

IN DEFENSE OF THE ELIGIBLE UNDOCUMENTED NEW YORKER'S STATE CONSTITUTIONAL RIGHT TO PUBLIC BENEFITS

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ABSTRACT

Under current New York State law, undocumented New Yorkers, (those residing in the U.S. without the federal government's permission), are ineligible for most state-funded means-tested public benefits, such as Medicaid and Safety Net Assistance. Articles XVII and I of the New York State Constitution nonetheless create a state mandate to provide for the eligible "needy" and ensure equal protection under the law, respectively. This article proposes that, under these state constitutional provisions, financially eligible undocumented residents of New York State possess an affirmative right to receive state-funded public benefits. Policy arguments against this entitlement are unfounded and barriers to enforcement of the right of undocumented New Yorkers to access state benefits are born of politics, not of the law.

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I. INTRODUCTION

Government assistance programs reduce the number of people living in poverty, reduce the severity of poverty, provide healthcare to those who cannot afford it,¹ and contribute to a healthy economy.² Despite this, providing public assistance to needy state residents can be politically unpopular,³ even in a relatively progressive state like New York.⁴ More unpopular still is the extension of public assistance to residents of the state who are undocumented immigrants.⁵

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1. ARLOC SHERMAN, CTR. FOR BUDGET & POLICY PRIORITIES, PUBLIC BENEFITS: EASING POVERTY AND ENSURING MEDICAL COVERAGE 2 (Aug. 17, 2005), <http://www.cbpp.org/research/public-benefits-easing-poverty-and-ensuring-medical-coverage> (“Means-tested programs play a large role in reducing the extent and severity of poverty.”).

2. See, e.g., Michel Nischan, *The Economic Case for Food Stamps*, ATL. (July 18, 2012), <http://www.theatlantic.com/health/archive/2012/07/the-economic-case-for-food-stamps/260015> (“[A] USDA study [] found that \$1 in SNAP benefits generates \$1.84 in gross domestic product (GDP).”); JOHN HOLAHAN, MATTHEW BUETTGENS & STAN DORN, KAISER FAMILY FOUND., THE COST OF NOT EXPANDING MEDICAID 16, 17 (July 17, 2013), <http://www.kff.org/medicaid/report/the-cost-of-not-expanding-medicaid> (“Increases in federal funding within states that expand [Medicaid] will have positive economic effects, increasing employment and state general revenues . . . [such as income taxes, sales taxes, etc.].”); LIZ SCHOTT & LADONNA PAVETTI, EXTENDING THE TANF EMERGENCY FUND WOULD CREATE AND PRESERVE JOBS QUICKLY AND EFFICIENTLY (Apr. 6, 2010), <http://www.cbpp.org/research/extending-the-tanf-emergency-fund-would-create-and-preserve-jobs-quickly-and-efficiently> (noting that TANF Fund “is itself a job creator because the families receiving it spend virtually all of it immediately to meet basic necessities, thereby boosting local economies”).

3. See, e.g., KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 32–47 (2011) (discussing the political and cultural trends over the last half-century that have contributed to the law’s hostile and punitive treatment of welfare recipients).

4. See, e.g., Rick Karlin, *Senate GOP Pushes Welfare Fraud Fight*, TIMES UNION (June 18, 2013), <http://www.timesunion.com/local/article/Senate-GOP-pushes-welfare-fraud-fight-4608521.php>; Michael Gormley, *NY Moves to Restrict Welfare Spending on Alcohol*, NBC NEWS NY (June 19, 2012), <http://www.nbcnewyork.com/news/local/New-York-Welfare-Spending-Alcohol-Cigarettes-Restriction-Senate-Bill-159637725.html> (quoting one state senator, Bill Perkins, describing a proposed law to prevent welfare recipients from spending benefits on “cigarettes, alcohol, gambling and strip clubs,” and opining that the support for the proposed law reveals “prejudice, I think, about poor people that we are seeing represented more than any statistical or study of behavior”).

5. See, e.g., Jake Grovum, *States Open Doors to Undocumented Immigrants While Progress Stalls on Capitol Hill*, HUFFINGTON POST (July 17, 2014), http://www.huffingtonpost.com/2014/07/17/states-undocumented-immigrants_n_5595116.html (reporting that the New York is Home Act would provide undocumented state residents with, among other benefits, “safety-net

Popular resistance to the idea of public entitlements for undocumented New Yorkers, however, may be in tension with the expansive right to public assistance in the state constitution. This article proposes that financially eligible undocumented residents of New York State possess an affirmative right to receive state-funded public benefits under the New York State Constitution. Popular resistance to such a right is in further tension with the evidence that enforcing this right is sound policy from an economic, ethical, and public health perspective. This policy argument underscores the urgency and wisdom of complying with the relevant parts of the New York State Constitution.

Part I of this article describes why it is critically important that financially eligible undocumented New Yorkers have access to public benefits in New York State. Part II identifies those state-funded public benefits that New York State does not currently make available to its undocumented residents, despite a state constitutional provision that provides similarly situated U.S. Citizen and documented New Yorkers with these benefits.

Parts III through V demonstrate how applicable provisions of the state constitution protect undocumented New Yorkers' access to public benefits. Part III argues that the right of undocumented New Yorkers to access public benefits exists under the state constitution. Part IV argues that undocumented residents have an equal right to public benefits under the state constitution's equal protection clause. Part V explains why federal law does not preempt these rights.

Parts VI and VII contemplate the real world implications of an undocumented New Yorker's right to state-funded public benefits. Part VI makes the policy argument for why this right should be enforced in state courts. Part VI then considers the express policy justifications for denying undocumented New Yorkers access to state funded public benefits, namely that to do so would burden the state economy and incentivize unauthorized immigration. Part VI finds no support for these notions and concludes these policy justifications are misinformed and undesirable, a conclusion which serves only to highlight the wisdom of the relevant parts of the state constitution as they are written and as they should be read.

Finally, Part VII speculates as to the means by which these arguments might be applied to enforce this right. It concludes by considering the challenges involved in bringing impact litigation or attempting to pass legislation that would enforce the right of undocumented New Yorkers to access state-funded public benefits.

Many terms used frequently in this article can have ambiguous meanings, so it is necessary to clarify how they are used here: Government assistance

programs such as Medicaid," but "has garnered plenty of skeptical and negative headlines"); Neda Mahmoudzadeh, *Love Them, Love Them Not: The Reflection of Anti-Immigrant Attitudes in Undocumented Immigrant Health Care Law*, 9 SCHOLAR 465, 466 (2007) ("[T]he public sentiment towards immigration has shifted from 'tolerance [to] ambivalence [to] outright rejection. Immigrants are often blamed for the high cost of social services and are easy targets for attempts to cut back on government expenditure.'").

programs, referred to here as public benefits, are state funds that provide financial support to low-income and disabled persons and families.⁶ For purposes of this article, the term “public benefits” refers to government sponsored health care and financial assistance to low-income people.⁷ The term public benefits as used in this article does not include public education, driver’s licenses, or the right to vote—topics beyond the scope of this discussion.

“Undocumented” refers here to a non-U.S. citizen residing in the U.S. without permission from the Department of Homeland Security (“DHS”), either because they entered without inspection, have been ordered deported, overstayed a visa or have otherwise entered the U.S. without valid documentation, or are not permanently residing in the U.S. under color of law⁸ (“PRUCOL”),⁹ a legal category of documented noncitizens who may be deportable under the law but who, for any number of reasons, DHS has permitted to remain and acquiesced to their presence in the U.S.¹⁰ The reader should note that the word “undocumented” has no legal meaning, but is rather a colloquial term commonly understood to refer to a person in the one or more situations described above.

6. SHERMAN, *supra* note 1.

7. 8 U.S.C. § 1621(c) (2012).

8. The term “permanently residing in the U.S. under color of law,” or “PRUCOL,” began as a term of art under federal law prior to the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”), when PRUCOLs could receive federal benefits. *See* *Holley v. Lavine*, 553 F.2d 845 (2d Cir. 1977). After PRWORA, when PRUCOLs were no longer eligible for federal benefits, some states, like New York, retained the term and rely upon older federal cases for their definition of PRUCOL. *See* *Tonashka v. Weinberg*, 678 N.Y.S.2d 883, 885 (N.Y. Sup. Ct. 1998) (citing to *Holley v. Lavine* for the definition of PRUCOL).

9. *See* *Lewis v. Grinker*, 111 F. Supp. 2d 142, 156 (E.D.N.Y. 2000) (describing those noncitizens who are not residing lawfully in the U.S. or who are not “residing permanently under color of law”). For the purposes of this article, “undocumented” excludes immigrants permanently residing under color of law. PRUCOL is a public benefits category that allows undocumented immigrants who have notified the U.S. government of their presence in the United States (for example by applying for a documented immigration status, such as a U-visa) and against whom the government is not, as a result, pursuing deportation, to apply for Medicaid in New York State. *See* STATE OF N.Y. DEP’T OF HEALTH, CLARIFICATION OF PRUCOL STATUS FOR PURPOSES OF MEDICAID ELIGIBILITY 2 (Mar. 15, 2007) [hereinafter CLARIFICATION OF PRUCOL STATUS], http://www.health.ny.gov/health_care/medicaid/publications/docs/inf/07inf-2.pdf (listing those immigration statuses which make a person eligible for certain benefits in New York State and excluding from that definition the undocumented). It is important to note that despite the designation of immigrants in this category as “documented” for the purposes of this article, PRUCOL is not an immigration status, only a public benefits category. *Id.*; *see also* STATE OF N.Y. DEP’T OF HEALTH, DOCUMENTATION GUIDE: IMMIGRANT ELIGIBILITY FOR HEALTH COVERAGE IN NEW YORK STATE (Feb. 2004), http://www.health.ny.gov/health_care/medicaid/publications/docs/gis/04ma003att1.pdf.

10. Generally, a person is considered PRUCOL if they have an application for immigration relief pending before the U.S. Customs and Immigration Services, or if their deportation has been deferred. *See* *Tonashka*, 678 N.Y.S.2d at 283 (noting that the first and second departments of the supreme court appellate division have “held that aliens with applications pending with the INS for permanent residency are considered PRUCOL”); *see also* CLARIFICATION OF PRUCOL STATUS, *supra* note 9, at 2; *Farjam v. Comm’r, Soc. Sec. Admin.*, No. cv-94-4486, 1995 WL 500477, at *4 (E.D.N.Y. Aug. 8, 1995) (noting that a grant of “deferred action or voluntary departure” makes one PRUCOL).

Conversely, this article will refer to “documented residents”—again not a legal term, but shorthand that describes a diverse list of legal statuses which share in common only that the individual has the permission and/or acquiescence of DHS to reside in the U.S. Documented residents include, among others, legal permanent residents (“LPR”),¹¹ colloquially known as “green card” holders, someone with a work permit, someone granted asylum, someone with a pending application for relief before DHS, or who is otherwise PRUCOL.¹² This article distinguishes only between documented and undocumented residents. Where a more specific class of noncitizens is relevant, the author will make that clear and provide a definition.

II.

LOW-INCOME UNDOCUMENTED NEW YORKERS FACE SEVERE POVERTY AND EARLY DEATH WITHOUT ACCESS TO PUBLIC BENEFITS

In the U.S., undocumented residents are generally a lower income population.¹³ In 2011, thirty-two percent of undocumented adults and fifty-one percent of undocumented children had family incomes below the federal poverty line.¹⁴ Some forty-four percent of undocumented adults and sixty-three percent of undocumented children had incomes below 138% of the federal poverty line.¹⁵ By contrast thirteen percent of adults aged eighteen to sixty-four and twenty-two percent of children under eighteen in the general U.S. population¹⁶ lived below the poverty line in 2011.¹⁷ Similar contrast exists between undocumented and documented immigrants. Undocumented residents from

11. 8 U.S.C. § 1101(a)(20) (2012).

12. An individual with an application for relief pending with DHS is PRUCOL. *See supra* note 9.

13. RANDY CAPPS, JAMES D. BACHMEIER, MICHAEL FIX & JENNIFER VAN HOOK, MIGRATION POLICY INSTITUTE, ISSUE BRIEF: A DEMOGRAPHIC, SOCIOECONOMIC, AND HEALTH COVERAGE PROFILE OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 4 (May 2013), http://www.migrationpolicy.org/sites/default/files/publications/CIRbrief-Profile-Unauthorized_1.pdf (“High shares [of undocumented residents] have incomes below the poverty level and the income thresholds for various public health insurance and other benefit programs.”). The data from the Migration Policy Institute, along with the data from the Center for Migration Studies, *infra* note 20, are the most recent numbers available for these specific demographics.

14. *See id.* at 4. The other sixty-eight percent of adults living above the poverty line likely owe their economic status to the relatively high rate of employment among undocumented adults.

15. *Id.*

16. The general U.S. population, it should be noted, includes within it undocumented people.

17. CARMEN DE NAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, CURRENT POPULATION REPORTS, U.S. CENSUS, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2011, at 14 (Sept. 2012), <http://www.census.gov/prod/2012pubs/p60-243.pdf>.

Mexico, for example,¹⁸ are more likely to live below the poverty line than documented immigrants from Mexico.¹⁹

New York does not fare much better with respect to poverty rates for its undocumented residents. There are an estimated 818,900 undocumented residents in New York State,²⁰ which is almost four percent of the state's population.²¹ Among these one in twenty-five New Yorkers,²² an estimated 24.4% live at or below the poverty line,²³ compared to 15.6% for the general state population.²⁴ In New York City specifically, between eleven and fourteen percent of undocumented residents earn less than \$20,000 a year,²⁵ with the federal poverty line set at \$20,090 for a family of three.²⁶

A number of factors contribute to high poverty among undocumented New Yorkers, and chief among them is that the law explicitly forbids their employment.²⁷ For those who do nonetheless find employment, another contributing factor is income discrimination in the workplace. Fear of deportation and unfamiliarity with U.S. law makes it very difficult for undocumented workers to advocate for a minimum wage,²⁸ to which they

18. I use Mexico as an example because it is the largest source of undocumented immigration to the United States. See JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., *A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES* 21 (Apr. 14, 2009), <http://pewhispanic.org/files/reports/107.pdf>.

19. STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, *IMMIGRATION FROM MEXICO: ASSESSING THE IMPACT ON THE UNITED STATES* 29 (July 2001) [hereinafter *IMMIGRATION FROM MEXICO*], <http://cis.org/sites/cis.org/files/articles/2001/mexico/mexico.pdf>.

20. CTR. FOR MIGRATION STUDIES, *ESTIMATES OF UNAUTHORIZED POPULATION FOR STATES* (2013) [hereinafter *ESTIMATES OF UNAUTHORIZED POPULATION SURVEY*], <http://data.cmsny.org/state.html> (note that the numbers from this source are the most recent available for these specific demographics); see also FISCAL POLICY INST., *WORKING FOR A BETTER LIFE: A PROFILE OF IMMIGRANTS IN THE NEW YORK STATE ECONOMY* 13 (Nov. 2007) [hereinafter *WORKING FOR A BETTER LIFE*], http://www.fiscalpolicy.org/publications2007/FPI_ImmReport_WorkingforaBetterLife.pdf (reporting that only three states—California, Texas, and Florida—have a higher raw number of undocumented residents).

21. STEVEN P. WALLACE, JACQUELINE TORRES, TABASHIR SADEGH-NOBARI, NADEREH POURAT & E. RICHARD BROWN, UCLA CTR. FOR HEALTH POLICY RESEARCH, *UNDOCUMENTED IMMIGRANTS AND HEALTH CARE REFORM* 31 (Aug. 31, 2012), <http://healthpolicy.ucla.edu/publications/Documents/PDF/undocumentedreport-aug2013.pdf>.

22. Again, the general population of New York State includes within it undocumented residents.

23. *ESTIMATES OF UNAUTHORIZED POPULATION SURVEY*, *supra* note 20.

24. N.Y. STATE CMTY. ACTION ASS'N, *NEW YORK STATE POVERTY REPORT* 5 (Apr. 2014) [hereinafter *NEW YORK STATE POVERTY REPORT*], <http://nyscommunityaction.org/wp-content/uploads/2013-Poverty-Report-Full-compressed.pdf>.

25. *WORKING FOR A BETTER LIFE*, *supra* note 20, at 60.

26. Annual Update of the Department of Health & Human Services Poverty Guidelines, 80 Fed. Reg. 3236 (Jan. 22, 2015), <https://www.federalregister.gov/articles/2015/01/22/2015-01120/annual-update-of-the-hhs-poverty-guidelines#t-1>.

27. See 8 U.S.C. § 1324a(a)(1) (2012) (making it unlawful to knowingly employ noncitizen persons who lack work authorization).

28. ANNETTE BERNHARDT, RUTH MILKMAN, NIK THEODORE, DOUGLAS HECKATHORN, MIRABAI AUER, JAMES DEFILIPPIS, ANA LUZ GONZÁLEZ, VICTOR NARRO, JASON PERELSHEYN,

nonetheless have a right in New York.²⁹ Workers fear that suing or reporting their employer will reveal their status.³⁰ These factors discourage undocumented workers from reporting employers who violate wage and hour laws.³¹ As a result, undocumented workers are much more likely to suffer minimum wage violations than documented noncitizens.³² This is especially true for female undocumented workers.³³ Thus, despite a relatively high rate of employment among undocumented residents,³⁴ many remain among the ranks of the working poor.

Higher rates of being under-insured compound these higher rates of poverty. Nearly sixty-two percent of undocumented New Yorkers do not have health insurance,³⁵ compared to 31.7% of the general state population of unemployed New Yorkers.³⁶ According to data drawn from a nationwide survey conducted in 2011, as many as seventy-one percent of undocumented residents aged nineteen or over do not have health insurance of any kind, as compared to forty percent of LPRs who are uninsured and fifteen percent of U.S. citizens who are uninsured.³⁷ This means that even though undocumented persons make up roughly 3.5% of the total U.S. population,³⁸ they compose sixteen percent of the total uninsured population.³⁹ As many as forty-seven percent of undocumented children—over 540,000 kids—are uninsured.⁴⁰ In fact, low-income children with

DIANA POLSON & MICHAEL SPILLER, UCLA INST. FOR RESEARCH ON LABOR & EMP'T, *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATION OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES* 25 (2009), <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf>.

29. See *Pineda v. Kel-Tech Const., Inc.*, 832 N.Y.S.2d 386, 395–96 (N.Y. Sup. Ct. 2007) (finding that worker's undocumented status did not preclude them from seeking unpaid wages for work performed).

30. See Laura K. Abel & Risa E. Kaufman, *Preserving Aliens' and Migrant Workers' Access to Civil Legal Services: Constitutional and Policy Considerations*, 5 U. PA. J. CONST. L. 491, 493–94 (2003) (“He [the employer who has cheated his employees out of pay] knows that the men are undocumented, are scared of being deported, know little about the American legal system, and could not, in any event, hire a lawyer [T]hey are scared that if they do so their employers will retaliate by reporting them to the [the immigration authorities].”).

31. BERNHARDT, MILKMAN, THEODORE, HECKATHORN, AUER, DEFILIPPIS, GONZÁLEZ, NARRO, PERELSHTEYN, POLSON & SPILLER, *supra* note 28, at 25 (noting that their immigration status makes them more likely to be the subject of retaliation or unfair labor practices by an employer and less likely to pursue workers compensation after injury).

32. *Id.*

33. *Id.*

34. CAPPS, BACHMEIER, FIX & VAN HOOK, *supra* note 13, at 4 (reporting that only “eight percent of men and nine percent of women were unemployed [in 2011]”).

35. ESTIMATES OF UNAUTHORIZED POPULATION SURVEY, *supra* note 20.

36. NEW YORK STATE POVERTY REPORT, *supra* note 24, at 5 (reporting that for employed New Yorkers in the general state population, 13.9% are not insured).

37. CAPPS, BACHMEIER, FIX & VAN HOOK, *supra* note 13, at 7.

38. Eleven million is about 3.5% of 322 million. See U.S. CENSUS BUREAU, <https://www.census.gov/topics/population.html> (last visited Nov. 11, 2015).

39. CAPPS, BACHMEIER, FIX & VAN HOOK, *supra* note 13, at 7.

40. *Id.* at 8.

undocumented parents are also less likely to be insured than children with documented noncitizen parents.⁴¹

This healthcare disparity is largely the product of the undocumented person's ineligibility to receive Medicaid, a means-tested public health insurance program, under federal and most state law.⁴² Among undocumented residents living up to 138% of the federal poverty line—the eligibility cut-off for New York Medicaid⁴³—eighty-one percent are uninsured.⁴⁴ At least twenty-one other states and the District of Columbia have a lower percentage of uninsured undocumented adults than New York, and only ten states have a higher percentage of uninsured undocumented residents.⁴⁵

Mixed-status families also suffer from the inaccessibility of healthcare. There are approximately 4.7 million children of undocumented parents in the U.S.⁴⁶ While most of these children are U.S. citizens, an estimated 1.6 million are undocumented.⁴⁷ Roughly one quarter of undocumented New Yorkers have children who are U.S. citizens or LPRs.⁴⁸ Generally, the children of undocumented immigrants are nearly twice as likely to live in poverty as the children of American-born parents.⁴⁹ Even U.S. citizen children of noncitizen parents are less likely to have access to healthcare than children in the general population.⁵⁰

When uninsured parents cannot access healthcare, the resulting illness and medical expenses subtract from their ability to work and care for their children. This makes children of uninsured parents less likely to be enrolled in insurance programs themselves even if eligible.⁵¹ In this way, being uninsured creates a feedback loop of ever-deepening poverty, whereby being uninsured burdens a family with sickness and medical expenses that make the family less likely to

41. KINSEY ALDEN DINAN, NAT'L CTR. FOR CHILDREN IN POVERTY, *CHILDREN IN LOW-INCOME IMMIGRANT FAMILIES: FEDERAL POLICIES RESTRICT IMMIGRANT CHILDREN'S ACCESS TO KEY PUBLIC BENEFITS* 8 (Oct. 2005).

42. 8 U.S.C. § 1621 (2012).

43. N.Y. SOC. SERV. L. § 366 (McKinney 2015). One-hundred thirty-eight percent includes the 133% cut-off plus the five percent “disregard.” See HENRY J. KAISER FAMILY FOUNDATION, KAISER COMMISSION ON MEDICAID AND THE UNINSURED: MEDICAID ELIGIBILITY, ENROLLMENT SIMPLIFICATION AND COORDINATION UNDER THE AFFORDABLE CARE ACT: A SUMMARY OF CMS'S MARCH 23, 2012 FINAL RULE 1 (Dec. 2012), <https://kaiserfamilyfoundation.files.wordpress.com/2013/04/8391.pdf>.

44. CAPPS, BACHMEIER, FIX & VAN HOOK, *supra* note 13, at 9.

45. *Id.* at 11.

46. DINAN, *supra* note 41, at 4.

47. *Id.*

48. ESTIMATES OF UNAUTHORIZED POPULATION SURVEY, *supra* note 20 (reporting that about 234,341 undocumented New Yorkers out of 818,900 have children who are U.S. citizens or LPRs).

49. PASSEL & COHN, *supra* note 18, at 17.

50. Leighton Ku & Sheetal Matani, *Left Out: Immigrants' Access to Health Care and Insurance*, 20 HEALTH AFF., Jan. 2001, at 247, 256 (“Being a noncitizen adult or the child of noncitizen parents reduces access to ambulatory medical care and emergency room care, after factors such as health status, income, and race/ethnicity are controlled for.”).

51. DINAN, *supra* note 41, at 6–8.

find and hold employment, which makes them less likely to be insured, and so on.⁵² Deepening poverty may be part of the reason “low-income children of immigrant parents face higher rates of food insecurity than children of native-born parents.”⁵³ The undocumented person’s ineligibility to receive federal public benefits, such as food stamps, also contributes to this reality.⁵⁴ Between twenty and twenty-eight percent of undocumented children in New York State live without health insurance,⁵⁵ despite eligibility for the Child Health Plus program for those living in households with income up to four hundred percent of the federal poverty level.⁵⁶

Like their uninsured U.S. citizen counterparts across the United States, undocumented people and their families living in New York State without health insurance and emergency financial assistance face dire health conditions. Life expectancy for those living in poverty in the U.S. can be over a decade less than for those not living in poverty.⁵⁷ Without access to preventative health care, people are more likely to die from preventable illness, and live shorter and sicker lives.⁵⁸ Estimates of the risk of death from preventable illness for the uninsured compared to those with insurance range from twenty-five percent higher for all adults⁵⁹ to forty-two percent higher for adults aged fifty-five to sixty-five.⁶⁰ Uninsured children are twenty to thirty percent more likely than insured children to lack basic, yet essential care such as immunizations, prescription medication, asthma care, and dental care.⁶¹ Without state-funded Medicaid and assistance, this population is trapped within these lethal statistics.

