Congressional Research Service
Informing the legislative debate since 1914

Noncitizen Eligibility for Public Benefits: Legal Issues

-name redacted-
Legislative Attorney

September 9, 2013

Congressional Research Service
7-....
www.crs.gov
R43221

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

Whether and when noncitizens may receive particular types of government assistance can be difficult to ascertain because of the various federal, state, and local laws governing their eligibility for such assistance. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 was enacted to establish "national policy with respect to welfare and immigration." With certain exceptions, PRWORA bars aliens who are not "qualified aliens" from receiving federal, state, or local "public benefits," and also precludes qualified aliens from receiving "federal means-tested public benefits" for five or more years after they enter the United States in a qualified status. However, there are also a number of federal, state, and local measures adopted prior to, or after, PRWORA, some of which make different provisions for noncitizens' eligibility for particular benefits. The application of these measures can raise complicated issues of constitutional law, statutory interpretation, and administrative law.

The constitutional guarantee of equal protection applies to all "persons" within the United States, including aliens. Thus, measures governing eligibility for public benefits could be subject to legal challenge if they treat aliens differently than citizens. Because of Congress's plenary power over immigration, federal measures that distinguish between aliens and citizens will generally be upheld so long as they are rationally related to a legitimate government interest. State and local measures, in contrast, are generally subject to some type of heightened scrutiny, the degree of which can vary depending upon the benefit involved and the aliens' status. However, state and local measures that follow a "uniform rule" established by Congress could potentially receive the same deferential review afforded to federal measures. Courts have reached differing conclusions as to whether PRWORA establishes such a uniform rule. Courts have also disagreed as to whether measures that treat lawful *nonimmigrant* aliens differently from citizens are subject to the same level of scrutiny as those that distinguish between lawful *immigrant* aliens and citizens.

Questions can also arise as to whether particular state and local measures are preempted by federal law. Some states and localities, concerned about the presence of unauthorized aliens within their jurisdiction, have recently enacted measures which would define *benefits* or related terms more broadly than PRWORA does, and further restrict aliens' eligibility for them. Such measures could potentially be challenged on preemption grounds because the Constitution grants Congress the power to regulate immigration. State and local measures that purport to determine the conditions upon which aliens may enter or remain in the United States are, *per se*, preempted. Federal statutes can also preempt state and local measures by expressly prohibiting them, containing conflicting requirements, or occupying the field.

Moreover, in the application of particular measures, there have been questions about whether particular government programs, services, or types of assistance are benefits. For example, although PRWORA includes certain types of assistance within its definitions of *public benefit*, it also refers to "any other similar benefit." Parties have litigated whether particular assistance constitutes a benefit "similar" to those governed by PRWORA. They have also litigated whether PRWORA bars aliens from receiving benefits whose provision entails the expenditure of appropriated funds, even if the aliens themselves must pay a fee for the benefit; as well as what it means for a state to "affirmatively provide" for eligibility. Similarly, because PRWORA does not affirmatively define "federal means-tested public benefits," there has been debate about the degree of deference to be accorded to agency interpretations of this term as encompassing only five mandatory spending programs (e.g., Medicaid), and no discretionary spending programs.

Contents

Contacts

Congress's interest in the receipt of government assistance by noncitizens dates back to at least 1882, when the country's first general immigration law excluded aliens who were deemed "likely to become a public charge" after they came to the United States.[1] The term *public charge* has historically meant persons who are "primarily dependent upon the government for subsistence,"[2] and the 1882 measure effectively limited aliens' receipt of government assistance by barring aliens who were likely to substantially rely upon such assistance from entering the United States. Since that time, Congress has returned periodically to the topic of noncitizens' eligibility for public benefits, sometimes restricting noncitizens' eligibility for public benefits and sometimes expanding it. Congressional interest has been particularly high in recent years due to the sizable number of aliens who are unlawfully present in the United States (i.e., entered without inspection, or overstayed or otherwise violated the terms of their visas). Some have suggested that noncitizens' eligibility for public benefits is a "magnet" for unauthorized immigration and ought to be further restricted.[3] Others have sought to expand at least certain aliens' eligibility for public benefits on humanitarian or public interest grounds.[4]

Whether and when persons who are present in the United States, but not U.S. citizens or nationals,[5] may receive particular types of government assistance can be difficult to ascertain because of the various federal, state, and local laws governing their eligibility for such assistance. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)[6] was enacted to establish "national policy with respect to welfare and immigration."[7] With certain exceptions, PRWORA bars aliens who are not "qualified aliens" from receiving federal, state, or local "public benefits," and precludes qualified aliens from receiving federal "means-tested public benefits" for 5 or more years after they enter the United States in a qualified status. However, there are also a number of other federal, state, and local measures adopted prior to, or after, the enactment of PRWORA, some of which make different provisions for noncitizens' eligibility for particular benefits. The applications of these measures can raise complicated issues of constitutional law, statutory interpretation, and administrative law.

This report provides an overview of PRWORA and illustrative pre- and post-PRWORA enactments regarding noncitizen eligibility for public benefits as background, before turning to a discussion of the major legal issues raised by such measures. The discussion of enactments other than PRWORA and the legal issues they raise is selective. The report does not attempt to identify all legal measures that might affect noncitizens' eligibility for particular benefits, or all legal

[1] Act of Aug. 3, 1882, 22 Stat. 58. A little over 20 years later, Congress made aliens who had migrated to the United States deportable if they became public charges within a period after entry. Act of Mar. 3, 1903, 32 Stat. 1213.

[2] *See, e.g.*, Dep't of Justice, Immigration & Naturalization Serv., Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999) (discussing prior usage of the term).

[3] *See, e.g.*, Paul Hammel, Prenatal Care a "Magnet" for Illegal Immigrants? *Omaha World-Herald*, Apr. 10, 2012, *available at* http://www.omaha.com/article/20120410/NEWS01/704109923 (describing certain state officials' views that the availability of public benefits, in part, motivates unauthorized immigration).

[4] *See, e.g.*, Sharon Parrott & Robert Greenstein, Benefit Restrictions Beyond Those in Senate Immigration Bill Would Jeopardize Legalization for Many and Risk Severe Hardships for Others, Center on Budget and Policy Priorities, June 14, 2013, *available at* http://www.cbpp.org/cms/?fa=view&id=3974.

[5] As used in the Immigration and Nationality Act (INA), the term *alien* means any person who is not a citizen or national of the United States. INA §101(a)(3), 8 U.S.C. §1101(a)(3).

[6] P.L. 104-193, tit. IV, §§401-435, 110 Stat. 2261-2276 (Aug. 22, 1996) (generally codified, as amended, in 8 U.S.C. §§1601-1646). PRWORA did not amend the INA, so citations to it reference only Title 8 of the *United States Code*.

[7] 8 U.S.C. §1601.

issues that could potentially be raised. Rather, its focus is upon illustrative measures, and major legal issues that have recurred.

The report also does not address legal issues that could potentially be raised by noncitizens' receipt of public benefits, particularly whether the receipt of such benefits may result in aliens being found to be inadmissible or deportable on public charge grounds. A separate report, CRS Report R43220, *Public Charge Grounds of Inadmissibility and Deportability: Legal Overview*, by (name redacted), discusses these issues. There are also several CRS reports addressing policy issues related to noncitizens' eligibility for public benefits.[8]

Background

PRWORA, as amended, establishes certain default rules regarding noncitizens' eligibility for federal, state, and local public benefits by creating various categories of aliens and benefits, and prescribing when particular aliens may receive certain benefits. However, numerous measures had been enacted prior to PRWORA, which PRWORA effectively nullified or modified. In addition, Congress, states and, in some cases, localities have enacted additional measures post-PRWORA that either expand, or restrict, noncitizens' eligibility for particular benefits.

Pre-PRWORA Enactments

Prior to the enactment of PRWORA, there generally were no overarching rules regarding noncitizens' eligibility for public benefits. Rather, individual statutes generally governed noncitizens' eligibility for benefits provided pursuant to the statute, and often classified aliens in terms of categories specific to the statute. For example, the Unemployment Compensation Amendments of 1976 expressly prohibited the payment of unemployment insurance on the basis of services performed by an alien unless the alien was (1) a lawful permanent resident (LPR) when the services were performed; (2) "lawfully present" for purposes of performing the services; or (3) residing in the United States "under color of law"[9] when the services were performed.[10] Noncitizens not belonging to one of these three classes—most notably, aliens who were unlawfully present or working in the United States when they provided the services upon which compensation would be based—were barred from receiving unemployment insurance. The Social Security Amendments of 1965 similarly provided that

[8] *See, e.g.*, CRS Report RL34500, *Unauthorized Aliens' Access to Federal Benefits: Policy and Issues*, by (name redac ted); CRS Report RL33809, *Noncitizen Eligibility for Federal Public Assistance: Policy Overview and Trends*, by (name redacted). These and other CRS reports also provide information about affidavits of support and systems for verifying noncitizens' eligibility for public benefits, neither of which are within the scope of this report.

[9] "Present in the United States under color of law" (PRUCOL) has been described as an "amorphous" and "elastic" category, including any aliens within the United States with the knowledge and permission of immigration authorities, whom the authorities do not contemplate deporting. *See* Berger v. Heckler, 771 F.2d 1556, 1575-76 (2d Cir. 1985). Post-PRWORA, the PRUCOL category is generally no longer used in federal benefits or other statutes. However, some states continue to use it when exercising their authority under PRWORA to provide benefits to certain aliens who are not eligible for federal benefits under PRWORA. *See, e.g.*, Tonashka v. Weinberg, 678 N.Y.S.2d 883 (1998).

[10] P.L. 94-566, §314(a), 90 Stat. 2680 (Oct. 20, 1976) (codified, as amended, at 26 U.S.C. §3304(a)(14)(A)). However, even prior to the 1976 amendments, denial of unemployment insurance compensation to unauthorized aliens was sometimes upheld on the theory that such aliens were not eligible or available for work, and have no constitutional right to work. *See, e.g.*, Alonso v. State, 50 Cal. App. 3d 242 (1975).

> Every individual who (1) has attained the age of 65, and (2) (A) is a resident of the United States, and is either (i) a citizen or an alien lawfully admitted for permanent residence who has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment under this part ... *is eligible* to enroll in the [Medicare Part B] insurance program.[11]

Here, the only noncitizens eligible for Medicare Part B were LPRs who had resided in the United States "continuously" for the five years prior to applying for enrollment. All others were excluded, including LPRs who had not yet resided in the United States for five years, or whose total period of residence, while longer than five years, had not been "continuous." In yet other cases, the statute was silent as to noncitizens' eligibility for benefits provided pursuant to the statute (e.g., school lunch and nutrition, supplemental food program for women, infants, and children (WIC), earned income credit), which was often taken to mean that noncitizens were not barred from receiving such benefits.[12]

In a few cases, however, states, in particular, enacted measures that addressed noncitizens' eligibility for public benefits more broadly. Perhaps the best known of these was California's Proposition 187, adopted by voters in 1994, and described by some commentators as the "impetus" for PRWORA.[13] Proposition 187 was intended to "prevent illegal aliens in the United States from receiving benefits or public services in the State of California."[14] Among other things, Proposition 187 barred the provision of "public social services" and "publicly-funded health care services" to persons who were not U.S. citizens, LPRs, or "admitted lawfully for a temporary period of time."[15] It also barred persons who were not citizens, LPRs, or "otherwise authorized under federal law to be present in the United States" from admission to public elementary, secondary, and postsecondary schools.[16] However, these and other provisions of Proposition 187 were found to be preempted by federal law, or otherwise impermissible,[17] and not enforced.

Some of these pre-PWRORA laws remain on the books, but their implementation has generally been shaped by the subsequent enactment of PRWORA. As discussed below, PRWORA "effectively invalidated all existing" federal, state, or local measures governing noncitizens' eligibility for public benefits,[18] replacing them with default rules that states, in particular, may opt out of only in specified circumstances (e.g., by enacting a measure subsequent to PRWORA that

---

[11] P.L. 89-97, §102(a), 79 Stat. 304 (July 30, 1965) (codified, as amended, at 42 U.S.C. §1395o) (emphasis added).

[12] *See, e.g.*, *Personal Responsibility and Work Opportunity Reconciliation Act of 1996: Conference Report to Accompany H.R. 3734*, H.R. Rpt. 104-725, 104th Cong., 2d Sess., July 30, 1996, at 379.

[13] *See, e.g.*, Kevin R. Johnson, et al., *Understanding Immigration* Law 137-38 (2009). Measures akin to PRWORA had, however, been introduced in Congress prior to the adoption of Proposition 187. *See, e.g.*, 141 Cong. Rec. S15548 (June 12, 1995) (statement of Mr. Exon) ("I have introduced th[e] measure either as a stand-alone bill or an amendment in every Congress since 1989, long before measures like California's proposition 187 arrived on the scene.").

[14] League of United Latin Am. Citizens [LULAC] v. Wilson, 908 F. Supp. 755, 787 (C.D. Cal. 1995).

[15] *Id*. at 788-89.

[16] *Id.* at 789-90.

