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Developments in Policy: Welfare Reform

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Developments in Policy: Welfare Reform

On August 22, 1996, President Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRA"), which aimed, as its name suggests, to reform the welfare system into "a second chance, not a way of life." The sweeping law attempted to break the cycle of welfare dependency among the poor by severely restricting eligibility for federal benefits and instituting workplace-oriented reforms that would promote individual self-reliance. Among its more controversial and landmark measures, the law (1) cut benefits for certain legal immigrants with the explicit justification of fostering self-reliance and reducing the public assistance incentive to immigrate to the United States; (2) limited benefits to children by requiring that single parents find work after two years on welfare or risk losing benefits; and (3) required states to create workfare programs by penalizing those states that fail to move half their caseloads into some work activity by 2002. In a further twist, the law delegated to states the entire implementation of welfare programs. States were given one year to comply with the reform measures, or they risked losing federal assistance.

While a year has passed since the enactment of the law, it is still difficult to determine what protections are available to three vulnerable groups under the law: legal immigrants, children, and workfare recipients. Pronouncements of the law's effectiveness on its first anniversary were preliminary. With few state programs in effect and even fewer legal challenges to the state programs, assessments that welfare enrollment numbers decreased were more than likely based on the "announcement effect" of the law—anxious welfare recipients...
fleeing the system out of fear—than the effectiveness of particular welfare-to-work programs. Thus, while on August 13, 1997, President Clinton declared a hands-down victory for the new law based on decreased welfare enrollment, the complex legal and political issues that vulnerable groups face are just beginning to emerge with the introduction of state programs. These issues are yet to be resolved. The year following the enactment of welfare reform has marked an increase in the number of states implementing programs under the law; legal challenges to these programs under state, federal, and constitutional law; and legislative and executive amendments to the law. These changes provide new evidence by which to judge the impact of the law on legal immigrants, children, and workfare recipients. For example, states such as New York and California now offer implementing laws that differ widely in their approaches to job-training and workfare programs. A legal challenge to the New York implementing law in the Southern District of New York represents one of the first federal court decisions on the federal law’s immigrant provisions. And two formal amendments to the law came this year in the form of the Balanced Budget Act, returning disability benefits to the class of legal immigrants that had previously received them, and a presidential directive that required states to pay the minimum wage to workfare recipients.

This installment of Developments in Policy will focus on defining the issues faced by legal immigrants, children, and workfare recipients in light of these changes and analyzing the legal and political options available to these groups. The Article is organized into three Parts. Each Part is written independently and represents perspectives of its author or authors within the larger debate addressed by each. Part I will analyze the updated legal challenges available to non-citizens denied benefits under the law. It considers the constitutional powers of the federal government to make distinctions among groups of aliens

9. President Clinton hailed the progress of the welfare reform law on its first anniversary, saying, “I think it’s fair to say the debate is over: We know that welfare reform works. We now have the smallest percentage of Americans living on public assistance since 1970.” Elizabeth Shogren, Welfare Reform is Working, L.A. TIMES, Aug. 13, 1997, at A15.
11. See Abreu v. Callahan, 971 F. Supp. 799 (S.D.N.Y. 1997); see also infra notes 59-65 and accompanying text.
13. See Vobejda, supra note 6.
Developments in Policy

in the distribution of federal benefits, the states to distinguish among aliens in the distribution of state and federal benefits, and the federal government to delegate to states the authority to make distinctions among different groups of aliens in the distribution of public benefits.

Part II will analyze the effect of the federal law on state child welfare programs. In particular, it will study the conflict that states face between a common law duty to protect children under the doctrine of *parens patriae* and a mandate to cut welfare benefits for children under the welfare reform law. After evaluating the harmful implications of this conflict for the status of children who have been denied benefits under the federal law, the Part will offer policy reasons for challenging state programs under the federal law. Part III will overview the legal and policy arguments for allowing workfare recipients to unionize and the implication of unionization for workfare workers and nonworkfare, unionized labor.

Challenges to the federal law and state implementing laws are being churned out week by week and will continue to rise as state programs are only now being passed, signed, and effected. It is this very early stage in the implementation of the federal law to which these Parts respond in their conception of possible challenges to and policy implications of the PRA.

—Gail P. Dave

I. CONSTITUTIONAL CHALLENGES TO THE IMMIGRANT PROVISION OF THE WELFARE REFORM LAW

In keeping with the PRA's emphasis on fostering self-sufficiency, the provisions regarding aliens make two major changes in welfare policy. They curtail certain federal benefits, and they dramatically increase state discretion over both federal and state benefits. Because the PRA enacts drastic cutbacks and authorizes unprecedented state discretion, it raises several constitutional questions.

The following section begins with a summary of the provisions of the PRA and the Balanced Budget Act\textsuperscript{14} that are most relevant to benefits for immigrants. A discussion of three significant constitutional questions raised by the PRA follows: first, whether the federal government can legally make distinctions among different groups of aliens in the provision of federal benefits; second, whether states can, with federal authorization, make distinctions among different groups of aliens in the provision of state or federal benefits; and third, whether the federal government can delegate to the states the authority to make distinctions among different groups of aliens in the provision of state or federal benefits.

A. **Summary of Title IV of the PRA and the Balanced Budget Act**

Title IV\(^5\) of the PRA establishes the restrictions on public benefits for aliens. In enacting this Title, Congress emphasized the goals of encouraging immigrant self-sufficiency and removing incentives for illegal immigration.\(^6\) To achieve these goals, the statute both denies some benefits outright and delegates to states discretion over other varieties of benefits. Prior to the PRA's enactment, there was no bar to eligibility for Aid to Families with Dependent Children (AFDC), food stamps, and Medicaid for legal permanent residents, refugees, and asylees.\(^7\) Illegal immigrants were not eligible, however, for

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16. The statute outlines these goals as follows:
   (1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.
   (2) It continues to be the immigration policy of the United States that—
      (A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and
      (B) the availability of public benefits not constitute an incentive for immigration to the United States.
   (C) Despite the principle of self-sufficiency, aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates.
   (D) Current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable of assuring that individual aliens not burden the public benefits system.
   (E) 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.
   (F) It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.
17. See NATIONAL IMMIGRATION LAW CTR., Key Elements of New Immigrant Benefit Restrictions, in IMMIGRANTS AND THE '96 WELFARE LAW: A RESOURCE MANUAL § 1, at 7 (National Immigration Law Ctr. ed., 1996); Immigrant Policy Project, National Conference of State Legislatures, Immigration Provisions in Welfare Reform: P.L. 104-193 (last modified Sept. 17, 1996) <http://www.ncsl.org/index.html-statefed/welf-web.htm>. Under the PRA, a sponsor's income and resources are now considered in determining eligibility for federal means-tested programs. For these programs, a sponsor's income and resources are considered until an alien "achieves United States citizenship," 8 U.S.C.A. § 1631(b)(1), or "has worked 40 qualifying quarters of coverage," 8 U.S.C.A. § 1631(b)(2)(A). See also, NATIONAL IMMIGRATION LAW CTR., *supra*, at 8 (noting the PRA's addition of provisions regarding the deeming of a sponsor's income and resources for federal means-tested programs); Immigrant Policy Project, *supra* (same). The PRA also added provisions affecting the circumstances under which a sponsor's income and resources are "deemed" to be a part of the alien's income and resources for the purposes of determining eligibility for benefits. Prior to the PRA's enactment, a sponsor's finances were considered for three years for AFDC and Food Stamps and for five years for SSI. See NATIONAL IMMIGRATION LAW CTR., *supra*, at 8; Immigrant Policy Project, *supra*; Jeffrey L. Katz, *After 60 Years, Most Control is Passing to States*, 54 CONG. Q. Wkly Rep. 2190, 2193 (1996). The PRA also changed the reporting requirements of agencies administering welfare programs. See NATIONAL IMMIGRATION LAW CTR., *supra*, at 8; Immigrant Policy Project, *supra*. The PRA includes a provision that "no State or local government entity may be prohibited . . . from sending to or receiving from the Immigration
Developments in Policy

these programs. The PRA denies benefits depending on the immigration status of a particular alien. Most of the provisions concern a category of immigrants, designated as "qualified aliens," which includes legal permanent residents, asylees, refugees, those granted withholding of deportation, and those paroled for at least one year. The PRA then carves out special provisions for certain aliens. Refugees, asylees, and aliens whose deportation is being withheld are one such group, who for the purposes of this article will be referred to as falling under the "political status exception." The statute also includes special provisions for those who have worked forty qualifying quarters, who will be referred to as falling under the "qualifying quarters exception," and for veterans, active-duty military personnel, and their spouses and dependents, who will be referred to as falling under the "military exception." Immigrants who are not "qualified," as defined by the statute, are ineligible for most federal and state benefits.

One of the PRA’s most controversial provisions, the elimination of qualified aliens’ eligibility for Supplemental Security Income (SSI), prompted Congress to include substantial modifications to the PRA in the recent Balanced Budget Act. Under the PRA, eligibility for SSI, which provides cash benefits for the low-income elderly and disabled, was to be phased out beginning on July 1, 1997. Qualified aliens were to lose eligibility for SSI entirely on August 22, 1997, the first anniversary of the PRA’s enactment. As the deadline neared, President Clinton and members of Congress pushed for Balanced Budget Act provisions that would allow certain qualified aliens to continue receiving benefits. Subsequently, the Balanced Budget Act as enacted substantially altered the denial of benefits to some groups.

As originally enacted, the PRA grouped SSI and food stamps under the title

and Naturalization Service information regarding the immigration status . . . of an alien in the United States." 8 U.S.C.A. § 1644. New York City recently challenged the constitutionality of the new federal reporting provisions, which preempted a New York City Ordinance that prohibited city officials from reporting an alien’s immigration status to federal authorities, alleging that the PRA violated the constitution and principles of federalism. See City of New York v. United States, 971 F. Supp. 789, 791 (S.D.N.Y. 1997). The court ruled against the city and denied its motion. See id.


of "specified federal programs," and made qualified aliens ineligible for both types of benefits. The Balanced Budget Act restored SSI eligibility to aliens lawfully residing in the United States who were receiving SSI benefits on the date of the PRA's enactment. In addition, the Balanced Budget Act made aliens who were lawfully residing in the United States on the date of the PRA's passage eligible for disability-related SSI even if they became disabled after the law's enactment. Despite the provisions of the Balanced Budget Act, qualified aliens remain ineligible for food stamps, qualified aliens are ineligible for SSI benefits for the elderly unless they were receiving those benefits prior to the PRA's enactment, and qualified aliens who became lawful residents after August 22, 1996, are ineligible for disability-related SSI benefits. Under the special exceptions originally stipulated in the PRA, those who fall within the qualifying quarters exception and the military exception are eligible for SSI and food stamps without any such time limit. Those who fall within the political status exception were originally eligible for SSI and food stamps for five years following their admission to the United States, and the new Balanced Budget Act has extended their SSI eligibility to seven years.

The Balanced Budget Act also altered the PRA's original provisions regarding programs grouped under the general category of "designated federal programs," including the Temporary Assistance for Needy Families (TANF) block grant, the Social Services block grant, and Medicaid. Under the original version of the PRA, Congress delegated to the states the task of determining whether qualified aliens would be eligible for designated federal programs. The Balanced Budget Act altered some of the PRA's provisions by mandating that states apply the same standards of Medicaid eligibility to qualified aliens as are applied to citizens. As with the provisions on specified federal programs, the PRA also makes exceptions for special groups. Those who fall within the qualifying quarters and military exceptions are eligible without time limit. Those within the political status exception were originally eligible for SSI and food stamps for five years, and the Balanced Budget Act has extended their Medicaid eligibility to seven years.