52. SUSAN STARR SERED & RUSHIKA J. FERNANDOPULLE, UNINSURED IN AMERICA: LIFE AND DEATH IN THE LAND OF OPPORTUNITY 6 (2007) (“That loss [of health coverage] can easily lead to health concerns going untreated, a situation that can exacerbate employment problems by making the individual less able to work.”).

53. DINAN, *supra* note 41, at 8.

54. 8 U.S.C. § 1611 (2012).

55. CAPPS, BACHMEIER, FIX & VAN HOOK, *supra* note 13, at 11.

56. N.Y. PUB. HEALTH L. § 2511(2)(iii) (McKinney 2015).

57. Robert Pear, *Gap in Life Expectancy Widens for the Nation*, N.Y. TIMES (Mar. 23, 2008), <http://www.nytimes.com/2008/03/23/us/23health.html>.

58. NAT’L ACAD. PRESS, INST. OF MED., HIDDEN COSTS, VALUE LOST: UNINSURANCE IN AMERICA 63–72 (2003) (explaining that a loss of health insurance generally results in shorter life span and poorer health).

59. Andrew P. Wilper, Steffie Woolhandler, Karen E. Lasser, Danny McCormick, David H. Bor & David Y. Himmelstein, *Health Insurance and Mortality in U.S. Adults*, 99 AM. J. PUBLIC HEALTH 2289–95 (Dec. 2009).

60. STAN DORN, URB. INST., UNINSURED AND DYING BECAUSE OF IT: UPDATING THE INSTITUTE OF MEDICINE ANALYSIS ON THE IMPACT OF UNINSURANCE ON MORTALITY 4 (Jan. 2008), http://www.urban.org/UploadedPDF/411588_uninsured_dying.pdf.

61. *Health Reform in the 21st Century: Expanding Coverage, Improving Quality and Controlling Costs: Hearing Before the H. Comm. on Ways & Means*, 111th Cong., 1st Sess. (Mar. 11, 2009) (statement of John Z. Ayanian, MD) (“Uninsured children are 20 to 30 percent more likely to lack immunizations, prescription medications, asthma care, and basic dental care.”), <http://www.gpo.gov/fdsys/pkg/CHRG-111hhr50249/pdf/CHRG-111hhr50249.pdf>.

Providing these New Yorkers with access to state-funded public benefits would reduce the number of undocumented New Yorkers living in poverty, reduce the severity of poverty, and provide lifesaving healthcare to those who cannot afford it. Nevertheless, New York State does not yet permit undocumented residents to access these essential benefits.

III.

NEW YORK STATE DENIES UNDOCUMENTED NEW YORKERS SOME STATE-FUNDED PUBLIC BENEFITS

While New Yorkers enjoy the protection of a state constitution that ensures, in part, a right to have their socio-economic needs sustained by the state,⁶² it is also the case that the law does not currently recognize in practice that this right extends to undocumented New York residents.⁶³

A. The New York State Constitution Creates a Right to Public Benefits

The New York State Constitution ensures needy and sick state residents a socio-economic right to government assistance. Article XVII, section 1 provides that “the aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.”⁶⁴ Article XVII, section 3 ensures that “[t]he protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefore shall be made by the state”⁶⁵ The latter provision has rarely been reviewed by the courts⁶⁶ and has never been applied to documented noncitizens,⁶⁷ while the former has.⁶⁸

62. *See infra* at Part III(A).

63. *See infra* at Part III(B).

64. N.Y. CONST. art. XVII, §1 (amended 2001).

65. N.Y. CONST. art. XVII, § 3 (amended 2001).

66. *See* Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1351 (2010) (“There is little, relevant case law on [article XVII, section 3]. Most cases merely recognize local public health departments’ authority to promulgate rules and regulations. When plaintiffs have asserted individual claims under the Public Health Provision, courts have side-stepped the question.”); *see also, e.g.*, *Aliessa v. Novello*, 754 N.E.2d 1085, 1093 & n.12 (N.Y. 2001) (declining to review at all); *Henrietta D. v. Giuliani*, 119 F.Supp.2d 181, 217 & n.28 (E.D.N.Y. 2000) (finding failure to “assist plaintiffs in accessing and maintaining their food stamps and public assistance benefits,” and “properly to budget clients’ benefits” violated section 3, but nonetheless avoiding any analysis of the provision altogether by merely adding it as a footnote to a discussion of section 1); *Betancourt v. Giuliani*, No. 97-civ-6748, 2000 WL 1877071, at *7 (S.D.N.Y. Dec. 26, 2000) (stating only that plaintiff articulates a claim for relief that is more appropriately brought under a different part of the constitution).

67. The provision was enacted January 1, 1939. *Paduano v. City of N.Y.*, 257 N.Y.S.2d 531, 535 (N.Y. Sup. Ct. 1965). Since then, it has been referenced in approximately thirty decisions, addressed substantively in perhaps half of these cases, and none have discussed its application to non-citizens. *See, e.g.*, *Hope v. Perales*, 634 N.E.2d 183, 185 & n.5 (N.Y. 1994) (failing to mention or address the immigration statuses of plaintiffs, most of whom were organizations); *Moran v.*

One state official has referred to article XVII of the New York State Constitution as “an empowering clause which enables the legislature to go ahead and meet the challenge of insecurity with such wisdom as it may have.”⁶⁹ The Court of Appeals, New York State’s highest court, has explained that it “was intended to serve two functions: First, it was felt to be necessary to sustain from constitutional attack the social welfare programs created by the State and, second, it was intended as an expression of the existence of a positive duty upon the State to aid the needy.”⁷⁰

Perhaps the most telling statement about the provision comes from one lawmaker speaking at the time of its 1938 adoption:

Convinced that the care of the unemployed and their dependents is in our modern industrial society a permanent problem of major importance affecting the whole of society . . . Here are the words which set forth a definite policy of government, a

Perales, 153 A.D.2d 947 (N.Y. App. Div. 1989) (describing petitioners as persons who “suffer with schizophrenia,” but never noting their immigration status); *Wiltwyck School for Boys, Inc. v. Hill*, 219 N.Y.S.2d 161, 185 (N.Y. App. Div. 1961) (describing plaintiff as a “school for boys,” none of whose immigration status is discussed); *Henrietta D.*, 119 F.Supp.2d at 218 (noting plaintiffs were “residents of the state of New York” and giving no specifics as to their immigration status). Most cases dealing with the provision do so not to discuss entitlements at all, but note only that it grants the state power to act in matters of public health. *See, e.g.*, *Advocates for Prattsburgh, Inc. v. Steuben Cnty. Indus. Dev. Agency*, 851 N.Y.S.2d 759, 761 (N.Y. App. Div. 2008) (noting the provision affords the Legislature broad discretion to promote public health); *Conlon v. Marshall*, 59 N.Y.S.2d 52, 54 (N.Y. Sup. Ct. 1945) (citing provision to support the idea that the legislature may delegate its power to the Board of Health of New York City to enact regulations); *Co-Pilot Enters., Inc. v. Suffolk Cnty. Dep’t of Health*, 239 N.Y.S.2d 248, 251 (N.Y. Sup. Ct. 1963) (citing to support the idea that authority to promulgate regulations for the “security, life and health” of the people of a municipality has been delegated by the legislature to county boards of health); *Du Mond v. Walsh*, 72 N.Y.S.2d 642, 644 (N.Y. Sup. Ct. 1947) (finding that regulation requiring potato growers to quarantine their crop was consistent with the legislature’s power to protect the public health under the provision); *In re Sayeh R.*, 693 N.E.2d 724, 727 (N.Y. 1997) (citing the provision as an example of the state’s *parens patriae* power to protect “infant residents”); *N.Y. State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115, 117 & n.2 (2d Cir. 1989) (citing the provision as a source of the state’s police powers to protect public health by regulating pesticides); *Paduano*, 257 N.Y.S.2d at 535 (discussing the provision as a source of the state’s police power to regulate health policy); *State of N.Y. v. Local 1115 Joint Bd., Nursing Home and Hospital Emps. Div.*, 392 N.Y.S.2d 884, 892 (N.Y. App. Div. 1977) (finding the provision gives the state Attorney General the power to bring an action for injunctive relief for violations of the Public Health Law). Still other cases do not address entitlements for entirely different reasons. *See, e.g.*, *Council of City of N.Y. v. Giuliani*, 664 N.Y.S.2d 197, 198 (N.Y. Sup. Ct. 1997) (noting that New York City “constructed, maintained and operated” public hospitals in order to be in compliance with the provision); *Fisher v. Kelly*, 36 N.Y.S.2d 497, 498–99 (N.Y. App. Div. 1942) (noting that the provision does not create any requirements as to precisely how municipalities are to administer their health departments); *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982) (incorrectly characterizing the provision as one that “do[es] no more than authorize the legislature to provide funds for the care of the needy . . . and do[es] not mandate the provision of any particulate care”).

68. *See, e.g.*, *Aliessa v. Novello*, 754 N.E.2d 1085 (N.Y. 2001).

69. John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 1000 (2007).

70. *Tucker v. Toia*, 371 N.E.2d 449, 451 (N.Y. 1977).

concrete social obligation which no court may ever misread. By this section, the committee hopes to achieve [sic] two purposes: First: to remove from the area of constitutional doubt the responsibility of the State to those who must look to society for the bare necessities of life; and, secondly, to set down explicitly in our basic law a much needed definition of the relationship of the people to their government.⁷¹

The provision has been interpreted to impose upon the state a number of socio-economic obligations, such as a duty to provide for the welfare of foster care children⁷² and to meet the emergency needs of the disabled.⁷³ This mandate to provide for the indigent is so robust as to be immune even from claims of insufficient funds by the government.⁷⁴ The power of the provision, however, is not without its limitations. While article XVII has been ruled a clear mandate to the state to provide for the needy,⁷⁵ it is equally true that the legislature may determine who is “needy” in providing such support.⁷⁶ With regard to means-tested benefits, the legislature has in turn defined “needy” as those individuals whose income qualifies them for the benefit under the law as it is written.⁷⁷

B. Most State-Funded Public Benefits in New York State Are Denied to Undocumented New Yorkers

States may provide undocumented residents with benefits that the federal government cannot provide. Under federal law, undocumented residents are only entitled to receive emergency medical care,⁷⁸ which does not include any preventative or non-emergent health care benefits,⁷⁹ with the exceptions of disaster relief, certain immunizations,⁸⁰ and care for persons who are pregnant⁸¹ or who are living with HIV/AIDS.⁸² The Affordable Care Act (“ACA”) continues to exclude undocumented persons from federal healthcare coverage.⁸³

71. *Id.* at 451–52 (quoting Edward F. Corsi, Chairman of the Committee on Social Welfare, speaking in 1938).

72. *Andrews v. Otsego Cnty.*, 446 N.Y.S.2d 169 (N.Y. Sup. Ct. 1982), *abrogated on other grounds by McCabe v. Dutchess Cnty.*, 895 N.Y.S.2d 446 (N.Y. App. Div. 2010).

73. *Ingram v. Fahey*, 358 N.Y.S.2d 604 (N.Y. Sup. Ct. 1974).

74. *Doe v. Dinkins*, 600 N.Y.S.2d 939, 943 (NY. App. Div. 1993).

75. *Tucker*, 371 N.E.2d at 451.

76. *Aliessa v. Novello*, 754 N.E.2d 1085, 1092 (N.Y. 2001); *see also Brownly v. Doar*, 903 N.E.2d 1155, 1163 (N.Y. 2009); *Childs v. Bane*, 605 N.Y.S.2d 488 (N.Y. App. Div. 1993).

77. *See, e.g., Aliessa*, 96 N.Y.2d at 428–29.

78. 42 U.S.C. § 1396b (v)(3) (2012).

79. 8 U.S.C. §§ 1611(a), 1621(a) (2012).

80. 8 U.S.C. §§ 1621(b)(2)–(3) (2012).

81. 42 U.S.C. § 1396r-1 (2014); 42 U.S.C. § 1396a(47) (2015); *Lewis v. Thompson*, 252 F.3d 567, 588–89 (2d. Cir. 2001).

82. 42 U.S.C. § 300ff-26 (2012) (creating the AIDS Drug Assistance Program).

83. 42 U.S.C. § 18032(f)(3) (2012).

While states cannot use federal funds to provide undocumented immigrants with public benefits, federal law gives states the choice to use their own funds to do so.⁸⁴ New York State may therefore spend state monies on services to undocumented non-citizens not otherwise eligible for federal funds,⁸⁵ just as Massachusetts⁸⁶ and California⁸⁷ have done.

Currently in New York State, regardless of immigration status, public health insurance is provided for medical emergencies via federal Medicaid, to all financially eligible persons under the age of twenty-one under its Child Health Plus program⁸⁸ and to all pregnant women with insured prenatal care under its Medicaid for Pregnant Women Program (“PCAP”).⁸⁹ Limited nutritional assistance programs are also available to some populations regardless of immigration status,⁹⁰ as is worker’s compensation for on- or off-job injuries.⁹¹ In the five boroughs of New York City, uninsured or undocumented residents cannot be refused non-emergency medical care from public hospitals (although they will have to pay for that care, the cost of which is measured using an income-based sliding scale).⁹² Finally, there are additional programs that provide medical assistance to persons diagnosed with HIV, regardless of immigration

84. 8 U.S.C. § 1613(a) (2012); 8 U.S.C. § 1621(d) (2012).

85. *Aliessa v. Novello*, 754 N.E.2d 1085, 1089 (N.Y. 2001).

86. Noam N. Levey, *Medical Help for Illegal Immigrants Could Haunt Mitt Romney*, L.A. TIMES (Oct. 23, 2011), <http://articles.latimes.com/2011/oct/23/nation/la-na-romney-healthcare-20111024>.

87. Deborah Sontag, *Immigrants Facing Deportation by U.S. Hospitals*, N.Y. TIMES (Aug. 3, 2008), http://www.nytimes.com/2008/08/03/us/03deport.html?pagewanted=all&_r=0.

88. N.Y. PUB. HEALTH L. §§ 2511(2)(b)–(c) (McKinney 2015).

89. N.Y. PUB. HEALTH L. § 2530-a (McKinney 2008); *see also* *Hope v. Perales*, 663 N.E.2d 183 (N.Y. 1994). *But see* General Information System Message from Judith Arnold, Dir., Div. of Eligibility and Marketplace Integration, N.Y. State Dep’t of Health, Office of Health Ins. Programs to Local Dist. Comm’rs, Medicaid Dirs. (Jan. 12, 2016), http://www.health.ny.gov/health_care/medicaid/publications/docs/gis/16ma002.pdf (conveying recent New York State changes in Medicaid coverage, including the provision of non-emergency Medicaid to all state residents with “non-immigrant” visas, such as tourist and student visas, which permit temporary stay in the U.S., even though these temporary visa holders are not considered PRUCOL).

90. *See, e.g.*, Special Supplemental Food Program for Women, Infants and Children (“WIC”), 42 U.S.C. §§ 1771–93 (2012). States may expand eligibility to the WIC program to any state residents regardless of immigration status. *See* 7 C.F.R. § 246.7(c)(3) (2014). New York State has opted to provide WIC to all eligible residents of shelters, regardless of immigration status. 10 N.Y.C.R.R. § 900.10 (amended 1999).

91. *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1260 (N.Y. 2006) (holding that worker’s undocumented status did not preclude recovery of compensation after injury on the job); *see also* N.Y. WORKER’S COMP. L. § 203 (McKinney 2015) (New York State Disability Insurance also compensates state residents for non-job-related injury regardless of immigration status).

92. Press Release, New York City Health and Hosps. Corp., Public Hospitals Renew Commitment to Keep Patient Immigrant Status Private (May 16, 2011), <http://www.nyc.gov/html/hhc/html/news/press-release-20110516-immigrant-status-private.shtml>; NEW YORK IMMIGRATION COAL., ACCESS TO HEALTH CARE FOR UNINSURED IMMIGRANTS 1 (Feb. 20, 2009), http://www.thenyc.org/sites/default/files/Uninsured_ENGLISH.pdf.

status.⁹³ Aside from these limited programs, no other state-funded benefits in New York State are made available to undocumented residents.

There are two state-funded benefit programs that New York State currently provides to U.S. citizens and documented residents but not to undocumented residents. These are state funded non-emergency Medicaid, which is comprehensive public health insurance,⁹⁴ and safety net assistance (“SNA”), a cash grant used to meet the emergency needs of single adults, childless adult couples, and families with children who are otherwise ineligible for federal or other state benefits.⁹⁵ SNA can be issued as a non-cash benefit to help pay rent or utilities or as a personal needs allowance.⁹⁶

Other state-administered public assistance programs are federally funded, and thus controlled by the far more restrictive federal eligibility rules for noncitizens. These federal eligibility-controlled benefits include, but are not limited to, temporary assistance to needy families (“TANF”), called “Family Assistance” in New York State,⁹⁷ emergency assistance to needy families (“EAF”),⁹⁸ which helps meet the emergency needs of children or families with children,⁹⁹ and Supplemental Nutritional Assistance Program (“SNAP”) (known colloquially as “food stamps”),¹⁰⁰ among others.¹⁰¹

Currently, undocumented residents of New York State have no recognized right at all to state-funded non-emergency SNA, and undocumented adult residents have no recognized right to non-emergency Medicaid.¹⁰² However, as

93. 42 U.S.C. § 300ff-26 (2012) (creating the AIDS Drug Assistance Program (“ADAP”)); 10 NYCRR § 43-2.2 (2010); 10 NYCRR § 43-2.6 (1988) (creating ADAP Plus and ADAP Plus Insurance Continuation (“APIC”) programs, which provide some additional medical care for all NY state residents living with HIV/AIDS, regardless of immigration status).

94. 42 U.S.C. § 1396a(a)(2) (2012).

95. N.Y. SOC. SERV. L. § 122(1)(c)(ii), 157 (McKinney 2015) (defining SNA); 18 N.Y.C.R.R. § 349.3(b)(1)(iv) (2004) (discussing noncitizen eligibility for SNA); N.Y. SOC. SERV. L. § 158(1)(g) (McKinney 2015) (discussing family and income eligibility for SNA), 18 N.Y.C.R.R. § 352.1 (2015) (discussing financial eligibility for SNA).

96. N.Y. SOC. SERV. L. § 131-a (McKinney 2015); *id.* § 159(1)(b)(i) (shelter allowance), (1)(b)(ii) (utility assistance), (1)(b)(iii) (personal needs allowance), (1)(b)(iv) (“other assistance”) (McKinney 2015).

97. 45 C.F.R. § 260.20 (2014); N.Y. SOC. SERV. L. § 358(1) (McKinney 2015).

98. 45 C.F.R. § 234.120(f) (2014); N.Y. SOC. SERV. L. § 350-j (McKinney 2015).

99. *See* N.Y. SOC. SERV. L. § 350-j(2) (McKinney 2015).

100. 7 U.S.C. § 2013(a) (2012).

101. *See, for example,* Supplemental Security Income for the Aged, Blind, and Disabled (20 C.F.R. § 416.202(b) (2014)), Social Security Disability Insurance (42 U.S.C. § 423 (a)(1) (2012)), the Low Income Home Energy Assistance Program (42 U.S.C. § 8621 (2012)), and Section 8 Housing Voucher Program (24 C.F.R. § 982.201(a) (2014)).

102. *See, e.g.,* Brunswick Hosp. Ctr., Inc. v. Daines, 907 N.Y.S.2d 435, 2010 WL 623707, at *1 (N.Y. Sup. Ct. Feb. 22, 2010) (“NCDSS [Nassau County Department of Social Services] processed the application but it only approved Medicaid benefits for what it considered emergency treatment . . . NCDSS again denied coverage for Ms. Thompson’s continued hospitalization and subsequent residency and treatment . . . contending that she was an undocumented immigrant . . . thus disqualifying her from receiving medical benefits at that level of treatment.”); *Tonashka v.*

argued below, the New York Court of Appeals decision in *Aliessa v. Novella* recognized a constitutional right to applicable state-funded public benefit programs, such as state-funded non-emergency Medicaid.

IV.

ARTICLE XVII, SECTION 1 OF THE NEW YORK STATE CONSTITUTION CREATES A RIGHT TO PUBLIC BENEFITS FOR “NEEDY” NON-CITIZEN RESIDENTS, REGARDLESS OF THEIR IMMIGRATION STATUS

Article XVII, section 1 of the New York State Constitution provides: “the aid, care and support of the needy are public concerns and shall be provided by the state”¹⁰³ New York is one of very few states¹⁰⁴ in which a state constitutional provision that ensures a right to public benefits has been reviewed by a state court to determine whether it applies to noncitizens, as the New York Court of Appeals did with article XVII in *Aliessa v. Novello*.¹⁰⁵

A. Despite the Influential Holding of the Court of Appeals in Aliessa v. Novello, Scholarship on the Topic Does Not Discuss Aliessa’s Implications for Undocumented New Yorkers

In 1997, New York State enacted the Welfare Reform Act, which precluded a number of documented non-citizens from receiving state-funded Medicaid.¹⁰⁶ Under this act, for the first five years after arrival in the U.S., many documented residents were permitted only Medicaid reimbursement for emergencies¹⁰⁷ and meager SNA.¹⁰⁸ In *Aliessa v. Novello*, twelve documented noncitizens¹⁰⁹ who were all suffering from life threatening illnesses¹¹⁰ were barred from Medicaid,

Weinberg, 678 N.Y.S.2d 883, 884–85 (N.Y. Sup. Ct. 1998) (explaining that plaintiff immigrant’s eligibility for SNA was conditioned on whether or not she was residing under color of law).

103. N.Y. CONST. art. XVII, § 1 (amended 2001).

104. See *Gonzales v. Shea*, 318 F. Supp. 572, 579 (D. Colo. 1970) (finding that the Old Age Pension found in article 24, sections 1–9 of the Colorado state constitution, which creates a right to receive a pension for U.S. citizen residents of Colorado, did not also apply to noncitizen residents of that state), *vac’d on other grounds*, 403 U.S. 927 (1971); *Op. Tex. Att’y Gen.* 1971, No. M-1035, at 5050–51 (determining that article III, section 51-a, of the Texas state constitution, which affords a right of public assistance to the elderly and blind, must also apply to certain noncitizens pursuant to the federal Equal Protection Clause).

105. *Aliessa v. Novello*, 754 N.E.2d 1085, 1092–93 (N.Y. 2001).

106. *Aliessa v. Whalen*, 694 N.Y.S.2d 308, 309–10 (N.Y. Sup. Ct. 1999).

107. See *Aliessa*, 754 N.E.2d at 1091; 8 U.S.C. § 1613(a) (2015); N.Y. SOC. SERV. L. § 122(1)(b)(ii), (e) (McKinney 2015); 42 U.S.C. § 1396b (t)(3)(D) (2012) (emergencies include only those health crises that are immediately life threatening or involve giving birth—and excludes all preventative and ongoing non-emergency medical care).

108. *Aliessa*, 754 N.E.2d at 1092.

109. *Id.* at 1088 (explaining that these twelve noncitizens were from Bangladesh, Belorussia, Ecuador, Greece, Guyana, Haiti, Italy, Malaysia, the Philippines, Syria, and Turkey).

110. See Br. for Pls.-Appellants, *Aliessa v. Novello*, No. 403748/98, 2000 WL 34030636, at *4 (N.Y. Sup. Ct. Dec. 26, 2000). The named plaintiff Muhamed Aliessa had suffered a severe car accident and required extensive non-emergency care as a result.

despite qualifying financially, either because they had not yet been permanent residents for five years or because, lacking permanent resident status, they were merely “permanently residing under color of law.”¹¹¹ They sued the state of New York for violating their rights under the New York State and U.S. constitutions by denying them access to these state-funded Medicaid benefits.¹¹²

The twelve plaintiffs argued that this denial of Medicaid violated three sections of the state constitution.¹¹³ First, they argued that it violated article XVII, sections 1 and 3.¹¹⁴ Second, they argued that it violated the state (and federal) constitutions’ equal protection clause.¹¹⁵ The first of these arguments is considered in this Part and the second in Part IV.

Plaintiffs argued that the Welfare Reform Act violated article XVII because the state was providing emergency Medicaid and meager SNA only, instead of full Medicaid, and in doing so failed to provide for their needs as the constitutional provision requires.¹¹⁶ The State responded that the legislature is permitted to define the levels of benefits to which the needy are entitled.¹¹⁷ At issue then was whether or not emergency Medicaid and the meager SNA was constitutionally sufficient to constitute “provid[ing] for” the plaintiffs’ needs.