[17] Initially, the reviewing federal district court found that the provisions regarding public social services and publicly-funded health care services were preempted by federal law because the state had imposed its own classifications on aliens (e.g., "admitted lawfully for a temporary period of time"), and state officials determined which aliens were deportable under federal law. *Id*. at 769. However, after PRWORA's enactment, the court viewed these provisions as preempted by PRWORA. LULAC v. Wilson, No. CV 94-7569 MRP, 1998 U.S. Dist. LEXIS 3418, at *43-*44 (C.D. Cal., Mar. 13, 1998). Proposition 187's provisions regarding primary and secondary education are discussed *infra* note 88 and accompanying text.

[18] Kaider v. Hamos, 975 N.E.2d 667, 673 (Ill. App. 2012). *See also infra* notes 22-23 and accompanying text.

"affirmatively provides" for unauthorized aliens' eligibility). PRWORA has, thus, resulted in unauthorized aliens being ineligible for various state services.[19] The U.S. Department of Education similarly modified its guidance regarding which noncitizens are eligible for federal financial aid under the Higher Education Act after PRWORA's enactment.[20]

PRWORA

Congress enacted PRWORA in 1996, in part, to bring a degree of uniformity to noncitizens' eligibility for federal, state, and local public benefits.[21] When enacting PRWORA, Congress provided that the restrictions and conditions it imposed apply "[n]otwithstanding any other provision of law," except as otherwise provided in PRWORA.[22] This language has been construed to mean that PRWORA generally "invalidated" or rendered unenforceable preexisting federal, state, and local measures, at least to the degree that these measures were inconsistent with PRWORA.[23] Then, in place of these varied measures—which often had their own ways of describing both categories of noncitizens and particular types of benefits—PRWORA established standardized taxonomies of aliens and benefits. It also prescribed general rules regarding when particular aliens are eligible for specific benefits.

Under PRWORA, aliens are divided into two basic categories: qualified and not qualified. PRWORA defines *qualified alien* to encompass: LPRs; aliens granted asylum; refugees; aliens paroled into the United States for a period of at least one year; aliens whose deportation is being withheld; aliens granted conditional entry; and Cuban and Haitian entrants.[24] However, certain aliens who have been subject to domestic violence are also treated as qualified aliens for purposes

[19] Dep't of Health v. Rodriguez, 5 So. 3d 22 (Fla. App. 2009) (finding that the services of the Florida Brain and Spinal Cord Injury Program constitute state public benefits, and that the program was created prior to PRWORA and not subsequently reenacted).

[20] Amendments made to the Higher Education Act in 1986 permit persons "in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident" to receive federal financial aid. An Act to Reauthorize and Revise the Higher Education Act of 1965, and For Other Purposes, P.L. 99-498, §407(a), 100 Stat. 1480 (Oct. 17, 1986) (codified, as amended, at 20 U.S.C. §1091(a)(5)). Currently, the U.S. Department of Education construes this language to mean only noncitizens encompassed within PRWORA's definition of qualified alien. *See* U.S. Dep't of Education, *Federal Student Aid Handbook*, 2013-2014, Vol. 2, at 1-24 to 1-27, Apr. 2013, *available at* http://ifap.ed.gov/fsahandbook/attachments/1314FSAHbkVol2Ch2.pdf. However, prior to PRWORA's enactment, the Department had considered noncitizens granted temporary resident cards, or who had suspension of deportation cases pending before Congress, eligible. U.S. Dep't of Education, *The Student Guide: Financial Aid from the U.S. Department of Education: Grants, Loans, and Work Study, 1989-1990*, at 71, quoted in CRS Report 89-435 EPW, *Alien Eligibility Requirements for Major Federal Assistance Programs*, by Joyce C. Vialet and (name redacted) (out of print, available upon request).

[21] *See, e.g.*, H.Rept. 104-651 (1998), at 374 ("This legislation seeks to further streamline operation of this Nation's public assistance programs."); 141 Cong. Rec. S15548 (June 12, 1995) (statement of Mr. Exon) ("We must initiate a joint new State-Federal resolve—a new compact, if you will—to put an end to such abuses."); 141 Cong. Rec. H8553 (Mar. 21, 1995) (statement of Mr. Riggs) (describing PRWORA as setting "a very clear standard for our country").

[22] *See* 8 U.S.C. §1611(a); 8 U.S.C. §1612(a)(1) & (b); 8 U.S.C. §1613(a); 8 U.S.C. §1621(a).

[23] *See, e.g.*, Pimentel v. Dreyfus, 670 F.3d 1096, 1101 (9th Cir. 2012) ("Upon enactment of the Welfare Reform Act, however, Washington's food stamp program automatically conformed to the new eligibility requirements concerning aliens."); *Kaider*, 975 N.E.2d at 673 ("In passing [PRWORA], Congress effectively invalidated all existing ... laws, regulations, or executive orders that extended benefits [to aliens who were not qualified aliens for purposes of PRWORA].'"); Doe v. Wilson, 67 Cal. Rptr. 2d 187, 190 (Cal. App. 1997) (upholding regulations terminating a state program that benefitted unauthorized aliens because the program was "rendered immediately illegal by [PRWORA]").

[24] 8 U.S.C. §1641(b)(1)-(7).

of PRWORA.[25] All other aliens are not qualified.[26] This includes those who are unlawfully present; have been granted temporary protected status, deferred enforced departure, or deferred action; or are lawfully present in the United States on nonimmigrant visas.

PRWORA similarly categorizes benefits as: federal public benefits, federal means-tested public benefits, and state and local public benefits.[27] With certain exceptions, it defines federal and state and local *public benefits* to mean the following:

> any grant, contract, loan, professional license, or commercial license provided by [a government] agency ... or by appropriated funds ...; and any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by [a government] agency ... or by appropriated funds.[28]

In contrast, *federal means-tested public benefit* is not affirmatively defined by PRWORA, although certain benefits are expressly excluded from the application of this term (e.g., short-term, non-cash, in-kind emergency disaster relief).[29] Because this term is not defined, PRWORA has generally been seen as granting federal agencies discretion to designate which public benefits are federal means-tested ones. As is discussed below,[30] the Office of Legal Counsel at the Department of Justice has opined that agency interpretations of this term as encompassing only Medicaid, food stamps, supplemental security income (SSI), Temporary Assistance to Needy Families (TANF), and the State Child Health Insurance Program (SCHIP) are entitled to deference.[31] PRWORA itself does not address state means-tested public benefits, beyond providing that affidavits of support provided by aliens' sponsors may be enforceable by any state or locality that provides "means-tested public benefit[s]" to the alien.[32]

---

[25] *See* 8 U.S.C. §1641(c).

[26] Noncitizens who are not qualified aliens could potentially receive certain public benefits, particularly pursuant to federal or state measures enacted subsequent to PRWORA. *See infra* "Post-PRWORA Enactments."

[27] Benefits paid for with federal funds are generally treated as federal benefits, even if they are administered by state or local governments. *See, e.g.*, *Pimentel*, 670 F.3d at 1099 n.4 (Supplemental Nutrition Assistance Program (SNAP) is a federal benefit, although provided through the States).

[28] 8 U.S.C. §1611(c)(1) (federal public benefits); 8 U.S.C. §1621(c)(1) (state and local public benefits). PRWORA expressly excludes certain things from these definitions (e.g., professional or commercial licenses for nonimmigrants whose visas are related to U.S. employment). *See* 8 U.S.C. §1611(c)(2)(A)-(C); 8 U.S.C. §1621(c)(2)-(3).

[29] 8 U.S.C. §1613(c)(2). Certain regulations implementing PRWORA do, however, define "means-tested public benefits." *See* 8 C.F.R. §213a.1 (defining the term, as used in the regulations pertaining to affidavits of support, to mean "either a Federal means-tested public benefit, which is any public benefit funded in whole or in part by funds provided by the Federal Government that the Federal agency administering the Federal funds has determined to be a Federal means-tested public benefit under [PRWORA], or a State means-tested public benefit, which is any public benefit for which no Federal funds are provided that a State, State agency, or political subdivision of a State has determined to be a means-tested public benefit.").

[30] *See* "Agency Determinations Regarding Federal Means-Tested Public Benefits."

[31] *See* Dep't of Justice, Office of Legal Counsel, Proposed Agency Interpretation of "Federal Means-Tested Public Benefits" Under Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Jan. 14, 1997, *available at* http://www.justice.gov/olc/meanstst10.htm. As amended, PRWORA also directly addresses many of the programs recognized as federal means-tested public benefits by the agencies. *See* 8 U.S.C. §1612(a)(3) (SSI and food stamps); 8 U.S.C. §1612(b)(3)(A)-(C) (TANF, Medicaid, social services block grants).

[32] 8 U.S.C. §1183a. *But see supra* note 29 (federal regulation addressing "State means-tested public benefits").

PRWORA relies upon the taxonomies of aliens and benefits that it creates in prescribing specific rules regarding which aliens are eligible for particular benefits. The "default" rules established by PRWORA are arguably simple (although, particularly as amended, PRWORA provides for numerous exceptions[33]). First, aliens who are not qualified aliens are generally barred from receiving public benefits. Such aliens are not eligible for federal, state, or local public benefits (means-tested or otherwise).[34] However, states and localities may furnish public benefits to unauthorized aliens if the state enacts legislation subsequent to PRWORA's enactment that "affirmatively provides" for their eligibility.[35] Second, even aliens who are qualified aliens are generally subject to significant restrictions on their eligibility for SSI, TANF, Medicaid, food stamps, social services block grants, and other means-tested public benefits. Such aliens are barred from receiving federal means-tested public benefits for five years after their entry into the United States in a qualified status.[36] In addition, certain qualified aliens are ineligible for SSI, TANF, Medicaid, food stamps, and social services block grants unless they have worked, or can be credited with, 40 qualifying quarters of work under the Social Security Act, and did not receive any federal means-tested public benefits during that time.[37] Moreover, in determining qualified aliens' eligibility for means-tested benefits, the income and resources of the aliens' sponsor may be attributed to the alien until the alien naturalizes or has worked 40 quarters.[38]

PRWORA's "national policy with respect to welfare and immigration"[39] is, however, subject to numerous exceptions. Some of these exceptions are incorporated into PRWORA, as amended.[40] Others, however, exist because PRWORA grants states the authority to make various determinations affecting noncitizens' eligibility for federal, state, and local public benefits. Specifically, PRWORA permits (but does not require) states to

- determine, with certain exceptions and subject to certain restrictions, the eligibility of qualified aliens for TANF, social services block grants, and Medicaid,[41] and for state public benefits;[42]
- limit aliens' eligibility for "programs of general cash public assistance" furnished by states or localities, provided that any such limitations are not more restrictive than the limitations imposed under comparable federal programs;[43]

[33] *See infra* note 40.

[34] 8 U.S.C. §1611(a) ("Notwithstanding any other provision of law and except as provided in subsection (b), an alien who is not a qualified alien ... is not eligible for any Federal public benefit."); 8 U.S.C. §1621(a) ("Notwithstanding any other provision of law and except as provided in subsections (b) and (d), an alien who is not ... a qualified alien ... is not eligible for any State or local public benefit.").

[35] 8 U.S.C. §1621(d).

[36] 8 U.S.C. §1613(a).

[37] 8 U.S.C. §1612(a) & (b).

[38] 8 U.S.C. §1631.

[39] 8 U.S.C. §1601.

[40] For example, among the benefits expressly exempted from PRWORA's prohibitions upon the provision of federal, state, or local public benefits to non-qualified aliens are: (1) assistance for the treatment of "emergency medical conditions"; (2) short-term, non-cash, in-kind emergency disaster relief; (3) immunizations, and treatment of the symptoms of communicable diseases; and (4) designated programs delivering in-kind services at the community level that are necessary for the protection of life or safety, and are not means-tested. 8 U.S.C. §1611(b)(1)(A)-(E) (federal public benefits); 8 U.S.C. §1621(b)(1)-(4) (state and local public benefits).

[41] 8 U.S.C. §1612(b)(1) ("[A] State is authorized to determine the eligibility of an alien who is a qualified alien ... for any designated Federal program.").

[42] 8 U.S.C. §1622(a).

- attribute the income and resources of the alien's sponsor(s) to the alien when determining aliens' eligibility for state public benefits;[44] and
- provide state and local benefits to unauthorized aliens by enacting a measure subsequent to PRWORA's enactment that provides for such eligibility.[45]

As discussed later, these provisions, permitting a range of state actions, have played a significant role in certain courts' finding that PRWORA does not provide a "uniform rule" for states to follow, such that challenged state measures enacted pursuant to it are reviewed more deferentially than other state measures classifying persons on the basis of alienage.[46]

Post-PRWORA Enactments

PRWORA has been amended periodically since its enactment to further clarify Congress's intent, as well as to permit certain noncitizens who were ineligible for particular benefits under PRWORA to receive such benefits. For example, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, enacted a little over a month after PRWORA, added a provision apparently intended to deter states from using their authority under PRWORA to grant in-state tuition to unauthorized aliens.[47] This provision bars states from providing "postsecondary education benefits" to unauthorized aliens based on the alien's residence within the state unless other citizens or nationals are eligible for such benefits, regardless of their state of residence.[48] IIRIRA also made certain other amendments to PRWORA, including by providing that certain victims of domestic violence are deemed qualified aliens for purposes of PRWORA.[49] Other measures enacted in 1997[50] and in 1998[51] similarly amended PRWORA to permit some aliens to receive benefits they could not have received under PRWORA, as originally enacted.