25. See Balanced Budget Act, § 5301(a) (amending 8 U.S.C. § 1612(a)(2)).
26. See id. § 5301(b) (amending 8 U.S.C. § 1612(a)(2)).
28. See id. § 1612(a)(2)(A).
29. See Balanced Budget Act, § 5302(a) (amending 8 U.S.C. § 1612(a)(2)(A)).
31. See id. § 1612(b)(1).
32. See Balanced Budget Act, § 5305(b) (amending 8 U.S.C. § 1612(b)(2)); see also Kilborn, supra note 23 (noting "the restoration of Medicaid for legal immigrants" under the Balanced Budget Act).
34. See id. § 1612(b)(2)(A)(i)-(ii).
35. See Balanced Budget Act, § 5302(b) (amending § 1612(b)(2)(A)).
Developments in Policy

The Balanced Budget Act did not affect the PRA’s remaining provisions, which include federal means-tested public benefits, and state benefits. Qualified aliens who enter the United States on or after August 22, 1996, are ineligible for federal means-tested public benefits for a period of five years after entry into the United States.\(^{36}\) As with earlier provisions, the PRA makes exceptions for certain groups of aliens. The five-year period of limited eligibility does not apply to those who fall within the political status and military exceptions.\(^{37}\)

The PRA gives states the authority to determine the eligibility of qualified aliens for state public benefits.\(^{38}\) Regardless of a state’s determination, however, the PRA stipulates that those who fall within the political status exception shall remain eligible for five years.\(^{39}\) Those who fall within the qualifying quarters and military exceptions retain their eligibility indefinitely.\(^{40}\) The PRA also blocks states from providing state benefits to certain groups of aliens: those who are not qualified aliens, those who are non-immigrants under the Immigration and Nationality Act (INA), and those who are paroled in the United States under the INA for less than one year.\(^{41}\) Significantly, states can circumvent these restrictions by enacting a state law after August 22, 1996, that provides eligibility for illegal aliens.\(^{42}\)

Besides being eligible for state benefits in states that have enacted special legislation, illegal aliens are also eligible for emergency federal and state services. Among the federal means-tested emergency programs are medical assistance for emergency conditions, short-term, non-cash, in-kind emergency disaster relief, assistance under the National School Lunch Act and the Child Nutrition Act of 1966, immunizations, and various education programs.\(^{43}\) State emergency programs include, but are not limited to, emergency medical assistance, short-term, non-cash, in-kind emergency disaster relief, public assistance for immunizations, and treatment of communicable diseases.\(^{44}\)

B. Federal Denial of Federal Benefits

The provisions of the PRA regarding the “specified federal programs,” SSI and food stamps, raise the question of whether the federal government may deny federal benefits to some legal permanent residents but not to others. Although the Balanced Budget Act restores some SSI benefits,\(^{45}\) exclusions

37. See id. §§ 1613(b)(1)(A)-(C), (b)(2)(A)-(C).
38. See id. § 1622(a).
39. See id. § 1622(b)(4)(A)-(C).
41. See id. § 1621(a)(1)-(3).
42. See 8 U.S.C.A. § 1621(d).
43. See id. § 1613(g)(2)(A)-(K).
44. See id. § 1621(b)(1)-(4).
45. See supra notes 23-24 and accompanying text.
remain. Qualified aliens who were not lawfully residing in the United States prior to the enactment of the PRA will not be eligible for SSI benefits of any kind, and even those who were lawfully residing in the United States at that time will not be eligible for SSI assistance to the elderly unless they were already receiving such benefits prior to the PRA's enactment. Finally, no qualified aliens will be eligible for food stamps, regardless of when they became lawful residents.

Indeed, the grave effects of these provisions are now being felt throughout the country as states face the task of meeting the needs of those losing food stamps.46 Three-fourths of the country's immigrant population currently live in four states—California, New York, Florida, and Texas.47 Of these four, only Texas has not taken any measures to ameliorate the effects of the federal denial of food stamps.48 However, states that are taking action are providing only a partial replacement of the federal program.49 Charitable organizations report that they will have difficulty picking up the slack.50 In addition, the changes are affecting private businesses as former food stamp recipients are reducing their spending. The repercussions are evident in supermarkets as well


48. See After Us Cuts, supra note 47; Maria F. Durand, Groups To March in Support of Food Stamps for Immigrants, SAN ANTONIO EXPRESS-NEWS, Aug. 28, 1997, at 3B, available in 1997 WL 1320221; Mittelstadt, supra note 47.

49. Using state funds, California has replaced food stamp benefits for three years to legal immigrants who are eighteen or younger, or sixty-five and older. See Grad et al., supra note 46; Patrick J. McDonnell, Number Losing Aid Is Disputed, L.A. TIMES, Sept. 1, 1997, at B3, available in 1997 WL 2243203; Leonel Sanchez, Legal Immigrants in County Face a Month Without Food Stamps, SAN DIEGO UNION-TRIBUNE, Aug. 31, 1997, at B2, available in 1997 WL 3152052. New York appears likely to continue to provide state-funded food stamps for legal immigrants who are children, elderly, or disabled. See Richard Perez-Peña, Leaders Near Budget Accord on Food Aid, N.Y. TIMES, July 24, 1997, at B1. Other states are also taking steps to provide partial replacements of federal food stamps. See, e.g., Jennifer Preston, Whitman Order Allows Some Legal Immigrants to Retain Food Stamps, N.Y. TIMES, Aug. 27, 1997, at B5 (describing a New Jersey executive order that will replace food stamp benefits for legal immigrants who are children, elderly, or disabled); Herbert A. Sample, Activists Want Food Stamps Restored to Immigrants, ORANGE COUNTY REG., Aug. 22, 1997, at A15, available in 1997 WL 7439419 ("Maryland will limit the benefits to minors; and Massachusetts will grant eligibility to all legal immigrants but at a reduced aid level.").

Developments in Policy

as in other businesses in immigrant communities.\textsuperscript{51}

Despite the gravity of the effects of denying federal benefits, these provisions of the PRA are likely to be held constitutional. Because the federal government has sole responsibility over immigration policy,\textsuperscript{52} the courts have treated discrimination on the basis of alienage as justifiable when carried out by the federal government. The clearest example of this distinction arose in the Supreme Court's 1976 decision in \textit{Mathews v. Diaz}.\textsuperscript{53} The Mathews Court considered a challenge under the Due Process Clause of the Fifth Amendment to a federal statute that limited enrollment in the Medicare supplemental medical insurance program to legal aliens over sixty-five who both had been admitted for permanent residence and had resided in the United States for at least five years.\textsuperscript{54} In upholding the provision, the Court asserted that although all immigrants, including those whose presence is not legal,\textsuperscript{55} "are protected by the Due Process Clause," that "does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship."\textsuperscript{56} Although the Court did not specify one of the traditional equal protection standards of review, it applied a much more deferential standard to reviewing the statute in question than it would to a state statute that made the same distinction. The Court explained that "a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the federal government is a routine and normally legitimate part of its business."\textsuperscript{57} With regard to benefits, the Court concluded that "it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and duration of his residence."\textsuperscript{58} The Court, therefore, found that discrimination against noncitizens is rational when carried out by the federal government and requires virtually no justification.

Although the PRA involves programs other than Medicare, the program examined in \textit{Mathews}, a recent case in the Southern District of New York


\textsuperscript{52} See U.S. CONST., art. I, § 8 ("The Congress shall have Power To . . . establish an uniform Rule of Naturalization . . . ."); see also \textit{Mathews v. Diaz}, 426 U.S. 67, 81 (1976) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.").

\textsuperscript{53} 426 U.S. 67 (1976).


\textsuperscript{55} \textit{Id.} at 77.

\textsuperscript{56} \textit{Id.} at 78.

\textsuperscript{57} \textit{Id.} at 85.

\textsuperscript{58} \textit{Id.} at 82-83.
illustrates that courts will likely apply the *Mathews* analysis to the PRA.\(^5\)

Prior to the passage of the Balanced Budget Act, the court in *Abreu v. Callahan*\(^6\) considered a constitutional challenge to the PRA provisions denying SSI and food stamps to aliens who were already legal residents on the date that the PRA became law.\(^6\) The court found that the applicable precedent was *Mathews v. Diaz*. Drawing an analogy to the provisions tested in *Mathews*, the court reasoned, "[L]ike Section 402 of the Welfare Reform Act, [the statute at issue in *Mathews*] classified aliens into two groups—one eligible for a federal benefit program and one not."\(^6\) The *Abreu* court, relying on the government's oral argument, found that "there is no substantive difference between [the standard applied in *Mathews*] and conventional rational basis review."\(^6\)

Accordingly, the *Abreu* court applied rational basis analysis to the provisions of the PRA.\(^6\)

The *Abreu* court then analyzed each of four potential government purposes for the statute:

1. giving aliens an incentive to become naturalized United States citizens;
2. encouraging non-citizens to be self-sufficient and to rely on families, sponsors, and private agencies;
3. controlling the escalating cost of the SSI program; and
4. diminishing the incentive for immigration created by the possible availability of benefits.\(^6\)

Each of the four purposes were found to be legitimate under rational basis

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61. The case specifically does not consider the constitutionality of the PRA with regard to aliens "who enter or become permanent residents of the United States on or after August 22, 1996." *Id.* at 803.

62. *Id.* at 807.

63. *Id.* at 809.

64. *See id.* at 815. The *Abreu* court explained that "rational basis review is not demanding." *Id.*

The court explained the standard as follows:

[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afool of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. Instead a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

*Id.* (quoting Heller v. Doe, 509 U.S. 312 (1993) (internal quotations and citations omitted)). The *Abreu* court further found that rational basis review "is the same in the context of immigration or alienage legislation." *Id.* For an argument that a stronger level of review is appropriate, see Needelman, *supra* note 59, at 362-65.

Developments in Policy

review.\textsuperscript{66} On these grounds, the court dismissed the plaintiffs' claims that the PRA is unconstitutional.

The \textit{Abreu} decision is now moot with regard to most provisions of SSI. The Balanced Budget Act has restored most SSI benefits to those who were the plaintiffs in \textit{Abreu}, immigrants who had established legal residency prior to the PRA's enactment.\textsuperscript{67} However, the decision still applies to those individuals with regard to food stamps and also to those who would have become eligible for elderly benefits after enactment. Although \textit{Abreu} considered only those who were legal residents before the PRA's enactment, courts are likely to apply the same reasoning to all qualified aliens. \textit{Mathews} is still the relevant standard; rational basis review is still likely to apply, and the same four purposes are likely to be upheld. Thus, all the provisions regarding specified federal programs are likely to be held constitutional.

---Suzanne M. Boyce

\section*{C. State Denial of Benefits}

The PRA grants states full discretion to determine the eligibility of most noncitizens for federal TANF, Social Services Block Grant, and Medicaid benefits, as well as state public assistance benefits.\textsuperscript{68} An exercise of this discretionary authority, whereby a state denies benefits to legally present noncitizens, raises two key constitutional questions. First, does a state violate the Equal Protection Clause of the Fourteenth Amendment if it denies, with federal authorization, eligibility for public benefits to a class of noncitizens? Second, if a state exercises its discretionary authority over benefit eligibility, does it impermissibly encroach on exclusive federal authority over immigration?

Absent specific federal authorization, the Supreme Court has not permitted states to tie benefit eligibility to citizenship. More than twenty-five years ago in \textit{Graham v. Richardson},\textsuperscript{69} the Court considered challenges to two states' welfare laws that distinguished between citizens and noncitizens for the purpose

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{66} \textit{Id.} at 816-19. For an argument that the PRA provisions fail rational basis review, see Needelman, \textit{supra} note 59, at 365-67.
\item \textsuperscript{67} \textit{See supra} notes 23-24 and accompanying text.
\item \textsuperscript{68} \textit{See discussion supra} Section I.A.; \textit{8 U.S.C.A.} § 1612(b)(1) (West Supp. 1997). The PRA prohibits states from making those who fall under the qualifying quarters exception category, the military exception category, and, for several years, the political exception category, ineligible for the designated federal programs. \textit{See supra} \textit{Section I.A.} \textit{8 U.S.C.A.} §§ 1612(b)(2)(A)(i)-(ii), (B)(i)-(ii), (C)(i)-(iii). In addition, under the Balanced Budget Act, states must apply the same eligibility criteria for Medicaid to qualified aliens as they do to citizens. \textit{See supra} text accompanying note 31. The PRA also forbids states from providing state benefits to illegal immigrants unless the state legislature enacts authorizing legislation after the passage of the PRA, requires states to grant eligibility to those who fall under the qualifying quarters or military exceptions, and requires states to grant eligibility for five years to those who fall under the political status exception. \textit{See supra} \textit{Section I.A.} \textit{8 U.S.C.A.} § 1622(b).
\item \textsuperscript{69} \textit{403 U.S.} 365 (1971).
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of distributing public assistance benefits. An Arizona law required noncitizens to have resided in the United States for at least fifteen years in order to be eligible for federal benefits administered by the state. A Pennsylvania law denied state benefits to noncitizens regardless of the duration of their residence. The *Graham* Court identified noncitizens as a "discrete and insular minority" deserving heightened judicial protection; consequently, the Court applied the most stringent form of equal protection review—strict scrutiny—requiring provisions to be narrowly tailored to serve a compelling governmental interest. Rejecting the states' claim of a compelling government interest in preserving limited welfare benefits for state citizens, the Court noted the particularly noxious quality of excluding from public benefit programs noncitizens who pay taxes and otherwise contribute to economic growth. The Court concluded that the classifications based on alienage were unjustified and thus struck down both state laws as violations of the Equal Protection Clause.