The court first noted that a statute is constitutionally insufficient under article XVII, section 1 when the conditions placed on eligibility are burdensome and unrelated to need.¹¹⁸ The court found deprivation of non-emergent healthcare was burdensome, citing the U.S. Supreme Court when it said “[t]o allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health.”¹¹⁹ Next, the New York Court of Appeals found that the conditions of Medicaid eligibility were based on something other than need, in this case a distinction between different immigration statuses—those of the plaintiffs and those of persons eligible for Medicaid under the statute at issue.¹²⁰ Recognizing the conditions in the statute at issue were both burdensome and unrelated to need, the court concluded unanimously that the failure to provide Medicaid to the “needy” plaintiffs was a failure of the state to satisfy the constitutional mandate under article XVII.¹²¹ The court awarded full Medicaid

111. *Aliessa*, 754 N.E.2d at 1088 n.2.

112. *Id.* at 1088–89.

113. *Id.*

114. *Id.* at 1088–89, 1092–93.

115. *Id.* at 1088–99, 1094.

116. *Id.* at 1092–93.

117. *Id.*

118. *Id.*

119. *Id.* at 1093 (citing *Memorial Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 261 (1974)).

120. *Id.*

121. *See id.* There seemed to be no question in the case that the twelve plaintiffs and the class of documented New Yorkers they represented fell under the legislature’s means-tested definition of “needy” by virtue of being financially qualified for Medicaid.

benefits to the class of plaintiffs.¹²² Today, documented noncitizens remain eligible for this benefit to the exclusion of undocumented residents.¹²³

Much insightful scholarship examining *Aliessa*¹²⁴ has yet to consider the impact of the decision upon the rights of undocumented people.¹²⁵ Authors writing generally on the right of noncitizens to access public benefits (often healthcare specifically),¹²⁶ also do not contemplate *Aliessa*'s applicability to undocumented residents,¹²⁷ or else cite the case merely as a footnote.¹²⁸ Still

122. *Id.* Almost immediately following the *Aliessa* decision, the New York State Health Department and then-Governor expressed their intention to cover all documented noncitizen New Yorkers under state-funded healthcare programs. See West Group, *Following Its Highest Court, New York Extends New Health Insurance Program for Working Poor to All LPRs*, 78 No. 39 INTERPRETER RELEASES 1600 (2001).

123. See, e.g., *Brunswick Hosp. Ctr. v. Daines*, 907 N.Y.S.2d 435, 2010 WL 623707, at *2 (N.Y. Sup. Ct. Feb. 22, 2010).

124. See, e.g., Diane M. Somberg, *New York State Constitutional Decisions: 2001 Compilation, Equal Protection, Court of Appeals of New York*, *Aliessa v. Novello (Decided June 5, 2001)*, 18 TOURO L. REV. 241 (2002) (discussing the case and its procedural history); Christopher DeCicco, *Case Compilation, Aliessa v. Novello (Decided June 5, 2001)*, 45 N.Y.L. SCH. L. REV. 527 (2002) (reflecting on *Aliessa*'s role in the continuing tension within American federalism); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1607 (2008); Michael Shapland, *Soskin v. Reinertson: An Analysis of the Tenth Circuit's Decision to Permit the State of Colorado to Withhold Medicaid Benefits from Aliens Pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act*, 2 SETON HALL CIRCUIT REV. 339, 348–49 (2005); Erin F. Delaney, *In the Shadow of Article I: Applying a Dormant Commerce Clause Analysis to State Laws Regulating Aliens*, 82 N.Y.U. L. REV. 1821, 1839–40 (2007); Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SURV. AM. L. 357, 358, 364 (2002); Tricia A. Bozek, *Immigrants, Health Care, and the Constitution: Medicaid Cuts in Maryland Suggest that Legal Immigrants Do Not Deserve the Equal Protection of the Law*, 36 U. BALT. L. REV. 77, 95 (2006).

125. Anna C. Tavis, *Healthcare for All: Ensuring States Comply with the Equal Protection Rights of Legal Immigrants*, 51 B.C. L. REV. 1627, 1642 n.124 (2010) (“[J]urisprudence concerning the equal protection rights of undocumented immigrants is . . . outside the scope of this Note.”); Gregory T. W. Rosenberg, *Alienating Aliens: Equal Protection Violations in the Structures of State Public-Benefit Schemes*, 16 U. PA. J. CONST. L. 1417, 1429 (2014) (“The argument I develop for proper equal protection review applies only to . . . documented legal status[.]”); Karin H. Berg, *May Congress Grant the States the Power to Violate the Equal Protection Clause? Aliessa v. Novello and Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 17 BYU J. PUB. L. 297, 308–20 (2003) (giving particular attention to the federal equal protection questions at issue in the case, but not discussing the applicability of the case to undocumented New York residents); Ellen M. Yacknin, *Aliessa and Equal Protection for Immigrants*, 58 N.Y.U. ANN. SURV. AM. L. 391, 404–07 (2002) (providing an excellent analysis of the equal protection argument in *Aliessa*, but addressing the implications of the decision upon documented noncitizens only). Incidentally, Yacknin is one of the attorneys who brought *Aliessa* to the New York County Supreme Court in 1999. See *Aliessa v. Whalen*, 694 N.Y.S.2d 308, 308 (N.Y. Sup. Ct. 1999); Michael J. Wishnie, *Introduction: Immigration and Federalism*, 58 N.Y.U. ANN. SURV. AM. L. 283, 289 (2002) (discussing Yacknin’s article and the analysis of *Aliessa* therein, but considering its applicability only to documented noncitizens).

126. See, e.g., Alan Jenkins & Sabrineh Ardan, *Positive Health: The Human Right to Health Care Under the New York State Constitution*, 35 FORDHAM URB. L.J. 479, 495 (2008); Weeks Leonard, *supra* note 66, at 1352.

127. See, e.g., Corynn Neevel, *At the Intersection of Immigration and Health Care Law: The Lack of Clear Standards Governing Medical Repatriation and Suggestions for Future Oversight*, 45 GONZ. L. REV. 821 (2009–2010); Julia Field Costich, *Legislating a Public Health Nightmare:*

others have looked beyond the *Aliessa* opinion itself to consider what it says or does not say about state constitutions,¹²⁹ or have used it to support other arguments outside the scope of the discussion here.¹³⁰ None of these have addressed the rights of undocumented residents.

B. There Are Two Different Readings of How the Court of Appeals Interpreted Article XVII, Section 1 in Aliessa v. Novello

The discussion section of the *Aliessa* opinion, labeled section III, is divided into two parts—A and B.¹³¹ In section III(A), the court considers the challenge under article XVII of the state constitution and in section III(B) the court considers the equal protection clause arguments.¹³² While the holding in section

The Anti-Immigrant Provisions of the “Contract with America” Congress, 90 KY. L.J. 1043, 1066–67 (2001–2002); Chang, *supra* note 124, at 364; Adrienne Ortega, *And Health Care for All: Immigrants in the Shadow of the Promise of Universal Health Care*, 35 AM. J.L. & MED. 185, 192 (2009); Tavis, *supra* note 125, at 1649–50, 1662–64.

128. See, e.g., Mahmoudzadeh, *supra* note 5, at 474 n.48; Abel & Kaufman, *supra* note 30, at 511 n.97; David J. Deterding, *A Deference-Based Dilemma: The Implications of Lewis v. Thompson for Access to Non-Emergency Health Benefits for Undocumented Alien Children*, 52 ST. LOUIS U. L.J. 951, 974 n.200 (2008); Frank Munger, *Afterword, How Can We Save the Safety Net?*, 69 BROOK. L. REV. 543, 564 n.92 (2004).

129. See, e.g., Daniel J. Canon, *Challenges to the Residency Requirements of the Personal Responsibility and Work Opportunity Reconciliation Act Under the Kentucky Constitution*, 45 BRANDEIS L.J. 151, 154–56 (2006) (contrasting *Aliessa* with other state high courts which have chosen not to protect the right of noncitizens to access public benefits, and reminding us that the decision “demonstrates the usefulness of unique provisions in a state’s constitution”); Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863, 871 (2008) (referencing *Aliessa* to show that “[d]ecisions interpreting constitutional welfare provisions are rare”); Harvard Law Review Ass’n, *Constitutional Law—Equal Protection—New York Court of Appeals Holds that State May Restrict Legal Alien Access to Disability Benefits—Khrapunskiy v. Doar*, 909 N.E.2d 70 (N.Y. 2009), 123 HARV. L. REV. 800, 801, 806–07 (2010) (contrasting the constitutional analysis in *Aliessa* with that of a different state court decision from New York); Judith S. Kaye, *A Double Blessing: Our State and Federal Constitutions*, 30 PACE L. REV. 844, 851 (2010) (providing *Aliessa* as an example of how one of New York State’s unique constitutional provisions has been applied).

130. See, e.g., Deborah N. Archer & Kele S. Williams, *Making America “the Land of Second Chances”: Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 579 (2006) (arguing that *Aliessa*’s reasoning under article XVII should be extended to protect the socio-economic rights of ex-offenders); Raquel Aldana, *On Rights, Federal Citizenship, and the “Alien”*, 46 WASHBURN L.J. 263, 301–02 nn.251, 254 (2007) (using *Aliessa* as an example of the proposition that “[i]n a few cases, New York courts have refused to allow federal immigration policy to trump state statutes seeking to implement the constitutional affirmative duty to provide for the needy”); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1737–38 (2010) (using *Aliessa* as an example of a state court opinion which makes an “institutional competency” argument); Janet M. Calvo, *The Consequences of Restricted Health Care Access for Immigrants: Lessons from Medicaid and SCHIP*, 17 ANNALS HEALTH L. 175, 207 (2008) (citing *Aliessa* as an example of a case in which the federal government immigration policy has caused the cost of noncitizen health care to shift to local government).

131. *Aliessa v. Novello*, 754 N.E.2d 1085, 1092–94 (N.Y. 2001).

132. *Id.*

III(B) is relatively straightforward, with the court applying the strict scrutiny standard of review,¹³³ the holding in section III(A) is less clear.

In section III(A), the court first expressed that “onerous” and “burdensome” eligibility conditions which are unrelated to need generally violate article XVII, section 1.¹³⁴ After noting that non-emergency medical treatment is a “basic necessity of life,”¹³⁵ the court recognized that depriving plaintiffs of that care is particularly burdensome.¹³⁶ The court then found that the conditions imposed by the statute at issue, in addition to being onerous, were also unrelated to need.¹³⁷ The court concluded:

Here . . . the concept of need plays no part in the operation of [the welfare statute at issue]. Indeed, the statute . . . cannot be justified on the basis of a distinction between qualified aliens . . . on the one hand, and citizens on the other. We conclude that [the welfare statute at issue] violates the letter and spirit of article VXII, § 1 by imposing on plaintiffs an overly burdensome eligibility condition having nothing to do with need.¹³⁸

It is possible to distinguish in the literature two opposing interpretations of exactly how the *Aliessa* court read article XVII here. In one interpretation, *Aliessa* held that article XVII, section 1 ensures a right to non-emergency public benefits of LPRs and other documented noncitizens *only*.¹³⁹ In another interpretation, article XVII ensures a right to non-emergency public benefits regardless of immigration status.¹⁴⁰ The latter interpretation is decidedly broader than the former in that the latter protects all noncitizens, while the former limits the holding to the documented.

Authors who espouse the narrower interpretation of the rule in *Aliessa* express this view implicitly through the words they choose to describe the holding in the case. Take for example descriptions such as, “*Aliessa v. Novello* . . . invalidated a New York state restriction on state Medicaid benefits *for lawfully*

133. *Id.* at 1098.

134. *Id.* at 1092–93.

135. *Id.* at 1093 (quoting *Memorial Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 259–61 (1974)).

136. *Id.*

137. *Id.* (noting that depriving the plaintiffs living with chronic health conditions such as diabetes, asthma, or dialysis, of non-emergency medical care causes their conditions worsen, leading to severe illness and preventable death).

138. *Id.*

139. *See, e.g.,* *Khrapunskiy v. Doar*, 909 N.E.2d 71, 76 (N.Y. 2009) (“[P]laintiffs rely on *Matter of Aliessa v. Novello* . . . where this Court held that Social Services Law § 122 violated the Equal Protection Clauses under the Federal and State Constitutions by denying Medicaid benefits funded solely by the State to plaintiffs based on their status as *legal aliens*.” (emphasis added)).

140. *See, e.g.,* *Weeks Leonard*, *supra* note 66, at 1352 (noting that in *Aliessa*, the New York court held that denying medical assistance based on criteria other than need, namely, *immigration status*, violated the letter and spirit of the Aid to the Needy Provision).

present noncitizens,”¹⁴¹ or “striking down a New York law denying *legal* immigrants access to Medicaid.”¹⁴² In their article on the right to healthcare under the New York State Constitution, Alan Jenkins and Sabrineh Ardalan state that “[t]he *Aliessa* court . . . decided the case under the aid to the needy provision, which it found to create an affirmative duty on the State to provide benefits to *permanent residents*.”¹⁴³ In each instance the rule in the case sounds limited to a particular class of documented immigrants such as “legal immigrants” or “permanent residents.”

Unfortunately, none of these descriptions of *Aliessa* also offer explanations into the reasoning behind their ostensible interpretation of the holding. Instead, these descriptions are often cursory references to the case,¹⁴⁴ or else merely footnotes.¹⁴⁵ Nonetheless, these descriptions on their face appear to say that the holding in *Aliessa* was limited to documented residents and, by implication, the rule in *Aliessa* does not extend to the undocumented.

In other descriptions of *Aliessa*, however, a broader reading is implicit from the phrasing of the holding in the case. These descriptions of the case imply a holding in which article XVII, section 1 prohibits the exclusion of the needy on the basis of *immigration status*.¹⁴⁶ For example, the late author and esteemed legal scholar David D. Siegel¹⁴⁷ described the case this way: “*Aliessa* . . . held that the state’s denial of benefits (in that case Medicaid benefits) based on *alien*

141. Motomura, *supra* note 130, at 1737 (emphasis added).

142. Scott Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 925 n.165 (2008) (emphasis added); see also Stephen Loffredo, *Poverty, Inequality, and Class in the Structural Constitutional Law Course*, 34 FORDHAM URB. L.J. 1239, 1258 & n.96 (2007) (“holding . . . that New York must extend state-financed Medicaid coverage to *certain* immigrants excluded from the federal Medicaid program”).

143. Jenkins & Ardalan, *supra* note 126, at 495–96 (emphasis added).

144. See, e.g., Canon, *supra* note 129, at 159 (“*Aliessa* is a perfect example of a well-rounded victory for indigent green card holders.”); Teytelman v. Wing, 773 N.Y.S.2d 801, 809 (N.Y. Sup. Ct. 2008) (“Although the Court of Appeals in *Aliessa* ruled that the restrictions of eligibility for State Medicaid to certain categories of aliens violated article XVII (§1), that decision is not dispositive.”); Noah D. Zatz, *Poverty Unmodified?: Critical Reflections on the Deserving/Undeserving Distinction*, 59 U.C.L.A. L. REV. 550, 569 (2012) (“In 2001, the New York Court of Appeals held that the state constitution required that *legal immigrants* be included within the state’s medical assistance program . . .” (emphasis added)).

145. See, e.g., Roger C. Hartley, *Congressional Devolution of Immigration Policymaking: A Separation of Powers Critique*, 2 DUKE J. CONST. L. & PUB. POL’Y 93, 103 n.41 (2007) (“holding unconstitutional termination of non-emergency, state-funded medical benefits for legal immigrants who were ineligible for federal benefits”); Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 71 n.182 (2006) (“holding that the state constitution required equal Medicaid benefits for citizens and legal aliens”); Katie Eyer, *Litigating for Treatment: The Use of State Laws and Constitutions in Obtaining Treatment Rights for Individuals with Mental Illness*, 28 N.Y.U. REV. L. & SOC. CHANGE 1, 3 n.209 (2003) (finding that “the exclusion of legal aliens from Medicaid eligibility violated § 1 of the New York Constitution”).

146. See, e.g., Weeks Leonard, *supra* note 66, at 1352 (noting that in *Aliessa*, the New York court held that denying medical assistance based on criteria other than need, namely, *immigration status*, violated the letter and spirit of the Aid to the Needy Provision) (emphasis added).

147. Chief Justice Judith Kaye once referred to Siegal as the Court of Appeals’ “favorite Master of the Art of Civil Practice.” Judith Kaye, *Remarks*, 72 ALB. L. REV. 397, 399 (2009).

status violated the state constitution”¹⁴⁸ Siegel frames the rule in the case as one based on immigration status itself, not just documented immigration status, a decidedly broader conceptualization.

Of course it is possible that the use of “immigration status” is meant to refer to those noncitizens with “status” only, since undocumented persons are sometimes referred to as being “out of status,” or said to have “no status.”¹⁴⁹ Some ostensible endorsements of the broader interpretation, however, use language that is inclusive of undocumented persons within the term “immigration status.” Consider former Chief Justice of the Court of Appeals, Judith Kaye, who joined the *Aliessa* opinion.¹⁵⁰ In an article comparing the state and federal constitutions, Judge Kaye explained “[s]ome years ago, the Court of Appeals found in favor of a group of immigrants, lawful New York residents, who had wrongfully been denied medical coverage for potentially life-threatening conditions *simply because they were immigrants.*”¹⁵¹ Judge Kaye does not say “because they were lawful immigrants” or “because they were immigrants with status,” but merely “because they were immigrants,” addressing immigrants as a group broader than just those immigrants with status. Judge Ciparick’s dissent in *Khrapunskiy v. Doar* used “status” language when she wrote “[t]here [in *Aliessa*], we held that Social Service Law 122(1)(c) violated the “letter” and “spirit” of article XVII of the State’s constitution by denying state-funded Medicaid benefits on the basis of *immigration status*”¹⁵² Reading the comments of these two Court of Appeals judges consistently implies that they intend “immigration status” to encompass all noncitizens.

An extensive search of scholarly articles discussing *Aliessa* did not reveal any author’s explanation of their descriptions. Several scholars, however, do appear to endorse a broader interpretation of the phrase “immigration status.” Gregory Gillen cites to *Aliessa* to assert that the state’s equal protection clause protects “all persons within [New York State’s] borders,” a description that would include undocumented persons within the state.¹⁵³ In her discussion about the right to healthcare under the New York State Constitution, Professor Elizabeth Weeks Leonard describes *Aliessa* this way: “[i]n . . . *Aliessa*, the New York court held that denying medical assistance based on criteria other than

148. David Siegel, *Legal Aliens, Though Resident in State, Need Not Be Paid Same Level of Benefits as Citizens*, 596 N.Y. ST. L. DIG. 3, 7 (2009) (emphasis added). For a similarly worded footnote citing to *Aliessa*, see Pratheepan Gulaskaram, “*The People*” of the Second Amendment: *Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1576 n.286 (“striking down law denying state healthcare benefits based on alienage”).

149. See *Khan v. Meissner*, No. 94-civ-7778, 1995 WL 244401, at *1, *3 (S.D.N.Y. Apr. 27, 1995) (describing undocumented workers as “out of status” and “possess[ing] no status”).

150. *Aliessa v. Novello*, 754 N.E.2d 1085, 1098 (N.Y. 2001).

151. Kaye, *supra* note 129, at 851 (emphasis added).

152. *Khrapunskiy v. Doar*, 909 N.E.2d 70, 80 (N.Y. 2009) (emphasis added).

153. Gregory Gillen, *Annual New York State Constitutional Issue, Equal Protection, Court of Appeals of New York, Cubas v. Martinez (Decided June 7, 2007)*, 24 TOURO L. REV. 455, 458 (2008).

need, namely, *immigration status*, violated the letter and spirit of the Aid to the Needy Provision.”¹⁵⁴ At one point in that article Professor Weeks Leonard endorses a much broader reading when she characterizes the plaintiff’s winning position as “a challenge to the state’s denial of Medicaid to undocumented immigrants.”¹⁵⁵ None of the plaintiffs in *Aliessa* were undocumented in the sense that they were all at least residing under color of law,¹⁵⁶ but Professor Weeks Leonard’s choice of words appears to indicate that she views the winning argument as a challenge to the denial of benefits to all noncitizens.

The broader reading is also implicit for those who focus on the *Aliessa* opinion’s condemnation of conditions upon public benefits that are based on anything other than need. Professor Stephen Loffredo noted of *Aliessa* that “[t]he theory adopted by the courts is that immigration status is not relevant to the issue of need under the New York State Constitution, and therefore the state may not constitutionally refuse to provide assistance.”¹⁵⁷ In her discussion of welfare rights under state constitutions, Elizabeth Pascal reveals her interpretation of *Aliessa*.¹⁵⁸ Pascal notes that “[a]lthough the [*Aliessa*] court made clear that it would be willing to strike down any law that withheld benefits from a classification of people not based on need, it refused to go beyond that pronouncement.”¹⁵⁹ Pascal wrote that the court refused to explicitly say its rule applies to all people because of the general hesitancy of state courts to create such sweeping affirmative rights.¹⁶⁰ These authors, among others,¹⁶¹ argue that if exclusionary criteria are based on anything other than need, it is

154. Weeks Leonard, *supra* note 66, at 1352 (emphasis added).

155. *Id.*

156. *Aliessa v. Novello*, 754 N.E.2d 1085, 1088 (N.Y. 2001).

157. Ruthann Robson, *A Discussion of Poverty and Economic Justice Between Frances Fox Piven and Stephen Loffredo*, 11 N.Y. CITY L. REV. 1, 7 (2007); *see also* Weeks Leonard, *supra* note 66, at 1352–53 (noting that in *Aliessa* “the court emphasized that care for the needy is not a matter of ‘legislative grace’, it is a constitutional mandate”).

158. *See* Pascal, *supra* note 129, at 871 (“Although the [*Aliessa*] court made clear that it would be willing to strike down any law that withheld benefits from a classification of people not based on need, it refused to go beyond that pronouncement.”).

159. *Id.* at 871–72.

160. *Id.* at 872.

161. *See, e.g.*, Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 954–55 (2011) (characterizing the court in *Aliessa* as finding that the state law could not justify the eligibility lines it drew because the concept of need played no part in its operation); DeCicco, *supra* note 124, at 533 (finding “social service law 122 violated Article XVII . . . because it imposed upon plaintiffs overly burdensome eligibility conditions for medical care that had nothing to do with need”); Aldana, *supra* note 130, at 301 n.254 (“holding that the five-year residency requirement to otherwise eligible immigrants for state Medicaid coverage violated article XVII, § 1 of the state constitution because the requirement had nothing to do with need and deprived immigrants of otherwise basic-necessity benefits”); *see also* Brunswick Hosp. Ctr. v. Daines, 907 N.Y.S.2d 435, 2010 WL 623707, at *2 (N.Y. Sup. Ct. Feb. 22, 2010) (“[T]he New York State Court of Appeals held that Social Services Law § 122 violated provisions of the State Constitution, which guarantees that aid for the needy be provided, by imposing an overly burdensome condition on eligibility that had nothing to do with need.”).

unconstitutional—and inasmuch as conditioning eligibility on being “out of status” is a criterion other than need, that criterion too would be unconstitutional. In this way, the focus on need speaks to a broader holding in the case.

The distinction between the two opposing, implicit interpretations—neither of which have been articulated explicitly in the literature on *Aliessa*¹⁶²—is meaningful because the narrower interpretation would not extend the Court’s holding to undocumented residents, whereas the broader one would. The importance of this distinction to the rights of undocumented noncitizens therefore, cannot be overstated.

*C. Aliessa v. Novello Holds That Article XVII, Section 1 Protects the Right of
“Needy” Non-Citizen Residents to Public Benefits Regardless of Their
Immigration Status*

A careful examination of *Aliessa* supports the broader interpretation that article XVII forbids conditions based on any immigration status, even undocumented status.

Aliessa cited to an earlier Court of Appeals decision, *Tucker v. Toia*, to remind the parties that article XVII supplies a constitutional mandate to care for the needy and that this mandate is “not a matter of ‘legislative grace.’”¹⁶³ In *Tucker* the court invalidated a state law that required minors to jump through several procedural hoops before they could receive public benefits.¹⁶⁴ The *Tucker* court struck that requirement down because it was a burdensome condition unrelated to need, and it therefore violated the “letter and spirit” of section 1 of article XVII.¹⁶⁵ The *Aliessa* court analogized the burdensomeness of the harm caused by the procedural hoops in *Tucker* to the lack of medical care caused by the immigration status conditionality that was before it.¹⁶⁶ The Court then reaffirmed the notion that the only constitutionally permissible conditions attached to public benefits are those based upon need¹⁶⁷—not procedural hoops as in *Tucker* and not immigration status as in *Aliessa*.

