for Maryland to follow).

<sup>57</sup> Peter J. Spiro, *Learning To Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1627 & n.\* (1997) (crediting Hiroshi Motomura with the term).

<sup>58</sup> *Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2171, 2265 (2005).

<sup>59</sup> Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 640 (2008).

<sup>60</sup> One impediment to this interpretation of the federal statute is the ambiguity of the congressional findings at the beginning of the text. Compare 8 U.S.C. § 1601 (2006) (“Congress makes the following statements concerning *national policy with respect to welfare and immigration . . .*” (emphasis added)), with *id.* § 1601(2)(B) (“It continues to be the *immigration policy* of the United States that . . . the availability of public benefits not constitute an incentive for immigration to the United States.” (emphasis added)).

<sup>61</sup> William J. Clinton, Statement on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 2 PUB. PAPERS 1328, 1328 (Aug. 22, 1996).

<sup>62</sup> *Cf., e.g., Chi., Burlington & Quincy Ry. Co. v. Illinois ex rel. Drainage Comm’rs*, 200 U.S. 561, 592 (1906).

Title IV is a welfare statute that delegates nonuniformly, the “uniform rule” rationale for grafting the federal equal protection standard onto a complementary state measure falls flat.<sup>63</sup> Similarly, if the state’s authority to pass alienage measures stems from its inherent police powers, *Graham* compels the application of strict scrutiny.<sup>64</sup> Had the majority reached an equal protection analysis, its strongest interpretive move would have been to follow *Aliessa* and apply strict scrutiny, turning the case for the plaintiffs.

There are several reasons to appreciate this result, beyond the fact that it effectuates congressional intent and avoids constitutional difficulties. Insulating Title IV’s immigration federalism scheme from constitutional attack may help preserve many positive state and local efforts aimed at integrating legal immigrants.<sup>65</sup> And some state variation may be preferable to a possible uniform federal rule *barring*, rather than granting, alien access to benefits.<sup>66</sup> At the same time, a firm constitutional backstop is needed to prevent unfair discrimination against aliens, who are particularly vulnerable because of their inability to exercise political power through the vote.<sup>67</sup> Such protection seems particularly urgent as state governments approach the difficult task of eliminating benefits in the wake of massive budget shortfalls.<sup>68</sup>

*Khrapunskiy* offers none of these advantages. Instead, the majority erroneously evaded the relevant constitutional inquiry, quietly casting doubt on the appropriateness of a two-tier system of review for state and federal alienage classifications. *Khrapunskiy* has left resolution of these hard constitutional questions for the next case and the next court. Indigent legal immigrants and their advocates should pay close attention as this anomalous area of the law continues to evolve.

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<sup>63</sup> See Huntington, *supra* note 6, at 800 (“Without . . . federal authorization, a state law hinging eligibility for state benefits on immigration status would be subject to strict scrutiny . . .”).

<sup>64</sup> See *Graham v. Richardson*, 403 U.S. 365, 382 (1971).

<sup>65</sup> See Rodríguez, *supra* note 59, at 609 (noting that such measures might be rendered impermissible if a principle of federal exclusivity in all matters of immigrant benefit access were to prevail); see also Huntington, *supra* note 6, at 792 (“[C]oncluding that the Constitution precludes state and local authority over pure immigration law casts a long shadow on *any* state or local conduct concerning immigration, even conduct that falls short of pure immigration law.”).

<sup>66</sup> See Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SURV. AM. L. 357, 363–64 (2002) (arguing that, rather than “insist[ing] on nondevolvability . . . [and potentially] get[ting] uniform discrimination as a result,” we might “view federal authorization of divergent state policies as creating laboratories of generosity toward immigrants” (emphasis omitted)).

<sup>67</sup> See Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1439 (1995).

<sup>68</sup> See Goodnough, *supra* note 1; Spiro, *supra* note 57, at 1639 (noting the possibility that states will engage in a “race to the bottom” in cutting benefits for aliens (internal quotation marks omitted)).