Yet *Graham* does not necessarily extend to instances, like those that may spring from the PRA, in which state discrimination based on alienage is federally authorized. The success of an equal protection challenge to a state denial of benefit eligibility authorized by the PRA would depend on whether the courts treat such a state policy more like a state denial of benefits, which is impermissible under *Graham*, or more like a federal denial of benefits, which is permissible under *Mathews*. Although the Supreme Court has not considered federally authorized state benefit denials, the Ninth Circuit rejected the argument that state eligibility requirements for welfare benefits should receive strict scrutiny as state classifications based on alienage even when they are consistent with federal welfare criteria. Yet the *Graham* Court specifically noted that if federal legislation "were to be read so as to authorize

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70. See id. at 367.
71. See id. at 368.
72. Id. at 372 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938)).
74. See *Graham*, 403 U.S. at 374, 376. The Court remained silent on whether the state laws were narrowly tailored.
75. See id. Eleven years later in *Plyler v. Doe*, 457 U.S. at 202, the Court rejected the notion that illegal immigrants constitute a suspect class warranting strict judicial scrutiny. See id. at 219-20, 220 n.19. Although the *Plyler* Court ultimately prohibited the state of Texas from banning undocumented children from attending public schools, the decision was based largely on the conclusion that children are not responsible for their illegal status. See id. at 220, 223. With regard to legal immigrants, however, *Graham*’s bar against state classification based on alienage is still the law.
76. 403 U.S. at 365.
78. See Sudomir v. McMahon, 767 F.2d 1456, 1466 (9th Cir. 1985) ("It would make no sense to say that Congress has plenary power in the area of immigration and naturalization and then hold that the Constitution impels the states to refrain from adhering to the federal guidelines. The district court correctly applied the relaxed scrutiny standard to the law in upholding the denial of benefits to asylum applicants."); see also discussion supra Section I.B.
Developments in Policy

discriminatory treatment of aliens at the option of the States . . . serious constitutional questions are presented . . . Congress does not have the power to authorize the individual States to violate the Equal Protection Clause."79 Graham thus suggests that states may violate the Equal Protection Clause even when acting with explicit federal authorization. Moreover, Graham implies that Congress may exceed its constitutional authority by explicitly permitting states to determine noncitizens' eligibility for benefits. Whether the PRA's delegation of discretionary authority violates the Equal Protection Clause, regardless of whether states choose to deny public benefits to noncitizens, will be addressed in the next section.80

In addition to equal protection challenges, state discretion over noncitizen eligibility for benefits might be challenged as intruding on federal jurisdiction over immigration policy.81 The Graham Court struck down the challenged state laws not only on equal protection grounds, but also because immigration policy is "constitutionally entrusted to the Federal Government."82 However, in light of the PRA's authorization of state eligibility determination, a court might now find a state denial of public benefits to noncitizens constitutionally permissible as a matter of federal immigration policy.

Whether state determination of eligibility for public benefits constitutes immigration policy was considered recently when California attempted to restrict benefits to noncitizens.83 Proposition 187, a ballot initiative enacted by popular vote, requires state personnel to deny social services, health care, and education to all illegal immigrants.84 The challenge and decision did not consider whether the initiative violates the Equal Protection Clause,85 but rather evaluated its provisions from an immigration standpoint. Specifically, the court examined whether the federal government's exclusive authority to regulate immigration preempted the initiative.86 A federal district court held that the initiative's provisions denying federal public benefits to illegal immigrants were preempted only when they created

79. Graham, 403 U.S. at 382.
80. See discussion infra Section I.D.; see also Recent Legislation, supra note 58, at 1193.
81. See U.S. Const. art. I, § 8, cl. 4, art. II, § 2, cl. 2.
82. Graham, 403 U.S. at 378.
84. The initiative also requires state employees to verify the immigration status of every person with whom they come into contact, notify those suspected of residing in the country illegally of their status, and report those individuals to immigration officials. See id. at 763.
85. In a 1996 case, a California Court of Appeals rejected a claim that a state policy of denying General Assistance benefits to noncitizens with pending applications for political asylum violates the Equal Protection Clause because such noncitizens are not "lawfully resident" in the county. See Khasminskaya v. Lum, 47 Cal. App. 537, 545 (Cal. Ct. App. 1996) ("[E]qual protection principles do not require that all aliens be treated alike, when they are not similarly situated for purposes of federal immigration law. It is constitutionally valid to distinguish among aliens and grant benefits to some who have a lawful residence status, but not to all aliens, however transient, impermanent, or unlawful.").
an obstacle to the accomplishment of congressional objectives. In other words, state denials of federal benefits were deemed permissible except where federal law specifically authorized eligibility regardless of immigration status. Although the court did not consider federal programs that distinguish among different categories of legal immigrants, the opinion clearly states that when Congress has conditioned eligibility for federal benefits on lawful immigration status, a state denial of public benefits to illegal immigrants would not be preempted.

Although the court declined to decide whether states could deny state benefits on the basis of alienage, its opinion suggests that such a denial would be preempted only if it were to conflict directly with federal law. Because the PRA explicitly allows states to determine eligibility for state benefits, state legislation restricting noncitizens’ eligibility would not conflict with federal law and thus presumably would not be preempted under the reasoning applied by the district court in the Proposition 187 case.

Immigration law challenges to state policies denying public benefits to certain noncitizens are unlikely to be successful in the wake of the challenge to Proposition 187 unless higher courts apply different reasoning. Equal protection claims that draw on Graham’s analysis are more viable, but still far from guaranteed in light of the entirely new context of federal authorization. Given the uncertainty of a federal constitutional claim, violation of state constitutional or statutory provisions might offer the strongest legal option for those seeking to challenge state benefit denials based on alienage. Ironically, however, such advocates face a strategic dilemma. Because states now have discretion over designated federal as well as state public benefits, litigants challenging partial eligibility denials might lead state legislators to attempt to “solve the problem” by eliminating discretionary benefits for noncitizens

87. The Court in De Canas v. Bica, 424 U.S. 351 (1976), established three tests to determine whether a state provision is preempted by federal law. A state law is preempted if: it “regulate[s] immigration,” id. at 354, Congress demonstrates a clear intent to effect a “complete ouster of state power” in the field addressed by the statute, id. at 357, or the statute frustrates congressional goals, see id. at 363. In examining the initiative’s provisions denying public benefits to illegal immigrants, the district court in League of Latin Am. Citizens concluded that such a denial does not constitute a regulation of immigration. See League of Latin Am. Citizens, 908 F. Supp. at 768-75. Furthermore, based on the legislative history of the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1525, the court held that Congress had not ousted state authority to regulate in the field of public benefits. See id. at 775-76. In light of the PRA’s explicit granting of state authority to determine eligibility for certain groups of legal immigrants, it is even less likely now that a court would consider state power ousted in the field of public benefits and strike down state legislation as preempted on those grounds.

89. See id. at 779.
90. The court was not convinced that wholly state-funded benefit programs actually existed. See id. at 780-82, 787.
91. See id.
92. Interview with Michael Wishnie, Staff Attorney at the American Civil Liberties Union, in New Haven, Conn. (Oct. 6, 1997).
Developments in Policy

altogether. Local attorneys may decide that the potential gains are not worth the risks involved in challenging states. As a result, challenges to provisions of the PRA itself that authorize state discretion, explored further in the following section, may offer a less risky alternative for advocates.93

D. Federal Authorization of State Discretion

The PRA authorizes states to determine the eligibility of most noncitizens for state public assistance benefits and certain federal benefits.94 Such broad state authority raises another constitutional question. Does Congress impermissibly delegate federal authority over immigration if it grants discretion regarding noncitizens' benefit eligibility to the states?

There are two main avenues of challenge to the federal authorization of state discretion regarding benefit eligibility. The first approach entails arguing that equal protection doctrine requires the same degree of protection from federal classification by alienage as it does from state classification by alienage.95 This argument necessitates distinguishing welfare policy from immigration policy. The second option entails treating the PRA as though it were immigration law and challenging the delegation of federal authority as violating either the nondelegation doctrine or the constitutional requirement that Congress establish a uniform rule of naturalization.96

In recent years the Supreme Court has come to accept the premise that "the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth."97 Equal protection challenges to the PRA's authorization of state discretion would rely on the inconsistent results that arise from Graham's98 holding that state denial of benefits violates the equal protection of the laws accorded to noncitizens and Mathews'99 holding that federal denial of benefits to noncitizens does not. From the perspective of an individual, it makes little difference whether it is the state government or federal legislation denying needed benefits.

The Supreme Court has addressed the possibility of Congress eroding state equal protection guarantees. In response to a suggestion in the dissent in Katzenbach v. Morgan100 that the Court's opinion would extend to Congress

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93. Challenges to the PRA raise a similar strategic dilemma in that there is always the possibility that Congress will respond by scaling back benefits.
95. See Recent Legislation, supra note 58, at 1194-95.
96. See Needelman, supra note 58, at 373-83.
the discretion to dilute prior equal protection decisions, the majority clarified that Section Five of the Fourteenth Amendment "grants Congress no power to restrict, abrogate, or dilute" the Amendment's equal protection and due process guarantees. In conducting its equal protection inquiry the Graham Court explicitly applied strict scrutiny and justified its selection of the most rigorous standard of review by characterizing alienage as a generally impermissible classification. Because Graham makes clear that state denials of benefits violate the equal protection afforded to noncitizens, Congressional authorization of state denials of benefits, although not enacted under Section Five of the Fourteenth Amendment, certainly appears to restrict, abrogate, and dilute an equal protection guarantee in a manner proscribed by Morgan.

The Mathews Court, even though it did not clearly articulate a level of scrutiny, applied an analysis more deferential to the political branches of government than did the Graham Court, with no mention of Morgan; consequently, the level of protection afforded noncitizens from state action differs from that provided to noncitizens from federal endeavors. This discrepancy runs counter to the doctrine that the Equal Protection Clause should apply to the federal government in the same way that it applies to the states.