By relying on *Tucker*, the *Aliessa* court’s reasoning shows that the documented plaintiffs were protected under article XVII not because they were documented, but because they depended on the state to care for their “necessities of life.”¹⁶⁸ The opinion cites to *Tucker* to reaffirm the rule that a law violates the letter and spirit of article XVII by imposing a burdensome condition that is not

162. A review of the articles cited *supra* shows no explicit discussion about the apparent, albeit subtle, difference in perspective on the holding of the case.

163. *Aliessa v. Novello*, 754 N.E.2d 1085, 1092 (N.Y. 2001).

164. *Tucker v. Toia*, 371 N.E.2d 449, 452 (N.Y. 1977).

165. *Id.*

166. *See Aliessa*, 754 N.E.2d at 1093.

167. *Id.*

168. *Tucker*, 371 N.E.2d at 452; *see Aliessa*, 754 N.E.2d at 1092.

based upon need.¹⁶⁹ The court reaffirms that immigration status itself is one such impermissible condition: “Indeed, the statute suffers from an infirmity comparable to the one in *Tucker* and cannot be justified on the basis of a distinction between qualified aliens . . . on the one hand, and citizens on the other.”¹⁷⁰ The distinction is unconstitutional because it is based on something other than need and not because some of the plaintiffs are qualified aliens.

Nowhere in *Aliessa* does the court factor into its reasoning the immigration status of the plaintiffs or identified class¹⁷¹—it only identifies that the distinction before it (documented residents versus citizens) as impermissible.¹⁷² It is impermissible, however, not because of the nature of the distinction, but only because it is a condition that is burdensome and not based on need.¹⁷³ In other words, the court appeared to limit its holding to “qualified immigrants” only because the putative class before it included the same.¹⁷⁴ Properly read, the rule in *Aliessa* is not that needy, documented noncitizens are protected under article XVII, but rather that all needy noncitizens are so protected, regardless of their immigration status.

This broader interpretation brings undocumented residents fully under the protection of article XVII; the conditioning of public benefits eligibility upon undocumented immigration status is an unconstitutional criteria because it is a burdensome one which is not based upon need. *Aliessa* does not just fail to preclude undocumented needy persons from article XVII protection, its reasoning mandates their inclusion under the article. In other words, nothing in the rationale of *Aliessa* permits the exclusion of needy undocumented immigrants on any grounds other than need from the constitutional protection that article XVII, section 1 grants.¹⁷⁵

One concern is the possibility that the absence in the *Aliessa* opinion of affirmative language applying the holding to undocumented residents means the holding was not meant to extend to this group. But had the Court of Appeals intended to give the opinion such meaning the holding could have been explicitly limited to documented persons. Yet nowhere in the opinion is there any affirmative statement limiting the holding to “authorized” noncitizens.

169. *See Aliessa*, 754 N.E.2d at 1092.

170. *Id.* at 1093.

171. *See generally id.* at 1092–93.

172. *Id.* at 1093.

173. *Id.* (“We conclude that section 122 violates the letter and spirit of article XVII, § 1 by imposing on plaintiffs an overly burdensome eligibility condition having nothing to do with need.”).

174. *Id.* at 1089 (“The putative class consists of ‘[a]ll Lawful Permanent Residents who entered the United States on or after September 22, 1996 and all [PRUCOLs] who, but for the operation of New York Social Services Law § 122, would be eligible for Medicaid coverage in New York State.’”).

175. *Id.* at 1093.

At least one author has argued that a footnote in *Aliessa* “specifically stated that undocumented immigrants were not affected by the decision to become eligible for these health services.”¹⁷⁶ An examination of the footnote in context, however, shows this interpretation to be erroneous. Footnote six follows a paragraph that explains the different categories of public benefit eligibility for noncitizens, among them “qualified” and “nonqualified aliens.”¹⁷⁷ Footnote six then reads: “Illegal aliens and certain others—with whom we are not here concerned—are also nonqualified aliens.”¹⁷⁸ The court is not saying that the holding does not apply to undocumented persons, because at this point in the opinion the court had not even begun to explain its reasoning.¹⁷⁹ Rather, the opinion is merely giving the definition of “nonqualified alien” and noting that no one with that status was featured among the plaintiffs in the case.¹⁸⁰ In other words, it is a guide to understanding the facts of the case and has nothing to do with the reasoning of the opinion or the application of its holding.

It can be concluded that any law excluding undocumented persons who are financially eligible for the benefit (“needy”) from state-funded public benefits offends the letter and spirit of article XVII inasmuch as using immigration status as a condition for obtaining benefits is a failure to condition benefits upon need. Recognition of this as the rule in *Aliessa* is also supported by additional case law, as explored in the next section.

D. Additional Relevant Case Law Supports the Broader Interpretation of the Rule in Aliessa v. Novello As Ensuring a Right to Public Benefits to All Needy Persons, Regardless of Immigration Status

Despite reasoning that shows otherwise, *Aliessa* does not explicitly extend its interpretation of protection under article XVII to undocumented residents. Just one year prior to *Aliessa*, however, a case from the Kings County Family Court did exactly that.

In *In re Kittridge*,¹⁸¹ Millie Kittridge suffered from sickle cell anemia, and it was alleged by the child protective services of New York City that she “fail[ed] to make suitable arrangements for the care of her ten-year-old son, Sean, during

176. Kristalee Guerra, *The Policy and Politics of Illegal Immigrant Health Care in Texas*, 3 HOUS. J. HEALTH L. & POL’Y 113, 146 (2003).

177. *Aliessa*, 754 N.E.2d at 1091.

178. *Id.* at 1091 n.6.

179. *Id.* at 1091.

180. *Id.*

181. The case has gone little noticed. After a thorough search this author could find only two articles, and no court opinions, that have ever discussed the case in any detail, and then only in the context of family law. See David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL’Y 45, 71 (2005); Soraya Fata, Leslye E. Orlaff, Andrea Carcamo-Cavazos, Alison Silber & Benish Anver, *Custody of Children in Mixed-Status Families: Preventing the Misunderstanding and Misuse of Immigration Status in State Court Custody Proceedings*, 47 FAM. L.Q. 191, 236–37 (2013).

repeated hospitalizations for her illness.”¹⁸² However, the opinion states that the allegation was amended to allege neglect based on the mother’s addiction to painkillers.¹⁸³ The child was placed into temporary foster care as a result of the allegation and the family court ordered the state to provide Ms. Kittridge and her son with the necessary Medicaid, housing, and financial assistance, in the form of Medicaid and SNA,¹⁸⁴ to reunite and rehabilitate the family.¹⁸⁵ The state refused to provide these services to the mother because she was undocumented, and thus they argued, ineligible for those services.¹⁸⁶ There was no question in the case that Millie Kittridge was financially eligible for these services and therefore “needy” as defined by the legislature.¹⁸⁷ At issue was whether New York City could remove the child from his mother, but then deny the court-ordered benefits solely on the basis of the mother’s immigration status.¹⁸⁸

Kings County Family Court Judge Philip Segal held that article XVII, section 1 required New York City to provide Medicaid and SNA to Millie Kittridge to rehabilitate and reunite her family.¹⁸⁹ The Family Court found that Millie Kittridge had an explicit right under the state constitution to these public benefits.¹⁹⁰ Judge Segal reasoned that “New York State has made a clear, concrete and absolute constitutional commitment to provide assistance to needy residents.”¹⁹¹ As the Court of Appeals did in *Aliessa*, the Family Court opinion cited to *Tucker v. Toia* to conclude that:

[Art. XVII, § 1] requires the state to come to the aid of all needy residents without regard to, *inter alia*, . . . immigration status,” and that therefore “New York Constitution Art. XVII, § 1. [applies] to all people residing in New York State. Neither provision expressly mentions or excludes any persons on the basis of their particular status (other than economic status); as such, *no exclusion for undocumented aliens can be inferred.*”¹⁹²

182. *In re Kittridge*, 714 N.Y.S.2d 653, 655 (N.Y. Fam. Ct. 2000).

183. *Id.*

184. *Id.* The benefits at issue in *In re Kittridge* are referred to in the opinion as “(emergency) public assistance,” “(emergency) Medicaid” and “necessary (emergency shelter) housing.” *Id.* Emergency public and shelter assistance is a reference to SNA. *See Rodriguez v. Wing*, 723 N.E. 77, 80 (N.Y. 1999) (explaining that emergency shelter allowance is SNA).

185. *In re Kittridge*, 714 N.Y.S.2d at 655.

186. *Id.*

187. *See id.* The court order to provide the Medicaid and public assistance to Ms. Kittridge was made pursuant to Family Court Act §1055(c), which authorizes social services be provided to those who are financially eligible for them and there was no indication this eligibility was disputed by the parties in the case.

188. *Id.*

189. *Id.* at 656.

190. *See id.*

191. *Id.* at 655.

192. *Id.* at 656 (emphasis added).

Like the opinion in *Aliessa* and the ostensible proponents of the broader interpretation of its holding, Judge Segal focuses on the idea that the only permissible condition upon public benefit eligibility is need, or as Segal put it, “economic status.”¹⁹³ Under this broader interpretation shared by the Kings County Family Court, no immigration status can be a condition upon which benefit eligibility is based, and thus no noncitizens—be they documented immigrant plaintiffs in *Aliessa* or the undocumented respondent in *In re Kittridge*—can be excluded.¹⁹⁴ Judge Segal’s opinion in *In re Kittridge* was never appealed.¹⁹⁵

In addition to *Aliessa* and *In re Kittridge*, New York courts have only applied article XVII to noncitizens on a few other occasions. These additional applications of article XVII are worth noting to explain why they do not conflict with a reading of *Aliessa* that extends benefits to undocumented New Yorkers.

Most important to distinguish from *Aliessa* is the Court of Appeals decision in *Khrapunskiy v. Doar*, which discussed the right of noncitizens to access a state-funded disability benefit.¹⁹⁶ At issue in *Khrapunskiy* was whether or not the state could deny to documented noncitizens a cash benefit called additional state payments (“ASP”).¹⁹⁷ New York State had a benefit program for people with disabilities prior to 1974, but discontinued it after a similar federal program, Supplemental Security Income (“SSI”),¹⁹⁸ was created.¹⁹⁹ SSI provides a monthly cash allowance to persons living with a disability that precludes gainful employment. However, SSI provided less money than what New York was providing prior to 1974.²⁰⁰ To ensure disabled New Yorkers the same support they received before 1974, ASP was created to bring an SSI recipient’s income up to pre-1974 levels.²⁰¹ ASP, however, was not available to any resident who was not receiving SSI, since ASP was created solely to supplement an SSI check.²⁰² The problem was that under federal law not all documented residents

193. *Id.*

194. *Id.*

195. *Id.* It is worth noting that, in addition to SNA, the public benefits at issue in *In re Kittridge* included emergency Medicaid—and under federal law even undocumented residents have a right to emergency Medicaid. However, no part of Judge Segal’s opinion rests on the federal statutory right of undocumented persons to emergency Medicaid—instead, he went further to tap a state constitutional source for that right. His reasoning explicitly applies the mandate in article XVII to “undocumented aliens,” without relying upon the federal statute to supply Millie Kittridge with emergency Medicaid. Thus, whether emergent benefits were at issue or not, Segal’s reasoning has the same result.

196. *See generally* *Khrapunskiy v. Doar*, 909 N.E.2d 70, 75 (N.Y. 2009).

197. *Id.*

198. *Id.* at 77.

199. *Id.*

200. *See id.* at 78.

201. *Id.*

202. *See id.*

and LPRs were eligible for SSI,²⁰³ and those that were not eligible were likewise unable to get ASP.²⁰⁴

In *Khrapunskiy*, a group of LPR noncitizens ineligible for SSI under federal law and who were denied ASP by New York as a result, sued New York for the ASP denial.²⁰⁵ Plaintiff LPRs argued that they were entitled to the ASP benefits because they were disabled and the denial violated their entitlement under article XVII.²⁰⁶ But the court in *Khrapunskiy* dismissed the argument by reasoning that article XVII does not require the state to meet every need of each public benefit recipient, only those needs defined by the legislature, and here that need was to supplement SSI.²⁰⁷ Since New York’s standard of need for disabled individuals was based solely on eligibility for SSI, those not receiving SSI were not “needy” as defined by the legislature, or so the court reasoned, and denied plaintiffs the ASP.²⁰⁸ The issue therefore turned on the scope of the benefit, not the status of the plaintiffs.

Unlike Medicaid or SNA, where the legislature’s definition of “needy” was income-based, the court reasoned “needy” recipients of ASP were defined by their eligibility for SSI.²⁰⁹ As such, the decision in *Khrapunskiy*, though a tragic precedent in its own way for the rights of non-citizens, does not conflict with a reading of *Aliessa* that extends means-tested benefits to undocumented New Yorkers. As it is, ASP is unique because no other state-funded public benefit piggy-backs on a federal public benefit as ASP does, making *Khrapunskiy*’s holding on article XVII *sui generis*, or unique, and inapplicable to means-tested benefits like Medicaid and SNA.²¹⁰

Two other cases have considered the right under article XVII of noncitizens to access a New York State Food Assistance Program (“FAP”), a food stamp-like benefit for certain documented immigrants denied federal SNAP benefits.²¹¹ The state statute creating FAP gave counties in the state the option to implement it, and few did so.²¹² Only some LPRs qualified for this benefit and those that did not challenged the state statute on two occasions.²¹³

203. *Id.*

204. *Id.*

205. *Id.* at 73.

206. *Id.*

207. *Id.* at 77.

208. *Id.* at 78.

209. *Id.* at 75–76.

210. Incidentally, *Khrapunskiy*’s larger contribution to an immigrant’s right to access public benefits in New York State comes from its equal protection discussion, which we will return to *infra* in the section on the same below.

211. *Teytelman v. Wing*, 773 N.Y.S.2d 801, 803–04 (N.Y. Sup. Ct. 2008).

212. *Id.* at 803.

213. *See Alvarino v. Wing*, 609 N.Y.S.2d 262, 263 (N.Y. App. Div. 1999); *Teytelman*, 773 N.Y.S.2d at 803.

In the first of these FAP challenges, *Alvarino v. Wing*, the court declined to address the article XVII issue raised by plaintiffs.²¹⁴ In the second, *Teytelman v. Wing*, plaintiff LPRs before the Supreme Court of New York County argued that the restrictions on eligibility for FAP violated article VXII, section 1 because the amount of FAP was insufficient to meet their needs.²¹⁵ Unfortunately, the New York County Supreme Court found that plaintiffs did not fit the legislature's definition of "needy," because counties had the discretion to implement or not implement FAP.²¹⁶ This discretion meant, according to the Court, that counties were free to not provide FAP under article VXII.²¹⁷ This makes *Teytelman* just another case that stands for the nonetheless harsh proposition that the courts defer completely to the legislature in defining who is "needy."²¹⁸ It is notable that FAP is also unlike other state-funded public benefits in that the legislature has not given any county the option of opting out of Medicaid or SNA, making *Teytelman* another *sui generis*, or unique, case like *Khrapunskiy*—determined by the unique nature of the benefit at issue and not the immigration status of the plaintiffs.

Perhaps most similar to *Aliessa*, and predating it, was the 1992 Court of Appeals decision in *Minino v. Pereles*. In *Minino*, LPR plaintiffs challenged a statutory denial of benefits similar to the one challenged in *Aliessa*.²¹⁹ Here, plaintiff LPRs were denied access to SNA²²⁰ because, among other things, they had not been residents in the state for three years, a criterion not shared by U.S. citizen SNA applicants.²²¹ The Court of Appeals in *Minino* found plaintiffs were impermissibly denied SNA under article XVII because the denial was conditioned on criteria other than need.²²² In doing so, the *Minino* court was the first to acknowledge that article XVII applied to noncitizens and that

214. *Alvarino v. Wing*, 609 N.Y.S.2d at 263 (failing to address the article XVII issue and instead framing plaintiffs' argument as one about equal protection and addressing this issue only).

215. *Teytelman*, 773 N.Y.S.2d at 803.

216. *Id.* at 810 ("[Plaintiff's] assertion that the Legislature deemed the proposed plaintiff class to be 'needy,' as that term has been construed under article XVII, is belied by their very failure to explain how this can be so in view of the optional nature of the FAP.").

217. *Id.*

218. FAP was eliminated entirely by the legislature effective August 29, 2012, removing it from the possible list of available state-funded public benefits to which we can argue undocumented immigrants have a right today. *See* N.Y. Laws ch. 41, § 95, 10 (repealed 2012).

219. *Minino v. Perales*, 589 N.E.2d 385 (N.Y. 1992).

220. *See Minino v. Perales*, 562 N.Y.S.2d 626, 626 (N.Y. App. Div. 1990) (referring to the program at issue in *Minino* as the "Home Relief Program"); N.Y. PUBLIC WELFARE ASS'N, GRAPPLING WITH SAFETY NET ASSISTANCE FOR SINGLE ADULTS: SAFETY NET POLICY PAPER 6 (Feb. 2009) (explaining that before it was called SNA, the program was titled the "Home Relief Program").

221. *Minino*, 589 N.E.2d at 286. More specifically, plaintiffs were denied SNA because the state statute at issue said that for three years after a noncitizen's entry into the U.S., the income of their immigration sponsor was factored into the noncitizen's income, which in this case rendered plaintiffs financially ineligible for SNA.

222. *Id.* at 387.

immigration status was a criterion not based on need.²²³ What is important to note about *Minino*, however, is that it recognized, just as *In re Kittridge* later did, that article XVII protects a right to SNA. As argued above, *Aliessa*, though it addressed only Medicaid, extended the reach of article XVII to undocumented state residents. Thus, when read consistently with each other, *Aliessa* and *Minino* together extend a constitutional right to Medicaid as well as SNA to the undocumented New Yorker.

No New York State court since *Khrapunskiy* has contemplated article XVII as it applies to noncitizens. *In re Kittridge*, as a Family Court decision, carries little in the way of persuasive authority for interpreting the rule in *Aliessa*. Nevertheless, the opinion underscores the importance of the distinction between the two interpretations of the rule in *Aliessa*, because Judge Segal's broader interpretation of article XVII resulted in Millie Kittridge's eligibility for public benefits even as an undocumented resident. The rule in *In re Kittridge* also lends support to the notion that the Court of Appeals may very well have seen article XVII the same way as the family court—applicable to undocumented residents—because of the way the reasoning in *In re Kittridge* mirrors that of the Court of Appeals in *Aliessa*. Alternatively, a reasoned argument can be made that undocumented residents of the state are also entitled to public benefits under the equal protection clause of the state constitution.

V.

THERE IS AUTHORITY UNDER THE EQUAL PROTECTION CLAUSE OF THE NEW YORK STATE CONSTITUTION FOR EXTENDING AN EQUAL RIGHT OF UNDOCUMENTED NEW YORKERS TO STATE-FUNDED PUBLIC BENEFITS

This Part argues that *Aliessa* and other precedential cases provide authority for the notion that undocumented New Yorkers have an equal right to state-funded public benefits under the state equal protection doctrine.

A. The New York State Equal Protection Clause Is Different from Its Counterparts in Most States and Under Federal Law in the Protection It Extends to Non-Citizen New Yorkers

Few state courts have examined a noncitizen's rights to public benefits under their state constitution's equal protection clause.²²⁴ Often, plaintiffs are unable to convince a state court to even review such a state constitutional argument.²²⁵ When courts do review the claim, the court may apply rational

223. *Id.* at 386.

224. *See, e.g.,* Ehrlich v. Perez, 908 A.2d 1220, 1230 (Md. 2006); Finch v. Commonwealth Health Ins. Connector Auth., 946 N.E.2d 1262, 1268–69 (Mass. 2011).

225. *See, e.g.,* El Souri v. Dep't of Social Servs., 414 N.W.2d 679 (Mich. 1987) (involving challenge by LPR to the denial of public benefits under the state and federal equal protection clauses, the court looked to federal precedent only to apply strict scrutiny and never reaches the state constitutional argument); Avila v. Biedess, 78 P.3d 280, 283 (Ariz. Ct. App. 2003) (involving

basis review,²²⁶ and only rarely apply a strict scrutiny standard²²⁷ or find for the plaintiff.²²⁸

In this hostile equal protection environment, few courts have ever considered the rights of undocumented immigrants,²²⁹ and those that have, have not found in their favor.²³⁰ Ironically, the one California case that did find favorably for undocumented plaintiffs did not do so because of the constitutional rights of those plaintiffs.²³¹ Courts in that state have since reaffirmed that the state's equal protection clause does not protect the rights of undocumented Californians.²³² As in California, no other state court has yet found under its

challenge by LPR plaintiffs denied access to a state benefit for which they were financially eligible under the state and federal constitutions and to which the court, arguing that the state constitution merely adopts the words and standard of its federal counterpart, applied the federal clause only); *Hong Pham v. Starkowski*, 16 A.3d 635, 664 (Conn. 2011) (finding the challenged law in question did not make a distinction based on alienage under the federal Equal Protection Clause and refusing to review plaintiff's claim under the state equal protection clause as a result).

226. *See, e.g., Doe v. Comm'r of Transitional Assistance*, 773 N.E.2d 404 (Mass. 2002) (involving challenge by plaintiff LPRs to denial of state-funded TANF benefits to LPR residents who had been in the state for less than six months and in which the court found the discrimination based on residence instead of alienage and, applying rational basis review, found for the state); *Cid v. S.D. Dep't of Soc. Servs.*, 598 N.W.2d 887, 892–93 (S.D. 1999) (explaining that the state of North Dakota has the choice to “assur[e] that aliens be self-reliant in accordance with national immigration policy”); *Guaman v. Velez*, 74 A.3d 931, 942 (N.J. Super. Ct. App. Div. 2013), *aff'd*, 110 A.3d 927 (N.J. 2015) (stating the plaintiffs “are ineligible because the State has elected to follow a policy that Congress was constitutionally permitted to establish,” and which NJ is free to follow).

227. *See, e.g., Ehrlich*, 908 A.2d at 1236–37 (Where LPR plaintiffs were denied state-funded Medicaid and argued this denial violated their equal protection rights under the Maryland constitution, the court applied strict scrutiny and found for plaintiffs); *Finch*, 946 N.E.2d at 1269 (where LPR plaintiffs challenged this exclusion from Commonwealth health insurance program under the state's equal protection clause, the court applied strict scrutiny and found for plaintiffs).

228. *See, e.g., Ehrlich*, 908 A.2d at 1244; *Finch*, 946 N.E.2d at 1269.

229. *See, e.g., Peter L. Reich, Public Benefits for Undocumented Aliens: State Law into the Breach One More*, 21 N.M.L. Rev. 219, 227 n.53 (1991) (noting only “at least one” decision in which a court extended protection to undocumented residents' access to a public service, namely education, under the state equal protection clause).

230. *See, e.g., State, Dep't of Revenue, Permanent Fund Dividend Div. v. Cosio*, 858 P.2d 621, 629 (Alaska 1993) (upholding law precluding undocumented plaintiffs from receiving dividend funds after applying rational basis review under state constitution's equal protection clause); *Sanchez v. State*, 692 N.W.2d 812, 819 (Iowa 2005) (upholding state law precluding undocumented residents from receiving drivers' licenses after applying minimal scrutiny under state constitution's equal protection clause); *Doe v. Wilson*, 67 Cal.Rptr.2d 187, 192, 198–9 (Cal. Ct. App. 1997) (finding that an undocumented California resident was ineligible for state prenatal care benefits regardless of state constitutional claims which the court did not address).

231. *Darces v. Woods*, 679 P.2d 458, 472, 474 (Cal. 1984) (finding that, where there were six children in the home, three U.S. citizens and three undocumented, the state's equal protection clause required the family to receive full benefits for all six instead of just three children, but only because dispersing funds for three children across six would prejudice the U.S. Citizen children's right to access public assistance equal to that of other similarly situated U.S. Citizen children).