Congress has also enacted legislation that addresses noncitizens' eligibility for particular benefits separate and apart from PRWORA, in many cases making noncitizens eligible for benefits that

(...continued)

[43] 8 U.S.C. §1624.

[44] 8 U.S.C. §1632. *See also* De Lemus v. Wagner, 2012 Cal. App. Unpub. LEXIS 6964 (Sept. 25, 2012) (upholding state agency's determination that father's SSI benefits may be attributed to alien child when determining child's eligibility for a means-tested state benefits program).

[45] 8 U.S.C. §1621(d). *But see infra* notes 47-48 and accompanying text for certain limitations on this authority.

[46] *See infra* notes 97 to 105 and accompanying text.

[47] P.L. 104-208, Div. C, tit. V, subtit. A, §505, 110 Stat. 3009-672 (Sept. 30, 1996) (codified at 8 U.S.C. §1623); Martinez v. Regents of the Univ. of Cal., 83 Cal. Rptr. 518, 530 n.15 (Cal. App. 2008) (state conceding that Section 505 of IIRIRA "narrowed" states' authority under PRWORA), *rev'd on other grounds*, 241 P.3d 855 (Cal. 2010).

[48] *But see Martinez*, 241 P.3d 855 at 1291-94 (finding that this provision does not bar states from providing in-state tuition to unauthorized aliens upon other grounds, such as their having completed a certain number of years of secondary school within the state).

[49] P.L. 104-208, Div. C, tit. V, subtit. A, §501, 110 Stat. 3009-670 to 3009-671.

[50] *See, e.g.*, Balanced Budget Act of 1997, P.L. 105-33, §§5561, 5565, 111 Stat. 638-39 (Aug. 5, 1997) (exempting certain benefits payable under the Social Security Act, Railroad Retirement Act, and Railroad Unemployment Act from PRWORA's restrictions upon the provision of federal public benefits to aliens who are not qualified aliens).

[51] *See, e.g.*, Noncitizen Benefit Clarification and Other Technical Amendments Act of 1998, P.L. 105-306, §§2, 5(a), 112 Stat. 2926-27 (Oct. 28, 1998) (providing that the restriction on the provision of federal public benefits to aliens who are not qualified aliens shall not apply to benefits under the SSI program, or under any other program that is based on eligibility for the SSI program, for aliens who were receiving such benefits on the date of PRWORA's enactment).

would be denied to them under PRWORA's default rules. For example, Section 214 of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) grants states the option to provide Medicaid and CHIP coverage to all children and pregnant women "who are lawfully residing in the United States … and who are otherwise eligible for such assistance."[52] The phrase "lawfully residing in the United States" has been construed to include certain aliens who are not qualified aliens for purposes of PRWORA, such as lawful nonimmigrants, as well as those with temporary protected status, under deferred enforced departure, in deferred action status, or whose visa petitions have been approved and have a pending application for adjustment of status.[53] The Patient Protection and Affordable Care Act (ACA) of 2010 similarly permits persons who are "lawfully present" to participate in certain health care programs established under the act.[54] *Lawfully present* for purposes of ACA has generally been construed in the same way as *lawfully residing* for purposes of CHIPRA (i.e., including those with temporary protected status or under deferred enforced departure),[55] although beneficiaries of Deferred Action for Childhood Arrivals (DACA) have been viewed as ineligible for certain benefits under ACA.[56]

States, in particular, have also enacted a number of post-PRWORA measures addressing noncitizens' eligibility for public benefits. Some of these measures were expressly authorized by PRWORA, and make aliens eligible for state and local benefits that they would otherwise be denied.[57] Others restrict qualified aliens' eligibility for TANF, Medicaid, and social services block grants, as permitted by PRWORA.[58] In yet other cases, however, states and localities have enacted measures that would define *public benefit* more broadly than PRWORA does, and seek to bar unauthorized aliens, in particular, from receiving such benefits. For example, the City of Farmers Branch, Texas, attempted to characterize residential occupancy licenses as "public benefits" when barring persons from renting housing to unauthorized aliens.[59] The State of Georgia relied upon a similarly broad definition of *public benefit*—including adult education; business, gaming, and professional licenses; registration of regulated businesses; state

[52] P.L. 111-3, §214(a), 123 Stat. 56 (Feb. 4, 2009) (codified at 42 U.S.C. §1396b(v)(4)(A)-(B)).

[53] Centers for Medicare & Medicaid Services, Medicaid and CHIP Coverage of "Lawfully Residing" Children and Pregnant Women, July 1, 2010, *available at* http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/sho10006.pdf.

[54] *See, e.g.*, P.L. 111-148, §1101(d)(1), 124 Stat. 142 (Mar. 23, 2010) (temporary high risk health insurance pools for uninsured individuals with preexisting conditions); *id*., at §1312(f)(3), 124 Stat. 184 (health care exchanges).

[55] *See, e.g.*, Dep't of the Treasury, Health Insurance Premium Tax Credit: Final Regulations, 77 Fed. Reg. 30377, 30387 (May 23, 2012) ("Lawfully present has the same meaning as in 45 CFR 155.20."). Section 155.20 of Title 45, in turn, defines *lawfully present* as qualified aliens; nonimmigrants who have not violated the terms of their status; certain aliens paroled into the United States; and aliens granted deferred action or deferred enforced departure, among others.

[56] *See, e.g.*, Dep't of Health & Human Servs., Center for Medicaid & CHIP Servs., Individuals with Deferred Action for Childhood Arrivals, Aug. 28, 2012, *available at* http://www.medicaid.gov/Federal-Policy-Guidance/downloads/SHO-12-002.pdf.

[57] *See, e.g.*, *Pimentel*, 670 F.3d at 1101 (Washington statute extending food stamp benefits to aliens who lost their eligibility for federal food stamps due to PRWORA); Ehrlich v. Perez, 908 A.2d 1220 (Md. 2006) (Maryland statute providing comprehensive medical care and other health services to qualified aliens who had not been present in the United States in that status for the requisite period of time to receive federal means-tested public benefits).

[58] *See, e.g.*, Wendy Zimmermann & Karen C. Tumlin, Patchwork Policies: State Assistance for Immigrants Under Welfare Reform, The Urban Institute Occasional Paper No. 24, 1999, *available at* http://www.urban.org/publications/309007.html (surveying the range of state actions shortly after PRWORA was enacted).

[59] *See, e.g.*, Villas at Parkside Partners v. City of Farmers Branch, 701 F. Supp. 2d 835, 856 (N.D. Tex. 2010) ("The City's attempt to characterize a residential occupancy license as a 'public benefit' for which it may require proof of eligibility pursuant to 8 U.S.C. § 1625 does not validate its classification or avoid the conclusion that the Ordinance is a regulation of immigration."), *aff'd*, 2013 U.S. App. LEXIS 14953 (5th Cir., July 22, 2013).

identification cards; and tax certificates required to conduct commercial businesses—when proscribing the provision of public benefits to unauthorized aliens.[60] More recently, Montana voters adopted a referendum which prohibits the provision of "state services" to unauthorized aliens, and defines this term to encompass cash payments, state licenses or permits, enrollment at state public universities, and services for crime victims and persons with physical disabilities.[61]

Legal Issues

Construing and applying PRWORA and related measures to determine whether individual aliens are eligible for particular benefits can raise a number of legal issues, including (1) the constitutional rights of aliens; (2) whether federal law preempts state or local measures; and (3) whether particular types of government assistance constitute benefits under particular definitions of this term.[62] In particular, questions regarding noncitizens' rights to equal protection and preemption are particularly likely to arise in facial challenges seeking to invalidate particular measures. Questions regarding what constitutes a *benefit*, in contrast, tend to occur in challenges to applications of particular measures.

Noncitizens' Rights to Equal Protection

The constitutional guarantee of equal protection applies to all "persons" within the United States, including aliens (regardless of their immigration status).[63] Thus, measures governing eligibility for public benefits could potentially be subject to legal challenges if they treat aliens differently than citizens. The level of scrutiny applied by the courts in reviewing challenges to such measures frequently determines whether the law is upheld, or struck down. With "rational basis review," the challenged measure will generally be upheld if it is a rational means of promoting a legitimate government objective. The measure is "presumed constitutional," and the persons challenging the law have the burden of negating all possible rational justifications for the classification.[64] In contrast, with "strict scrutiny," the challenged measure will be upheld only if the government can

[60] GA. CODE ANN. §50-36-1(a)(4)(A)(i). This provision was among those challenged in *Georgia Latino Alliance for Human Rights v. Deal*, No. 1:11-CV-1804, Complaint for Declaratory and Injunctive Relief (filed N.D. Ga., June 2, 2011). However, the courts do not appear to have addressed it in any published decision. *See* Ga. Latino Alliance for Hum. Rights v. Deal, 793 F. Supp. 2d 1317 (N.D. Ga. 2011), *aff'd, in part*, by 691 F.3d 1250 (11th Cir. 2012).

[61] *See* Montana Immigrant Justice Alliance v. Schweitzer, No. BDV-2012-1042, Complaint for Declaratory Judgment and Injunctive Relief (filed Mont. 1st Judicial Dist. Ct., Dec. 7, 2012) (alleging that the measure is unconstitutional).

[62] Specific measures, or applications thereof, could also raise other issues, including violations of state constitutions and agencies' failure to comply with their own regulations. *See, e.g.*, M.K.B. v. Eggleston, 445 F. Supp. 2d 400 (S.D.N.Y. 2006) (New York Department of Health failed to give certain alien victims of domestic violence the requisite notice of their eligibility for benefits); Tonashka v. Weinberg, 678 N.Y.S.2d 883 (1998) (alleged violation of state constitutional provision mandating that aid, care, and support be provided to the needy).

[63] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term."). *But see* Mathews v. Diaz, 426 U.S. 67, 78 (1972) ("The fact that all persons, aliens and citizens alike, are protected by the [constitutional guarantee of Equal Protection] does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogenous legal classification.").

[64] *See, e.g.*, Heller v. Doe by Doe, 509 U.S. 312, 320 (1993) ("[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record[, and] courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends.") (internal citations omitted).

demonstrate that the measure is necessary to achieve a compelling interest, and has been narrowly tailored to achieve that interest.[65] Other "intermediate" degrees of scrutiny are also possible, depending upon the persons and rights affected by the challenged measure.

Application to Federal Restrictions on Public Benefits

Because Congress's plenary power over immigration permits it to enact measures as to aliens that would be unconstitutional if applied to citizens,[66] federal restrictions on noncitizens' eligibility for public benefits are subject to rational basis review, and have generally been upheld. For example, in its 1976 decision in *Mathews v. Diaz*, the Supreme Court upheld a federal law that barred LPRs who had not resided in the United States for five years from enrolling in Medicare Part B, because it viewed the measure as a valid exercise of the federal government's authority to regulate the entry and residence of aliens, not as "irrational."[67] In particular, the *Mathews* Court noted that Congress could have reasonably determined that the strength of the aliens' ties to the United States increases over their time here, and that "as the alien's tie grows stronger, so does the strength of his claim to an equal share of the munificence."[68] The Court further suggested that Congress could have considered the "fiscal integrity" of the benefits program in drawing this line.[69] More recently, lower courts have upheld under rational basis review PRWORA's restrictions on the receipt of federal means-tested public benefits by qualified aliens who have not resided in the United States in that status for the requisite period of time.[70] In so doing, the courts have rejected the argument that, as a welfare statute, PROWRA was not enacted pursuant to Congress's plenary power over immigration and, thus, should be subject to more stringent review.[71] Courts have further noted that, while a five-year bar on qualified aliens' eligibility for certain benefits is "arbitrary," as the plaintiffs asserted, this does not invalidate the measure.[72]

---

[65] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326-27 (2003). PRWORA expressly notes that it is "a compelling government interest" to "enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy," and "to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. §1601(5)-(6). PRWORA further provides that states that follow federal classifications in determining noncitizens' eligibility "shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest in assuring that aliens be self-reliant in accordance with national immigration policy." 8 U.S.C. §1601(7). At least one court has, however, found that these statements did not preclude invalidating a state measure purportedly enacted pursuant to PRWORA under strict scrutiny. *See infra* note 105 and accompanying text.

[66] *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 765-70 (1972).

[67] *Mathews*, 426 U.S. at 85.

[68] *Id*. at 80.

[69] *Id*. at 83.

[70] *See, e.g.*, Lewis v. Thompson, 252 F.3d 567 (2d Cir. 2001) (Medicaid coverage for pregnant women); Aleman v. Glickman, 217 F.3d 1191 (9th Cir. 2000) (food stamps); Alvarez v. Shalala, 189 F.3d 598 (7th Cir. 1999) (welfare benefits); Rodriguez v. United States, 169 F.3d 1342 (11th Cir. 1999) (SSI and food stamps); City of Chicago v. Shalala, 189 F.3d 598 (7th Cir. 1999) (SSI, food stamps, and other public benefits); Kiev v. Glickman, 991 F. Supp. 1090 (D. Minn. 1998) (food stamps); Abreu v. Callahan, 971 F. Supp. 799 (S.D.N.Y. 1997) (SSI and food stamps).