In Adarand Constructors, Inc. v. Pena, however, the Supreme Court specifically pointed to alienage as an exception to the general rule that the Equal Protection Clause should apply to the federal government just as it applies to the states. The Court justified the special treatment of alienage as warranted by deference due to the political branches in determining immigra-

101. See id. at 668 (Harlan, J., dissenting).
102. See Morgan, 384 U.S. at 651 n.10. The Court has also rejected the argument that state regulation authorized by federal legislation pursuant to the Commerce Clause is exempt from rational review under the Equal Protection Clause. See, e.g., Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 880 (1985).
103. See discussion supra notes 71-72 and accompanying text.
104. The Ninth Circuit rejected the argument that the federal policy of denying AFDC benefits to noncitizens with pending asylum applications is unconstitutional because it authorizes states to treat one category of noncitizens differently from another, an action that would violate the Equal Protection Clause if carried out by a state alone. See Sudomir v. McMahon, 767 F.2d 1456, 1466-67 (9th Cir. 1985) ("[T]he classification Congress has created is valid because of its plenary power over immigration. Moreover, Congress has enacted a uniform policy regarding the eligibility of asylum applicants for welfare benefits. This makes inapplicable the suggestion in Graham v. Richardson that Shapiro may require the invalidation of congressional enactments permitting states to adopt divergent laws regarding the eligibility of aliens for federally supported welfare programs.") (citation omitted).
105. See discussion supra note 56 and accompanying text.
106. The idea that the same equal protection standards should apply to the federal government as to the states was first articulated with regard to race in a school desegregation case, but has since been extended to sex and equal protection claims more generally. See Buckley v. Valeo, 424 U.S. 1, 93 (1976); Frontiero v. Richardson, 411 U.S. 677, 681 n.5 (1973); Boiling v. Sharpe, 347 U.S. 497, 499 (1954); see also Recent Legislation, supra note 58, at 1194-95.
Developments in Policy

tion policy. In keeping with this exception, the courts might view authorization of state discretion over benefit eligibility as a matter of federal immigration policy determined by the political branches and therefore subject to deference.

One argument that might overcome the alienage exception is that the PRA does not determine immigration policy, but rather welfare policy. Because the impetus for deference with regard to immigration is its close relationship to foreign policy, domestic welfare policy may be subject to more rigorous judicial scrutiny. Ironically, the Proposition 187 decision supports this argument because the district court concluded that state restrictions on state benefits do not constitute a regulation of immigration. Although the PRA does not pose an identical question because it involves federal authorizing legislation, the notion that state determination of benefit eligibility is not immigration policy may still apply. Nonetheless, because the Supreme Court failed to recognize a distinction between welfare policy and immigration policy in Mathews, an equal protection claim based on distinguishing between the two fields is unlikely to succeed.

If instead, the courts deem welfare eligibility an aspect of immigration policy, federal authorization of state discretion could be challenged as a violation of Congress' constitutional authority to delegate its responsibilities, or alternatively as a violation of the Naturalization Clause of the Constitution. The Supreme Court adheres loosely to the non-delegation doctrine that "Congress generally cannot delegate its legislative power to another branch." Increasingly, however, the Court permits Congress to obtain

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108. See id.
109. See discussion supra notes 80-81 and accompanying text.
110. See Recent Legislation, supra note 58, at 1195-96.
111. This argument was raised in a recent challenge to the PRA's provisions denying food stamps and SSI benefits to certain legal permanent residents. The City of Chicago argued that since the PRA bears only a tangential relationship to immigration or naturalization policy and denies critical subsistence-level benefits, the court should apply an intermediate level of scrutiny when evaluating its equal protection challenges. Such scrutiny would require the federal government to demonstrate that the provisions are substantially related to an important federal interest. As of November 14, 1997, no opinion had been issued in the case. See Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 12-13, City of Chicago v. Shalala, No. 97 C 4884 (N.D. Ill. filed July 10, 1997).
114. The City of Chicago raised both arguments in a Complaint challenging the PRA's provisions denying Food Stamps and SSI benefits to certain legal permanent residents. See Complaint at 3, 15, City of Chicago v. Shalala, No. 97 C 4884 (N.D. Ill. filed July 10, 1997). The City of Chicago did not, however, pursue these claims in its Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction. As of November 14, 1997, no opinion had been issued in the case. See Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, City of Chicago v. Shalala, No. 97 C 4884 (N.D. Ill. filed July 10, 1997).
115. Mistretta v. United States, 488 U.S. 361, 372 (1989) (quoting Field v. Clark, 143 U.S. 649, 692 (1892)). The non-delegation doctrine became associated with attempts to prevent New Deal delegations of regulatory authority to the executive branch and was largely abandoned along with the
assistance from other branches of government so long as it provides an “intelligible principle” to guide the agency receiving authority. The PRA does not offer such a guiding principle. In fact, it sends conflicting messages. While the PRA declares that states have a compelling interest in denying benefits to non-citizens to encourage self-sufficiency, it permits states to offer federal benefits anyway. Ironically, a complete federal denial of benefits would be more likely to withstand judicial scrutiny. Therefore, arguing that the PRA lacks an intelligible principle might undermine access to benefits by prompting a decision to prohibit all benefits to non-citizens.

The delegation of authority to the states might be challenged on grounds of institutional competence and political accountability. The argument would be that because the states are not accountable for foreign policy, they are not appropriate guardians of authority over immigration policy. The Supreme Court has already prohibited delegation to an executive agency of the authority to consider alienage in hiring decisions, even though such a classification would be permissible if made by the President or Congress. Following this line of reasoning, even if the federal government may consider alienage when defining benefit eligibility, the Court might not find that Congress is constitutionally authorized to delegate this discretion to the states.

Immigration law provides an alternative claim resting on the Naturalization Clause, which requires that Congress “establish an uniform Rule of Naturalization.” Such a challenge would assert that by authorizing the states to determine eligibility criteria, Congress has virtually assured that there will be no uniform policy regarding whether noncitizens may receive certain federal benefits. In fact, the Graham Court went so far as to declare that “[a]
Developments in Policy

congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity."123 Graham is consistent with the way the Court has treated the uniformity requirement with regard to taxation.124 In that context the Court has interpreted uniformity to mean geographic uniformity.125 A uniform rule, however, may be construed to mean only uniform federal incorporation of divergent state rules. The Court has interpreted the uniformity requirement in this manner in the context of bankruptcy.126 The question for the courts would be whether the Naturalization Clause requires geographic uniformity, not guaranteed by the PRA, or merely federal incorporation of state rules, which the PRA constitutes.

The Supreme Court has never clarified the nature of the uniformity required by the Naturalization Clause, but a few appellate courts have construed the clause as requiring geographic uniformity.127 These cases suggest that a rule is uniform if it operates differently in each state due to variations in circumstances,128 but they do not resolve whether a rule is uniform if it operates differently in each state due to variations in state law.129 Moreover, despite the suggestion in Graham,130 the Supreme Court has not determined definitively whether the uniformity requirement of the Naturalization Clause even extends to immigration policy or public bene-

125. See, e.g., Knowlton v. Moore, 178 U.S. 41 (1900).
127. See, e.g., Kharaiti Ram Samras v. United States, 125 F.2d 879, 881 (9th Cir. 1942) ("Regarding the provision in the Constitution empowering Congress to establish a 'uniform' rule of naturalization, we think the restriction of uniformity relates to geography only" and does not invalidate a federal statute that extended naturalization rights only to certain racial groups.).
128. See, e.g., Darling v. Berry, 13 F. 659, 667-68 (D. Iowa 1882) ("[W]hen a bankrupt, revenue, or naturalization law is made by its terms applicable alike to all the states of the Union, without distinction or discrimination, it cannot be successfully questioned on the ground that it is not uniform, in the sense of the constitution, merely because its operation or working may be wholly different in one state from another. . . . The law must be general and uniform in its provisions but its working and operation may be very different in different states, owing to their diverse conditions and circumstances.").
129. See, e.g., Moon Ho Kim v. INS, 514 F.2d 179, 180-81 (D.C. Cir. 1975) (rejecting the argument that recourse to state law meets the uniformity requirement); Petition of Schroers, 336 F. Supp. 1348 (S.D.N.Y. 1971) (preferring a uniform federal standard for citizenship to "patchwork standards of each state"). But see, e.g., Brea-Garcia v. INS, 531 F.2d 693, 697-98 (3d Cir. 1976) (rejecting Moon Ho Kim's interpretation of uniformity requirement in favor of recourse to state laws when community standards are more appropriate than national standards); Petition of Lee Wee, 143 F. Supp. 736, 738 (S.D. Cal. 1956) (holding naturalization requirement of fewer than two gambling convictions to be constitutional because it is "uniformly of geographic applicability" even though gambling convictions depend on varying state laws).
fits. Nonetheless, outside the context of interpreting the Naturalization Clause, the Court has emphasized the importance of ensuring that lawfully admitted immigrants receive equal hospitality throughout the states. Therefore, one could argue that the geographic uniformity requirement should apply to public benefits. Regardless, federal authorization of state discretion renders it easier for the courts to interpret the PRA as fulfilling the uniformity requirement even though noncitizens' eligibility for public benefits may vary by state.

In conclusion, challenges to congressional authorization of state discretion to determine noncitizens' benefit eligibility are among the most unique legal claims that may be raised by the PRA. Distinguishing welfare from immigration policy, the argument that federal equal protection should be coextensive with state equal protection is unlikely to be accepted by the courts in light of Mathews. However, the charge that Congress has exceeded its authority to delegate responsibility, both because it has failed to provide a guiding principle and because the states are ill-suited to make eligibility determinations that bear on immigration policy, is credible and has a sound precedential basis. The question of whether state discretion is consistent with a uniform rule as required by the Naturalization Clause remains to be resolved by the Supreme Court. These potential challenges present an opportunity to forge a body of precedent on federally authorized state discretion, which is especially pressing at a time of increasing federal emphasis on delegating policy decisions to the states.

—Zoë Neuberger

II. CHILDREN'S WELFARE & THE DOCTRINE OF PARENS PATRÆAE

The doctrine of parens patriae vests state governments with the authority to intervene in one of the nation's innermost sanctums—the family. Specifically, the doctrine empowers the state to act as protector and caretaker of its children. The passage of the PRA, however, created a wrinkle in the

131. Nor have the appellate courts made such a declaration. See Moon Ho Kim, 514 F.2d at 180 (declining to decide whether uniformity requirement of Naturalization Clause extends beyond naturalization to immigration laws).

132. See, e.g., Truax v. Raich, 239 U.S. 33, 42 (1915) ("[I]f a state law restricting employment of noncitizens] were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.").


134. See Kay P. Kindred, God Bless The Child: Poor Children, Parens Patriae, and a State Obligation To Provide Assistance, 57 Ohio St. L.J. 519, 526 (1996) ("When acting to protect the general welfare of children, the state has wide latitude to restrict parental control. This state power, known as the parens patriae doctrine, in essence, gives the state the authority to serve as a substitute parent and ultimate protector of children's interests.") (citations omitted).
Developments in Policy

legal and policy fabric of parens patriae. Notably, the PRA was the death knell for the over half-century old program of Aid to Families with Dependent Children (AFDC). In place of this massive federal assistance program, the PRA instituted a nationwide patchwork of block grant programs to be administered with nearly complete state discretion and little federal oversight. Through the PRA, the federal government has essentially thrust upon the states the responsibility to end the distressing patterns of welfare dependency and the ever-increasing disbursal of federal entitlement dollars. While these may be impressive and necessary policy goals, the PRA will also likely place over one million children in poverty. Because of the PRA-mandated state government programs, more children will be in poverty; and these children, thereby, may be more apt to suffer from a lack of the very services and proper care that typically causes states to intervene in child abuse and neglect cases.

Accordingly, this Part explores the potential tension between the new welfare law and the doctrine of parens patriae. Section A outlines the changes in the law that most affect the welfare of children. Section B provides a brief explanation of the doctrine of parens patriae. Finally, Section C contemplates the impact that the PRA will likely have on the care that children receive and suggests that the requirements imposed by the federal law may conflict with the states' established common law doctrine of parens patriae.

A. Changes in the Law

The PRA instituted several changes that promised to have significant effects on child welfare throughout the United States. As discussed above, the Act abolished individual federal entitlement for AFDC and related programs, which previously provided cash assistance to more than 4.6 million families with approximately 8.6 million children. Under AFDC, states defined what was considered sufficient “need” to qualify for assistance, set their own benefit levels, and established income and resource limits. As state resources were augmented by unlimited matching funds from the federal government, individual applicants who met their state’s need criteria were guaranteed benefits.

The primary goal of AFDC was to enable single mothers to care for their...