232. *Blanco v. McMahon*, 243 Cal.Rptr. 736, 740 (Cal. Ct. App. 1988) (distinguishing *Darces* as a case where the effect of upholding the denial of public benefits prejudiced the rights of the U.S. citizen children, whereas here the U.S. citizen children were not at risk of receiving less public assistance if the denial was upheld; thus here, the denial of benefits to the family was

equal protection clause the right to equal access of public benefits for undocumented residents of that state.²³³

Before addressing *Aliessa's* discussion of the New York State equal protection clause, it is important to distinguish between the federal Equal Protection Clause and the state's equal protection clause because each commands a completely different body of law. Under federal law, documented noncitizens receive strict scrutiny review when being discriminated against by a State,²³⁴ and rational basis review when being discriminated against by the federal government in matters of immigration enforcement.²³⁵ Undocumented noncitizens, however, receive rational basis review under federal law always, even when it is the state that is discriminating.²³⁶ In *Lewis v. Thompson*, the Second Circuit examined the constitutionality of denying Medicaid benefits to undocumented residents under federal law.²³⁷ The *Lewis* court applied rational basis review to determine whether the federal government could exclude undocumented persons from this benefit and held that the law was constitutional.²³⁸ The Second Circuit found three "rationales" for the denial of healthcare to undocumented residents, including "deterrence of illegal immigration, self-sufficiency, and cost savings," and said that reason "alone suffices for rational basis review."²³⁹

Confusing matters, however, is that the body of law around the state's equal protection clause, while separate and different, sometimes draws upon its federal counterpart for inspiration. What follows is an exploration of what the New York

permissible because *Darces* ensured equal protection of the U.S. citizen children, not the undocumented children); *Khasminskaya v. Lum*, 54 Cal.Rptr.2d 915, 920 (Cal. Ct. App. 1996) (citing to *Blanco* to support the finding that the state's equal protection clause did not apply to undocumented persons).

233. See *supra* notes 228 and 231. States have, however, extended other privileges to undocumented immigrants under the authority of their state constitution's equal protection clause. See, e.g., *George v. City of Portland*, 235 P. 681 (Or. 1925) (extending a license to sell soft drinks to a noncitizen with unspecified status under the state constitution's equal protection clause); *People v. Cesar*, 14 N.Y.S.3d 100, 106 (N.Y. App. Div. 2015) (finding it impermissible under the state due process and state equal protection clauses for a criminal court to refuse to consider a sentence of probation for undocumented defendants); *In re Hong Yen Chang*, 344 P.3d 288, 292 (Cal. 2015) (finding undocumented but otherwise qualified applicant to the state bar, in being denied admission to the same, was denied "equal protection under the law," but citing to a new state statute instead of the state constitution). Sometimes those privileges have been extended without considering state constitutional arguments at all. See, e.g., *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1259 n.9 (N.Y. 2006) (extending under state labor law lost wages to an undocumented New Yorker plaintiff following an injury on-the-job, but rejecting equal protection arguments against plaintiff).

234. *Graham v. Richardson*, 403 U.S. 365, 375–76 (1971).

235. *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001).

236. Cf. *Plyler v. Doe*, 457 U.S. 202, 228 (1982); *Cubas v. Martinez*, 819 N.Y.S.2d 10, 24 (N.Y. App. Div. 2006).

237. *Lewis*, 252 F.3d at 582.

238. *Id.*

239. *Id.* at 583.

State equal protection clause says about the rights of undocumented persons under its jurisdiction, despite its partial reliance on federal law.

Article I, section 11 of the New York State Constitution is the state's equal protection clause which reads, "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof."²⁴⁰ Much like article XVII, the equal protection clause has been applied to noncitizens very few times.²⁴¹ In fact, most of the cases to have interpreted its application to noncitizens of any status are those same cases already referenced above.²⁴² They are considered again here, but this time to examine their respective state equal protection analyses, beginning with *Aliessa*.

Recall that the twelve plaintiffs in *Aliessa* also argued, in Part B of section III, that they were being denied access to state-funded Medicaid on the basis of their status as (documented) noncitizens in violation of their right to equal protection under Article I.²⁴³ The plaintiffs argued further that the court should apply a strict scrutiny standard of review for noncitizens under the state equal protection clause.²⁴⁴ New York State argued in response that strict scrutiny did not apply here.²⁴⁵ The court's reasoning turned on this debate.²⁴⁶

Applying article I, section 11, the Court of Appeals in *Aliessa* stated "[i]t is axiomatic that aliens are 'persons' entitled to equal protection."²⁴⁷ Then, the court looked to federal law to inform its decision of what level of scrutiny ought to apply to documented non-citizens.²⁴⁸ The court first looked to federal precedent set in *Hampton v. Mow Sun Wong*, which distinguished between the federal government and federal agencies, and held that while Congress and the President could discriminate on the basis of nationality as a valid exercise of their immigration authority, federal agencies could not do so in matters that did not deal directly with immigration, such as public benefits.²⁴⁹ "Surely," the Court of Appeals reasoned, "this is also true of the States," i.e., the state equal protection clause.²⁵⁰ The court also considered the U.S. Supreme Court decision

240. N.Y. CONST. art. I, § 11.

241. An exhaustive search of New York State case law in which the state equal protection clause was applied to the rights of noncitizen parties produced few examples, including the following: *Aliessa v. Novello*, 754 N.E.2d 1085, 1094 (N.Y. 2001); *Khrapunskiy v. Doar*, 909 N.E.2d 70, 72–74 (N.Y. 2009); *Teytelman v. Wing*, 773 N.Y.S.2d 801, 803–04 (N.Y. Sup. Ct. 2008); *Alvarino v. Wing*, 690 N.Y.S.2d 262 (N.Y. App. Div. 1999); and *People v. Quiroga-Puma*, 848 N.Y.S.2d 853 (N.Y. Just. Ct. Nassau Cnty. 2007).

242. See, e.g., *Aliessa*, 754 N.E.2d at 1094; *Khrapunskiy*, 909 N.E.2d at 72–74; *Teytelman*, 773 N.Y.S.2d at 803–04; *Alvarino*, 690 N.Y.S.2d 262.

243. *Aliessa*, 754 N.E.2d at 1094.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 1094–95.

249. *Id.* at 1097–98 (citing *Hampton v. Mow Sun Wong*, 426 U.S. 88, 105 (1976)).

250. *Id.* at 1098.

in *Graham v. Richardson*,²⁵¹ which applied strict scrutiny to state discrimination of persons based on their (documented) immigration status because it described those noncitizens as a “discrete and insular” minority.²⁵² Following *Graham*, the Court of Appeals in *Aliessa* adopted strict scrutiny review.²⁵³ Accordingly, the court held that the state law in question violated the equal protection clause of the New York State Constitution because it could not demonstrate a compelling state interest to discriminate against aliens in matters related to public benefits.²⁵⁴

However, what is notable about the *Aliessa* court’s finding that strict scrutiny should apply to discrimination of documented noncitizens is that it does not merely parrot federal law when classifying noncitizens as a discrete and insular minority; it also adds some of its own reasoning to arrive at this conclusion. After citing to *Graham*’s classification of documented noncitizens as a discrete and insular minority, the court says, “Lawful resident aliens benefit our country in a great many ways. Like citizens, they contribute to our economy, serve in the Armed Forces and pay taxes . . . including, of course, taxes that fund State Medicaid . . . yet are inhibited from protecting their own interests by their inability to vote”²⁵⁵ This reasoning helps the court arrive at its classification of noncitizens as a discrete and insular minority, but notably it is reasoning that does not feature completely in *Graham* and is instead reasoning unique to the Court of Appeals.

Aliessa’s classification of noncitizens as a discrete and insular minority is an original and unique interpretation of the state’s equal protection law. *Graham* does mention that documented residents contribute to tax revenue, the economy, and serve in the armed forces,²⁵⁶ but the majority in *Graham* never considers noncitizens’ inability to vote to protect their interests.²⁵⁷ The majority in *Mow Sun Wong* does discuss a noncitizen’s inability to vote, but in order to justify some intermediate scrutiny standard of review, not strict scrutiny.²⁵⁸ Neither case notes, as *Aliessa* does, that the taxes plaintiffs pay fund the very benefit at issue.²⁵⁹ In none of the federal cases cited to in this part of the *Aliessa* opinion do any federal court’s link together the (1) contribution of noncitizens to the benefit at issue with (2) their inability to participate in elections in order to (3) define them as a discrete and insular minority (4) that merits strict scrutiny

251. *Id.* at 1095.

252. *Id.*

253. *Id.* at 1098.

254. *Id.* at 1098–99.

255. *Id.* at 1095.

256. *Graham v. Richardson*, 403 U.S. 365, 376 (1971).

257. *Id.* at 371–76.

258. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976).

259. *Graham*, 403 U.S. at 376; *Mow Sun Wong*, 426 U.S. at 107 n.30.

protection,²⁶⁰ as the *Aliessa* opinion does. In other words, the combination of these four rationales in this sequence is arguably New York State-specific equal protection jurisprudence; it is original New York law.

B. Aliessa's Reasoning Paves the Way for Future Courts to Apply a Strict Scrutiny Standard of Review to Undocumented New Yorkers' Denial of Public Benefits Under the State Equal Protection Clause

As original New York law, *Aliessa's* rationale provides the greatest guidance on how to interpret the state equal protection clause as it would apply to undocumented noncitizens and to understanding how it differs from the federal Equal Protection Clause in this regard. Under federal law in the Second Circuit, despite the holding in *Graham*, undocumented residents are protected from a state's discrimination only by rational basis review, which is to say they are not protected at all.²⁶¹ It is possible, however, that *Aliessa's* holding reveals an interpretation of the state equal protection clause that differs from its federal counterpart—one that is more protective of undocumented residents. While the *Aliessa* opinion does not apply its reasoning to undocumented residents, the opinion itself gives authority to any New York court that may wish to do so; putting New York in a unique position among states to expand equal protection to undocumented residents.

The perspective that *Aliessa* limits its decision to documented New Yorkers is certainly not without justification. Unlike the court's discussion of the article XVII issue, the *Aliessa* opinion is explicitly limited under the equal protection issue to "lawful resident aliens."²⁶² This might mean that the Court of Appeals did not intend its reasoning to be applied by other courts to undocumented New Yorkers, or it may mean only that it did not intend in *Aliessa* to comment on any class beyond that which was at issue.

The evidence points to the latter of these possibilities. *Aliessa* contains within it authority for reading the equal protection clause as protecting undocumented New Yorkers and demanding a strict scrutiny standard of review when their right to equal protection is prejudiced: first, because the opinion includes nothing within it explicitly precluding another court from making such a finding; and second, because the court's reasoning, which finds strict scrutiny

260. In this part of the *Aliessa* opinion, the court also cites to *In re Griffiths*, 413 U.S. 717, 722 (1973) (discussing authorized noncitizens as persons who contribute to the economy, tax base, and armed forces, but not noting their inability to vote as a reason to classify them as a discrete and insular minority), and *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977) (considering that authorized noncitizens pay their taxes and cannot vote or run for office, but not for the purpose of demonstrating their status as a discrete and insular minority).

261. *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) ("[I]llegal aliens are not a suspect class."); Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 2 N.Y.U. J.L. & LIBERTY 897, 898 (2005) ("The Supreme Court has practically had to invent a new vocabulary to make clear just how utterly insubstantial the rational basis test is as a standard of judicial review.")

262. *Aliessa v. Novello*, 754 N.E.2d 1085, 1095 (N.Y. 2001).

review appropriate, is as applicable to undocumented persons as it is to documented residents.

While the Court of Appeals states that the equal protection holding of *Aliessa* is limited in scope to documented noncitizens, it never says that the equal protection clause itself does not also protect undocumented New Yorkers. Nor does it give reasons for why its opinion might not be used for that purpose. As such, *Aliessa* can be drawn upon by future plaintiffs to support greater protection of undocumented New Yorkers under the equal protection clause.

The reasons the court gives for classifying documented immigrants as a discrete and insular minority are also applicable to undocumented immigrants. Like other noncitizens, undocumented residents contribute economically to the state²⁶³ and pay their taxes—the same taxes that fund state Medicaid. In 2010, undocumented residents of New York State paid an estimated \$662.4 million in taxes.²⁶⁴ They also participate in the armed forces,²⁶⁵ albeit in rare circumstances given the law prohibiting their enlistment.²⁶⁶ Still, like other noncitizens, they cannot vote to protect their interests,²⁶⁷ making them as much of a discrete and insular minority as documented noncitizens, if not more so. Therefore, a reasoned argument can be made that the New York state equal protection clause should apply to undocumented residents and trigger the same level of scrutiny as that applied to documented residents.

Although *Khrapunskiy v. Doar* is regarded as a significant chapter in the short history of the state's equal protection clause as applied to noncitizens, it is worth mentioning here to explain why it is not a source of negative precedent for extending equal protection to undocumented New Yorkers. In *Khrapunskiy*, the issue before the court was the state-funded ASP benefit that New York provided to supplement the federal SSI benefit.²⁶⁸ The state did and does, however, make SNA available to all documented residents, including those ineligible for SSI under federal law.²⁶⁹ Unlike the plaintiffs in *Aliessa* and *Teytelman*, the noncitizens in *Khrapunskiy* were not asking for the state to provide the same

263. See *infra* Part VII(A).

264. IMMIGRATION POLICY CTR., AM. IMMIGRATION COUNCIL, UNAUTHORIZED IMMIGRANTS PAY TAXES, TOO: ESTIMATES OF THE STATE AND LOCAL TAXES PAID BY UNAUTHORIZED IMMIGRANT HOUSEHOLDS (Apr. 18, 2011), http://www.immigrationpolicy.org/sites/default/files/docs/Tax_Contributions_by_Unauthorized_Immigrants_041811.pdf.

265. See, e.g., 8 U.S.C. § 1440(a) (2012); 8 U.S.C. § 1440e (2012) (permitting veterans of WWII, the Korean War, and the Vietnam War to naturalize regardless of their immigration status); see also Anna Gorman, *Iraqi War Veteran May Be Denied Citizenship*, L.A. TIMES (Apr. 26, 2010), <http://articles.latimes.com/2010/apr/26/local/la-me-immig-army-20100426>; Mirela Iverac, *Few Undocumented Immigrants Qualify for Military Exception Under New Rules*, WNYC NEWS (N.Y.C. PUBLIC RADIO) (July 2, 2012), <http://www.wnyc.org/articles/wnyc-news/2012/jul/02/few-undocumented-immigrants-qualify-military-exception-under-new-rules>.

266. 10 U.S.C. § 504(b) (2012) (mentioning only those who “may” enlist and by implication precluding from enlistment those not mentioned).

267. See, e.g., 8 U.S.C. § 1227(a)(6)(A) (2012); 18 U.S.C. § 611 (2012).

268. *Khrapunskiy v. Doar*, 909 N.E.2d 70, 72–74 (N.Y. 2009).

269. *Id.* at 73.

state-funded ASP to them equally, but rather that SNA (which provided \$352 per month) be provided in an equal amount to SSI/ASP (which provided \$761 per month).²⁷⁰

The majority found that the equal protection clause did not require the state “to create a new public assistance program in order to guarantee equal outcomes under wholly separate and distinct [federal] public benefit programs.”²⁷¹ As discussed earlier, the financial assistance at issue in *Khrapunskiy* presented a unique arrangement not mirrored in other state-funded public benefit programs, such as Medicaid and SNA, which are provided as a straight benefit as opposed to a supplement that fills in the gap left by a paltry federal benefit. Thus, by addressing the limitations of a specific kind of supplemental benefit, *Khrapunskiy*’s holding turns on the type of benefit and not the class of plaintiffs. For this reason, *Khrapunskiy* both lends little insight into the applicability of equal protection to undocumented residents and does not conflict with the extension of equal protection to undocumented residents.²⁷²

Alvarino and *Teytelman*, discussed above, also applied the state’s equal protection clause to noncitizens. Recall that both cases considered the right of noncitizens to access a New York state food stamp-like benefit called FAP for certain documented immigrants who were denied SNAP benefits.²⁷³ While the First Department in *Alvarino* applied rational basis to the LPR plaintiff’s equal protection claim,²⁷⁴ *Alvarino* is no longer good law because *Aliessa*’s application of strict scrutiny review two years later abrogated this decision,²⁷⁵ as the First Department has noted.²⁷⁶ In *Teytelman v. Wing*, the Supreme Court of New York County relied upon and reaffirmed the holding in *Aliessa* and found for the plaintiffs.²⁷⁷

Like *Aliessa*, nowhere in the majority or dissenting opinions of either *Teytelman* or *Khrapunskiy* does the court make any statement that the rules articulated therein are to the exclusion of undocumented residents. Therefore, there does not appear to be any express authority that prohibits the application of

270. *Id.* at 75.

271. *Id.* at 77.

272. *But see id.* at 78 (Ciparick, J., dissenting) (stating that “[n]owhere in [the legislative history of ASP] was any restriction based upon alienage,” for the aged and disabled); *id.* at 81 (Ciparick, J., dissenting) (contending that disparity by definition offends equal protection and that the majority’s decision “turned its back on the history of New York’s commitment to protect its most fragile and vulnerable populations”).

273. *Teytelman v. Wing*, 773 N.Y.S.2d 801, 803–04 (N.Y. Sup. Ct. 2008).

274. *Alvarino v. Wing*, 690 N.Y.S.2d 262 (N.Y. App. Div. 1999).

275. *Aliessa v. Novello*, 754 N.E.2d 1085, 1088 (N.Y. 2001).

276. *Teytelman*, 773 N.Y.S.2d at 807 (“[I]n reversing the First Department’s application of the rational basis test in *Aliessa*, the Court of Appeals clearly rejected the same reasoning which led the First Department to apply the rational basis test in *Alvarino*.”).

277. *Id.* at 806 (“As already noted, in [*Aliessa*], the court ruled that the strict scrutiny test should be applied to an equal protection challenge to a state statute which differentiated between aliens on the basis of the length of their residency in this country . . .”).

the state's equal protection clause to undocumented persons with respect to public benefits. Instead, there *is* authority in *Aliessa*'s reasoning that future New York courts could rely upon to find and enforce such a right.

Finally, the opinion of a justice court²⁷⁸ in Nassau County,²⁷⁹ while reversed on other grounds,²⁸⁰ is worth noting because it appears to be the only New York court to have explicitly protected undocumented New Yorkers under the state equal protection clause. Before the court in *People v. Quiroga-Puma* was a defendant who had been charged with driving without a license.²⁸¹ In a verbose and dramatic opinion, Judge Thomas F. Liotti, who “presum[ed]” the defendant was undocumented,²⁸² held that the vehicle and traffic law under which the defendant was charged unconstitutionally discriminated against undocumented residents.²⁸³ Applying strict scrutiny to the law because undocumented people cannot vote and are “perennial losers in the political struggle due to widespread, insistent prejudice against them,”²⁸⁴ Judge Liotti struck down the vehicle and traffic law under, among other things, the state equal protection clause.²⁸⁵ As a vacated justice court opinion, it carries little to no precedential weight, but this case is nonetheless worth noting for its unique contribution to the subject.

One First Department decision *may* contain negative precedent for extending a strict scrutiny-protected right under the state equal protection clause to undocumented New Yorkers. In *Cubas v. Martinez* the plaintiffs were nine noncitizens, five of whom were undocumented and all of whom were without social security numbers, who sued the Department of Motor Vehicles (“DMV”).²⁸⁶ In New York State, the DMV requires that a social security number be submitted in order to receive a driver's license.²⁸⁷ Plaintiffs argued that denying them driver's licenses because they lacked social security numbers violated their right to equal protection by the law under the state and federal equal protection clauses.²⁸⁸ The court denied their claim and, citing exclusively

278. The justice courts are the city or village courts of New York State and the lowest level of courts in the state's unified court system. See William Claberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. TIMES (Sept. 25, 2006), http://www.nytimes.com/2006/09/25/nyregion/25courts.html?pagewanted=all&_r=0.

279. *People v. Quiroga-Puma*, 848 N.Y.S.2d 853 (N.Y. Just. Ct. Nassau Cnty. 2007).

280. *People v. Quiroga-Puma*, 884 N.Y.S.2d 567, 569 (N.Y. App. Term 2009) (reversing the opinion of the lower court because, among other things, the judge of that court impermissibly raised constitutional defenses without the parties having raised them and the record did not reflect the facts alleged by the judge).

281. *Quiroga-Puma*, 848 N.Y.S.2d at 854.

282. *Id.*

283. *Id.* at 859–60, 862.

284. *Id.* at 862.

285. *Id.* at 865–66.

286. *Cubas v. Martinez*, 819 N.Y.S.2d 10, 15 (N.Y. App. Div. 2006).

287. *Id.* at 14–15.

288. *Id.* at 15–16.

to federal law, found that undocumented residents did not constitute a “suspect class” and therefore receive only rational basis review under, ostensibly, the equal protection clause of the state constitution.²⁸⁹ The majority found the DMV’s rationale for the restriction rationally related to the government interest in conserving resources.²⁹⁰

The *Cubas* holding, however, has significant limitations. First, while the opinion mentions that the plaintiffs argued for their rights under both the state and federal equal protection clauses, this is the last time the opinion makes any reference to the state constitution.²⁹¹ When it arrives at its choice of rational basis review, the court never explicitly says whether it is interpreting the federal or the state equal protection clause.²⁹² This opaque reasoning leaves any affirmative interpretation of the state equal protection clause uncertain, since it is possible the court was interpreting the federal constitution only and failed to consider the state constitutional claim. The sole reliance upon federal jurisprudence implies as much. Second, even if the opinion *is* an interpretation of the state equal protection clause in the First Department, it leaves the Second, Third, and Fourth Departments open to interpret the state equal protection clause differently and to build upon the *Aliessa* decision to do so.

More importantly, however, the Court of Appeals arguably abrogated the First Department’s equal protection finding in *Cubas* as it applies to undocumented New Yorkers because the majority of the Court of Appeals found that the equal protection rights of undocumented residents were not at issue.²⁹³ The majority stated that “[plaintiffs] frame the issue in terms of discrimination against aliens, or against undocumented aliens—but, as what we have already said makes clear, this case does not present any such issue.”²⁹⁴ The Court of Appeals subsequently declined to review this issue, and affirmed the rest of the First Department’s holding on other grounds. Arguably then, the First Department’s decision on this issue is abrogated since the Court of Appeals found that the equal protection issue was actually not before the court at all.

VI.

FEDERAL LAW ALLOWS NEW YORK TO PROVIDE PUBLIC BENEFITS TO UNDOCUMENTED NEW YORKERS

Generally, undocumented residents do not qualify for any non-emergency federal public benefits under federal law.²⁹⁵ Under federal law, however, states may provide benefits to undocumented residents if they so choose.²⁹⁶

289. *Id.* at 24.

290. *Id.* at 23.

291. *Id.* at 15–16.

292. *Id.* at 24.

293. *Cubas v. Martinez*, 870 N.E.2d 133, 137 (N.Y. 2007).

294. *Id.*

295. 8 U.S.C. §§ 1611(a), 1621(a) (2012).

The Personal Responsibility and Work Opportunity Act (“PRWORA”) was a major welfare reform bill passed by Congress and signed into law by President Clinton in 1996.²⁹⁷ The law is most infamous for having “end[ed] welfare as we know it,” by effectively making it more difficult to access and keep federal public assistance benefits.²⁹⁸ PRWORA also gave more control to the states to enact their own barriers to public benefits if they chose to do so, so long as the requirements were consistent with the goals of PRWORA.²⁹⁹ A similar deference to state power was enacted in Title IV of the law, which despite restricting noncitizen eligibility for most federal public benefits, gave states the choice to provide their own benefits to noncitizens.³⁰⁰ Title IV, Section 1621(d) of PRWORA states that undocumented residents are ineligible for state or local-funded public benefits, *unless* a state enacts, “after August 22, 1996, a new law that affirmatively provides for such eligibility.”³⁰¹

The argument has been made that states do not have the power to provide public benefits to undocumented residents because certain state initiatives to limit benefits have been struck down as preempted by PRWORA.³⁰² This argument simply fails to consider the 1621(d) exception. Take for example the California district court decision in *League of United Latin Am. Citizens v. Wilson*, which considered proposition 187, a law that, among other things, prevented all noncitizens from receiving public benefits from the state of California.³⁰³ Proposition 187 was struck down by the district court because, under PRWORA, Congress occupied the field of law that dealt with public benefits for noncitizens,³⁰⁴ and because it failed to fit within the Title IV, 1621(d) exception—proposition 187 having been enacted *before* August 22, 1996.³⁰⁵ Or as the court concluded, “[a state] can do what [1621(d)] permits, and nothing more.”³⁰⁶ It is settled law that any state provision providing benefits to

296. 8 U.S.C. § 1621(d) (2012).

297. Katherine Anne Paddock Betcher, *Revisiting the Personal Responsibility and Work Opportunity Reconciliation Act and Calling for Equality: Problematic Moral Regulations and the Changing Legal Status of LGBT Families in a New Obama Administration*, 31 WOMEN’S RTS. L. REP. 104, 104–05 (2009).