[71] *See, e.g.*, *Alvarez*, 189 F.3d at 604-05 ("Congress' interest in regulating the relationship between our alien visitors and the national government ought not to be defined in such narrow terms as to preclude application of the rational basis test in a case such as the present one involving eligibility for government benefits."); *Rodriguez*, 169 F.3d at 1349 (similar). The plaintiffs in these and related cases had also argued for strict or other heightened scrutiny on other grounds, including on the grounds that PRWORA evidenced "animus" toward aliens, but these arguments also failed.

[72] *See, e.g.*, *Rodriguez*, 169 F.3d at 1348 (alleging that the "fourteen categories Congress defined in § 1612(a)(2) do not distinguish among aliens on a principled basis").

Rather, "cutoff dates inevitably lead to persons 'who have an almost equally strong claim to favored treatment being placed on different sides of the [eligibility] line.'"[73]

Application as to State and Local Restrictions on Public Benefits

The situation as to state and local measures is more complicated, with the level of scrutiny applied in challenges to such measures generally depending upon the persons and rights affected by the measure. There is no fundamental right to receive public benefits.[74] Rather, receipt of benefits falls within the "area of economics and social welfare,"[75] and classifications affecting such interests, standing alone, are generally subject to rational basis review.[76] However, courts also give heightened scrutiny to measures involving "suspect classifications," regardless of whether a fundamental right is involved, and classifications based on alienage are suspect.[77] Thus, because states and localities lack the federal government's plenary power over immigration, certain state and local measures restricting noncitizens' eligibility for public benefits—particularly measures restricting LPR's eligibility—have been subject to strict scrutiny. In its 1971 decision in *Graham v. Richardson*, for example, the Supreme Court struck down Pennsylvania and Arizona laws that barred or limited receipt of state "general assistance"[78] by LPRs. In so doing, the Court expressly rejected the argument that states have a "special public interest" in favoring their own citizens over aliens in the distribution of limited resources such as welfare benefits.[79] The *Graham* Court also emphasized that LPRs, like citizens, may live and work in a state for many years, contributing to its economic growth.[80]

Courts have, however, declined to apply strict scrutiny to state measures that exclude aliens, even long-term "permanent resident" aliens with significant ties to the United States, from employment involving "political and governmental functions." Instead, courts have applied rational basis review to such measures on the grounds that states must have the power to "preserve the basis conception of a political community" for a democracy to function.[81] Certain states have recently enacted measures that would define *public benefits* or *state services* in such a way as to encompass employment with state or local governments,[82] and denials of certain employment

[73] *Id*. at 1352. *See also* City of Chicago v. Shalala, No. 97 C 4884, 1998 U.S. Dist. LEXIS 4463, at *38 ("In addition, Congressional line drawing necessarily implies that people ... will be placed on either side of the line. ... This court is not empowered to second-guess Congress' decision on where to place that line.").

[74] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974). However, the denial of particular benefits, most notably publicly financed private and secondary education, could be subject to heightened scrutiny. *See infra* notes 85-90 and accompanying text.

[75] Dandridge v. Williams, 397 U.S. 471, 485 (1970).

[76] 403 U.S. 365, 371-72 (1971).

[77] *See, e.g.*, *id*. at 372; Nyquist v. Mauclet, 432 U.S. 1, 8 n.9 (1977) ("[C]lassifications based on alienage are inherently suspect, and are therefore subject to strict scrutiny whether or not a fundamental right is impaired.") (internal quotations omitted).

[78] *Graham*, 403 U.S. at 366-70.

[79] *Id*. at 374-75.

[80] *Id*. at 376.

[81] Foley v. Connelie, 435 U.S. 291, 295-96 (1978) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)) (upholding a New York law that barred noncitizens from becoming police officers).

[82] *See, e.g.*, Montana Immigrant Justice Alliance v. Bullock, No. BDV-2012-1042, Order on Petition for Preliminary Injunction (Mont. 1st Judicial Dist. Ct., Mar. 26, 2013), at 2 (Montana referendum defining "state service" as including "employment with a state agency").

pursuant to such measures could potentially be subject to more lenient review than denials of other benefits.

Courts have also declined to view unauthorized aliens as a suspect classification on the grounds that "their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'"[83] This means that state and local measures denying benefits to unauthorized aliens are generally subject to more deferential review than measures denying benefits to LPRs, such as the state laws at issue in *Graham*. However, state and local measures denying particularly significant benefits to certain unauthorized aliens could potentially be subject to heightened scrutiny.[84] Most notably, in its 1982 decision in *Plyler v. Doe*, the Supreme Court struck down a Texas statute which prohibited the use of state funds to provide elementary and secondary educations to children who were not "legally admitted" to the United States on the grounds that the statute did not further a "substantial" state goal.[85] While noting that education did not constitute a fundamental right, the Court distinguished it from other benefits, describing primary and secondary education as of "supreme importance" in preserving a democratic system of government.[86] The Court further noted that denying public elementary and secondary educations to unauthorized alien children would contribute to the formation of a permanent underclass, which the Fourteenth Amendment was designed to prevent.[87] Lower courts have reached similar conclusions as to Proposition 187's denial of public elementary and secondary educations to unauthorized alien children,[88] and certain Alabama requirements regarding verification of the citizenship and immigration status of students enrolling in public elementary and secondary schools.[89]

The *Plyler* Court also suggested, however, that state and local measures classifying persons on the basis of alienage could potentially enjoy more deferential review if Congress has "by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass."[90] Following PRWORA's enactment, questions have arisen as to whether PRWORA

[83] *Plyler*, 457 U.S. at 223.

[84] The Supreme Court has stated that *Plyler* "has not been extended beyond its unique circumstances." Kadrmas v, Dickinson Pub. Sch., 487 U.S. 450, 459 (1998). However, some lower courts have recently recognized other benefits as particularly significant for preemption purposes. *See, e.g.*, *Villas at Parkside Partners*, 701 F. Supp. 2d at 855 (renters' licenses).

[85] *Plyler*, 457 U.S. at 205, 228-30. The Court specifically rejected the three goals proffered by the state: (1) protecting itself from an influx of unauthorized aliens; (2) avoiding the special burdens imposed by unauthorized aliens on the state's ability to provide high quality public education; and (3) limiting the expenditure of state resources on unauthorized children who are unlikely to remain in the state. *But see* Regents of the Univ. of Cal. v. Superior Court of Los Angeles Cty., 225 Cal. App. 3d 972, 981 (1990) ((1) not subsidizing violations of federal law and (2) preferring to educate the state's own lawful residents recognized as legitimate state interests in denying eligibility for in-state tuition at public institutions of higher education to unauthorized aliens).

[86] *Plyler*, 457 U.S. at 221.

[87] *Id*. at 222.

[88] *LULAC*, 908 F. Supp. at 785.

[89] Hispanic Interest Coalition of Ala. v. Gov. of Ala., 691 F.3d 1236, 1245 (11th Cir. 2012) ("Our duty ... is to analyze whether [this provision of Alabama law] operates in such a way that it 'significantly interferes with the exercise of' the right to an elementary public education as guaranteed by *Plyler*. ... We conclude that it does and, further, find that no substantial state interest justifies the interference."), *cert. denied*, Alabama v. United States, 133 S. Ct. 2022 (2013).

[90] *Plyler*, 457 U.S. at 219 n.19. Other language in *Plyler* could, however, potentially be construed to mean that Congress's ability to authorize state and local classifications based on alienage is limited to unauthorized aliens. *See, e.g.*, *id*. at 226 ("In other contexts, *undocumented status*, coupled with some other articulable federal policy, might enhance state authority with respect to the treatment of *undocumented aliens*.") (emphases added).

provides such a uniform rule, as discussed below.[91] If it does, state and local measures that follow this rule could potentially be subject to rational basis review, like federal measures, and thus more likely to withstand legal challenges.[92] Similarly, several courts and commentators have noted that the Supreme Court precedents applying strict scrutiny to measures classifying persons on the basis of alienage all arose from challenges brought by LPRs (i.e., *lawful immigrants*). Some have suggested that classifications affecting *lawful nonimmigrants* (i.e., aliens lawfully permitted to remain in the country on a temporary basis) might be subject to less stringent review, regardless of whether PRWORA provides a uniform rule,[93] as is also discussed below.

Whether PRWORA Provides a Uniform Rule for States and Localities

Courts have reached differing conclusions about whether PRWORA provides a uniform rule regarding noncitizens' eligibility for public benefits, like that contemplated in *Plyler*. Some courts, including one federal appellate court, have suggested that it does. In its 2004 decision in *Soskin v. Reinertson*, the U.S. Court of Appeals for the Tenth Circuit ("Tenth Circuit") characterized the state law in question—which repealed optional state-funded Medicaid coverage for certain aliens—as "addressing the Congressional concern (not just a parochial state concern) that 'individual aliens not burden the public benefits system.'"[94] The Tenth Circuit further noted that, although PRWORA expressly authorizes states to make a number of determinations affecting noncitizens' eligibility for public benefits, it "does not give the states unfettered discretion. Some coverage must be provided to aliens; some coverage is forbidden. State discretion is limited to the remaining optional range of coverage."[95] Previously, in its 1999 decision in *Cid v. South Dakota Department of Social Services*, the Supreme Court of South Dakota had reached a similar conclusion, finding that an administrative rule which terminated certain noncitizens' eligibility for benefits did not conflict with national policies regarding aliens, and placed no burdens on aliens other than those contemplated by federal law.[96]

Other courts, in contrast, have found that PRWORA does not establish a uniform rule that permits states to classify persons on the basis of alienage when providing public benefits. New York's highest state court reached this conclusion in its much-cited 2001 decision in *Aliessa v. Novello*. There, the court applied strict scrutiny in reviewing a challenge to a state law that barred the provision of state-funded Medicaid coverage to lawfully present aliens who were not qualified

[91] The conference report on PRWORA, in particular, suggests that Members were aware of the possibility that congressional action could potentially affect judicial scrutiny of state and local measures affecting certain noncitizens. *See Personal Responsibility and Work Opportunity Reconciliation Act of 1996: Conference Report*, *supra* note 12, at 382 ("[*Plyler v. Doe*] may imply ... that Congress may influence the eligibility of illegal aliens for State benefits.").

[92] However, even if PRWORA were seen as establishing a uniform rule, state or local measures that did not adopt this rule could potentially still be strictly scrutinized. *See, e.g.*, Kurti v. Maricopa Cty., 33 P.3d 499 (Ariz. 2001) (finding that the state law in question was invalid, in part, because its treatment of certain aliens differed from PRWORA), *appeal after remand*, Avila v. Biedess, 78 P.3d 280 (Ariz. App. 2003).

[93] *See, e.g.*, 1-6 IMMIGRATION LAW & PROCEDURE §6.07[1] ("[*Graham's*] holding may to some extent be limited to [LPRs]."); David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*," 2001 SUPREME COURT REVIEW 47, 86-87, 92-97, 107 ("I believe the categorical approach still holds up and justifies a major distinction between LPRs and other aliens for constitutional purposes.").

[94] 353 F.3d 1242, 1255 (10th Cir. 2004).

[95] *Id*.

[96] 598 N.W.2d 887, 892 (S.D. 1999). The South Dakota Supreme Court further opined, that if strict scrutiny were applied, the challenged rule "would pass such review," because the state has a "compelling interest in implementing the national immigration policy," and the rule was the least restrictive means of achieving that interest. *Id*. at 892 n.10.

aliens for purposes of PRWORA, as well as to qualified aliens who had not resided in the United States for five years.[97] The court did so because it did not view PRWORA's provisions regarding aliens' eligibility for public benefits as reflecting "a uniform national policy."[98] Rather, according to the *Aliessa* court,

> [PRWORA] expressly authorizes States to enact laws extending "any State or local public benefit" even to those aliens not lawfully present within the United States ... The converse is also true and exacerbates the lack of uniformity: ... subject to certain exceptions, States are authorized to withhold State Medicaid from even those qualified aliens who are eligible for Federal Medicaid under PRWORA. Thus, in administering their own programs, the States are free to discriminate in either direction—producing not uniformity, but potentially wide variation based on localized or idiosyncratic concepts of largesse, economics and politics.[99]

Maryland's highest court took a similar view in its 2006 decision in *Ehrlich v. Perez*.[100] There, the court applied strict scrutiny in invaliding a state budget measure that did not appropriate funds for the State Medical Assistance Program for resident alien children and pregnant women who immigrated to the United States on or after PRWORA's enactment, but funded the same benefits for citizens and resident aliens who arrived before that date.[101] The state argued that this was permissible, because Congress had prescribed "a uniform rule for the treatment of an alien sub-class in regard to the provision of medical benefits."[102] The court, however, disagreed, finding that PRWORA did not prescribe a uniform rule.[103] The court further suggested that it was not inclined to view as compelling the alleged government interests that PRWORA recognized as such (i.e., enacting new rules for eligibility and sponsorship agreements in order to assure that aliens are self-reliant in accordance with national immigration policy, and removing the incentive for illegal immigration provided by the availability of public benefits).[104] It also suggested that, even if PRWORA had prescribed a uniform rule, state measures that classify persons on the basis of alienage would remain subject to strict scrutiny because Congress cannot authorize the states to violate the constitutional guarantee of Equal Protection.[105]

---

[97] 754 N.E.2d 1085 (N.Y. 2001).