136. See id.
137. See Mary Jo Bane, Welfare as We Might Know It, AM. PROSPECT, Jan.-Feb. 1997, at 47.
138. See id. (referring to a Department of Health and Human Services estimate).
139. See MARK V. NADEL, WELFARE REFORM—IMPLICATIONS OF INCREASED WORK PARTICIPATION FOR CHILD CARE, GAO/HEHS Doc. No. 97-95 (1997) [hereinafter IMPLICATIONS].
140. See Berner, supra note 136, at 38.
children at home.141 Before mothers’ pensions were established, most children in orphanages or foster care were not orphans, but had living parents who lacked jobs or access to child care.142 AFDC was originally restricted to widows who could provide a caseworker’s vision of a “suitable home,” but expanded coverage gradually until the 1960s, when a series of court decisions invalidated eligibility tests that had been used to deny AFDC to racial minorities.143 In 1988, Congress mandated that states purvey AFDC to two-parent families.144

The new welfare law replaces this system with block grants provided by the federal government to states in a program called Temporary Assistance for Needy Families (“TANF”). The TANF grants have stringent requirements, forcing welfare parents to obtain jobs in return for their benefits.145 A portion of the Act, dubbed “workfare,” mandates that at least twenty-five percent of a state’s welfare recipients be “engaged” in paid employment, unpaid “work experience” or “community service” for at least twenty hours per week in fiscal year 1997, and that fifty percent be so employed by fiscal year 2002.146 Further, seventy-five percent of two-parent households receiving assistance must demonstrate that one parent is working at least thirty-five hours per week.147 All welfare families are required to comply, though states maintain the option to exempt single parents who are caring for a child up to age one.148 If a welfare parent refuses to work, the family’s assistance will either be reduced in proportion to the number of work hours by which the parent falls short, or be terminated.149 Single parents of children under age six can avoid reduction or termination of aid by demonstrating that “appropriate” child care is unavailable, but the parents bear the burden of proof. Moreover, the state—ever under pressure to meet its twenty-five percent quota—determines what constitutes “unavailable” and “appropriate.”150

In addition, the Act takes the harsh step of placing a five-year lifetime limit on the receipt of welfare benefits,151 and permits states to shorten the limit if they so desire. The time limit applies only to benefits received as an adult,
Developments in Policy

and the state may choose to exempt a family from the limit as a result of "hardship," or if a member has "been battered or subjected to extreme cruelty;" however, such exceptions may at no time constitute more than twenty percent of the state's aggregate caseload. Moreover, "hardship" itself is not defined, and the law makes no mention of who or what determines whether an abuse claim qualifies a family for exemption.

In sum, the changes that the PRA institutes require welfare parents to spend more hours at work activities and fewer hours at home with their children. In the breach stands a system of child care that may be inadequate in meeting increased demands for day care (and sometimes night care) services at all, let alone with a modicum of quality and affordability for low-income parents. With a state demanding work hours, and a child care system possibly unable to provide adequate care, the PRA may leave welfare parents and children with an impossible choice: risk noncompliance and possible benefits termination or place the children at risk in low-quality or even dangerous caretaker arrangements. Thus, in imposing strict welfare-to-work requirements on states and parents, while at the same time leaving states and parents little guidance to navigate "appropriate" child care options, the PRA and TANF may operate in contravention to states' parens patriae obligation to protect children.

B. Parens Patriae: The State as Protector of Children

_Parens patriae_ is a common law doctrine under which the state has an obligation to ensure the safety and well-being of children. The doctrine originated in seventeenth-century England, but has long been recognized

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152. _Id._ § 103, 408(a)(7)(C), 110 Stat. at 2137-38.
154. _See id._
155. Estimates of the quality of child care centers indicate that most children receive moderately to highly substandard child care. _See Inadequate Child Care Strains America's Working Families_ (last modified Nov. 4, 1997) <http://www.childrensdefense.org.ccfact.html> ("Six out of seven child care centers provide care that is mediocre to poor, according to a recent national study by a group of universities."). One study found that one in eight child care centers could actually "jeopardize children's safety and development." _Id._ (citing Helburn et al., _Cost, Quality, Outcomes Study: Executive Summary_ (University of Colorado, Denver)(1995)). According to another study, in-home child care may not be the answer—one in three homes was found to be possibly harmful to children. _See id._ (citing Galinsky et al., _The Study of Children in Family Child Care and Relative Care: Highlights of Findings_ (Families and Work Institute, New York)(1994)).

156. In major cities across the nation, average yearly child care costs for children age one to age three would seem to occupy a large portion of a family budget based on annual income at or near minimum wage. Collected from resource and referral agencies in several cities, statistics of cost-per-child show the burden: Boston, Mass., $8,840; Boulder, Colo. $6,240; Dallas, Tex., $4,210; Durham, N. C., $4,630; Oakland, Calif., $6,500; Minneapolis, Minn., $6,030. _See id._

157. _Parens patriae_ doctrine is said to have arisen from the right of the Crown to protect subjects who were unable to protect themselves. The first reported use of the concept occurred in 1696 in _Falkland v. Bertie_, 23 Eng. Rep. 814, 818 (1696), where the court held that the demise of the Court of Wards returned the "pater patriae" responsibility of the King for the care of charities, infants, idiots, and lunatics to the Chancery. _See Kindred, supra_ note 134, at 519, 526 n.45. Over the years, the _parens_
in the United States, where it is now governed primarily by state statutes.\textsuperscript{158} Literally defined as the "parent of the country," the term refers to the traditional role of the state as sovereign and guardian of persons under legal disability, such as juveniles or the insane, and in child custody determinations, when acting to protect the interests of the child. Fundamentally, it is the principle that the state must care for those who cannot take care of themselves.\textsuperscript{159} The \textit{parens patriae} power essentially gives the state authority to serve as a substitute parent and protector of children's interests; in the proper exercise of the power, the state may require parents to provide adequate food, clothing, shelter, and medical care for their children.\textsuperscript{160} Indeed, parental dereliction in these respects can lead to the removal of children from the parents' care.

At a minimum, then, the doctrine can be said to obligate the state to act in the "best interests of the child."\textsuperscript{161} Yet the new federal welfare law, in forcing parents to abandon the close care of their children, may conflict with states' own \textit{parens patriae} obligation to protect the best interests and welfare of children.

C. Independence or Inadequacy: The Child Care Dilemma of Welfare Reform

The PRA sets states on an ironic path: At one turn, the states must play the primary role in cutting the expenditures of welfare dollars to needy families; at another turn, the states must intervene in family situations that demonstrate abuse or neglect of children—situations in which poverty is often a major contributing factor. With the changes in the welfare system under the PRA, the states will require more parents to work. As more parents transition from welfare to work, outside-the-home child care needs will likely increase.\textsuperscript{162}

\textit{parens patriae} power was expanded to justify court interference to protect wards from the misdeeds of testamentary guardians, \textit{see id.} (citing Beaufort v. Berty, 24 Eng. Rep. 579 (1721)), and to protect a child from exploitation by third parties, \textit{see id.} (citing Butler v. Freeman, 27 Eng. Rep. 204, 204 (1756)). Precursors to the modern conception appeared in \textit{In re Spence}, 41 Eng. Rep. 937, 938-39 (1847), when a court held that the state properly could intervene to protect a child from his parent or guardian in the absence of property. \textit{See id.} For a more thorough exposition of the historical evolution of \textit{parens patriae}, see Lawrence B. Custer, \textit{The Origins of Parens Patriae}, 27 EMORY L.J. 195 (1978).

\textsuperscript{158} See, e.g., CAL. BUS. \& PROF. CODE § 16760 (West 1997); CONN. GEN. STAT. ANN. § 35-32 (West 1997); N.J. STAT. ANN. § 2A:53A-21c (West 1997); S.D. CODIFIED LAWS § 19-14-26 (Michie 1980); UTAH CODE ANN. § 76-10-916 (1953).

\textsuperscript{159} See BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

\textsuperscript{160} See Kindred, \textit{supra} note 154, at 521.

\textsuperscript{161} The "best interest of the child" standard is the one used by state courts in determining what course of action should be taken with respect to children. See, e.g., \textit{In re Coast}, 561 A.2d 762, 782-83 (Pa. Super. Ct. 1989) (involving parental termination); Hagins v. Hagins, 678 So.2d 479, 481 (Fla. 1996) (involving custody issues); \textit{In re Dickhaus}, 371 N.E.2d. 800, 802 (Ohio 1974) (involving adoption proceedings).

Developments in Policy

The PRA has no guaranteed child care component. The PRA’s only guarantee is that “child care subsidies provide ‘equal access’ between those families receiving child care services under the Act and those receiving similar services in the state or geographic area.” While this requirement certainly conforms to constitutional equal protection requirements, the PRA contains no provision guaranteeing basic child care. This omission ignores the role that child care plays in realizing welfare-to-work goals.

1. Public Assistance and Neglect

Supporting one’s children in the transition from AFDC to TANF may prove daunting for many families. The data simply is not available to ascertain just how many families are unable to cope under the new TANF program. The question remains, therefore, to what extent the care of children is sacrificed as states get tougher on the poor. The late 1980s and early 1990s saw a rise in concern over child care, evidenced by expansion of subsidies such as the Dependent Care Tax Credit, the Head Start program and Title XX of the Social Services Block Grant, the Child Care Development Block Grant, and subsidies to parents through the Family Support Act of 1988’s Job Opportunities and Basic Skills (JOBS) program. With the dawn of the twenty-first century nearly upon us, questions remain—despite the subsidy programs and tax credits—as to the ability of the State to facilitate quality child care for low-income parents. Indeed, the provision of quality child care may be the linchpin in the lasting success of welfare reform.

Being poor certainly significantly increases the likelihood that a child will

million children ages 5 to 14 in America with a working parent, and typically they spend less than two-thirds of the time their parents are working in school.” Marion Wright Edelman, A Voice for Children: After-school Activities a Must, CDF Reports, Nov. 1997, available at http://www.childrensdefense.org/-voice.html.

163. See, e.g., Deily, supra note 162, at 134 (describing child care law in the State of California).
164. See id. (quoting § 103, 110 Stat. at 2283 (codified as amended at 42 U.S.C. § 9858c(c)-(4)(A))).
165. See Deily, supra note 162, at 136.
166. Bane, supra note 137, at 47 (“States that have gotten serious about work or more general participation requirements are cutting the benefits of many, many families who are sanctioned for noncooperation. States have also seen dramatic decreases in caseloads, not entirely driven by good economies, from people deterred by the new requirements and the new climate.”).
167. See id.
169. See id.
170. See NADEN, supra note 139.
171. See id.; see also Barbara B. Blum, Children and Welfare Reform—Policy Point of View, CHILD POVERTY NEWS & ISSUES, Fall 1994, <http://ccpmcnet.columbia.edu/dept/nccp>. The PRA subsumed the JOBS program under the umbrella of the Child Care Development Block Grant (CCDBG). The CCDBG now absorbs several programs that were responsible for guaranteeing child care to those existing on welfare, transitioning from welfare to work, and trying to avoid welfare through work (but still at-risk for receiving welfare. See Pub. L. No. 104-193, § 603, 110 Stat. 2105, 2279 (1996).
suffer from neglect, as well as generally inadequate care. Inadequate care may include malnutrition, lack of proper hygiene, disturbing and disruptive living conditions, or being left in the hands of unsafe or inexperienced child-care providers. Poor children have higher risks of death, cause of death notwithstanding, than other children. Furthermore, poor children have a greater likelihood of stunted growth, substandard health, and leaving school before high school graduation. Circumstances of neglect or inadequate care create the potential for real harm. Consistent with parens patriae, where such harm exists, state agencies and judiciaries may intervene in family situations. A vicious cycle thus begins in which state action becomes a primary factor in jeopardizing the ability of parents to provide their children with adequate care. The inability to provide adequate care, in turn, becomes a primary factor in causing potential state intervention. Stopping this cycle may become even less possible as welfare reform removes the concept of entitlement to governmental assistance from the nation’s consciousness.