298. *Id.* By changing Aid to Families with Dependent Children (“AFDC”), into the TANF program, PRWORA subjected qualifying families to greater qualification requirements, limited the availability of benefits to a maximum of five years, and required recipients to participate in work activities after receiving benefits for two years.

299. *Id.* at 105.

300. Aldana, *supra* note 130, at 272–73.

301. 8 U.S.C. § 1621(d) (2012).

302. Julianne Zuber, *Healthcare for the Undocumented: Solving a Public Health Crisis in the U.S.*, 28 J. CONTEMP. HEALTH L. & POL’Y 350, 376–77 (2012).

303. *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997).

304. *Id.*

305. *Id.* at 1249–50.

306. *Id.* at 1261.

undocumented residents pursuant to the conditions of 1621(d) is not preempted by federal law.³⁰⁷

Alternatively, there is an argument that 1621(d) is constitutionally unsound under federal constitutional law, allowing state laws that do not comply with its conditions to dodge preemption.³⁰⁸

A. Articles XVII and I of the New York State Constitution Are Not Preempted by Federal Law Because 1621(d) May Be Federally Unconstitutional

PRWORA's section 1621(d) may not be able to preempt a state law that fails to meet its conditions because the statute may be unconstitutional under the federal U.S. Constitution.

The Court of Appeals in *Aliessa* may have been the first to question the constitutionality of 1621(d). In *Aliessa*, while some of the twelve plaintiffs were LPRs, others were PRUCOLs.³⁰⁹ Under 1621(d), a state may provide public benefits to PRUCOLs if they enact laws that affirmatively do so after August 22, 1996.³¹⁰ The court in *Aliessa* noted PRWORA and its affirmative law exception and explained that New York State's Social Services Law 122, with PRWORA's permission, excluded some LPRs and PRUCOLs from state-funded Medicaid.³¹¹ As already discussed, the Court of Appeals in *Aliessa* went on to hold that articles XVII and I of the state constitution required the state to provide access to state-funded Medicaid to the needy plaintiffs, who were LPRs and PRUCOLs.³¹² The Court of Appeals, however, did not reach the question of whether or not the state constitutional provisions entitling PRUCOLs to state-funded benefits satisfied the requirements in 1621(d), i.e. whether articles XVII and I were affirmatively enacted after August 22, 1996. Instead, the Court of Appeals challenged the constitutional validity of 1621(d).³¹³

Aliessa appears to have regarded 1621(d) as unconstitutional under the federal Fourteenth Amendment's Equal Protection Clause.³¹⁴ Relying on the

307. See, e.g., *Day v. Sebelius*, 376 F. Supp. 2d 1022, 1033 (2005) (upholding a Kansas law that permitted undocumented residents of Kansas to attend University in that state because it was enacted after 1996); *Martinez v. Regents of the Uni. of Cal.*, 50 Cal.4th 1277, 1297 (Cal. 2010) (rejecting the U.S. citizens' argument that the state statute was preempted by 1621, because "Congress did not merely imply that matters beyond the preemptive reach of the statutes are not preempted; it said so explicitly. Section 1621(d) says that a state "may" provide public benefits for unlawful aliens").

308. *Aliessa v. Novello*, 754 N.E.2d 1085, 1097 (N.Y. 2001).

309. *Id.* at 1088 & n.2.

310. *Id.* at 1091. The *Aliessa* court in fact mentions the post-August 22, 1996 requirement of 1621(d) with respect to providing benefits to PRUCOLs quite explicitly, but then never revisits or acknowledges the fact that article XVII was enacted long before this date.

311. *Id.* at 1091-92.

312. *Id.* at 1098.

313. *Id.* at 1096-97.

314. *Id.* at 1096 ("Plaintiffs contend . . . the issue is not whether the State has followed the authorization. Rather, it is whether title IV can constitutionally authorize New York to determine

U.S. Supreme Court’s reading of the Equal Protection Clause in *Graham v. Richardson*, the Court of Appeals noted that Congress does not have the power to permit states to violate the equal protection clause,³¹⁵ and that it is a violation of that clause for Congress to enact non-uniform rules.³¹⁶ Quoting *Graham*, the Court of Appeals noted that 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.”³¹⁷ The Court found that 1621(d) does not prescribe a uniform rule for states to follow, but in fact does quite the opposite by explicitly permitting each state to treat noncitizens differently, such that the law produces “not uniformity, but potentially wide variation based on localized or idiosyncratic concepts of largesse, economics and politics.”³¹⁸ As such, the Court of Appeals found 1621(d) did not “reflect a uniform national policy,”³¹⁹ and, while never explicitly calling 1621(d) unconstitutional under the federal equal protection clause, implied as much.³²⁰ *Aliessa* concludes by holding that articles XVII and I extend Medicaid to PRUCOLs without ever addressing whether or not they satisfy 1621(d)’s conditions.³²¹

Aliessa is not the only New York State court opinion to have questioned the federal constitutionality of 1621(d) and to have then disregarded the conditions it imposes. In June 2015, in *In re Vargas*, the Second Department Appellate Division of the New York Supreme Court found that the state judiciary had the power³²² to grant an undocumented noncitizen resident a license to practice law in the state.³²³ The court reasoned that, regardless of the opt-out provisions in 1621(d), 1621 could not restrain this power.³²⁴ The Tenth Amendment, which reserves certain rights to the states,³²⁵ prohibits the commandeering of state governments by the federal government.³²⁶ The Second Department held 1621 was unconstitutionally commandeering the state legislature because it prescribed

for itself the extent to which it will discriminate against legal aliens for State Medicaid eligibility. Plaintiffs argue that it cannot, and we agree.”).

315. *Id.* at 1097.

316. *Id.*

317. *Id.* (citing *Graham v. Richardson*, 403 U.S. 365, 382 (1971)).

318. *Id.* at 1097–98.

319. *Id.*

320. *Id.* (“Thus, we address this case outside the context of a Congressional command for nationwide uniformity in the scope of Medicaid coverage for indigent aliens as a matter of federal immigration policy.”); *see also* DeCicco, *supra* note 124, at 533 (“Although he stopped short of declaring Title IV of PRWORA unconstitutional, Judge Rosenblatt made clear that under *Graham* and the United States Constitution, Title IV was flawed because it did not reflect a uniform federal policy on immigration matters and actually encouraged non-uniform laws.”).

321. *Aliessa*, 754 N.E.2d at 1098–99.

322. N.Y. JUD. LAW §§ 53, 90 (McKinney 2015).

323. *In re Vargas*, 10 N.Y.S.3d 579, 597 (N.Y. App. Div. 2015).

324. *Id.* at 596.

325. U.S. CONST. amend. X.

326. *In re Vargas*, 10 N.Y.S.3d at 595.

the mechanism by which a state may opt out of the restrictions in 1621.³²⁷ The Second Department concluded that “where, as here, New York, by its own legislative enactment, has determined that the state Judiciary is the sovereign authority vested with the responsibility for formulating the eligibility qualifications . . . governing the admission of attorneys . . . that limitation cannot withstand scrutiny under the Tenth Amendment.”³²⁸ Like *Aliessa*, *In re Vargas* does not then go on to address the conditions in 1621(d),³²⁹ presumably because it challenged the validity of the statute itself. *In re Vargas* has not yet been appealed, and appears to remain the only case to question 1621’s constitutionality under the Tenth Amendment.

Together, *Aliessa* and *In re Vargas* raise two distinct federal constitutional questions about 1621(d). *Aliessa*’s treatment of the statute, in particular, implies that PRWORA could not preempt articles XVII and I as they apply to undocumented New Yorkers, regardless of whether or not they comply with the conditions in 1621(d), because in that case the Court of Appeals did not regard those articles as preempted by PRWORA.

B. Absent a Finding That 1621(d) Is Federally Unconstitutional, Articles XVII and I of the New York State Constitution Are Not Preempted by 1621(d) in Any Case

Title IV, Section 1621(d) of PRWORA states that undocumented residents are ineligible for state or local-funded public benefits, *unless* a state enacts, “a State law after August 22, 1996, which affirmatively provides for such eligibility.”³³⁰ Even if Section 1621(d) were not found federally unconstitutional, as it was in *Aliessa* and *In re Vargas*, it is unlikely, in any case, that these conditions in 1621(d) would preempt articles XVII and I of the state constitution.

1. The New York State Constitution Affirmatively Extends Benefits to Undocumented Residents

Section 1621(d) of Title IV of PRWORA states that in order for the state law granting public benefits to undocumented persons/PRUCOLs to be permissible under the federal statute, it must “affirmatively provide[] for such eligibility.”³³¹ This raises the questions of whether or not articles XVII and I of

327. *Id.* at 597 (“[B]ecause the opt-out provision of 8 U.S.C. § 1621(d) . . . is constitutionally infirm, we reject its authority to mandate the governmental mechanism by which the state may exercise its discretion to opt out of the restrictions imposed by section 1621(a.)”); *id.* at 595 (“Congress may not directly or indirectly compel a state to enact a specific policy, nor may Congress ‘simply commandeer[] the legislative processes of the States.’”).

328. *Id.* at 595.

329. *Id.* at 597–98.

330. 8 U.S.C. § 1621(d) (2012).

331. *Id.*

the state constitution “affirmatively” provide for the eligibility of undocumented state residents. Courts vary significantly on how they interpret this “affirmative” clause of 1621(d).

Some state courts advocate a strict interpretation of the “affirmative” provision. In *Martinez v. Regents of the University of California*, the California Supreme Court reviewed a challenge to a California statute that allowed undocumented residents to pay in-state tuition at public universities.³³² The lower state appellate court had found for the U.S. citizen plaintiffs on the basis that, among other things, the California statute in question failed to specify that it applied to undocumented residents.³³³ The Supreme Court of California disagreed, finding “section 1621 requires no specific words” and adding “[i]f Congress had intended to require more, we believe it would have said so clearly and would not have set a trap for unwary legislatures.”³³⁴ However, the court also said “[w]e agree . . . that ‘in order to comply [with 1621] the state statute must expressly state that it applies to undocumented aliens, rather than conferring a benefit generally without specifying that its beneficiaries may include undocumented aliens.’”³³⁵ So California state courts require a law to somehow specify the immigration status of those to benefit from the law. As such, a law that said only that it applied to all people may not satisfy 1621(d)’s affirmative law provision in that state.

Other courts have cautioned against reading into Title IV’s affirmative law requirement and advocate a much less literal interpretation. In *Kaider v. Hamos*, more U.S. citizens challenged an Illinois statute enacted in 2008 that provided healthcare benefits to pregnant women and children who were undocumented.³³⁶ The U.S. citizens in this case were again arguing that the Illinois statute failed to “affirmatively provide” for undocumented persons, pursuant to 1621(d).³³⁷ They argued further that the legislative purpose of the statute was to put the public on notice that benefits were being provided to undocumented persons.³³⁸ The Illinois appellate court disagreed on both accounts, finding “no basis to conclude that Congress intended to impose a public notice requirement,”³³⁹ and adding:

Where Congress did not require reference to section 1621(d) or “express” or “specific” reference to “illegal aliens,” the better understanding of the requirement that the state law “affirmatively provides” for eligibility of undocumented aliens

332. *Martinez v. Regents of the Uni. of Cal.*, 241 P.3d 855, 859 (Cal. 2010).

333. *Id.* at 1296.

334. *Id.*

335. *Id.*

336. *Kaider v. Hamos*, 975 N.E.2d 667, 669 (Ill. App. Ct. 2012).

337. *Id.* at 671.

338. *Id.* at 672.

339. *Id.* at 673.

is that Congress wanted to prevent the passive or inadvertent override of section 1621(a).³⁴⁰

Kaider concluded that 1621(d) is satisfied merely where the law at issue “conveys a positive expression of legislative intent,”³⁴¹ and need not expressly opt out of the statute.³⁴²

While article XVII and the state’s equal protection clause provide no specific or express language that they apply to undocumented persons, there is nothing inadvertent about their language. The former is purposefully designed to protect all needy residents of New York, regardless of immigration status. It is for this reason that *Tucker v. Toia*, discussing the legislative history of article XVII, identifies its “clear intent” to aid the needy.³⁴³ Likewise the equal protection clause unambiguously applies to all persons equally since, as *Aliessa* reminds us, it is axiomatic that noncitizens are “persons” under the law.³⁴⁴ For these reasons, under *Kaider*’s reasoning the state constitution “affirmatively” provides for such eligibility. New York courts are free to follow *Kaider* in this regard and decline to follow the reasoning in *Martinez*. Given the skepticism with which New York Courts have regarded 1621(d) historically, a *Kaider* interpretation, versus a *Martinez* interpretation, seems more likely.

2. *The Right to Public Benefits Flowing from the New York State Constitution Need Not Comply with 1621(d)’s Enactment Provision*

Section 1621(d) also states that in order for a state’s law granting public benefit rights to undocumented persons to be effective and not preempted by federal law, it must be enacted after August 22, 1996.³⁴⁵ Articles XVII and I of the New York State Constitution were enacted in 1938, long before August 22, 1996,³⁴⁶ so assuming 1621(d) is not unconstitutional itself, the question of whether or not these provisions could satisfy this enactment requirement of 1621(d) is a pertinent one.

PRWORA’s 1621(d) has only come substantively before state courts, and then only infrequently,³⁴⁷ leaving us without a federal court’s interpretation of

340. *Id.* (adding that Congress could have required a “specific” or “express” reference to “illegal aliens,” “undocumented aliens,” or a similar term, but did not).

341. *Id.* at 674 (adding, “[w]here Congress has shown that it knows how to require states to expressly reference a federal statute, and it could have easily proscribed the exact wording of the state law, we conclude that Congress did not intend to impose those conditions by using the less restrictive language of section 1621(d)”).

342. *Id.* at 677.

343. *Tucker v. Toia*, 371 N.E.2d 449, 452 (N.Y. 1977).

344. *Aliessa v. Novello*, 754 N.E.2d 1085, 1094 (N.Y. 2001).

345. 8 U.S.C. § 1621(d) (2012).

346. N.Y. CONST. art. XVII, § XX (adopted Nov. 8, 1938); N.Y. CONST. art. I, § 11 (adopted: Nov. 8, 1938, amended: Nov. 6, 2001).

347. *See, e.g., Aliessa*, 754 N.E.2d at 1090; *Day v. Sebelius*, 376 F. Supp. 2d 1022, 1033 (D. Kan. 2005); *Martinez v. Regents of the Uni. of Cal.*, 241 P.3d 855, 866–67 (Cal. 2010); *Dep’t of Health v. Rodriguez ex rel. Melendez*, 5 So. 3d 22, 25 (Fla. Dist. Ct. App. 2009).

the provision.³⁴⁸ Typically, when state courts look at state statutes that extended benefit rights to undocumented persons or PRUCOLs, the statute's compliance with 1621(d) turns on the date the statute was enacted, as one would expect.³⁴⁹ However, what remains an open question is how this enactment provision would affect a right to public benefits for PRUCOLs or undocumented people when that right flows, not from a statute, but from a state constitutional provision.³⁵⁰

Other than the Court of Appeals in *Aliessa*, the only other court to have potentially confronted this state constitutional question was a lower New Jersey court in *Guaman v. Velez*.³⁵¹ In *Guaman*, LPR plaintiffs challenged a new state statute that denied them access to a state-funded Medicaid program for low-income residents.³⁵² Plaintiffs argued that the denial was a violation of their right to equal protection under the New Jersey state constitution,³⁵³ which was enacted in 1947.³⁵⁴ The court found against plaintiffs under that state's equal protection clause.³⁵⁵ In so finding, however, the court never considered the enactment provision of Title IV's 1621(d).³⁵⁶ The court may have simply ducked the issue, or the absence of any discussion may imply that 1621(d) would not have barred a finding for plaintiffs under PRWORA had the court found their substantive argument convincing. Since *Aliessa* found 1621(d) constitutionally inadequate, how state constitutional rights are affected by 1621(d) when the court does not regard it as unconstitutional remains an unanswered question.

If the court in *Guaman* was implying anything, it may have been that public benefit rights flowing from constitutional provisions need not be enacted after the August 1996 date. On its face, 1621(d) addresses "laws" which must be affirmative and "enacted" after the given date,³⁵⁷ but this may refer to statutes

348. See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1255 (C.D. Cal. 1997). Section 1621(d) itself appears to have only gone before a federal court on one occasion, in *Wilson*, but the court's only comment was that, except for 1621(d), the federal government has field-preempted this area of law.

349. See, e.g., *Rodriguez*, 5 So.3d at 23–24; *Kaider v. Hamos*, 975 N.E.2d 667, 675 (Ill. App. Ct. 2012) (noting the importance of the date the statute was enacted and saying "[t]here is no dispute that the state laws authorizing the Moms & Babies program . . . were enacted after August 22, 1996"); see also *In re Garcia*, 315 P.3d 117, 129 (Cal. 2014) (finding a statute that granted qualifying undocumented residents of California the right to be licensed to practice law to be permissible under 1621(d) because it was enacted after August 22, 1996 and affirmatively grants the right to this group).

350. Cf. *Kaider*, 975 N.E.2d at 675–76; *Rodriguez*, 5 So. 3d at 24–25. In *Kaider*, plaintiffs were challenging an Illinois statute that granted the benefit in question to undocumented persons, while in *Rodriguez* the challenger was arguing that the statute in question was an improper delegation of legislative authority. However, in neither case was either party arguing that the source of the undocumented person's right to the benefit was constitutional in origin.

351. *Guaman v. Velez*, 74 A.3d 931, 956–57 (N.J. Super. Ct. App. Div. 2013).

352. *Id.* at 932–33.

353. *Id.*

354. See N.J. CONST. art. 1, ¶ 1; 36 N.J. PRAC., LAND USE LAW § 1.1 (3d ed. 2014).

355. *Guaman*, 74 A.3d at 956–57.

356. *Id.*

357. 8 U.S.C. § 1621(d) (2012).

only; articles XVII and I are not statutes, but constitutional provisions. PWRORA may simply not apply to state constitutional rights, and this may reflect the deference to state power inherent in 1621. At least one appellate court in Illinois has noted that the legislative intent of 1621(d) was to give states autonomy on matters of public benefits.³⁵⁸ If deference to the states was not the intention, that has nonetheless been the effect of the provision.³⁵⁹ Such a legislative purpose would certainly be cogent with a waiver of the enactment and, for that matter, even the affirmative law provisions, when a right flows from a state's constitution.

Dovetailing with this idea of state deference is the opinion in *In re Vargas*, which implies that, like rights flowing from the state judiciary, rights flowing from the state constitution may be shielded from 1621(d) preemption by the federal Tenth Amendment. If 1621(d) may not commandeer the state legislature by proscribing the mechanism by which the state must opt out of 1621, then it follows that it may not commandeer the state constitution—the highest authority in the land—to do the same. Just as the state legislature is vested with the power to decide who may and may not be licensed to practice law in New York, so the state constitution is vested with the power to dictate the rights and entitlements of state residents. Following *In re Vargas*, there may be an argument that 1621(d) is an act of commandeering of the state constitution by the federal government, and thus a violation of the Tenth Amendment, as it proscribes the mechanism by which the state constitution may opt out of PRWORA. New York State has already chosen the means by which it will opt out of 1621—namely, by constitutional provisions articles I and XVII—and, under *In re Vargas*, the federal government may not command the state to do so by different means.

VII.

SIGNIFICANT POLICY CONSIDERATIONS COMPEL NEW YORK STATE COURTS TO FIND AN EQUAL AND AFFIRMATIVE RIGHT OF “NEEDY” UNDOCUMENTED NEW YORKERS TO PUBLIC BENEFITS

The career of Philip Segal, the Family Court judge that adjudicated *In re Kittridge*, presents an example of the kind of judicial personality that advances the protection and adjudication of the state constitutional rights of undocumented residents to public benefits. In 2001, the Mayor's Committee on the Judiciary rejected Segal for a second term because, in one author's opinion, he had “a reputation for being bolder than most Family Court judges,” and was described as “exceptionally willing to press city officials to provide services to help reunite

358. *Kaider v. Hamos*, 975 N.E.2d 667, 679–80 (Ill. App. Ct. 2012).

359. See Paddock Betcher, *supra* note 297, at 105; Aldana, *supra* note 130, at 272 (“PRWORA . . . devolved to states the authority to enact similar restrictions for state-funded welfare programs and to enforce the provisions of the PRWORA.”).

families.”³⁶⁰ The author mentions *In re Kittridge* specifically as one of the controversial cases that gave Judge Segal his reputation with the city and, by implication, ultimately cost him his job.³⁶¹ Of course there is no way of knowing if it was the status of the respondent in *In re Kittridge* specifically that made it a controversial decision, but suffice it to say that Segal appears to have been generally bolder and more controversial than the average judge in his position.

If Judge Segal’s opinion in *In re Kittridge* did add to his controversial nature, it would have been because of today’s widespread political hostility toward providing undocumented immigrants with government benefits.³⁶² Even in New York, where the political climate can be extremely favorable to undocumented persons,³⁶³ limitations still exist on what is and is not politically popular for lawmakers and public figures to advocate with respect to undocumented New Yorkers.³⁶⁴ Consider, for example, the failure of then-Governor Elliot Spitzer’s driver’s license bill in 2007.³⁶⁵ The bill would have permitted undocumented residents to acquire driver’s licenses without revealing their immigration status, ultimately improving road safety.³⁶⁶ Yet even some Democrats voted to reject the bill amid “overwhelming public opposition.”³⁶⁷ Extending public benefits to undocumented New Yorkers would be at least as controversial. It remains to be seen whether the recently proposed New York is Home Act—which, among other things, extends the right to receive Medicaid in New York State to undocumented state residents—garners more support.³⁶⁸

New policies, however, might indicate that public opinion has shifted since 2007, at least in New York City. In 2015, for example, New York City began

360. Daniel Wise, *Mayor’s Panel Rejects Brooklyn Family Court*, 5 N.Y. L.J. 5 (Mar. 14, 2001).

361. *Id.*

362. See, e.g., Day v. Sebelius, 376 F. Supp.2d 1022, 1033 (D. Kan. 2005); Nicholas Confessore, *Senate Votes to Stop Spitzer Plan to Give Illegal Immigrants Driver’s Licenses*, N.Y. TIMES (Oct. 23, 2007), http://www.nytimes.com/2007/10/23/nyregion/23legislature.html?_r=0 (“The 39–19 vote, which passed with the support of all the Republican senators present as well as several key Democrats, capped a debate laden with accusations of racism and demagoguery and warnings about terrorism and voter fraud.”).

363. See, e.g., Jennifer Fermino, *Exclusive: NYC to Shell Out \$18M to Help Undocumented Immigrants Get Jobs*, N.Y. DAILY NEWS (July 17, 2013), <http://www.nydailynews.com/new-york/nyc-shell-18m-aid-immigrant-youths-article-1.1400673>; Kirk Semple, *De Blasio Offers Plan to Help Immigrants Assimilate*, N.Y. TIMES (May 16, 2013), http://www.nytimes.com/2013/05/17/nyregion/de-blasio-offers-initiatives-for-immigration-reform.html?_r=0.

364. See, e.g., Confessore, *supra* note 362 (“About 100 opponents of Mr. Spitzer’s policy met in a rally on the Capitol steps at noon, where tempers ran high. James N. Tedisco, the Assembly’s minority leader, and others spoke, and protesters waved signs with slogans like “Illegal is a sickness” and “No licenses for illegals”; some shouted for Mr. Spitzer to be recalled or impeached.”).

365. *Id.*

366. *Id.*

367. *Id.*

368. See Grovum, *supra* note 5.

offering a city identification card to all residents regardless of immigration status.³⁶⁹ With respect to public benefits specifically, Mayor Bill De Blasio's office recently announced plans to expand healthcare coverage for uninsured residents of the five boroughs, beginning with a pilot program scheduled to begin in spring of 2016 that would insure some one thousand undocumented New Yorkers.³⁷⁰

Nonetheless, despite an apparent constitutional mandate to provide benefits to needy undocumented persons, no other judge in New York has followed the lead of Judge Segal or Judge Liotti on the matter, and no case examining these issues has reached the Court of Appeals since *Khripunsky*. Popular hostility to public entitlements for undocumented New Yorkers no doubt adds to the difficulty of imagining the judge that would hold in opposition to what many perceive as overriding political and economic considerations to the contrary. This climate may have the effect of discouraging judges, especially elected judges, from ruling favorably on such claims and, it follows, attorneys from bringing those claims.³⁷¹

There are at least two major fears driving opposition to providing public benefits to the undocumented New Yorker: first, that doing so will burden the economy, and second, that it will incentivize unauthorized immigration.³⁷² National policy provisions concerning welfare and immigration in PRWORA, for example, state that “[i]t continues to be the immigration policy of the United States that . . . the availability of public benefits not constitute an incentive for immigration to the United States,”³⁷³ and that “[c]urrent eligibility rules for public assistance . . . have proved wholly incapable of assuring that individual aliens not burden the public benefits system.”³⁷⁴ Both concerns, however, are unfounded.