[98] *Id*. at 1098.

[99] *Id*.

[100] 908 A.2d 1220 (Md. 2006).

[101] *Id*. at 1223-24.

[102] *Id*. at 1231.

[103] *Id*. at 1241. *See also* Hong Pham v. Starkowski, No. HHDCV095034410S, 2009 Conn. Super. LEXIS 3470, at *50 (Conn. Super., Dec. 18, 2009) ("[PRWORA] simply does not provide the states with any sort of consistent guidance or clear limits as to what they can and cannot do."), *rev'd on other grounds*, 16 A.3d 635 (Conn. 2011); Finch v. Commonwealth Health Insurance Connector Auth., 946 N.E.2d 1262, 1277 (Mass. 2011) ("PRWORA ... does not require that states apply Federal eligibility requirements but instead merely declares that Federal policy will not be thwarted if states decide to discriminate against qualified aliens."), *appeal after remand on other grounds*, 959 N.E.2d 970 (Mass. 2012); Korab v. McManaman, 805 F. Supp. 2d 1027, 1035 (D. Haw. 2011) ("Because ... PRWORA gave states a choice in determining what benefits to provide certain groups of aliens, ... PRWORA did not create a uniform rule for states to follow.").

[104] *Ehrlich*, 908 A.2d at 1244 n.23. *Cf.* Hong Pham, Conn. Super. LEXIS 3470, at *52 (government cost savings not a compelling interest for purposes of strict scrutiny), *rev'd on other grounds*, 16 A.3d 635 (Conn. 2011).

[105] *Ehrlich*, 908 A.2d at 1239 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) (finding that state laws that denied public benefits to persons who had not resided in the jurisdiction for at least one year infringed upon the fundamental right to travel, and suggesting that, even if Congress had approved a one-year waiting period, the state legislation could still be found to infringe constitutional rights because "Congress may not authorize the States to violate the Equal Protection Clause"), and *Saenz v. Roe*, 526 U.S. 489, 509 (1999) (similar)). *See also Korab*, 805 F. (continued...)

It is important to note, however, that the structure of the programs in question, as well as the framing of the issues by the litigants, can substantially affect the outcome in such cases. Several courts have, for example, recently suggested that the repeal of state programs that had benefited qualified aliens who were ineligible for federal means-tested public benefits because they had not been present in the United States in a qualified status for the requisite period of time are not subject to strict scrutiny, so long as (1) the beneficiaries of the state program are exclusively aliens, and (2) the only comparable programs benefitting citizens are federal ones. The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit), for example, found that the noncitizens challenging the repeal of a Washington law failed to raise an equal protection claim, since they had failed to show that the state had "treated the plaintiff[s] differently from similarly situated individuals."[106] Because there were no similarly situated individuals, the Ninth Circuit rejected plaintiffs' Equal Protection challenge without subjecting the repeal measure to either strict scrutiny or rational basis review.[107]

Other courts, however, have applied rational basis review in upholding similar measures, sometimes on the grounds that rational basis review should govern state measures that repeal (as opposed to create) programs that benefited only aliens.[108] In other cases, the court has suggested that rational basis review is appropriate so long as the measure only distinguishes between classes of aliens, and does not distinguish between aliens and citizens.[109]

Level of Scrutiny Applied to State Measures Affecting Lawful Nonimmigrants

Questions have also been raised recently regarding the level of scrutiny to be applied to state and local measures denying lawful nonimmigrants drivers or occupational licenses, which constitute benefits under certain definitions of this term. Many of the Supreme Court and other cases discussed previously, scrutinizing state and local benefits measures, involved LPRs (i.e., *lawful immigrants*, many of whom reside and work in the United States for extended periods of time). Far fewer challenges have involved aliens lawfully admitted to the United States as *nonimmigrants* (such as guestworkers), and two federal courts of appeals expressly noted the lack of Supreme Court precedent applying strict scrutiny to measures affecting nonimmigrants in finding that such measures are subject to a lower level of scrutiny than that given to measures affecting LPRs.

(...continued)

Supp. 2d at 1037 (similar).

[106] Pimentel v. Dreyfus, 670 F.3d 1096 (9th Cir. 2012). *See also Hong Pham*, 16 A.3d at 435 (no classification based on alienage and no violation of Equal Protection where the benefit that was denied to aliens as the result of a statute's repeal was not made available to citizens); Khrapunskiy v. Doar, 909 N.E. 70, 76 (N.Y. 2009) ("Because the State did not create a program of benefits which excluded plaintiffs, levels of scrutiny are inapplicable and there is no basis for an equal protection challenge.").

[107] *Pimentel*, 670 F.3d at 1106-10.

[108] *See, e.g.*, Soskin v. Reinertson, 353 F.3d 1242 (10th Cir. 2004) (applying rational basis review); Bruns v. Mayhew, No. 1:12-CV-00131-JAW, 2013 U.S. Dist. LEXIS 35322, at *18 (D. Me. Mar. 14, 2013) ("Several federal and state courts have concluded that a state's elimination of a state-created and state-funded benefit program for noncitizens ineligible for federal benefits does not violate the Equal Protection Clause.") (collecting cases).

[109] *See, e.g.*, *Doe*, 773 N.E.2d at 411; *Soskin*, 353 F.3d at 1256. The Supreme Court has rejected the argument that certain measures "only" distinguished between classes of aliens and, as such, were subject to less stringent review. *See* Nyquist v. Mauclet, 432 U.S. 1, 8-9 (1977) (striking down a New York law that barred certain resident aliens from obtaining state financial assistance for higher education). However, the challenged measure in this case provided benefits to citizens and certain LPRs which were denied to other LPRs.

In its 2005 decision in *LeClerc v. Webb,* the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) upheld a Louisiana law that prohibited lawful nonimmigrants from sitting for the state bar exam, in part, because it viewed "rational basis review ... [as] the appropriate standard for evaluating state law classifications affecting nonimmigrant aliens."[110] In so doing, the Fifth Circuit distinguished an earlier case, *In re Griffiths*, wherein the Supreme Court invalidated a Connecticut law that conditioned bar admission on U.S. citizenship, on the grounds that the plaintiffs in *Griffiths* were LPRs,[111] and the Supreme Court "ha[s] never applied strict scrutiny review to a state law affecting ... other alienage classifications."[112] In particular, the Fifth Circuit found that LPRs are distinguishable from lawful nonimmigrants because LPRs are unable to "exert political power in their own interest given their status as virtual citizens," while lawful nonimmigrants' lack of legal capacity is "tied to their temporary connection to this country."[113] The Fifth Circuit also found that, while LPRs can be said to be "similarly situated" to citizens in their economic, social and civic conditions, lawful nonimmigrants are not.[114] The Fifth Circuit noted, among other things, that lawful nonimmigrants may not serve in the U.S. military, are subject to strict restrictions on employment, and incur different tax treatment than citizens and LPRs.[115] The Fifth Circuit relied upon similar reasoning in its 2011 decision in *Van Staden v. St. Martin*, upholding a Louisiana law that barred lawful nonimmigrants from obtaining practical nursing licenses.[116]

The U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) reached a similar conclusion in its 2007 decision in *League of United Latin American Citizens [LULAC] v. Bredesen*.[117] There, in upholding a Tennessee law that permitted lawful nonimmigrants to obtain only "certificates for driving," not driver's licenses, the Sixth Circuit observed that "lawful permanent residents are the only subclass of aliens who have been treated as a suspect class."[118] Like the Fifth Circuit, the Sixth Circuit noted that the Supreme Court had never applied strict scrutiny to a state or local measure affecting aliens who were not LPRs, and found that lawful nonimmigrants differ from LPRs in ways which suggest that the traditional rationale for applying strict scrutiny to measures affecting LPRs (i.e., their similarity to citizens) might not apply to measures affecting lawful nonimmigrants.[119] The Sixth Circuit further found that the Tennessee law withstood rational basis

[110] 419 F.3d 405, 420 (5th Cir. 2005).

[111] *Id*. at 415.

[112] *Id*. at 416. As the Fifth Circuit noted here, the Supreme Court has never applied strict scrutiny to a case involving aliens who are not LPRs, instead either foregoing Equal Protection analysis, or applying modified rational basis review. *See* Toll v. Moreno, 458 U.S. 1 (1982) (foregoing Equal Protection analysis in a case involving lawful nonimmigrant aliens); De Canas v. Bica, 424 U.S. 351 (1976) (foregoing Equal Protection analysis in a case involving unauthorized aliens); Plyler v. Doe, 457 U.S. 202 (1982) (applying modified rational basis review in a case involving unauthorized aliens).

[113] *LeClerc*, 419 F.3d at 417. *See also id*. at 417-18 (further suggesting that "the numerous variations among nonimmigrant aliens' admission status make it inaccurate to describe them as a class that is 'discrete' or 'insular,'" and thus a suspect classification for Equal Protection purposes).

[114] *Id*. at 418.

[115] *Id*. at 418-19. The Fifth Circuit then went on to uphold the Louisiana law under rational basis review, finding that the state had a substantial interest in regulating the practice of those it admits to the bar, and that the challenged restriction bears a rational relationship to this interest by assuring clients that attorneys licensed by the Louisiana bar will provide "continuity and accountability in legal representation"). *Id*. at 421.

[116] 664 F.3d 56 (5th Cir. 2011), *cert. denied*, 113 S. Ct. 110 (Oct. 1, 2012).

[117] 500 F.3d 523 (6th Cir. 2007).

[118] *Id*. at 533.

[119] *Id*. at 533-35.

review since it "was designed to serve homeland security interests by indicating to third parties that the State of Tennessee does not vouch for the identity of the person holding a certificate for driving while at the same time allowing the holder of the certificate to validly operate a motor vehicle in Tennessee," and the plaintiffs had failed to show why these restrictions are not rationally related to a legitimate government interest.[120]

Most recently, however, the U.S. Court of Appeals for the Second Circuit (Second Circuit) reached the opposite conclusion in its 2012 decision in *Dandamudi v. Tisch*, applying strict scrutiny to strike down a New York law that permits only U.S. citizens and LPRs to become licensed pharmacists.[121] The Second Circuit reached this conclusion, in part, because it viewed Supreme Court precedent as recognizing only two circumstances in which state and local classifications based on alienage are not subject to strict scrutiny: namely, (1) when a state excludes aliens from political and governmental functions; and (2) when a state denies certain benefits to unauthorized aliens.[122] It thus declined to recognize a third exception for measures involving aliens who are not LPRs, although it acknowledged that the Supreme Court had "never explicitly applied strict scrutiny review to a statute discriminating against nonimmigrant aliens."[123] The Second Circuit also rejected the reasoning applied by the Fifth and Sixth Circuits, particularly their grounds for distinguishing lawful nonimmigrants from LPRs.[124] According to the Second Circuit, lawful nonimmigrants are, in practice, no different than LPRs in that they often live and work in the United States for extended periods of time.[125] Relatedly, the Second Circuit noted that the purported "transience" of nonimmigrant aliens does not provide a compelling justification for barring nonimmigrants from obtaining pharmacist licenses and practicing in the state, since "[c]itizenship and Legal Permanent Residency carry no guarantee that a citizen or LPR professional will remain in New York ..., have funds available in the event of malpractice, or have the necessary skill to perform the task at hand."[126]

While these decisions all focus upon licenses, they could have potentially significant implications for state and local measures regarding noncitizens' eligibility for public benefits more generally.[127] Certain states, in particular, have adopted definitions of *public benefits* or related terms that would encompass drivers' licenses or occupational and professional licenses.[128]

---

[120] *Id*. at 536-37.

[121] 686 F.3d 66 (2d Cir. 2012).

[122] *Id*. at 73-74. *See supra* notes 81-83 and accompanying text.

[123] 686 F.3d at 73-74. As the Second Circuit noted, all the cases where the Court applied strict scrutiny in striking down state measures involved challenges brought by LPRs. *See Nyquist*, 432 U.S. at 7 (New York law requiring immigrants to pledge to become citizens before they could receive financial aid); Examining Bd. of Eng'rs, Archs. & Surveyors v. Flores de Otero, 426 U.S. 572, 601-06 (1976) (Puerto Rican law denying licenses to immigrant engineers); Sugarman v. Dougall, 413 U.S. 634, 642-43 (1973) (New York statute prohibiting immigrants from working in the civil service); *In re* Griffiths, 413 U.S. 717, 721-22 (1973) (Connecticut statute barring immigrants from sitting for the bar).

[124] 686 F.3d at 76-79.

[125] *Id*. at 78.

[126] *Id*. at 79.