These statements ought not to imply that TANF has ravaged the AFDC’s rosier prospects for happy and healthy children. To be sure, inadequacies existed under that program as well, particularly in funding for child care. The AFDC program seemed to engender circumstances that encouraged neglect because, even at that time, the funds available in the budget of a family receiving public assistance were far less than the cost of child care. AFDC parents received approximately $365 per year for child care, whereas quality child care may reasonably cost more than $8,500 per year. Even when AFDC families could afford to pay, the quality of care their children might have received at many child care centers was uncertain at best, and downright dangerous at worst. Currently, safety and health conditions in many centers are still substandard, although the costs of child care have

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172. See Kindred, supra note 134, at 532.
173. See id.
174. See Children’s Defense Fund, The New Welfare Law: One Year Later, CDF Issues: Fair Start. (Oct. 14, 1997) <http://www.childrensdefense.org/fairstart_oneyear.html> (“Poor children are three times more likely to die from all causes compared to nonpoor children. They are two to three more likely to have stunted growth and three times more likely to be in fair or poor health.”).
175. See id. (“Poor children are more likely to fail behind in school and to drop out, compared with middle-class and wealthy children. If lost benefits mean deeper and more prolonged child poverty, the risks to children’s well-being are great.”).
176. See Kindred, supra note 134, at 521 (arguing for some “minimum level of state assistance grounded in the constitutional right to assistance when necessary to protect and maintain family integrity”).
177. See Mark V. Nadel, Welfare Reform-Implications of Increased Work Participation for Child Care (Report to the Honorable Christopher Dodd, Ranking Minority Member, Subcommittee on Children and Families).
178. See id.
179. See id.
180. See id.
Developments in Policy

risen six percent annually since 1990.181

The problem may have been and still may be that the states' protective role in serving the best interests of children does not necessarily assure the best possible child care.182 Most states do not have laws to ensure that every parent has access to high-quality child care.183 Still, as the nation undergoes the transition to PRA and TANF, the gap between supply and demand will most likely increase.184

At least from the anecdotal evidence, a crisis in child care supply does not seem to have manifested itself. Although child care providers in Tulsa, Oklahoma, expected to be inundated with demand, that expectation did not materialize.185 Oklahoma welfare rolls decreased; however, day care enrollment did not increase.186 Child care providers and officials in that state hypothesized three possible scenarios:187 first, children might be in unapproved day-care programs;188 second, relatives and friends might be caring for the children;189 third, and perhaps most frighteningly, the children might be at home alone.190 Given that a family with an average annual income of $17,000 might spend as much as one-fourth of its income on child care,191 the third scenario might be the most likely.

2. Other Obstacles

Other difficulties in successfully finding care may include having sick children, infants, special needs children, and the before and after school needs for care.192 Thus, parents with sick children, very young children, children with disabilities and challenges, and a need for child care during un convent-
al work hours may not find care.\textsuperscript{193} Because specialized child care is scarce, finding care for infants or beyond the confines of nine-to-five work schedules may be difficult and often impossible for many working parents.\textsuperscript{194} The job hours of many low-income parents may be incompatible with away-from-home child care, because the parents work at nights and on weekends.\textsuperscript{195} This child care market failure could pose a particular problem for welfare-to-work parents who are entering a labor market in which "most new jobs will be in the service sector during nonstandard hours."\textsuperscript{196}

Even if all other demands can be met, transportation to and from child care providers can be a problem.\textsuperscript{197} Parents must make child care arrangements that not only fit their budgets, but also fit their work schedules and access to reliable transportation. To the extent that the location of child care services imposes additional costs in time and money for low-income families, all of these factors—special needs, infant care, nonstandard hours, and transportation—contribute to the gap between supply and demand in child care. When these factors go unaddressed, the likelihood increases that low-income parents and children will suffer doubly from discontinuous and low-quality child care—\textsuperscript{198} if they can find any child care at all.

3. \textit{From Welfare to Work: The Human Stories}

Newspapers across the country convey human interest stories regarding the triumphs and trials of families in the transition from public assistance to fully independent employment.\textsuperscript{199} Often, the challenges of finding appropriate and continuous care for children weigh heavily in the ultimate success of the family in becoming financially independent. For example, one mother asked to be terminated from her job so that she could receive welfare.\textsuperscript{200} The mother

\begin{thebibliography}{9}
\bibitem{193} See \textit{id}.
\bibitem{194} See Huntington, supra note 184, at 100-02.
\bibitem{195} See \textit{id.}; see also Hearings (statement of Sandra L. Hofferth, University of Michigan Institute for Social Research) (stating that one-third of working poor parents and one-fourth of working class parents work weekends—almost one-half of poor parents have a changing work schedule that makes stable care difficult).
\bibitem{196} Huntington, supra note 184, at 101.
\bibitem{197} See Hearings, supra note 195.
\bibitem{198} See \textit{id}.
\bibitem{199} See, e.g., Margaret Edds, \textit{3 Women's Cases Show the Pitfalls, the Promise Following Welfare Reform}, VIRGINIAN-PILOT, July 6, 1997, at A11 (examining the lives of women in Culpepper, Virginia, who are struggling to make the transition from welfare to work); Margaret Edds, \textit{Making Welfare Work: Women at a Turning Point}, VIRGINIAN-PILOT, Feb. 24, 1997, at A1 (contrasting the complicated life stories of former welfare recipients with the simplified statistical accomplishment of getting people off welfare); Louise Kiernan, \textit{Glimmers of Hope on Way to Work}, CHI. TRIB., June 1, 1997, at C1 (describing the slow, yet hopeful moves of women on welfare toward financial independence); Elizabeth Simpson, \textit{Making the Change}, VIRGINIAN-PILOT, July 6, 1997, at A1 (documenting the lives of women making the transition from welfare to work as "a clue to the future of hundreds of people").
\end{thebibliography}
Developments in Policy

worked six days per week at a job to which she had to commute one hour each way by bus.\textsuperscript{201} Besides the transportation challenges, this mother paid $1,228 for just three months of day care services.\textsuperscript{202} This figure constituted over half of the less than $800 she received in wages each month.\textsuperscript{203} For her, like many parents, the cost of child care made it economically inefficient to remain employed.

This child care dilemma seems to be an inherent part of the new welfare system. Parents who want to work cannot meet the rising costs of quality care for their children, given the budgets that their low-paying scales of compensation create.\textsuperscript{204} Parents are feeling the crunch of being caught through the demands of the state and the demands of their children. The system does not seem to recognize that dilemma.

Caseworkers and social workers recognize the system's shortcomings and the problems with the new law.\textsuperscript{205} As caseworkers scramble to help families make the effective transition from welfare to work, they race against time.\textsuperscript{206} They recognize that if these parents do not become self-sufficient, then their children will suffer.\textsuperscript{207} These professionals clearly attribute problems to the "rigidity" of a system that seems not to have considered the realities of child care in this nation.\textsuperscript{208} Overall, problems of access to child care, especially for parents with children who present special challenges (e.g., disabled and sick children) frustrate the attempts of these professionals to facilitate the transition from welfare to work.\textsuperscript{209} Unfortunately, as the more easily employable former welfare recipients are "creamed off" the caseloads, caseworkers and social workers face even greater challenges with those adults who have substantial employment qualifications issues such as illiteracy, drug addiction, and mental health problems.\textsuperscript{210}

D. Conclusion

A system that removes financial support from children because their parents cannot meet the financial responsibilities of independent living is clearly unfair,
especially in the situation of child care. The social safety net for these children is torn and tattered—and fast disappearing. Without affordable, quality child care for low-income parents, children living on the “economic fringes” will suffer. The situation of child care under the PRA presents a federalism quandary because the state governments’ implementation of the federal government’s goal of smaller welfare rolls not only may conflict with the states’ parens patriae obligations, but also may trigger the kind of neglect and possible harm to children that evokes state intervention through the court system. What resources states save in welfare expenditures, they may lose in expenditures for the judiciary and child protection services. Indeed, the federal government may just be asking the states to trade one set of expenditures for another. The net savings in resources President Clinton sought when he signed PRA into law may not exist in the current federal approach to child care. Perhaps, in approaching the specific dilemma of child care and welfare reform, we should remember that “[w]e are talking about some of the most powerless people in society [children]. Therefore, we need sure ethical footing. We need to be pretty confident before going forward that we will not do more harm.”

—Anita Krishnakumar and Shanna M. Cohn

III. THE UNEASY UNION BETWEEN LABOR AND WORKFARE

Imagine that a company was employing a large number of non-unionized personnel to perform menial tasks such as sweeping the factory floor or cleaning the company’s bathrooms. What would organized labor’s response to this scenario be? Labor unions would attempt to unionize employees in order to obtain better wages, benefits, and working conditions for these workers. Organized labor would not think twice about confronting the corporation and utilizing every tactic at its disposal to gain the best possible bargaining position for these workers. Now, imagine that instead of a company, New York City is requiring large numbers of workfare recipients to perform jobs such as cleaning New York City Transit Authority trains and buses in fulfillment of the


213. See Edds, Welfare Reform in a Child’s World, supra note 211.

workfare requirements of the PRA.\textsuperscript{215} Would organized labor’s response be the same in this situation as it was in the first scenario? In reality, the answer is unclear. Labor unions are rushing to the defense of workfare participants and pressing on their behalf for increased benefits and better working conditions. However, instead of being motivated solely by the best interests of workfare participants, unions are often acting in their own self-interest. Unions have claimed that “states and municipalities, tempted by lower costs, [will] hire workfare participants for positions that would usually be filled by unionized workers.”\textsuperscript{216} As a result, there is an uneasy union between the interests of organized labor and workfare participants. In the current controversy over workfare, mixed in with the traditional desire of organized labor to fight for the best interests of workers is the desire for self-preservation. This Part will chronicle the reaction of labor unions to the PRA and the steps they have taken to ensure not only that workfare participants receive better treatment, but also that their organizations remain viable. Section A will trace the efforts of municipalities to place workfare participants in positions that are normally held by unionized workers, thus leading to the current problem. Section B will discuss the effort by unions to have workfare participants declared “employees” under the Fair Labor Standards Act of 1938,\textsuperscript{217} and the ramifications of that designation. Section C will analyze the legal and policy issues of recognizing workfare participants as employees.

A. The Current Controversy

The PRA prohibits any able-bodied, childless adult between the ages of eighteen and fifty from collecting food stamps for more than three months in any three year period unless she works at least twenty hours per week. No exception or exemption is provided for those recipients who cannot find work. Welfare recipients with minor dependent children must work pursuant to federal requirements or suffer certain penalties. For example, if a parent does not fulfill her workfare obligation, then the parent will not receive her share of the family’s monthly welfare check for one month. Subsequent violations can result in the entire family losing benefits for a finite period of time.

In order to comply with the PRA, states and municipalities have been developing programs to place welfare recipients in jobs programs so that they can meet their workfare requirement. It is estimated that the welfare reform law requires “that 2.2 million welfare recipients be placed in workfare jobs nationwide by the year 2002, including up to 200,000 in New York State . . . .

\begin{itemize}
  \item 216. \textit{Wage Laws to Apply to Work Programs}, FACTS ON FILE WORLD NEWS DIG., May 22, 1997, at 357 D2.
\end{itemize}
New York City, which has the largest such program in the nation, is required to expand its workfare force to 60,000 by 1998. Indeed, New York City has launched an enormous public jobs program in order to comply with the PRA. New York City requires able-bodied adults without children who receive benefits from the state’s Home Relief Program to work twenty-six hours each week in its Work Experience Program (WEP). In April 1996, New York City began requiring those who receive AFDC to work at least twenty hours a week or lose public assistance for their children.

Currently, New York City has the largest workfare program in the country. Fifty thousand people out of 450,000 welfare recipients are already working for their welfare benefits; 4,000 to 5,000 persons are expected to be added each month; and more than 100,000 recipients are anticipated in the coming years. The new workfare participants do not receive any benefits besides Medicaid, and effectively earn less than the federal minimum wage.

New York City’s workfare program costs between $1,200 and $3,000 a year per welfare worker. This amount covers the supervision of the program participants and the administrative costs of running the program, but not the costs of child care which the city must pay as well. The total cost incurred by New York City may well be $400 million, much greater than what the federal government will provide. In addition, New York State, like other states, must meet certain federal targets or risk losing substantial amounts of federal aid. In order for a state such as New York to receive all of the federal funding to which it is entitled, twenty-five percent of adult welfare recipients must be in twenty-hour per week work programs by the end of 1997 and an even higher percentage of welfare recipients must be in a workfare program by 2002.