Assuming a law is not preempted by federal immigration policy, New York courts need not be concerned with how protecting the state constitutional rights of undocumented residents affects national immigration policy, but merely

369. Kirk Semple, *New Yorkers Clamor for IDs, Swamping Mayor's Key Project*, N.Y. TIMES (Feb. 6, 2015), <http://www.nytimes.com/2015/02/07/nyregion/more-popular-than-expected-new-yorks-id-program-has-officials-scrambling.html> (describing the city ID program as more popular than officials expected).

370. Sarah Betancourt, *In New De Blasio Healthcare Plan, Limited Coverage for Undocumented Immigrants*, GOTHAM GAZETTE (Nov. 3, 2015), <http://www.gothamgazette.com/index.php/government/5965-in-new-de-blasio-health-care-plan-limited-coverage-for-undocumented-immigrants>.

371. These fears likely explain why no one has defended or adjudicated this right for an undocumented party in any state court above the justice court level since *In re Kittridge* was decided in 2000.

372. See, e.g., The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 22, 1996), codified at 8 U.S.C. § 1601(2) and § 1601(4).

373. 8 U.S.C. § 1601(2)(B) (2012).

374. *Id.* § 1601(4) (2012).

immigration into the State of New York. One of the freedoms that state courts have, which the federal courts do not share, is that they need not consider the national implications of their decisions.³⁷⁵ And, to quote one author, “they need only reach the best decisions for their communities.”³⁷⁶ Where preemption is not at issue, courts should inquire into how unauthorized immigration affects New York State’s economy specifically, whether such immigration into this state would be incentivized, and whether the answers to these questions should concern New York residents at all. Additionally, it is important to remember that constitutional rights function in part to protect minority groups from the potential tyranny of the majority,³⁷⁷ and in this case articles XVII and I serve that function, not just regardless of, but *in anticipation of*, public opposition.

A. Providing Needy Undocumented New Yorkers with Public Benefits Will Not Burden the State Financially

In our recessionary economy, further dampened as it is by government sequesters,³⁷⁸ the argument that additional public expenses are unaffordable is for some a compelling one. This anxiety appears to run deepest when the subject is publically-funded healthcare³⁷⁹ or, for that matter, immigration.³⁸⁰ Policy makers and courts should challenge the assumptions behind these concerns.

Paradoxically, new expenses do not necessarily add to a state’s costs. In 2012, in *Finch v. Commonwealth Health Insurance Connector Authority*, the Supreme Judicial Court of Massachusetts ruled that the state could not prohibit documented noncitizens from participating in that state’s Commonwealth Care program, which provides public healthcare for low-income residents.³⁸¹ The program began serving documented Massachusetts residents that same year.³⁸²

375. See Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1043, 1045 (1985).

376. *Id.*

377. See Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 254 (1997) (surveying seventy-four ballot initiatives across the U.S. that defeated minority interests seventy-eight percent of the time).

378. See, e.g., Arthur Delaney, *Food Stamp Decrease Set for November*, HUFFINGTON POST (Oct. 25, 2013), http://www.huffingtonpost.com/2013/10/25/food-stamps_n_4158690.html.

379. See, e.g., Richard Kim, *‘We Can’t Afford It’: The Big Lie About Medicaid Expansion*, NATION (Jul. 20, 2012), <http://www.thenation.com/article/we-cant-afford-it-big-lie-about-medicaid-expansion> (noting that governors of Texas, Louisiana, and South Carolina have all complained that Medicaid expansion under the ACA would be unaffordable in their respective states).

380. See, e.g., *The Gallup Poll: Public Opinion 2008*, at 229 (Allec M. Gallup & Frank Newport, eds.) (2009) (reporting that a 2008 Gallup poll found that, by a 2-to-1 margin, Americans believed that immigrants, particularly undocumented immigrants, cost taxpayers “too much” money).

381. *Finch v. Commonwealth Health Ins. Connector Auth.*, 959 N.E.2d 970, 973 (Mass. 2012).

382. See Wendy E. Parmet & Lorianne A. Sainsbury-Wong, *Restoring Legal Immigrants’ State Health Insurance—The Finch Cases*, 7 BOSTON HEALTH L. REP. 6, 9 (2012).

The additional cost to the state is estimated at \$150 million.³⁸³ However, the rising cost of healthcare in Massachusetts is not the consequence of the state's expansion of the Commonwealth Care program.³⁸⁴ Instead the state's rising healthcare costs have more nuanced, systemic causes (e.g., unregulated insurance premiums and preventable readmissions).³⁸⁵ These demand more nuanced systemic solutions that are more strategic than simply knocking people off the state insurance rolls.³⁸⁶ The RAND Corporation has recommended, for example, that Massachusetts *reduce* rising healthcare costs by adopting such policies as *improving* care for chronic diseases³⁸⁷ and *increasing* preventative care.³⁸⁸ It is inevitable that additional monies are necessary to pay for additional costs; however, the real measure of affordability is not how much a new service costs, but whether or not it is an investment that pays off in the long term.

For this reason, the notion that needy undocumented New Yorkers would be a financial burden on the state of New York if they received government benefits is belied by two points: first, undocumented residents already contribute greatly to the state's economy, and second, ensuring this population access to public benefits will reduce costs elsewhere.

1. Undocumented New Yorkers Contribute Greatly to the State's Economy

Recipients of state welfare carry with them their own stigma, even when they are U.S. citizens.³⁸⁹ The perception of recipients of public benefits as

383. See Lauren M. Schoeffler, *Denying Lawful Immigrants Access to State Healthcare Subsidies Violates the Equal Protection Provision of the Massachusetts Constitution—Finch v. Commonwealth Health Insurance Connector Authority*, 38 AM. J.L. & MED. 228, 231 (2012).

384. HENRY J. KAISER FAMILY FOUND., MASSACHUSETTS HEALTH CARE REFORM: SIX YEARS LATER 2 (May 2012) [hereinafter MASSACHUSETTS HEALTH CARE REFORM], <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8311.pdf> (“Escalating health care costs are not unique to Massachusetts, nor are they driven by the state's health reform efforts . . .”). The report notes that eligibility of non-citizens was discontinued in 2009 (prompting the litigation that ended with *Finch* restoring it in 2012) and does attribute this to “budget shortfalls,” but without saying whether those shortfalls were related to the cost of service to noncitizens.

385. CHRISTINE E. EIBNER, PETER S. HUSSEY, M. SUSAN RIDGELY & ELIZABETH A. MCGLYNN, RAND CORP., CONTROLLING HEALTH CARE SPENDING IN MASSACHUSETTS: AN ANALYSIS OF OPTIONS 130, 193 (Aug. 2009), http://www.rand.org/content/dam/rand/pubs/technical_reports/2009/RAND_TR733.pdf; MASSACHUSETTS HEALTH CARE REFORM, *supra* note 384, at 8.

386. EIBNER, HUSSEY, RIDGELY & MCGLYNN, *supra* note 385, at 109, 198–99, 206, 214–16 (recommending as strategies for saving money: increasing Medicaid reimbursement fees, increased use of preventative care, improved disease management for chronic health conditions, financial incentives for healthy living, and workplace health promotion).

387. *Id.* at 109 (“Improving care for these populations [of people living with a chronic disease] is therefore a promising strategy for reducing health care costs while improving patient care and outcomes.”).

388. *Id.* at 32 (“[E]xpanding mandates for coverage of preventive services in public and private insurance and supporting educational campaigns to increase utilization of services . . . would save money by substituting preventive services now for treatment services later.”).

389. See, e.g., Jennifer Stuber & Karl Kronebusch, *Stigma and Other Determinants of Participation in TANF and Medicaid*, 23 J. POL'Y ANALYSIS MGMT. 509 (2004).

undeserving or parasitic is rooted in a moralistic view of poverty, as old as it is erroneous.³⁹⁰ This mythic presumption alleges that the poor person is responsible for their poverty because of a failure of character, instead of more complex social forces such as recession or structural racism.³⁹¹ The notion nonetheless persists today and fuels the perception that recipients of state welfare, undocumented or not, cannot also contribute economically to society.³⁹² This perception is incomplete and flawed,³⁹³ in part because it fails to consider how all needy residents contribute to the state's economic prosperity. Undocumented residents are no different.

Refusing public assistance to an undocumented person on the basis that she is a “burden” on society is a justification that did not survive a rational basis “with bite” level of scrutiny when it came before the U.S. Supreme Court in 1982.³⁹⁴ In *Plyler v. Doe*, the Court found this “burden” argument an irrational basis for denying public elementary school education to undocumented children, noting “[t]here is no evidence in the record suggesting that illegal entrants impose any significant burden on the State’s economy. To the contrary, the available evidence suggests that [undocumented people] underutilize public services, while contributing their labor to the local economy and tax money to the state fisc.”³⁹⁵ As true today as it was in 1982, undocumented New Yorkers contribute to the economy, and thereby compensate for any public benefit they receive, in at least three ways: (1) by contributing generally to Gross Domestic

390. See, e.g., GUSTAFSON, *supra* note 3, at 17–19 (explaining the history of welfare in the U.S. and how the theme of the “deserving poor” and undeserving poor is as old as welfare itself); Zatz, *supra* note 144, at 556 (“[O]nce judged to be undeserving, poor people are then no longer thought to be deserving of public aid that is financially sufficient and secure enough to help them escape poverty.” (quoting Herbert J. Gans, *Positive Functions of the Undeserving Poor: Uses of the Underclass in America*, 22 POL. & SOC’Y 269, 270 (1994))).

391. See JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* 22 (1994) (explaining how, through legitimizing discrimination in employment and housing, public assistance programs beginning with the New Deal reinforced racial segregation and inequality).

392. See ROBERT RECTOR & CHRISTINE KIM, HERITAGE FOUND., *THE FISCAL COST OF LOW-SKILL IMMIGRANTS TO THE U.S. TAXPAYER* (May 21, 2007), <http://www.heritage.org/research/reports/2007/05/the-fiscal-cost-of-low-skill-immigrants-to-the-us-taxpayer> (arguing that the government cost of supporting undocumented people exceeds their contribution in taxes).

393. See, e.g., ALEX NOWRASTEH, CATO INST., *HERITAGE IMMIGRATION STUDY FATALLY FLAWED* (Apr. 4, 2013), <http://www.cato.org/blog/heritage-immigration-study-fatally-flawed> (finding that the results of the 2007 Heritage Foundation study were “grossly exaggerated” because, among other things, the authors factored into its conclusions the cost of educating U.S. citizen children and supporting U.S. citizen spouses of undocumented residents).

394. *Plyler v. Doe*, 457 U.S. 202, 228 (1982); Maria Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373, 1388 (2005) (“[T]hrough the Court purported to apply the traditional rational basis test, a close reading of the opinion reveals that the Court actually employed a more demanding standard.”); Rachel F. Moran, *Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 LA RAZA L.J. 1, 14 (1995) (discussing Supreme Court application of the “rationality with a bite” standard).

395. *Plyler*, 457 U.S. at 228.

Product (“GDP”) and job growth; (2) by contributing to population growth; and (3) by expanding the tax base.

The most exaggerated estimate of the cost of undocumented immigration to the U.S. taxpayer (which includes undocumented U.S. taxpayers) has probably been \$113 billion annually, which ignores that the bulk of this cost represents immigration law enforcement and the education and care of the U.S. citizen children of undocumented parents.³⁹⁶ This number also discounts the reality that undocumented residents contribute to the U.S. GDP through spending and consumption of resources.³⁹⁷ Estimates of that contribution range between \$4.7 billion³⁹⁸ and \$227 billion³⁹⁹ annually.⁴⁰⁰ Heidi Shierholz, an economist with the Economic Policy Institute, has said “there is a consensus that, on average, the incomes of families in this country are increased by a small, but clearly positive amount, because of [documented and undocumented] immigration.”⁴⁰¹ Consistent with this conclusion, a number of economists have noted that freer migration across borders would generally boost the world economy dramatically,⁴⁰² perhaps even doubling the size of it.⁴⁰³

396. See JACK MARTIN & ERIC A. RUARK, FED’N FOR AM. IMMIGRATION REFORM, *THE FISCAL BURDEN OF ILLEGAL IMMIGRATION ON UNITED STATES TAXPAYERS* (July 2010), http://www.fairus.org/site/DocServer/USCostStudy_2010.pdf?docID=4921 (noting that, in addition to the cost of immigration enforcement and education, the \$113 billion includes “general expenditures,” such as the cost of garbage collection and fire departments).

397. See Francine J. Lipman, *Taxing Undocumented Immigrants: Separate, Unequal and Without Representation*, 59 *TAX LAW.* 813, 816 (2006).

398. See GORDON H. HANSON, MIGRATION POLICY INST., *THE ECONOMICS AND POLICY OF ILLEGAL IMMIGRATION IN THE UNITED STATES* 9 (Dec. 2009), <http://www.migrationpolicy.org/pubs/hanson-dec09.pdf> (estimating that the net gain to U.S. workers and employers of undocumented immigrants is approximately 0.03% of U.S. GDP); U.S. DEP’T OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS, TABLE I.1.5 GROSS DOMESTIC PRODUCT (Sept. 26, 2013), <http://www.bea.gov/iTable/iTable.cfm?ReqID=9&step=1#reqid=9&step=3&isuri=1&903=5> (reporting that U.S. GDP is over \$15.6 trillion, making the economic contribution of undocumented residents to the rest of us over \$4.7 billion annually).

399. See RAUL HINOJOSA-OJEDA, IMMIGR. POL’Y CTR., *RAISING THE FLOOR FOR AMERICAN WORKERS: THE ECONOMIC BENEFITS OF COMPREHENSIVE IMMIGRATION REFORM* 2, 12 (Jan. 2010), <http://www.immigrationpolicy.org/sites/default/files/docs/Hinojosa%20-%20Raising%20the%20Floor%20for%20American%20Workers%20010710.pdf> (noting that, were all of the undocumented residents in the U.S. to leave, the annual GDP would be reduced by 1.46%, or \$227 billion); see also M. RAY PERRYMAN, PERRYMAN GRP., *IMMIGRATION REFORM* (Feb. 1, 2013), <http://perrymangroup.com/2013/02/01/immigration-reform> (estimating the loss to the GDP per annum of removing all undocumented persons would be \$245 billion and 2.8 million jobs).

400. Numbers of the contribution of undocumented residents to New York State’s GDP specifically are generally not available.

401. Adam Davidson, *Do Illegal Immigrants Actually Hurt the U.S. Economy?*, N.Y. TIMES (Feb. 12, 2013), <http://www.nytimes.com/2013/02/17/magazine/do-illegal-immigrants-actually-hurt-the-us-economy.html?pagewanted=2>.

402. See, e.g., Bjørn Lomborg, *How to Make the World’s Poor \$500 Billion Dollars Richer*, TIME (Sept. 17, 2014) (“[W]e have long known that free mobility of *people* could add anywhere from 67–147% to global GDP.”).

403. Jonathon W. Moses & Bjorn Letnes, *The Economic Costs to International Labor Restrictions: Revisiting the Empirical Discussion*, 32 *WORLD DEV.* 1609, 1610 (2004) (“Using

The familiar narrative that undocumented residents of the U.S. will compete with American citizens for jobs is as old as the Chinese Exclusion Acts.⁴⁰⁴ Related is the notion that undocumented labor drives down wages.⁴⁰⁵ In the short run, undocumented residents do compete for employment with unskilled or low-skilled U.S. citizen residents, such as those with a high school education or less.⁴⁰⁶ Some downward pressure on wages does occur for unskilled and low-skilled workers in industries like construction and meatpacking, but most researchers stress this impact is extremely modest⁴⁰⁷ or “negligible.”⁴⁰⁸ At the same time, this same immigration also contributes to job growth through the establishment of new businesses⁴⁰⁹ and the patronization of established ones.⁴¹⁰ Increased low-skilled migration may also increase the number of jobs.⁴¹¹ It is

1998 data, we find that the estimated gains from free migration may be as high as US \$55.04 trillion—exceeding the world’s GDP in that year.”).

404. The “Chinese Exclusion Acts” refer to a series of laws enacted between 1882 and 1902 which excluded from entering the U.S. noncitizens of Chinese descent because of their race. These laws were largely motivated by the perceptions that Chinese workers competed with Americans for jobs. The Chinese Exclusion Acts were repealed in 1943. See Lisa Flores, *Constructing Rhetorical Borders: Peons, Illegal Aliens, and Competing Narratives of Immigration*, 20 *Critical Stud. Media Commc’n* 362, 368 (Dec. 2003).

405. See Bonnie Kavoussi, *Undocumented Workers Have ‘Negligible Impact’ on Wages: Study*, HUFFINGTON POST (Mar. 12, 2012), http://www.huffingtonpost.com/2012/04/12/undocumented-workers-illegal-immigrants-negligible-impact-wages_n_1420375.html (citing the findings of a paper released by the Federal Reserve Bank of Atlanta that found the impact of undocumented labor upon wages was “negligible,” and characterizing the finding as one that pokes holes in “one of the most common arguments for pushing undocumented workers out of America,” i.e., that said labor depresses wages).

406. See U.S. COMM’N ON CIVIL RIGHTS, *THE IMPACT OF ILLEGAL IMMIGRATION ON THE WAGES AND EMPLOYMENT OPPORTUNITIES OF BLACK WORKERS* 2, 6, 9, 28 (2010) [hereinafter *THE IMPACT OF ILLEGAL IMMIGRATION*], <http://www.law.umaryland.edu/marshall/usccr/documents/cr12im2010.pdf> (noting that “[a]lthough available data did not distinguish precisely between legal and illegal immigration . . . most panelists agreed that illegal immigration appears to have had at least some negative effects on the wages and employment of workers in the low-skill labor market”).

407. *Id.* at 6, 9, 28, 80 (noting that some research even shows that cities with higher levels of immigration do not experience a negative impact on wage growth at all); Kavoussi, *supra* note 405 (“[D]ocumented workers at firms that also employ undocumented workers earn 0.15 percent less”); Davidson, *supra* note 401 (noting that “[l]abor economists have concluded that undocumented workers have lowered the wages of U.S. adults without a high-school diploma—25 million of them—by anywhere between 0.4 to 7.4 percent The impact on everyone else, though, is surprisingly positive”).

408. See Kavoussi, *supra* note 405.

409. See Emma Sapon, *Immigrant Economic Engine: Regional Economy Benefiting from New Businesses*, BUFFALO NEWS (Jan. 14, 2012), http://www.buffalonews.com/immigrant_economic_engine_regional_economy_benefiting_from_new_businesses.html (“‘[Immigrants] find ways to help their community and make a profit,’ [Eva Hassett, executive director of the Buffalo International Institute] said. ‘You don’t have to go far to see their impact on the business community. Just look around.’”).

410. See Kavoussi, *supra* note 405.

411. See PHILIPPE LEGRAIN, *IMMIGRANTS: YOUR COUNTRY NEEDS THEM* 66, 81 (2007) (“The problem for immigrants is that while the jobs they take are visible, the jobs they create for everyone else are largely invisible”).

because of this immense contribution to the economy that the better solution is to help those unskilled and low-skilled U.S. citizens by increasing the minimum wage,⁴¹² instead of reducing undocumented immigration.⁴¹³

Economic growth is also advanced by population growth.⁴¹⁴ The census in 2010 revealed that the population of upstate New York continues to shrink, as it has for decades.⁴¹⁵ In fact the only part of the state that continues to grow is New York City and its surrounding areas, a growth the census contributes to new arrivals in its immigrant communities,⁴¹⁶ which constitute thirty-seven percent of the city's population.⁴¹⁷ North of New York City, immigration has served to offset the population loss. Erie County, home to the state's second largest city Buffalo, lost 4.3% of its population and had the largest numerical drop of any county in the state of 41,018 people.⁴¹⁸ Yet its foreign-born population has grown by twenty percent in the past ten years.⁴¹⁹ In 2005 the mayor of the central New York city of Utica said of that city's immigration, "[t]he town had been hemorrhaging for years. The arrival of so many refugees has put a tourniquet around that hemorrhaging."⁴²⁰ Refugees are not undocumented residents, and these numbers reflect documented as well as undocumented residents, but news like this shows how new arrivals to upstate New York, regardless of their status, are critical to its economic prosperity.

Additional public benefits to additional New Yorkers will certainly cost more money. Emergency Medicaid alone in New York State hospitals costs the federal government \$12 million annually.⁴²¹ But undocumented New Yorkers,

412. Even the Center for Immigration Studies, a think tank generally hostile to immigration, recommends raising the minimum wage instead of changing immigration policy as a way of offsetting this downward wage pressure. See STEVEN A. CAMAROTA, IMMIGRATION'S IMPACT ON U.S. WORKERS, TESTIMONY PREPARED FOR THE HOUSE JUDICIARY COMMITTEE SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW (Nov. 19, 2009), <http://cis.org/node/1582>.

413. See THE IMPACT OF ILLEGAL IMMIGRATION, *supra* note 406, at 6–33 (surveying a number of economists who study the subject, most of whom conclude that the best way to address any downward pressure on wages is by assisting lower wage workers with such policies as raising the minimum wage, reducing incarceration, or increasing protection for undocumented workers' rights).

414. See, e.g., THOMAS P. DINAPOLI, NEW YORK CITIES: AN ECONOMIC AND FISCAL ANALYSIS 1980–2010, at 6, 12 (2012) (generally associating economic growth with population growth and economic decline with population decline in New York cities, and noting that “associated with the decline in population has been a decline in employment”).

415. Michael Hill, *Census Estimates Growth in New York City, Losses Upstate*, ASSOCIATED PRESS, Mar. 23, 2010 [hereinafter *Census Estimates*], http://www.syracuse.com/news/index.ssf/2010/03/census_estimates_show_growth_i.html.

416. *Id.*

417. WORKING FOR A BETTER LIFE, *supra* note 20, at 1–3, 18 (“Mayor Bloomberg has been enthusiastic and outspoken about the role of immigrants in the economy . . .”).

418. *Census Estimates*, *supra* note 415; Davidson, *supra* note 401.

419. Sapong, *supra* note 409.

420. Ray Wilkinson, *The Town That Loves Refugees*, REFUGEES, Apr. 1, 2005, at 1, 2.

421. Robert Pear, *U.S. Is Linking Status of Aliens to Hospital Aid*, N.Y. TIMES (Aug. 10, 2004), <http://www.nytimes.com/2004/08/10/us/us-is-linking-status-of-aliens-to-hospital-aid.html>.

like other state residents, also help pay for themselves. Recall the \$662 million plus that the state gets from taxing undocumented New Yorkers *each year*. In the U.S. overall, undocumented immigrants have paid as much as \$1.5 billion into Medicaid since 2000,⁴²² and \$300 billion into the Social Security Trust Fund.⁴²³ This added tax base is particularly important to help pay for programs like Social Security, which, with fewer young working people to refill its coffers, may be losing sustainability.⁴²⁴ Undocumented immigration promises to bring with it more young people who pay social security taxes, because undocumented residents as a group are younger than the general U.S. population.⁴²⁵ In New York, 52.3% of undocumented residents are age thirty-four or younger.⁴²⁶ The question is not whether New York can afford to welcome new undocumented arrivals, but whether it can afford not to.

2. Ensuring Needy Undocumented New Yorkers Access to Public Benefits Will Reduce Costs Elsewhere

The perception of public benefits as “handouts” obscures the reality that these programs have the effect of benefiting more than just the recipient. Ensuring a healthy undocumented population reduces the fiscal, pathological, and moral costs to society in the long term.

With respect to those public benefits that provide undocumented persons with healthcare (e.g., Medicaid, Child Health Plus, etc.), a number of medical authorities and experts on health policy have written on the benefits of ensuring access to these programs to undocumented residents.⁴²⁷ Early treatment and

422. Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security with Billions*, N.Y. TIMES (Apr. 5, 2005), http://www.nytimes.com/2005/04/05/business/illegal-immigrants-are-bolstering-social-security-with-billions.html?_r=0.

423. Davidson, *supra* note 401.

424. Robert Pear, *Report Shows Better Outlook for Medicare*, N.Y. TIMES (May 31, 2013), <http://www.nytimes.com/2013/06/01/us/politics/outlook-for-medicare.html?gwh=F60AC77BD0E7CF0DCFDBFCF8748356BC> (“The administration said in its 2012 report that the Medicare trust fund would run out of money in 2024, and the Social Security fund in 2033.”).