[127] Lawful nonimmigrants are not included within PWRORA's definition of *qualified alien*. However, PRWORA would appear to permit (although not require) states and localities to provide public benefits to lawful nonimmigrants. *See* 8 U.S.C. §1621(a). As a practical matter, however, generally applicable requirements limiting benefits to state residents could potentially serve to bar many lawful nonimmigrants in the United States for short periods of time from receiving benefits. *See, e.g.*, *Personal Responsibility and Work Opportunity Reconciliation Act of 1996: Conference Report*, *supra* note 12, at 384 ; Doe v. Comm'r of Transitional Assistance, 773 N.E. 2d 404 (Mass. 2002) (upholding a state law requiring noncitizens to have resided in the state for six months before receiving certain benefits).

[128] *See, e.g.*, GA. CODE ANN. §50-36-1(a)(4)(A)(i); Montana Immigrant Justice Alliance v. Bullock, No. BDV-2012-
(continued...)

However, PRWORA expressly exempts professional and commercial licenses for nonimmigrants whose visas are related to employment in the United States from its definition of *public benefits*,[129] which would appear to limit the ability of states and localities to assert that they are complying with a "uniform rule" established by the federal government when restricting nonimmigrants' ability to obtain occupational and professional licenses.[130] To the contrary, an argument could potentially be made that, to the degree that the state or locality purports to deny an occupational or professional license to an alien whom the federal government admitted to work in a particular field, the state or local measure is preempted by federal law.[131] In fact, the Second Circuit indicated that it viewed the New York law as "stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[132] However, its holding in *Dandamudi* was not based on preemption since some plaintiffs had "TN status" created pursuant to the North American Free Trade Agreement (NAFTA), and only the federal government may bring suit challenging state laws inconsistent with NAFTA.[133]

Preemption of State and Local Measures

State and local measures concerning noncitizens' eligibility for public benefits can raise questions of preemption, because the Supremacy Clause of the U.S. Constitution establishes that federal law, treaties, and the Constitution itself are "the supreme Law of the Land, ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."[134] In particular, the Constitution entrusts Congress with the power to regulate immigration.[135] This means that state or local measures that purport to regulate immigration—by determining which aliens may enter or remain in the United States, or the terms of their continued presence—are, *per se*, preempted, regardless of whether Congress has legislated on the matter.[136] Other measures, which affect aliens, but do not constitute regulation of immigration, could also be found to be preempted,

(...continued)

1042, Order on Petition, *supra* note 82, at 2.

[129] 8 U.S.C. §1611(c)(2)(A) (federal public benefits); 8 U.S.C. §1621(c)(2)(A) (state and local public benefits).

[130] *See supra* notes 94 to 109 and accompanying text.

[131] *See infra* "Preemption of State and Local Measures."

[132] *Dandamudi*, 686 F.3d at 80. *But see LeClerc*, 419 F.3d 423-26 (finding that a Louisiana law barring lawful nonimmigrants from obtaining law licenses was not preempted, in part, because H-1B visas permit non-licensed employment). The Sixth Circuit did not directly address the question of preemption in its decision in *LULAC*, although its statements there suggest it probably would not have looked favorably on such a claim. *See LULAC*, 500 F.3d at 533 ("[T]he classification drawn by Tennessee law ... is in no way inconsistent with federal law, but rather mirrors it.").

[133] *Dandamudi*, 686 F.3d at 81 (citing and discussing 19 U.S.C. §3312(b)(2)).

[134] U.S. Const., art. VI, cl. 2.

[135] Courts have located the source of this power in various provisions of the Constitution, and in the inherent power of sovereign nations to control the terms upon which noncitizens may enter and remain within their borders. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius,—U.S.—, 132 S. Ct. 2566, 2600 (2012) (Congress's powers under the Commerce Clause); Arizona v. United States,—U.S.—132 S. Ct. 2492, 2498 (2012) (power to establish a uniform rule of naturalization); Nishimara Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); Henderson v. Mayor of New York, 92 U.S. 259 (1876) (power to regulate interstate commerce); Chy Lung v. Freeman, 92 U.S. 275 (1875) (power to regulate the admission of noncitizens); *The Passenger Cases*, 48 U.S. 283 (1849) (power to regulate foreign commerce).

[136] *See, e.g.*, *De Canas*, 424 U.S. at 355 (also noting that preemption by this constitutional power occurs regardless of whether the power is "latent," or has been "exercised").

depending upon the scope of any congressional enactments. Specifically, federal statutes may preempt state and local measures in one of three ways: (1) the statute expressly indicates its preemptive intent (express preemption); (2) a court concludes that Congress intended to occupy the regulatory field, thereby implicitly precluding state or local action in that area (field preemption); or (3) state or local action directly conflicts with or otherwise frustrates the purpose of the federal scheme (conflict preemption).[137] Preemption claims have recently been raised in response to state and local measures that would define *benefits* broadly and bar the provision of benefits to unauthorized aliens.

Restrictions on Benefits as Regulations of Immigration

The Supreme Court distinguished between impermissible regulations of immigration, and permissible measures affecting aliens, in its 1976 decision in *De Canas v. Bica*. There, in reversing and remanding a state court decision finding that a California law which prohibited the knowing employment of unauthorized aliens was preempted, the Court noted that

> the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain. ... In this case, California has sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country; even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration.[138]

Subsequent decisions have generally followed *De Canas*, striking down state and local measures that are seen as determining who should be admitted to the country, or the conditions under which entrants may remain, and reviewing other measures affecting aliens within the context of congressional enactments, as discussed below. However, courts have reached differing conclusions as to what types of measures are to be seen as determining who may be admitted to the country or the conditions under which they may remain.

In several cases, state or local measures that would deny benefits to certain noncitizens have been found to be preempted regulations of immigration because they would create their own categories for classifying aliens, or would involve state and local officials in determining aliens' status. For example, the provisions of California's Proposition 187 restricting noncitizens' eligibility for "public social services" and "publicly-funded health care services," discussed previously, were initially struck down on these grounds.[139] In particular, the reviewing court noted that, by

---

[137] *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000); English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248-49 (1984); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983). The delineation between these categories, particularly between field and conflict preemption, is not rigid. *See English*, 462 U.S. at 79 n.5 ("By referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation."); *Crosby*, 530 U.S. at 373 n.6.

[138] 424 U.S. 351, 355-56 (1976). It should be noted that, after *De Canas* was decided, the Immigration and Nationality Act (INA) was amended to impose sanctions on persons who employ unauthorized aliens. *See generally* CRS Report R41991, *State and Local Restrictions on Employing Unauthorized Aliens*, by (name redacted).

[139] Subsequently, after PRWORA was enacted, the provisions were found to be preempted by PRWORA. *See LULAC*, 1998 U.S. Dist. LEXIS 3418, at *43-*44.

categorizing persons as citizens, LPRs, or "admitted lawfully for a temporary period of time," Proposition 187 "created its own scheme setting forth who is, and who is not, entitled to be in the United States" that "is not in any way tied to federal standards."[140] According to the court, the creation of this independent scheme constituted a regulation of immigration because it was tantamount to determining which aliens may enter and the conditions on which they may remain. The court similarly viewed Proposition 187's requirement that state officials "make independent determinations as to whether a person is deportable under federal law" as a regulation of immigration, since it, too, would have involved the state in determining who may be admitted to and remain in the country.[141] Subsequent state or local measures have similarly been found to be preempted because they created their own classifications of aliens and/or authorized state or local officials to determine aliens' status, including an Alabama law that prohibited various categories of aliens from attending public post-secondary institutions of higher education,[142] and a Montana law that barred "illegal aliens" from receiving state services.[143]

There is less agreement as to whether measures that would deny benefits to noncitizens, but do not involve state or local classifications or determinations of aliens' status, are regulations of immigration. Some courts have suggested that they are on the grounds that aliens are effectively excluded from jurisdictions where they cannot obtain necessary benefits.[144] Other courts, however, have held that the denial of benefits can only be said to have a "purely speculative and indirect impact on immigration," and thus does not constitute a regulation of immigration under *De Canas*.[145] Yet other courts have found that, while the denial of benefits, in itself, is generally not a regulation of immigration, the denial of benefits that significantly affect noncitizens' ability to obtain housing within the jurisdiction should be viewed as such.[146] One federal district court,

[140] *LULAC*, 908 F. Supp. at 769-72. In particular, the court noted that federal "standards for who is and is not deportable are entirely different" from those contemplated by Proposition 187, even if "lawfully admitted" is construed to mean those who are lawfully present in the United States, not those who entered lawfully. *See id*. at 772-73.

[141] *Id*. at 773.

[142] *Hispanic Interest Coalition*, 691 F.3d at 1242-42 (noting that the district court had found this provision preempted because it was "understood to define *lawful presence* as requiring lawful permanent residence or a nonimmigrant visa," but finding that there was no basis for enjoining its enforcement at present since the legislature had deleted this language). *See also* United States v. Alabama, 691 F.3d 1269, 1298 (11th Cir. 2011) (finding that an Alabama law that called for withholding business, commercial, and professional licenses from aliens who are "not lawfully present" was permissible, pursuant to PRWORA, but that as-applied challenges could arise if "not lawfully present" were construed in a manner inconsistent with federal immigration law).

[143] Order on Petition for Preliminary Injunction, *see supra* note 62 (finding that the definition of "unauthorized alien" used in the referendum encompassed aliens who had entered unlawfully, but whose current presence was lawful).

[144] *See, e.g.*, *Kurti*, 33 P.3d 499 ("[B]ecause Arizona's statutes discourage entry into or continued residence in Arizona, they conflict with the 'constitutionally derived federal power to regulate immigration' and may be invalidated on federal preemption grounds."). Some support for this view can be found in *Graham v. Richardson*, where the Supreme Court noted that "State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with ... overriding national policies in an area constitutionally entrusted to the Federal Government." 403 U.S. at 378. However, *Graham* could potentially be distinguished from subsequent state and local measures denying benefits to unauthorized aliens, in particular, since *Graham* involved state measures that restricted benefits to LPRs, and was decided prior to PRWORA. *See id*. at 377 (expressly noting that "Congress has not seen fit to impose any burden or restriction on aliens who become indigent after their entry to the United States).

[145] *See, e.g.*, *LULAC*, 908 F. Supp. at 771 ("To the extent that state actors deny benefits to persons based on determinations by federal authorities that those individuals are deportable pursuant to federal law, benefits denial is not a direct regulation of immigration, but rather, has only the possible indirect effect of deterring 'illegal' aliens from coming to California or causing them to leave.").

[146] *Villas at Parkside Partners*, 701 F. Supp. 2d at 855 (noting that such measures "directly impact immigration"), *aff'd*, 2013 U.S. App. LEXIS 14953 (5th Cir., July 22, 2013).

for example, found that, while the local ordinance in question was "grounded in federal immigration classifications ..., ... it use[d] those classifications for purposes not authorized or contemplated by federal law" when attempting to deny residential occupancy licenses to aliens who were not lawfully present.[147]

Preemption by the INA or PRWORA

Measures that are not *per se* preempted as regulations of immigration can also be challenged on the grounds that they are expressly or impliedly preempted by federal statute. The outcome in such cases can vary considerably, depending upon the terms of the state or local measure, and the provisions of the federal statute that allegedly preempts it. However, certain issues have been litigated with some frequency, and often addressed in similar fashion by the courts. For example, the provisions of the Immigration and Nationality Act (INA) barring the employment of unauthorized aliens have generally not been seen as preempting such aliens' eligibility for public benefits and, particularly, their recovery of workers' compensation.[148] Similarly, the INA's provisions regarding alien harboring have not been seen as preempting state and local measures (enacted pursuant to PRWORA) providing benefits to unauthorized aliens.[149] Nor has the INA's provisions regarding nonimmigrant visas (particularly student visas) been seen as preempting state measures that would permit unauthorized aliens who have completed a certain number of years of secondary education within the state from obtaining in-state tuition.[150]

Courts have disagreed as to whether PRWORA constitutes a comprehensive scheme such that it could be said to have occupied the regulatory field concerning noncitizen eligibility for benefits, precluding States and localities from establishing their own eligibility standards. Some courts have suggested that it does, noting,

> The intention of Congress to occupy the field of regulation of government benefits to aliens is declared throughout Title IV of [PRWORA]. Whatever the level of government extending the benefits and whatever the source of the funding for the benefits—federal, state or local—they are all included within the expansive reach of [PRWORA]. The ... law includes: statements of national policy regarding the denial of public benefits to illegal immigrants ...; rules regarding immigrant eligibility for federal, state and local benefits, including definitions of the benefits covered ...; a description of state legislative options in the area of immigrant eligibility for state or local benefits ...; and a system for verifying immigration status to determine eligibility for benefits and services. Together, these provisions both demarcate a field of comprehensive federal regulation within which states may not legislate, and define federal objectives with which states may not interfere.[151]

---

[147] 701 F. Supp. 2d at 855. The district court specifically distinguished residential occupancy licenses from other types of benefits or assistance, whose denial has been found not to constitute a regulation of immigration in some cases. *Id.* ("[R]egulation that conditions the ability to enter private contract for shelter on federal immigration status is of a fundamentally different nature than the sorts of restrictions on employment or public benefits that have been found not to be preempted regulations of immigration.").