While some states, such as Minnesota, place welfare recipients into private-sector positions that are covered by federal wage and hour laws, other states, including New York and Wisconsin, require welfare recipients to work in municipal jobs or perform community service in exchange for their welfare

220. See id.
223. Firestone, infra note 231.
224. See id.
225. See id.
Developments in Policy

grants. There is an incentive for states to utilize workfare participants in municipal jobs such as cleaning parks or subway cars because the average family welfare benefit is so low that it works out to about $2.40 per hour if the recipient worked full-time to earn it. Unions argue that workfare participants performing "clerical work and cleaning parks to receive welfare benefits, are filling jobs previously done by union members."228

In describing the magnitude of the conflict between municipalities and themselves, unions often cite the August 1996 contract negotiations between New York City's Municipal Transit Authority (MTA) and the Transport Workers Union—which represents the city's subway and bus workers. In negotiating with the MTA, "[t]he best the union could do was to win an agreement that 500 subway cleaning jobs would be eliminated without layoffs, through attrition, as workfare recipients took over their tasks."229 The significant concession that the Transport Workers Union gained through contract negotiations was the promise that "eventually a few workfare recipients would be allowed to join the union in permanent, normal wage jobs."230 However, a significant problem with the contract, as New York City Mayor Rudolph W. Giuliani's aides well recognize, is that "[t]he city . . . has an agreement with its unions that workfare participants will never fill jobs formerly held by unionized workers."231

The problem underlying the Transport Workers Union contract dispute—workfare workers displacing unionized municipal employees—is not confined to the MTA. Labor unions representing painters and carpenters who work for New York City contend that the city is violating an agreement between unions and the Giuliani administration that the city not use workfare participants to perform jobs once held by union members. The unions asserted in their application for a temporary restraining order that the New York City Parks Department "has cut its roster of unionized painters to [two] from [thirty] a decade ago . . . . [and that the city has] illegally us[ed] welfare

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227. See Workfare Fight; Honorable Work Deserves Honorable Pay, MINNEAPOLIS STAR TRIB., June 22, 1997, at 24A.
228. Id.
230. Id. If vacancies occur beyond the five hundred eliminated jobs, then some welfare recipients will be hired for full-time positions. See Richard Perez-Pena, Transit Union Agrees to Allow Workfare Plan, N.Y. TIMES, Sept. 19, 1996, at A1.
231. David Firestone, Giuliani Attacks Transit Workers Accord and Threatens to Scuttle Union Deal, N.Y. TIMES, Sept. 20, 1996, at B4. As Richard Schwartz, senior advisor to the Mayor and architect of his workfare program, stated:
The transit contract is phrased in a way that is dangerous and jeopardizes the overall workfare program by stating that they will conduct an attrition program and replace those people with people in workfare . . . . We have always held to the principle that workfare is a supplement to the city work force but not a substitute. As a result, we have to separate ourselves from this contract to preserve the overall program.
Id.
recipients to fix park benches, repair the Coney Island Boardwalk and perform carpentry at Downing Stadium, all work that was once done by unionized workers.”

The union official representing the painters stated that, “[the Giuliani administration] fail to see the fact that they’re replacing painters, they’re replacing civil service jobs, with [Work Experience Program] workers.”

Under the Work Experience Program—New York City’s workfare participation program—welfare recipients constitute seventy-five percent of the Parks Department’s work force, and approximately a third of those working in the Sanitation Department. It has been claimed that “[t]he file cabinets of union locals and advocate groups bulge with the names of people who were once employed—with union pay and benefits—for the same organizations they now work for in the WEP program.” Perhaps one of the more extraordinary cases of this sort of déjà vu is that of Hadie Hartgrove, a workfare participant formerly employed as a part-time custodian for Nassau County in New York State. Hartgrove was laid off from her custodian job as part of budget cuts, and subsequently applied for welfare benefits. As part of her workfare assignment, she was assigned to her former job in Nassau County, but without the higher wages and benefits she had previously enjoyed as a regular employee.

While unions have advanced an overarching argument that the above situations violate norms of fundamental fairness, they have yet to put forth the stronger legal argument that conduct by municipalities in cases such as those of Hadie Hartgrove may violate the displacement provisions of the welfare reform law which prevents the replacement of employed individuals—either through terminations or layoffs—with workfare participants. Municipalities

235. Id.
237. See id.
238. See 42 U.S.C. § 684(c) (1994). Section 684(c) states: No work assignment under the program (Grants to States for Aid and Services to Needy Families with Children and for Child-Welfare Services) shall result in—

(1) the displacement of any currently employed worker or position (including part displacement such as reduction in hours of nonovertime work, wages, or employment benefits), or result in the impairment of existing contracts for services or collective bargaining agreements;

(2) the employment or assignment of a participant or the filling of a position when (A) any other individual is on layoff from the same or any equivalent position, or (B) the employer has terminated the employment of any regular employee or otherwise reduced its workforce with the effect of filling the vacancy so created with a participant
Developments in Policy

cannot use workfare programs as a cost-cutting measure. They cannot layoff union members who are well-paid in order to replace them with welfare recipients whose jobs in workfare programs not only subsidize the cost of their benefits, but also serve as a method of reducing these institutions' payrolls.239

B. Workfare Participants as “Employees”

Although labor unions have not yet relied on the statutory provisions that appear to prevent the replacement of employed personnel with workfare participants, they have made use of other tactics in their struggle against states and municipalities over the use of workfare participants. Labor unions actively lobbied the Labor Department and the White House to find that workfare participants are “employees” for purposes of the Fair Labor Standards Act (“FLSA”). In May 1997, the White House concluded that a proper interpretation of the FLSA dictated such a conclusion.240 The most immediate ramification of that decision is that workfare participants would have to be paid the minimum wage—$5.15 per hour—for each hour that they are required to work in fulfillment of their workfare obligations.241 Other potential consequences are that in some states, workfare participants are automatically eligible for workers’ compensation and unemployment insurance, and that labor leaders may be able to organize welfare recipients into unions.242

As expected, governors and state workfare administrators were extremely critical of the Clinton administration’s conclusion that workfare programs fall within the “employee-employer” relationship governed by the FLSA, and

subsidized under the program; or

(3) any infringement of the promotional opportunities of any currently employed individual.

Funds available to carry out the program under this part may not be used to assist, promote, or deter union organizing. No participant may be assigned under section 682(e) or (f) of this title to fill any established unfilled position vacancy.

In addition, 7 C.F.R. § 273.22(f)(2)(viii) states:

Operating agencies shall not provide work to a workfare participant which has the effect of replacing or preventing the employment of an individual not participating in the workfare program. Vacancies, due to hiring freezes, terminations, or layoffs, shall not be filled by a workfare participant unless it can be demonstrated that such vacancies are a result of insufficient funds to sustain former staff levels.

239. See Farhan Haq, United States: Workfare Workers Worry About Labor Conditions, INTER PRESS SERVICE, Jan. 15, 1997. The article states that “[a]ccording to some preliminary estimates calculated by the New York Sanitation Department, workfare workers may earn as little as one-seventh of regular trash collectors, and they also lack the unionized workers’ health, retirement and vacation benefits.” Id.


241. See id.

242. See id.
predicted grave consequences. However, the financial consequences of classifying workfare participants as employees are not as dire as states have been forecasting. Some states argue that they will not have the fiscal resources to pay workfare participants. Under the PRA, participants must work at least twenty hours a week in 1997, and thirty hours a week by 2002. In order to meet both the minimum-wage law and the hours requirement of the welfare reform law, states must pay each welfare recipient at least $404 a month this year and $657 in 2002. It is estimated that “[g]iven current funding, only [thirty] states could meet the 2002 requirement,” because of the increased number of workfare participants and the hours that they will have to work by 2002.

The White House attempted to soften the blow by arguing that states may include the cash portion of welfare and the value of food stamps in calculating whether welfare recipients are working for the equivalent of the minimum wage. According to White House estimates, “[f]or every state except for Mississippi, the combination of food stamps and cash welfare is enough to pay at least the minimum wage for [twenty] hours a week.” Nevertheless, the above statement is misleading, given the determination by the White House that workfare participants are “employees” under the FLSA. Depending on state labor laws, some states will have to pay additional compensation above the minimum wage in the form of workers’ compensation, unemployment insurance and other benefits, thus raising the cost to them for each workfare participant.

Reacting to concerns from state officials, congressional Republicans proposed legislation to exempt those welfare recipients participating in workfare programs administered by public agencies or nonprofit organizations

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243. Governor Homas Carper of Delaware, a Democrat, has stated that the Clinton administration has placed states in an “untenable position” because states might have to reduce the number of participants in their workfare programs in order to meet the federally mandated levels for pay and benefits. Editorial, Workfare Wages, ORANGE COUNTY REG., May 19, 1997, at B6. Further, while the Clinton administration’s interpretation aids those in workfare programs, welfare recipients participating in educational or training activities are not entitled to the wages mandated by the FLSA because they do not stand in an “employee-employer” relationship.

244. See id.

245. The hourly totals per week may include time spent in training and obtaining employment.

246. Schine et al., supra note 232.


248. Elizabeth Shogren, Minimum Wage for ‘Workfare’ Favored, L.A. TIMES, May 17, 1997, at A13 (quoting Presidential advisor Bruce Reed). The Clinton administration’s decision will have almost no effect in California, because all workers, including former welfare recipients placed in jobs through state programs, receive at least the state minimum wage of $5.00 per hour. See id. The “Cal Jobs” program has placed former welfare recipients in jobs that pay about $7.50 per hour. See id.

249. Other possible benefits could include paid vacation and sick days. See Melissa Healy, Group Pushes to Limit Workfare Benefits, L.A. TIMES, Mar. 27, 1997, at A34.
Developments in Policy

from receiving the minimum wage. In June 1997, both the House Committee on Education and the Work Force and the House Ways and Means Committee voted to exempt workfare participants in the above placements from entitlement to the minimum wage. Later, Senate Republicans agreed to implement this provision in the budget bill. However, the proposed provision was not included in the final budget bill that was passed last summer. Yet, the effort to overturn the Clinton administration's decision on this issue is not finished. House Speaker Newt Gingrich recently stated that one of his objectives for the congressional session beginning in Fall 1997 was to pass legislation denying the minimum wage to workfare participants not holding jobs in the private sector.

If Congress does enact legislation declaring that workfare participants are not employees for purposes of the FLSA, then the effort by unions to gain greater benefits for welfare recipients will be dealt a damaging, but by no means decisive, blow. Unions will have to shift their efforts from the federal level, where they have until now been concentrated, to the state level. In states that do not recognize workfare participants as employees, and therefore refuse to allow them to organize as union members, labor leaders have stated that the "unions would try to organize such workers in informal groups to meet with government officials and discuss working conditions—without formal bargaining." Up to this point, the push for greater benefits has been virtually unsuccessful for the same reasons that state officials have pressed the federal government not to recognize workfare participants as "employees": Workfare participants are being trained to become productive workers, and are fulfilling a duty to the state in return for minimal economic benefits.

In New York State, for example, unions have tried to overturn rulings by state agencies that workfare participants are not "employees" and cannot be represented by unions. In April 1997, the New York State Assembly

250. See Robert Pear, G.O.P. in House Moves to Bar Minimum Wage for Workfare, N.Y. TIMES, June 12, 1997, at B16. However, workfare participants in private sector jobs would still receive the minimum wage. See id.

251. See id.


253. See Effort to Aid Recipients from Protections Fails, CHI. TRIB., Oct. 12, 1997, at C7. Gingrich's aims were immediately stalled by the lack of support from state GOP leaders. Many credit political pressure from unions and a good economy with assuring that workfare workers receive benefits equal to that received by other employees in the state. See Christopher Georges, GOP Drive to Deny Workfare Benefits Sputters in States, WALL ST. J., Oct. 7, 1997, at A7. However, future downturns in the economy may provide support for Gingrich's efforts.