425. Just seventeen percent of undocumented residents are ages forty-five to sixty-four, versus twenty-six percent of the total U.S. population, and only one percent of undocumented residents are sixty-five or older, versus thirteen percent of the total population. *See* CAPPS, BACHMEIER, FIX & VAN HOOK, *supra* note 13, at 3; William Hochul III, *Enforcement in Kind: Reexamining the Preemption Doctrine in Arizona v. United States*, 87 NOTRE DAME L. REV. 2225 (2012).

426. ESTIMATES OF UNAUTHORIZED POPULATION SURVEY, *supra* note 20.

427. *See, e.g.*, Ortega, *supra* note 127, at 187–90; James W. Jones, Laurence D. McCullough & Bruce W. Richman, *My Brother’s Keeper: Uncompensated Care for Illegal Immigrants*, 44 J. VASCULAR SURGERY 679–83 (Sept. 2006) (“Poverty and fear of discovery and deportation among illegal immigrants with tuberculosis invariably delays their presentation for care by months, and in the interim they can infect as many as 10 others.”); WALLACE, TORRES, SADEGH-NOBARI, POURAT & BROWN, *supra* note 21, at 33; UCLA CTR. FOR HEALTH POLICY RESEARCH, FINAL REPORT TO THE COMMONWEALTH FUND (Aug. 31, 2012), <http://healthpolicy.ucla.edu/publications/Documents/PDF/undocumentedreport-aug2013.pdf>; AM. NURSING ASS’N ISSUE BRIEF: NURSING BEYOND BORDERS: ACCESS TO HEALTH CARE FOR DOCUMENTED AND UNDOCUMENTED IMMIGRANTS LIVING IN THE U.S.

preventative care are very important for controlling infectious diseases and are effectively impossible to obtain without access to non-emergent healthcare.⁴²⁸ In addition to the human tragedy of disease, illness is also expensive. Preventative care greatly reduces that expense.⁴²⁹ Access to healthcare for needy undocumented New Yorkers will reduce disease and healthcare costs overall.

In particular, access to preventative healthcare reduces the cost of emergency healthcare. Without access to preventative care, uninsured undocumented persons seek medical attention from emergency facilities more often.⁴³⁰ These patients are then unable to pay for these services, leaving hospitals to bear the cost.⁴³¹ Of course, there would be a decrease in these emergency room costs if undocumented immigrants had access to cheaper preventative care. Access to prenatal care, for example, has been shown to reduce the cost and incidence of premature birth and other health complications among undocumented persons.⁴³² The Massachusetts Commonwealth Care program, by providing preventative healthcare care to nearly all of the state's

1, 7–8 (2010) [hereinafter NURSING BEYOND BORDERS], <http://www.nursingworld.org/MainMenuCategories/Policy-Advocacy/Positions-and-Resolutions/Issue-Briefs/Access-to-care-for-immigrants.pdf> (“[Q]uality health care [for undocumented immigrants] also promotes better control of infectious diseases which can adversely affect the larger U.S. population.”).

428. Zuber, *supra* note 302, at 369, 370; Deterding, *supra* note 128, at 982. When the mere threat of California's Proposition 187 hit the undocumented community in that state (the proposition would have, among other things, barred undocumented Californians from receiving medical public benefits), immigrants were frightened away from hospitals and clinics, causing a drop in vaccination rates and a rise in illness. See Geoffrey Cowley & Andrew Murr, *Good Politics, Bad Medicine*, NEWSWEEK, Dec. 5, 1994, at 31–34; Paul Feldman, *Proposition 187: Measure's Foes Try to Shift Focus from Walkouts to Issues*, L.A. TIMES, Nov. 4, 1994, at A3.

429. See generally ROSS DEVOL & ARMEN BEDROUSSIAN, MILKEN INST., AN UNHEALTHY AMERICA: THE ECONOMIC BURDEN OF CHRONIC DISEASE—CHARTING A NEW COURSE TO SAVE LIVES AND INCREASE PRODUCTIVITY AND ECONOMIC GROWTH 2 (Oct. 2007), <http://www.caaccess.org/pdf/econburdenofchrondis-feb2008-presentation.pdf> (“[A]ssuming modest improvements in preventing and treating disease . . . in 2023, compared with the baseline scenario . . . [w]e could reduce the economic impact of disease by 27 percent, or \$1.1 trillion annually; we could increase the nation's GDP by \$905 billion linked to productivity gains; we could also decrease treatment costs by \$218 billion per year.”).

430. Dana Canedy, *Hospitals Feeling Strain from Illegal Immigrants*, N.Y. TIMES (Aug. 22, 2002), <http://query.nytimes.com/gst/fullpage.html?sec=health&res=950DE6DB133CF936A1575BC0A9649C8B63>.

431. A federal program exists to reimburse hospitals for the cost of providing emergency services to undocumented people, and in 2005 that program paid out \$12.3 million to hospitals in New York State alone. Pear, *supra* note 424; see also Ortega, *supra* note 127, at 193.

432. One California study found that for every dollar spent on prenatal care for undocumented mothers, three to four dollars were saved. See Michael C. Lu, Yvonne G. Lin, Noelani M. Prietto & Thomas J. Garite, *Elimination of Public Funding of Prenatal Care for Undocumented Immigrants in California: A Cost/Benefit Analysis*, 182 AM. J. OBSTETRICS & GYNECOLOGY 233, 237 (2000); Heather Kuiper, Gary A. Richwald, Harlan Rotblatt & Steven Asch, *The Communicable Disease Impact of Eliminating Publicly Funded Prenatal Care for Undocumented Immigrants*, 3 MATERN. CHILD HEALTH J. 39, 47–48 (1999); see also Lewis v. Thompson, 252 F.3d 567, 579 (2d Cir. 2001) (“[T]he costs of furnishing prenatal care for the more than 13,000 annual births to undocumented pregnant women in New York would be almost completely recouped.”).

impoverished population, has reduced the number of non-emergency visits to the ER as a result.⁴³³ Opening Medicaid to undocumented New Yorkers would have the same effect in this state.

Finally, we should consider the moral and ethical costs of denying undocumented New Yorkers healthcare. All economic and public health reasons are second in priority to the moral argument that it is ethically incumbent upon us to protect the human right to healthcare and economic stability of undocumented persons. The right to healthcare is recognized under international law and in the law or constitutions of many countries.⁴³⁴ This legal reality is buttressed by an abundant literature on the universality of the human right to life-saving government assistance,⁴³⁵ and more than a few public health policy authorities agree that opposing healthcare access for undocumented people is ethically indefensible.⁴³⁶ New Yorkers should be asking themselves if denying these services to their neighbors based on their immigration status is a value they want history to associate with their state.

Indeed, the legislative intent behind article XVII was aimed in part to ensure New Yorkers had access to preventative medical care⁴³⁷ and, in part, to alleviate poverty that was the result of complex social forces—namely, the Great

433. MASSACHUSETTS HEALTH CARE REFORM, *supra* note 384, at 140.

434. See, e.g., Eleanor D. Kinney & Brian Alexander Clark, *Provisions for Health and Health Care in the Constitutions of the Countries of the World*, 37 CORNELL INT'L L.J. 285, 296 (2004); JONATHAN WOLF, *THE HUMAN RIGHT TO HEALTH* 1–16 (2012).

435. See, e.g., Hartley Dean, *Human Rights and Welfare Rights: Contextualizing Dependency and Responsibility*, in HUMAN RIGHTS, DEPENDENCY AND RESPONSIBILITY (Hartley Dean ed., 2004); ELIZABETH BUSSIÈRE, *DISSENTING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION* (1st ed. 1997); JOSEPH M. WRONKA, *HUMAN RIGHTS AND SOCIAL JUSTICE: SOCIAL ACTION AND SERVICE FOR THE HELPING AND HEALTH PROFESSIONS* (2008); ELIZABETH REICHERT, *SOCIAL WORK AND HUMAN RIGHTS: A FOUNDATION OF POLICY AND PRACTICE* (2d ed. 2011); SONJA SNACKEN & ELS DUMORTIER, *RESISTING PUNITIVENESS IN EUROPE?: WELFARE, HUMAN RIGHTS AND DEMOCRACY* (2012); WOLF, *supra* note 434, at 1–16.

436. NURSING BEYOND BORDERS, *supra* note 427, at 1 (“Resolved, that the American Nurses Association will reaffirm its position that all individuals living in the U.S., including . . . undocumented immigrants, have access to health care”); ALAN WAXMAN & RAYMOND COX, *AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (ACOG) COMM. OPINION, HEALTHCARE FOR UNDOCUMENTED IMMIGRANTS 3* (Jan. 2009) (“Immigrant women living within our borders should have the same access to basic preventive health care as U.S. citizens without regard to their country of origin or documentation of their status.”); Ruth Fadan, *Bioethics, Denying Care to Illegal Immigrants Raises Ethical Concerns*, KAISER HEALTH NEWS (Dec. 31, 2009), <http://www.kaiserhealthnews.org/Columns/2009/December/123109Faden.aspx> (“People who are in this country illegally have broken our laws, but the magnitude of their crime does not justify depriving them of the basic right to health care coverage while they are in our midst.”).

437. Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 392 (2006) (referring to Edward Corsi, the primary sponsor of the article XVII amendment, who listed a number of public health concerns the new provision was intended to address, including “prevention and control of diseases,” immunizations, “programs to discover physical defects in children,” and “cancer, diabetes, and heart disease”).

Depression.⁴³⁸ The framers of article XVII thus recognized the important economic, public health, and moral interests that were served by requiring the state to provide life-saving aid to all needy persons. The practical value of ensuring all New Yorkers have access to preventative healthcare, regardless of their immigration status, also highlights the wisdom of the 1938 state constitutional convention that wrote article XVII in the first place.⁴³⁹

B. New Yorkers' Access to Public Benefits Will Not, But Should, Incentivize Settlement in New York

One of the policy considerations that motivated Congress to pass the PRWORA elimination of benefits for many noncitizens is explained in Section 1601(6) of the statutory scheme itself: "It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits."⁴⁴⁰ Many law makers, as well as courts,⁴⁴¹ believe that providing undocumented persons with access to public benefits incentivizes their immigration. A thoughtful examination of the subject reveals this causal connection to be overblown.⁴⁴²

The U.S. Supreme Court explained in its landmark *Plyler v. Doe* decision that "[t]he dominant incentive for illegal entry into the State of Texas is the availability of employment," and not, as was at issue in the case, free education.⁴⁴³ The same can be said of public assistance in New York. The vast majority of migrants who come to the United States are incentivized to do so by wages and job availability,⁴⁴⁴ not public benefits.⁴⁴⁵ Persons without official

438. *Id.* at 393 ("[T]he development and enactment of article XVII, section 3, took place . . . in the domestic context, where many called for more government social protections to respond to the misery of the Great Depression.").

439. *Tucker v. Toia*, 371 N.E.2d 449, 449–50 (N.Y. 1977).

440. 8 U.S.C. § 1601(6) (2012).

441. *See, e.g., Graham v. Richardson*, 403 U.S. 365, 379 (1971) ("Alien residency requirements for welfare benefits necessarily operate . . . to discourage entry into or continued residency in the state."); *Abreu v. Callahan*, 971 F. Supp. 799, 819 (S.D.N.Y. 1997) ("In seeking to defend Section 402 as rationally related to deterring immigration, [the federal government] argue[s] that Congress wished to eliminate welfare benefits as a "magnet" for immigration.").

442. GEORGE J. BORJAS, *HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY* 114 (1999) ("Although this is the magnetic effect that comes up most often in the immigration debate, it is also the one for which there is no empirical support.").

443. *Plyler v. Doe*, 457 U.S. 202, 228 (1982).

444. JUDITH GANS, UDALL CTR. FOR STUDIES IN PUBLIC POLICY, *ILLEGAL IMMIGRATION TO THE UNITED STATES: CAUSES AND POLICY SOLUTIONS I* (Feb. 2007), http://udallcenter.arizona.edu/immigration/publications/fact_sheet_no_3_illegal_immigration.pdf ("Simply stated, most immigrants who come to the United States illegally . . . do so because U.S. employers hire them at wages substantially higher than they could earn in their native countries."); CLAUDIA L. SCHUR, MARK L. BERK, CYNTHIA D. GOOD & ERIC N. GARDNER, KAISER FAMILY FOUND., *CALIFORNIA'S UNDOCUMENTED LATINO IMMIGRANTS: A REPORT ON ACCESS TO HEALTH CARE SERVICES 6* (May 1999) [hereinafter *CALIFORNIA'S UNDOCUMENTED LATINO IMMIGRANTS*], <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/california-s-undocumented-latino->

documentation will therefore continue to come to states like New York seeking employment regardless of whether or not benefits are provided to those needy enough to qualify for them. Moreover, the increase in undocumented immigration since 1996 belies the contention that denial of public benefits does anything to “remove the incentive” of undocumented immigration.⁴⁴⁶

One particular example highlights the salience of this point. Canada famously affords its residents a lifetime of state funded healthcare,⁴⁴⁷ but more than forty-five million Americans lacked any health insurance coverage at all prior to the ACA.⁴⁴⁸ Yet despite this dramatic disparity, there has been no great exodus of uninsured Americans seeking legal residency in Canada. This may have something to do with the fact that the unemployment rate in the United States and Canada has been comparable for many years,⁴⁴⁹ and Canadian GDP per capita (the average annual individual income) is about the same as in the U.S.—around \$50,000.⁴⁵⁰ Compare this to the GDP per capita in Mexico, which is about \$10,000.⁴⁵¹ The comparison is an inexact one for sure. But it makes the point somewhat clearer. Tens of millions of uninsured Americans are not charging across the Canadian border for the same reason immigration into New York will not skyrocket if we give Medicaid to undocumented New Yorkers: people generally migrate for a chance at upward economic mobility—something jobs can provide, but a benefit like Medicaid by itself cannot.

Even if we assume that protecting the substantive rights to state benefits for needy undocumented New Yorkers did incentivize immigration to New York,

immigrants-a-report-on-access-to-health-care-services-report.pdf (“Finding work was reported as the most important reason for entering the U.S.”).

445. CALIFORNIA’S UNDOCUMENTED LATINO IMMIGRANTS, *supra* note 444, at 8 (“[O]btaining health care does not appear to be an important reason for immigration by Latinos.”). Surveys of undocumented residents living in Fresno and Los Angeles found that less than one percent of respondents cited public benefits as among their reasons for migration, while surveys from El Paso and Houston produced zero respondents identifying that as a reason. See Marc L. Berk, Claudia L. Schur, Leo R. Chavez & Martin Frankel, *Health Care Use Among Undocumented Latino Immigrants: Is Free Health Care the Main Reason Why Latinos Come to the United States?*, 19 HEALTH AFF. 51, 56–58 (2000).

446. Mahmoudzadeh, *supra* note 5, at 492 (“The fact that current healthcare policies have not been successful in deterring illegal entries . . . presents the need to rethink current immigrant healthcare policies.”).

447. William Farley, *Bordering Health Care: A Comparison of Coverage Costs and Access for U.S. and Canadian Consumers*, 20 ANNALS HEALTH L. ADVANCE DIRECTIVE 125, 126 (2010).

448. Jeffrey Young, *Uninsured Americans 2012: More Than 45 Million Lacked Health Insurance Last Year*, CDC Reports, HUFFINGTON POST (Mar. 21, 2013), http://www.huffingtonpost.com/2013/03/21/uninsured-americans-2012_n_2918705.html.

449. David Card & W. Craig Riddell, *A Comparative Analysis of Unemployment in Canada and the United States*, in SMALL DIFFERENCES THAT MATTER: LABOR MARKETS AND INCOME MAINTENANCE IN CANADA AND THE UNITED STATES 149–90 (David Card & Richard B. Freeman eds., 1993).

450. In the United States, GDP per capita is \$49,781.4, and in Canada GDP per capita is \$52,086.50. See WORLD BANK WEBSITE, GDP PER CAPITA (CURRENT US\$), <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD>.

451. *Id.* Listing current per capita GDP for Mexico at \$9730.30.

then the many economic benefits discussed above only encourage that outcome. Given the contribution undocumented New Yorkers make to the state's economy and population growth, it seems strange to argue *against* incentivizing immigration to this state, even undocumented immigration. New York State is a constellation of population-starved rust-belt cities anchored with a cosmopolitan metropolis⁴⁵²—making New York a place that *needs* undocumented immigrants as much as they need it. This is the local policy that New York State courts must consider, regardless of any national or state political anxiety over undocumented immigration.

VIII.

CONTEMPLATING THE MEANS OF ENFORCEMENT OF A STATE CONSTITUTIONAL RIGHT TO STATE-FUNDED PUBLIC BENEFITS FOR UNDOCUMENTED NEW YORKERS

The implications of *Aliessa* and the related case law are as far reaching as they are daunting. When properly read, *Aliessa* guarantees access to state-funded public benefits in New York, such as Medicaid and SNA, for all needy undocumented residents of the state. But this is not currently how the law is enforced, and New Yorkers without documentation are actively blocked from receiving these benefits.⁴⁵³ In light of the politically controversial nature of this issue, the question of how to get from where we are to where *Aliessa* says we should be feels overwhelmingly ambitious. Perhaps the genesis of *Aliessa* itself provides us with the best guide for getting there.

There is promise for an impact litigation class action strategy like the one used in *Aliessa*. Before *Aliessa*, there were only two cases at an advocate's disposal to aid in the interpretation of article XVII on behalf of noncitizens.⁴⁵⁴ The Court of Appeals in *Menino v. Pereles* and *Tucker v. Toia* provided authority for the assertion that article XVII applied to noncitizens and that immigration status, as a criterion not based upon need, was an unconstitutional

452. Of the twenty-five most diverse urban areas in the United States during 2010, the New York City metropolitan area was ranked the fifth most diverse urbanity in the country in a Brown University study. See BARRETT A. LEE, JOHN ICELAND & GREGORY SHARP, BROWN UNI. U.S. 2010 PROJECT, RACIAL AND ETHNIC DIVERSITY GOES LOCAL: CHARTING CHANGE IN AMERICAN COMMUNITIES OVER THREE DECADES 13 (Sept. 2012), <http://www.s4.brown.edu/us2010/Data/Report/report08292012.pdf>.

453. See, e.g., *Brunswick Hosp. Ctr., Inc. v. Daines*, 907 N.Y.S.2d 435, 2010 WL 623707, at *7 (N.Y. Sup. Ct. Feb. 22, 2010); *Tonashka v. Weinberg*, 678 N.Y.S.2d 883, 884–85 (N.Y. Sup. Ct. 2008) (SNA eligibility at issue in the case turned on whether or not party was PRUCOL, without which designation she would not have been eligible).

454. Br. for Pls.-Appellants, *Aliessa v. Novello*, No. 403748/98, 2000 WL 34030636, at *22, *32 (N.Y. Dec. 26, 2000). Plaintiffs in *Aliessa* could have cited to *In re Kittridge*, but it is possible that they did not do so because a single family court case would have offered insufficient persuasive authority before the Court of Appeals.

criterion under article XVII.⁴⁵⁵ Nonetheless, the attorneys for the *Aliessa* plaintiffs still had to argue that *Menino* and *Tucker* protect a noncitizen's access to Medicaid.⁴⁵⁶ In a theoretical post-*Aliessa* case advocating for undocumented residents' access to public benefits, petitioners would have to argue that article XVII actually protects undocumented plaintiffs, even though *Aliessa* did not explicitly say this. Then, as now, plaintiffs would have to argue that the reasoning of the controlling case law (then *Menino*, now *Aliessa*) captures the new plaintiff class, even though the earlier case law does not say this explicitly.

It is also instructive to future litigators and plaintiffs to note that the *Aliessa* plaintiffs also faced the challenge of extending the enforcement of the constitution's protection to a new legal class of persons.⁴⁵⁷ *Aliessa* plaintiffs argued that article VII protects PRUCOLs and not just LPRs.⁴⁵⁸ In *Menino*, the plaintiff class consisted of LPRs only.⁴⁵⁹ The legal gulf between LPRs and PRUCOLs is surely narrower than the one between PRUCOLs and undocumented residents, but nonetheless the fact that the litigation was successful in pushing the limits of the status quo is encouraging precedent for future plaintiffs seeking to do the same.

A claim brought through impact litigation would face similar challenges and possess similar strengths as that of *Aliessa* some fifteen years ago. Like *Aliessa*, there is little in the way of precedent to support an undocumented New Yorker's right to benefits; yet still, as before, there is enough precedent to supply a more than colorable argument that this right exists. There are many legal service organizations in the state adept at bringing this kind of legal challenge, and any one or combination could provide more than competent representation in such a matter.⁴⁶⁰ The recent victory in *In re Vargas*, in which a state appellate court allowed undocumented plaintiff Cesar Adrian Vargas to be licensed to practice law in New York,⁴⁶¹ may portend, in at least some New York State courts, a potentially favorable judicial atmosphere for undocumented plaintiffs seeking to expand their rights to benefits and licenses.

Alternatively, the extent to which the state constitution protects undocumented New Yorkers could be enforced through legislation. This seems

455. *Minino v. Perales*, 562 N.Y.S.2d 626 (N.Y. App. Div. 1990), *aff'd*, 589 N.E.2d 385 (1992); *Tucker v. Toia*, 371 N.E.2d 449, 451 (N.Y. 1977).

456. Br. for Pls.-Appellants, *Aliessa*, 2000 WL 34030636, at *22, *32.

457. For a pre-*Aliessa v. Novello* discussion of *Aliessa v. Whalen*, see Christopher Vatter, *Public Welfare: Supreme Court, New York County: Aliessa v. Whalen (Decided May 17, 1999)*, 16 *TOURO L. REV.* 661 (2000).

458. *Aliessa*, 2000 WL 34030636, at *33-34.

459. *Minino v. Perales*, 589 N.E.2d 385, 386 (N.Y. 1992).

460. See, for example, the organizations that brought *Aliessa*, including the Legal Aid Society, New York Legal Assistance Group, and the Greater Upstate Law Project. Br. for Pls.-Appellants, *Aliessa*, 2000 WL 34030636, at *i.

461. *In re Vargas*, 10 N.Y.S.3d 579, 597 (N.Y. App. Div. 2015). Plaintiff Cesar Adrian Vargas had been granted Deferred Action for Childhood Arrivals, but the court identified him as someone without lawful status. *Id.* at 592.

extremely difficult to accomplish at the state level, if Governor Spitzer's failed attempt to provide driver's licenses for undocumented New Yorkers and the stalled New York is Home Act are any indication of the political will that Albany possesses on such issues. A less uphill battle might be available in a city legislature. The New York City Council, for example, has been looking at extending voting rights for documented noncitizens in the five boroughs⁴⁶² and now provides city identification ("ID") to all residents regardless of immigration status.⁴⁶³ Extending public benefits unique to New York City to undocumented denizens of that city, while perhaps more controversial than voting rights or city IDs, nonetheless might find more support at the city, rather than the state, level.

IX.

CONCLUSION

This article makes the case that a substantive right of otherwise eligible undocumented persons to receive state-funded public benefits exists under the New York State Constitution. It also makes the argument that neither the state equal protection clause nor federal immigration policy obstruct the enforcement of that right by the courts. Nevertheless, the fact that this right has not been asserted explicitly since *Quiroga-Puma* in 2007, and not even considered by a major court since *Aliessa* in 2001, implies a lack of political will to raise, adjudicate, or affirm that right. However, opposition to ensuring all needy New Yorkers have access to public assistance is a political barrier, not a legal one. Regardless of the politics, the state constitution entitles undocumented residents of the state to these benefits. Those with the means to advocate for or affirm the politically unpopular constitutional rights of undocumented New Yorkers in state courts will have to appreciate the state's real interest in preserving these rights. Judges that do so will be more willing to protect those rights, and attorneys may encourage judges to do so by raising these arguments.

If the New York State Constitution is to be applied to the fullest letter of the law, the state will need more judges as "bold" as Philip Segal and as willing to accept the attendant professional risks. It will also take brave plaintiffs like Millie Kittridge and willing attorneys able to take on certain long-shot arguments for eligible undocumented New Yorkers across the state. The law does, can, and should ensure public assistance to all needy New Yorkers.

462. Chester Soria, *Expansion of Voting Rights to Immigrants May Not Hold Up Under Legal Scrutiny*, GOTHAM GAZETTE (May 9, 2013), <http://www.gothamgazette.com/index.php/elections/4237-expansion-of-voting-rights-to-immigrants-may-not-hold-up-to-scrutiny>.

463. Semple, *supra* note 369.