[148] *See, e.g.*, Dowling v. Slotnik, 712 A.2d 396, 403 (Conn. 1998) (finding that requiring employers to pay workers' compensation is not a state or local "sanction" of the sort expressly prohibited by Section 274a of the INA, and that providing workers' compensation does not stand as an obstacle to removing the "employment magnet" for such aliens).

[149] *Kaider*, 975 N.E.2d at 678.

[150] Day v. Sebelius, 376 F. Supp. 2d 1022, 1028, 1033 (D. Kan. 2005).

[151] *LULAC*, 1998 U.S. Dist. LEXIS 3418, at *17. *See also* Equal Access Educ. v. Merten, 103 F. Supp. 2d 585, 603 (E.D. Va.) ("[I]t does appear that Congress has preempted the field of determining alien eligibility for certain public (continued...)

Other courts, however, have noted the range of discretion that PRWORA left to the state, and found that PRWORA does not constitute a "comprehensive scheme," or "purport to offer a definitive approach to the problem that Congress perceived."[152] Such courts have generally emphasized that PWRORA expressly authorizes states to enact measures making unauthorized aliens eligible for state and local benefits. In such courts' view, the fact that Congress has granted this authority to the states—with "no ... limits on the duration, extent, or quantity of state or local benefits" that may be provided—precludes a finding that Congress has impliedly preempted the field.[153] Courts have generally also relied upon similar logic in rejecting the argument that state and local measures providing benefits to unauthorized aliens are preempted because they conflict with the stated congressional policy that "aliens within the Nation's borders not depend on public resources to meet their needs."[154]

Defining "Benefits" and Related Terms

What constitutes a benefit for purposes of particular federal, state, and local statutes can raise issues of statutory interpretation and administrative law. Statutes generally cannot address all potential circumstances wherein questions might arise about whether individual aliens are entitled to specific benefits. Thus, courts frequently must construe various statutes addressing noncitizens' eligibility for public benefits in the course of applying them in particular cases and controversies. In many cases, the court does this by relying upon the "plain meaning" rule. This rule calls for courts to look to the statutory text, as opposed to legislative history, when the meaning is clear.[155] In other cases, the court may consult the legislative history of the statute in an attempt to determine lawmakers' intent; or resort to other canons of statutory construction.[156] In yet other cases, the executive agency tasked with implementing the statute has, formally or informally, interpreted the statute in the course of administering it, and the court must determine what degree of deference, if any, is to be accorded to the agency's interpretation. Courts generally grant the greatest deference to agency interpretations that were adopted by an agency through notice-and-comment rulemaking,[157] although interpretations adopted through other means may also be granted some deference.[158]

(...continued)

benefits, including even state benefits," with PRWORA, but finding that PRWORA had not preempted the field of post-secondary education).

[152] *Alabama*, 691 F.3d at 1300.

[153] *Kaider*, 975 N.E.2d at 678; *Martinez*, 241 P.3d at 855.

[154] *Kaider*, 975 N.E.2d at 678.

[155] *See, e.g.*, Darby v. Cisneros, 509 U.S. 137, 147 (1993) ("Recourse to the legislative history of §10(c) is unnecessary in light of the plain meaning of the statutory text."); USA Choice Internet Servs., LLC v. United States, 522 F.3d 1332, 1336 (Fed. Cir. 2008) ("In construing a statute, we begin with the literal text, giving it its plain meaning.").

[156] *See generally* CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by (name red acted).

[157] *See* Chevron U.S.A. v. Natural Resources Def. Council, 467 U.S. 837 (1984).

[158] *See Skidmore v. Swift & Co*., 323 U.S. 134 (1944) (holding that, while rulings, interpretations, and opinions of the Administrator under the Fair Labor Standards Act are not binding upon the courts, they are entitled to deference based upon their "power to persuade"); Reno v. Koray, 515 U.S. 50, 61 (1995) (internal Bureau of Prisons guideline interpreting the phrase "official detention" is entitled to deference where it constitutes a permissible construction of the statute).

Three questions, in particular, have recurred as to noncitizens' eligibility for public benefits: (1) what constitutes a public benefit for purposes of PRWORA; (2) what does it mean for a state law to "affirmatively provide" for unauthorized aliens' eligibility for public benefits; and (3) what constitutes a federal means-tested public benefit for purposes of PRWORA. These three questions are the focus of the discussion below. However, it is important to note that PRWORA and other measures affecting noncitizens' eligibility for public benefits have also raised related questions (e.g., what it means for an alien to have entered the United States in a qualified status, what constitutes an emergency medical condition, etc.), that are outside the scope of this report.[159] It should also be noted that identical terms can be construed differently in different provisions of law.[160] Relatedly, courts in different jurisdictions could potentially construe the same statute differently.

"Public Benefits" for Purposes of PRWORA

As previously noted, PRWORA encompasses various types of government assistance within its definitions of *public benefits*, including grants, contracts, loans, and professional or commercial licenses, as well as retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, and unemployment benefits.[161] However, it also refers to "other similar benefit[s],"[162] raising questions about whether particular types of assistance constitute federal, state, or local public benefits for purposes of PRWORA. Some have argued that this term be construed narrowly, as encompassing only cash payments provided directly to the alien.[163] Others have proposed that the term be construed broadly, to encompass every function that government instrumentalities perform for persons within their jurisdictions.[164] Courts have, to date, generally declined to adopt either of these views, instead viewing "other similar benefit[s]" as services that "assist people with economic hardship,"[165] and could potentially "create [an] incentive for illegal immigration."[166]

In *County of Alameda v. Agustin*, for example, the California Court of Appeals rejected the argument that "child collection support services" and the issuance of a court order requiring child support payments constituted state and local public benefits and, thus, could not be provided to an

[159] *See, e.g.*, Greenery Rehabilitation Group, Inc. v. Hammon, 150 F.3d 226 (2d Cir. 1998) (emergency medical condition); Szewczyk v. Dep't of Social Servs., 881 A.2d 259 (Conn. 2005) (same); Andrianova v. Ind. Family & Social Servs. Admin., 799 N.E.2d 5 (Ind. App. 2003) ("continuous physical presence).

[160] Megrabian v. Saenz, 30 Cal. Rptr. 262 (Cal. App. 2005) (finding that a state agency's interpretation of the phrase "entered the United States," when used in a California statute, to mean the date one attained one's current immigration status was permissible, notwithstanding the fact that the Social Security Administration has construed this term, when used in certain federal statutes, to mean physical entry). *See also* Riggs v. Riggs, 622 N.W. 2d 861, 866-67 (Neb. 2001) (finding that the earned income tax credit (EITC) is a means-tested public assistance benefit for purposes of Nebraska child support law). Federal agencies have not recognized the EITC as a federal means-tested public benefit for purposes of PRWORA. *See infra* "Agency Determinations Regarding Federal Means-Tested Public Benefits."

[161] 8 U.S.C. §1611(c)(1) (federal public benefits); 8 U.S.C. §1621(c)(1) (state and local public benefits).

[162] *Id*.

[163] *See, e.g.*, *Martinez*, 83 Cal. Rptr. at 531 (rejecting the state's argument that "benefit" has the same meaning in Sections 1622 and 1623 of Title 8 of the United States Code, and encompasses only cash assistance; and finding that in-state tuition is a benefit for purposes of PRWORA since it is a calculable amount), *rev'd on other grounds*, 241 P.3d 855 (Cal. 2010).

[164] *See* cases cited, *infra*, notes 175 to 179 and accompanying text.

[165] Rajeh v. Steel City Corp., 813 N.E.2d 697, 707 (Ohio App. 2004).

[166] 2007 Cal. App. Unpub. LEXIS 7665, at *10 (1st App. Dist., Div. One, Sept. 24, 2007).

unauthorized alien in the absence of a state law that expressly provided for noncitizens' eligibility.[167] While the court's primary rationale for reaching this conclusion was that child support payments were made from private funds, it noted the county's role in obtaining these funds,[168] but found this role permissible given the purposes of PRWORA and the types of benefits encompassed within its definition of *state and local public benefits*. According to the court, PRWORA was intended to "reduce the incentive for illegal immigration by denying publicly financed social welfare benefits to aliens not residing legally in the United States."[169] The court also noted that all the benefits listed in PRWORA are "direct income support payments" or "services intended to meet the daily needs of disadvantaged persons," and are "continuing or potentially continuing benefits, intended to provide ongoing public support for the recipients for as long as required."[170] It viewed the child collection support services as "quite different" from the benefits listed in PRWORA because such services do not "foster[] dependence on public support."[171] Rather, according to the court, such services are intended to help recipients support themselves, and terminate with the award of child support. Thus, the court concluded that, because child collection support services "provide no continuing public assistance to recipients" and "create little or no incentive for illegal immigration," they are not state and local public benefits for purposes of PRWORA.[172] The court further noted that, "when properly provided, child support collection services return to the local agency considerably more funds than they cost."[173]

Other decisions by various state courts have expressly or apparently relied upon similar logic in finding that workers' compensation;[174] benefits payable from a state fund for compensating victims of hit-and-run accidents and uninsured motorists;[175] admission to or enrollment at public institutions of higher education (but not in-state tuition);[176] residential occupancy licenses for renters;[177] payment of prevailing wages;[178] funding of an entity that provides services to day laborers;[179] and death benefits under federal employees' group life insurance policies[180] do not

[167] *Id*. at *8-*10. *See infra* "Affirmatively Providing" for Unauthorized Aliens' Eligibility."

[168] 2007 Cal. App. Unpub. LEXIS 7665, at *8.

[169] *Id*. at *9.

[170] *Id*.

[171] *Id*. The court did not directly address the question of whether the award of child support by the court constituted a public benefit. However, lawsuits to enforce private rights have traditionally not been viewed as public benefits. *See, e.g.*, Cano v. Mallory Mgmt., 760 N.Y.S.2d 816 (2003).

[172] 2007 Cal. App. Unpub. LEXIS 7665, at *10.

[173] *Id*.

[174] *Rajeh*, 813 N.E.2d at 707; *Dowling*, 712 A.2d at 412 n.17. *But see Dowling*, 712 A.2d at 414 (McDonald, J., dissenting) (provision of workers' compensation benefits would constitute "an incentive for illegal immigrants to enter or remain in th[e] country").

[175] Caballero v. Martinez, 897 A.2d 1026 (N.J. 2006) (noting that the fund was administered by a private, non-profit entity, is not funded by state appropriations, and its benefits are not similar to the "need-based benefits" listed in PRWORA). The court further noted that an alien's ability to recover from the fund if he or she is injured in an accident involving an uninsured or hit-and-run driver would not create incentives for unauthorized immigration.

[176] *Equal Access Educ.*, 305 F. Supp. 2d at 605. *But see* Sanchez v. Hall, No.5:10-CT-3027-D, 2011 U.S. Dist. LEXIS 145542 (E.D.N.C., Dec. 19, 2011) (suggesting that enrollment in state-funded post-secondary education, in itself, could potentially constitute a public benefit for purposes of PRWORA).

[177] *Villas at Parkside Partners*, 701 F. Supp. 2d at 856.

[178] City Plan Dev., Inc. v. Office of the Labor Comm'r, 117 P.3d 182, 190 (Nev. 2005).

[179] Garcia v. Dicterow, No. G039824, 2008 Cal. App. Unpub. LEXIS 9611, at *25 (Fourth App. Dist., Div. Three, Nov. 26, 2008).

constitute public benefits for purposes of PRWORA. However, in-state tuition[181] and certain health programs[182] have been found by some reviewing state courts to be public benefits.

More recently, similar questions have arisen as to what it means for professional licenses to be provided by a government agency or with appropriated funds. In particular, in challenging petitions from unauthorized aliens seeking admission to the California and Florida bars, the federal government and other parties have suggested that PRWORA generally bars unauthorized aliens from receiving law licenses unless the state legislature has adopted a statute that "affirmatively provides" for their eligibility.[183] According to this view, state high courts, which generally regulate admission to the state bar, are state agencies because they are part of the state's judicial branch.[184] Similarly, according to this view, law licenses are provided by appropriated funds since state high courts rely, in part, on appropriated funds to finance their operations.[185] Others, however, have argued that state courts are not state "agencies," as that term is conventionally understood, and that bar applicants pay fees for their licenses.[186] It remains to be seen what the courts will decide, or whether administrative agencies or the courts will adopt an equally broad view of what it means for other (non-license) benefits to be provided by a government agency, or by appropriated funds.[187]

(...continued)

[180] Herrera v. Metropolitan Life Insurance Co., No. 11 Civ. 1901 (LAK), 2011 U.S. Dist. LEXIS 145409 (S.D.N.Y., Dec. 19, 2011) (finding that such benefits were not public benefits for purposes of PRWORA because they were available only to government employees, not to the "public at large"). The court also viewed the benefit in question as one belonging to the government employee, which she then gave to her unauthorized alien spouse. *See also* Ruiz v. Robinson, 892 F. Supp. 2d 1321 (S.D. Fla. 2012) (in-state tuition is a benefit to the student, and PRWORA thus does not bar the provision of in-state tuition to students who are U.S. citizens, but whose parents are unauthorized aliens).