254. Steven Greenhouse, Labor Leaders Seek to Unionize Welfare Recipients Who Must Go to Work, N.Y. TIMES, Feb. 19, 1997, at A18. In February 1997, the AFL-CIO decided to attempt to unionize "hundreds of thousands of welfare recipients who will be required to work for their benefits, with the dual goal of improving their working conditions and pressuring states and cities to give them permanent jobs." Id.

255. See id.
Yale Law & Policy Review

approved a revision of state welfare laws that would "make welfare recipients employees of their city or county governments once they have been on workfare assignments for six months. Upon becoming public employees, welfare recipients could be organized by unions . . . ." 256 As the bill is doomed in the Republican-controlled New York State Senate, however, it is simply a "one-house bill." 257 It is a symbolic device whose main purpose is to placate one of the most powerful constituencies of the New York State Assembly—organized labor. 258 So far, the only successful state effort to unionize workfare participants has been Alaska, where the state, county, and municipal employees' union has organized three hundred workers. 259 Alaska allowed unionization of workfare participants because they were performing work similar to that of union members covered by contract. 260 In attempting to convince states that workfare participants should be considered employees and allowed to organize into unions in order to bargain for greater benefits, organized labor faces a truly Sisyphean effort.

C. Are Workfare Participant Employees?

Politicians of all political stripes have strenuously objected to treating workfare participants as civil service employees. 261 They argue that workfare participants are not state or municipal employees because they receive government aid such as cash grants, food stamps, and Medicaid. Moreover, even if one contended that some workfare participants should be viewed as employees because they perform services such as cleaning trains or parks, there are other workfare participants who are only receiving job skills training, studying in education programs leading to a high school diploma, or participating in community service programs. As those participating in these alternatives to workfare are not performing work comparable to that of municipal employees, opponents to the inclusion of workfare participants as employees argue that these welfare recipients surely have no rightful entitlement to a minimum wage. Unions and advocates for welfare recipients contending that workfare workers should be viewed as employees state that it is readily apparent that workfare participants are performing similar tasks as unionized city workers, and that if

257. Id.
258. See id.
259. See Greenhouse, supra note 254.
260. See id.
261. See CNN Morning News (CNN television broadcast, May 5, 1997) (Governor Pataki stated: "It's utterly ridiculous, in my opinion, to propose that workfare recipients be unionized. The whole concept of workfare is that it is a temporary transition."); Edward Epstein, Some Concessions on Workfare; But S.F. Mayor Won't Budge on Equal-Pay Request, S.F. CHRON., Sept. 20, 1997, at A16 (Mayor Willie Brown stated: "I think its wrong [for a workfare participant] to be expected to be treated like union employees.").
Developments in Policy

they were not doing this work, then city employees would have to clean the streets, collect garbage, and dispose of medical waste. These proponents point to the fact that workfare participants constitute a large portion of municipal departments such as the New York City Parks Department and the New York City Sanitation Department. They argue further that in New York City, workfare participants have even been required to perform hazardous duties such as disposing of blood bags and hypodermic needles and exterminating rodents—tasks for which regular city employees receive a premium or professionals are normally required. In order to secure decent working conditions and adequate equipment, workfare participants sued New York City for access to materials such as gloves—necessary when handling hazardous waste products—and access to necessities such as bathrooms and drinking water at outdoor working sites. Thus, the argument concludes, workfare participants must be recognized as akin to unionized municipal employees because they perform comparable work.

However, the above argument advanced by unions is too simplistic. It neglects several important considerations about workfare workers. First, workfare workers may be less efficient in performing their tasks than regular employees because they have little incentive to devote their full energy to the jobs they are assigned. Second, they may need more supervision then the average employee because they may not have held previously a full-time job or been trained to be disciplined workers. Third, workfare is an instrumentality to place workfare workers into better jobs by teaching jobs skills such as discipline and responsibility to the participants. Because workfare is meant to be a temporary training program rather than a full-time career work assignment, workfare participants properly should be viewed as trainees and not as employees.

The Court of Appeals for the Tenth Circuit agreed that workfare workers were not employees in *Johns v. Stewart*, but offered a different rationale than the one set forth above. The plaintiffs in *Johns*, a group of workfare workers, claimed that the state unlawfully compensated them below the minimum wage. The court held that “workfare” benefit recipients were not employees under the FLSA. Though the court recognized that the scope

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263. *See* Robert Ratish, *Working In Fear of a Dead End*, NEWSDAY, Sept. 1, 1997, at A8. Workfare workers have alleged that there were no uniforms, and often no boots or gloves to use while cleaning streets. *See* Joe Sexton, *Discontented Workfare Laborers Murmur 'Union,'* N.Y. TIMES, Sept. 27, 1996, at B1. A New York State Supreme Court ordered New York City to stop sending workers to outdoor sites until conditions change. *See* id.

264. 57 F.3d 1544 (10th Cir. 1995).

265. *See* id. at 1548.

266. *See* id. at 1559.
of employee coverage under the FLSA is very broad, it stated that the "economic reality" is that workfare participants are not employees.\textsuperscript{267} This "economic reality" consists of the following facts: employees apply for public assistance, not for a state job; they receive their financial assistance checks from a welfare agency, not from the state payroll; they do not pay withholding taxes as do state employees; and they do not accrue sick or annual leave like state employees.\textsuperscript{268} However, the *Johns* court failed to consider that many of the advantages of being a state employee were denied to workfare participants because of cost concerns. Why would a state pay a workfare participant or give him or her accrued vacation time unless forced to do so? Indeed, the court's reasoning is specious. It had previously recognized that

[workfare participants] may perform the same functions as regular employees at some of the projects to which they are assigned, [however] they differ from state employees in that they do not receive the same salary, safe working conditions, job security, career development, Social Security, pension rights, collective bargaining, or grievance procedures as do the actual employees.\textsuperscript{269}

Instead of using the state's differentiation among types of workers as a starting point for its analysis, the court employed this difference as a conclusion. In its simplest terms, the court's analysis is: Since the state does not treat workfare participants in the same manner as regular employees, workfare participants are not equivalent to regular employees. The state's predicate rationale for its disparate treatment of the different types of workers is never investigated. As the court realizes, the "economic reality" is that workfare participants and regular employees perform the same work.\textsuperscript{270}

While the result in *Johns* is correct, the court should have relied on other factors in distinguishing workfare participants from state employees. The court should have noted that if workfare workers were to be treated in the same manner as state employees, then workfare workers should be allowed to unionize. If workfare workers were allowed to join unions, there would be an economic disparity between workfare program participants and regular employees. Not only would workfare workers gain additional benefits, but they presumably would not have the same tax burden as regular civil service employees. In addition to noting that workfare participants perform work in exchange for government benefits, the *Johns* court could also have distinguished workfare from regular employment by discussing the likely possibility


\textsuperscript{268} See *Johns*, 57 F.3d at 1558.

\textsuperscript{269} *Klaips* v. Bergland, 715 F.2d 477, 483 (10th Cir. 1983) (emphasis added). In *Johns*, the court stated that "[a]lthough *Klaips* referred only to [other workfare] participants, its reasoning applies with equal force [in this case]." *Johns*, 57 F.3d at 1559.

\textsuperscript{270} See *Klaips*, 715 F.2d at 483.
that the state does not truly benefit from the work performed by workfare workers due to the greater training and supervision needed when administering a workfare program. The above factors would have further illuminated the "economic reality" in *Johns* beyond the court's basic analysis.

Not all courts, however, have agreed with the result in *Johns*. For example, in *County of Los Angeles v. Workers' Compensation Appeals Bd.*, the Supreme Court of California held that an indigent who was required to work for Los Angeles County as part of a workfare program was an "employee" of the county under the state's Workers' Compensation Act. Under California law, an employer-employee relationship must exist in order for a person to bring a workers' compensation claim. The law defines an "employee" as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written . . . ."273

The workfare participant received back and leg injuries when he fell from a chair while during his job as a watchman for a school district. The County argued that because he was part of a workfare program he did not qualify as an employee. In holding that the workfare participant was an "employee," the court focused on a number of factors and found that:

The County, though it did not directly supervise his day-to-day activities, exercised its right of control by assigning him to jobs. Also, the County determined [his] rate of pay, specified the number of hours he was to work, and had the sole power to terminate his benefits if he did not perform his work to the County's satisfaction. The County received a benefit from [his] work, which helped to ensure the safety of a school within the County's boundaries. Finally, by assigning [him] to work at the school, the County exposed him to the same risks of employment faced by similar school employees.274

The *County of Los Angeles* and *Johns* courts confronted a similar set of circumstances—workfare participants being placed into comparable jobs as regular employees and being exposed to similar risks. Nonetheless, while the *Johns* court failed to extend workfare participants the same protections given regular employees, the California Supreme Court concluded that, although the government treated the two sets of employees differently, they actually differed in no relevant respect. Municipalities were utilizing workfare participants as employees, and those municipalities were gaining a benefit by not having to fill the positions with civil service employees. In the view of the California Supreme Court, the municipalities could utilize workfare employees only under the constraints of the California Workers' Compensation Act.

272. See id. at 689.
274. *County of Los Angeles*, 637 P.2d at 685 (emphasis added).
Considering workfare participants as equivalent to regular employees can profoundly affect the wages that workfare participants receive and the hours that they must work. Recently, a New York State Supreme Court judge ruled that New York City’s workfare system improperly calculated the number of hours that welfare recipients must work in order to receive benefits.\textsuperscript{275} The city had calculated the number of hours based roughly on the federal minimum wage.\textsuperscript{276} Justice Jane S. Solomon ruled, however, that the city had to base its calculation on what the city pays regular employees for similar tasks—approximately eight to ten dollars per hour in most cases.\textsuperscript{277} Justice Solomon held that the city had violated the New York State Constitution and the state welfare law by failing to determine the prevailing wage of the different jobs done by workfare participants and not paying the workers the higher wage, whether it be the prevailing wage or the minimum wage.\textsuperscript{278} The New York City Comptroller calculated that the comparable pay of a groundskeeper employed to work in the city’s parks was $9.08 per hour and that the prevailing rate for clerical work in a social services office was $8.11 per hour.\textsuperscript{279}

The question of whether workfare program participants should be treated as equivalent to regular municipal employees is one that will be fought in state courts and legislatures and in the federal courts and Congress in the coming months and years. In considering whether workfare workers are equivalent to regular employees, these institutions should not lose sight of the fact that the two types of workers are performing similar tasks, but the dispositive consideration should be the fact that workfare programs are opportunities to train welfare recipients to become productive workers in order to wean them off of welfare. The traditional alternative to workfare has proven to be a hand-out program without job-training or a requirement of social contribution. Workfare participants should receive compensation for their services, but not necessarily the same level of compensation enjoyed by those who have sought employment without the incentive of a possible loss of welfare benefits.

D. Conclusion

While unions may cast welfare recipients as indentured servants, participants in workfare programs receive employment and valuable training.


\textsuperscript{276} See id. at 919.

\textsuperscript{277} See id. at 921.

\textsuperscript{278} See id.

\textsuperscript{279} See Greenhouse, \textit{supra} note 254. Justice Solomon’s decision does not necessarily mean, however, that workfare workers will be paid these wages, because the city has the option of reducing the number of hours that workfare participants receive instead of increasing benefits to reflect the prevailing wage. See id.
Developments in Policy

Essentially, workfare workers are not employees. Because government agencies are not interested in providing any protections to workfare participants that might endanger their status as cost-effective alternatives to regular, unionized employees, the question looms: Who will fill the vacuum and advocate on behalf of these workers? In another time, this role would have been filled by organized labor. The PRA and government agencies, however, have pitted labor unions against workfare participants. Although unions have made strenuous efforts on both the national and local fronts to enhance protections for workfare workers, their advocacy stems not from a selfless generosity, but rather from the fact that the cheap labor provided by workfare participants threatens to obviate the more expensive services of unionized employees. In the end, workfare participants may find that they would more effectively vindicate their rights by suing for recognition as employees and for coverage under prevailing wage laws, than by aligning themselves with groups that may not have the poor and untrained workfare participant’s best interests at heart.

—John P. Collins, Jr.