[181] *Martinez*, 83 Cal. Rptr. at 533, *rev'd on other grounds*, 242 P.3d 855 (Cal. 2010).

[182] *See, e.g.*, Soskin v. Reinertson, 353 F.3d 1242 (10th Cir. 2004); Dep't of Health v. Rodriguez, 5 So. 3d 22 (Fla. App. 2009). In the latter case, in particular, the alien asserted that the program fell within PRWORA's exemptions permitting states to provide services for the treatment of emergency medical conditions and certain community based programs to unauthorized aliens. However, the court disagreed.

[183] *See, e.g.*, In re Sergio C. Garcia on Admission, Bar Misc. 4186, Application and Proposed Brief for Amicus Curiae the United States of America (filed Cal., Aug. 3, 2012); In re Sergio C. Garcia on Admission: Amicus Curiae Brief in Opposition to Admission (filed Cal., July 23, 2012).

[184] Brief for Amicus Curiae the United States of America, *supra* note 170, at 9 (suggesting that the term "agency," as used in PRWORA, could be construed to "cover any instrumentality of the State" since PRWORA does not define this term, and the plain meaning of "agency" includes "a person or thing through which power is exerted or an end is achieved: INSTRUMENTALITY, MEANS") (internal quotations omitted); Amicus Curiae Brief in Opposition to Admission, *supra* note 170, at 9-12 (similar).

[185] Brief for Amicus Curiae the United States of America, *supra* note 170, at 9 ("It is ... undisputed that this Court [i.e., the California Supreme Court] and its officers are funded through appropriations").

[186] *See, e.g.*, In re Sergio C. Garcia on Admission, Bar Misc. 4186, Opening Brief of Applicant (filed Cal., June 18, 2012).

[187] Both "prongs" of PRWORA's definition of public benefits—the one addressing grants, contracts, and licenses, and the one addressing other benefits—refer to benefits "provided ... by appropriated funds." However, the fact that appropriated funds serve, in any way, to finance the provision of assistance that, some would say, falls within the second prong has historically not necessarily resulted in such assistance being found a public benefit. *See supra* notes 174 to 179 and accompanying text.

"Affirmatively Providing" for Unauthorized Aliens' Eligibility

Because PRWORA bars states and localities from providing benefits to unauthorized aliens unless the state has enacted a measure that "affirmatively provides" for such eligibility,[188] questions have also been raised about what it means to affirmatively provide for unauthorized aliens' eligibility. Some have asserted that a measure must expressly reference Section 411(d) of PRWORA (8 U.S.C. §1621(d)), and clearly specify that unauthorized aliens will be eligible, in order to affirmatively provide for such aliens' eligibility. This view is generally based on the conference report accompanying PRWORA, which states that "[o]nly the affirmative enactment of a law by a ... legislature and signed by the Governor after the date of enactment of this Act, *that references this provision*, will meet the requirements of this section."[189] However, as enacted, PRWORA does not require that states refer to either Section 411, or to the aliens being unauthorized, and reviewing courts generally have found that there are no such requirements. In reaching this conclusion, the courts have noted that Congress has elsewhere required states to reference specific provisions of federal law when enacting particular measures, and PRWORA does not do this.[190] Thus, they concluded, Congress is presumed not to have intended to impose such a requirement with PRWORA. Courts have also found that nothing in PRWORA requires states to include in any measures making unauthorized aliens eligible for public benefits language that "clearly put[s] the public on notice that tax dollars are being used to benefit illegal aliens."[191]

However, one court has suggested that a state could not be said to have "affirmatively provided" for unauthorized aliens' eligibility if it were to "confer[] a benefit generally without specifying that its beneficiaries may include undocumented aliens."[192] This court further found that resorting to the conference report and PRWORA's legislative history in construing "affirmatively provides" is inappropriate, since the plain meaning is clear.[193]

Courts have also found that state legislatures may, consistent with Section 411 of PRWORA, delegate to administrative agencies or local governments the authority to determine whether unauthorized aliens are eligible for particular benefits.[194] At least one court has indicated that it views the judicial branch as similarly entitled to provide for unauthorized aliens' eligibility for any "benefits" within the court's power to grant.[195] However, PRWORA does refer to measures being "enacted,"[196] and certain parties challenging unauthorized aliens' eligibility for law licenses have asserted that, while courts could be said to "adopt" rules, they do not "enact" legislation.[197]

---

[188] *See* 8 U.S.C. §1621(a) & (d).

[189] *Personal Responsibility and Work Opportunity Reconciliation Act of 1996: Conference Report*, *supra* note 12, at 383 (emphasis added).

[190] *Martinez*, 241 P.3d at 1296 ("Congress has shown it knows how to require a state specifically to reference a federal law when it wishes to do so, because it has done just that numerous times."); *Kaider*, 975 N.E.2d at 674 (similar).

[191] *Martinez*, 83 Cal. Rptr. at 544, *rev'd*, 241 P.3d at 1296; *Kaider*, 975 N.E.2d at 674.

[192] *Martinez*, 241 P.3d at 1296.

[193] *Id*. at 1295. *See also Kaider*, 975 N.E.2d at 672.

[194] *Kaider*, 975 N.E.2d at 678. In other words, while PRWORA states that legislation must be enacted that "affirmatively provides" for unauthorized aliens' eligibility for public benefits, it does not preclude the delegation of certain authority from the legislative branch to the executive branch, or from a state government to local governments.

[195] Cano v. Mallory Mgmt., 760 N.Y.S.2d 816 (2003) (even if ability to sue for negligence were a state and local public benefit for purposes of PRWORA, the court could extend such benefits to unauthorized aliens).

[196] 8 U.S.C. §1621(d).

[197] Amicus Curiae Brief in Opposition to Admission, *supra* note 183, at 15.

Agency Determinations Regarding Federal Means-Tested Public Benefits

Some have questioned the degree of deference to be accorded to federal agency determinations regarding federal means-tested public benefits and, specifically, whether benefit programs other than the five historically recognized by the federal government ought to be included. As noted previously, PRWORA does not affirmatively define *federal means-tested public benefits*. Rather, it excludes certain benefits (e.g., some emergency disaster relief) from the application of the general bar upon the receipt of such benefits by qualified aliens during their first five years after entering the United States in a qualified status.[198] Executive agencies have determined that *federal means-tested public benefits* means SSI, TANF, Medicaid, food stamps, and the state Child Health Insurance Program (SCHIP).[199]

As introduced in the House and Senate, PRWORA would have defined *federal means-tested public benefits* to mean the following:

> a public benefit (including cash, medical, housing, and food assistance and social services) of the Federal Government in which the eligibility of an individual, household, or family eligibility unit for benefits, or the amount of such benefits, or both are determined on the basis of income, resources, or financial need of the individual, household, or unit.[200]

However, this definition was stricken from the bill passed by the Senate because PRWORA was brought to the floor as a reconciliation bill and, as such, was subject to procedural rules allowing challenges to extraneous provisions. As used here, *extraneous provisions* included provisions that "produced changes in outlays or revenues which are merely incidental to the non-budgetary components of the provision." The proposed definition of *federal means-tested public benefits* was deemed to be extraneous because it "reached discretionary spending programs, which, in this context, lay beyond the proper scope of the reconciliation process."[201] However, the conference report accompanying the language that was ultimately enacted as PRWORA includes a statement that the conferees intended the term *federal means-tested public benefit* to be construed in light of the definition given in the bill as introduced.[202]

Following PRWORA's enactment, the Departments of Health and Human Services and Housing and Urban Development proposed regulations, which other agencies either concurred in or

---

[198] *See supra* note 29 and accompanying text.

[199] *See* Social Security Admin., Personal Responsibility and Work Opportunity Reconciliation Act of 1996: Federal Means-Tested Public Benefits Paid by the Social Security Administration, 62 Fed. Reg. 45284, 45284-85 (Aug. 26, 2007) ("The Social Security Administration announces that, of the programs it administers, only supplemental security income benefits under title XVI of the Social Security Act are 'Federal means-tested public benefits' for purposes of title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, as amended."); Dep't of Health & Human Services, Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of "Federal Means-Tested Public Benefit," 62 Fed. Reg. 45256 (Aug. 26, 1997) ("[T]he HHS programs that constitute 'Federal means-tested public benefits' under PRWORA are Medicaid and TANF."); Dep't of Ag., Food Stamp Program: Noncitizen Eligibility, and Certification Provisions of P.L. 104-193, as Amended by Public Laws 104-208, 105-33 and 105-185, 65 Fed. Reg. 10856, 10876 (Feb. 29, 2000) ("[F]ood stamps are a 'Federal means-tested public benefit' under section 403.").

[200] *Personal Responsibility and Work Opportunity Reconciliation Act of 1996: Conference Report*, *supra* note 12, at 381-82.

[201] *See* Proposed Agency Interpretation of "Federal Means-Tested Public Benefits," *supra* note 31.

[202] *Personal Responsibility and Work Opportunity Reconciliation Act of 1996: Conference Report*, *supra* note 12, at 382.

deferred to, that construed *federal means-tested public benefits* as encompassing only mandatory spending programs, not discretionary ones.[203] The Office of Legal Counsel (OLC) at the Department of Justice subsequently expressed its view that these regulations are entitled to deference, since the statutory text is ambiguous, and the agency's construction is a reasonable one.[204] OLC acknowledged that "[s]everal aspects of the text and legislative history of [PRWORA], when viewed in isolation," could potentially be said to "support a broad[er] interpretation of 'federal means-tested public benefit' that would include discretionary programs."[205] However, OLC found that these factors carried less weight than Congress's ultimate decision not to incorporate a definition of *federal means-tested public benefits* that encompassed discretionary spending programs in the text of PRWORA as enacted.[206] In so finding, OLC cited the "well-settled canon of interpretation that 'where the final version of a statute deletes language contained in an earlier draft, [it may be presumed] that the earlier draft is inconsistent with ultimate congressional intentions."[207] It also pointed to several provisions that had been struck from the Senate-passed version of PRWORA on the grounds that they were extraneous, and subsequently been reintroduced by the conference committee.[208] The definition of *federal means-tested public benefits* was not one of these. OLC further suggested that PRWORA ought to be construed in light of the rules governing reconciliation that shaped its enactment, which foreclosed consideration, in that context, of provisions affecting discretionary spending.[209] Following the OLC's opinion, individual agencies promulgated additional regulations identifying specific mandatory spending programs that they administered as providing federal means-tested public benefits.[210]

No court appears to have addressed the permissibility of these agency interpretations. However, as noted in OLC's opinion, any party seeking a broader (or narrower) application of the term *federal means-tested public benefit* in the courts could face significant legal barriers, since PRWORA does not define this term, and the agencies tasked with implementing the statute have done so by notice-and-comment rulemaking. Where Congress has not addressed the "precise question at issue," courts generally defer to "reasonable" agency interpretations.[211] On the other hand, it should be noted that the fact that federal agencies have historically interpreted the phrase *federal means-tested public benefit* to mean five specific mandatory spending programs would not necessarily preclude them from interpreting the phrase differently in the future.[212]

---

[203] *See* U.S. Dep't of Health & Human Services, Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of "Federal Means-Tested Public Benefit," 62 Fed. Reg. 45256 (Aug. 26, 1997). The Office of Legal Counsel's opinion addressed the permissibility of these regulations before they were promulgated.

[204] *See* Proposed Agency Interpretation of "Federal Means-Tested Public Benefits," *supra* note 31.

[205] *Id*. (noting particularly the dictionary definition of *means-tested*; the conference report language previously noted; and the inclusion of some discretionary programs in the listing of programs expressly excluded from the application of PRWORA's restrictions on the provision of federal means-tested public benefits to qualified aliens).

[206] *Id*.

[207] *Id*.

[208] *Id*.

[209] *Id*.

[210] *See* sources cited, *supra*, note 199.

[211] *See Chevron*, 467 U.S. at 843.

[212] *Chevron*, 467 U.S. at 863-64 ("The fact that the agency has from time to time changed its interpretation of the term 'source' does not ... lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition (continued...)

Conclusion

As the foregoing discussion illustrates, noncitizen eligibility for public benefits can raise complicated legal issues in part because of the various federal, state, and local statutes regarding such eligibility, and in part because the construction and application of these statutes can raise questions of constitutional law, statutory interpretation, and administrative law. The situation does not seem likely to change in the near future. In fact, Congress has recently considered a number of changes to noncitizens' eligibility for public benefits, some intended to expand, and other to restrict, such eligibility.[213] Issues related to noncitizens' eligibility are also being litigated in the courts, with different jurisdictions coming to sometimes different conclusions on the same question (e.g., the standard of review applicable to measures affecting nonimmigrant aliens).

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

(...continued)

itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.").

[213] *See, e.g.*, Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, as passed by the Senate, §2103(f) (eligibility of certain aliens legalizing their status for specified assistance under the Higher Education Act); Sessions25-(ERN13165), *available at* http://www.judiciary.senate.gov/legislation/immigration/amendments.cfm (proposing to prohibit aliens from becoming registered provisional immigrants if the alien is deemed likely to receive "State means-tested assistance," among other things).