

the development of medical science in a liability free environment or the protection of the patients into whose bodies these devices are being implanted? Hopefully, Congress will recognize the injustices and dangers to patients in allowing such an interpretation of pre-emption. If it does not, the possibility of more people in the position of Dorothy Marie Reeves, innocent, injured, and uncompensated, will loom larger than ever.

THE POLICY AND POLITICS OF ILLEGAL IMMIGRANT HEALTH CARE IN TEXAS

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INTRODUCTION

This comment will focus on the July 2001 Texas Attorney General advisory decision that barred Texas county hospital districts from providing preventive health services to undocumented immigrants.¹ Although illegal immigrants can still receive medical care for emergency conditions, immunizations, and communicable diseases, the Attorney General's decision precludes unqualified immigrants from receiving other government-provided medical benefits.²

The author advocates that this decision is a technically correct interpretation of state and federal regulations. Under current law, illegal immigrants are not entitled to preventive health care services provided by the government.³

The current law, however, also gives states the opportunity to circumvent this limitation of benefits.⁴ State legislatures can pass affirmative legislation providing state funded (not federally funded) services to illegal immigrants.⁵ The Texas Legislature should utilize this capability to fund limited preventive health care services to illegal immigrants in Texas. The issue of providing health care to illegal immigrants is clearly one for the legislature to grapple with — not the court system or the Attorney General. The legislature can more appropriately weigh the ethical and economic consequences of an ill immigrant population.

Part II of this comment will focus on the background of the Texas Attorney General's advisory opinion regarding illegal immigrant health care. In particular, this section will discuss Title IV of the Personal Responsibility and Work Opportunity Reconciliation

¹ Op. Tex. Att'y Gen. No. JC-0394 (2001).

² *Id.* at 2.

³ 8 U.S.C. §1621 (2000).

⁴ 8 U.S.C. §1621(d) (2000).

⁵ 8 U.S.C. §1621(d).

Act of 1996 (PRWORA). This act is the federal law upon which the Attorney General's opinion is based. Title IV limits immigrant access to state and federal government benefits.⁶ In addition, it grants states the power to offer illegal immigrants governmental benefits.⁷

Part II will also discuss previous United States Supreme Court cases dealing with immigrant access to government benefits. Although these cases have triggered "equal protection" challenges in the past, PRWORA's Title IV should not be vulnerable to this Fourteenth Amendment argument. The author advances that Title IV of PRWORA will be viewed as immigration legislation, not equal rights legislation. Therefore, PRWORA and any state initiatives stemming from it will be upheld under a rational relationship standard.

Part III will discuss the Texas Attorney General's advisory opinion itself, while Part IV will take a close look at the opinion's legal analysis and basis. Part V will focus on the public policy implications of the Attorney General's interpretation of PRWORA and address the ethical and economical consequences of denying illegal immigrants health care. Part VI will be a comparison study, delving into how New York and California have dealt with the PRWORA and state-provided medical care to undocumented immigrants. This section will also suggest how Texas should approach illegal immigrant health care.

The author advocates that this Texas Attorney General case was interpreted correctly. Current federal law does not allow Texas to provide prophylactic health care services to illegal immigrants. However, given the ethical and economic consequences of denying basic health care to sick immigrants, the state legislature should pass legislation that provides for limited preventive care.

I. THE BACKGROUND

A. The Personal Responsibility and Work Opportunity Reconciliation Act

The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) provided the legal backbone for the Texas Attorney General's advisory opinion regarding immigrant health care in 1999.

⁶ 8 U.S.C. §1621 (2000).

⁷ 8 U.S.C. §1621(d) (2000).

PRWORA was passed by the 104th Congress of the United States and signed into law in 1996.⁸ This welfare reform legislation was designed to "end welfare as we know it."⁹ In passing this bill, Congress announced its position regarding the nexus between welfare, immigration, and U.S. domestic policy:¹⁰

The Congress makes the following statements concerning national policy with respect to welfare and immigration:

- (1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.
- (2) It continues to be the immigration policy of the United States that—
 - (a) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and
 - (b) the availability of public benefits not constitute an incentive for immigration to the United States.
- (3) Despite the principle of self-sufficiency, aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates.
- (4) Current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable of assuring that individual aliens not burden the public benefits system.
- (5) It is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy.
- (6) It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.
- (7) With respect to the state authority to make determinations concerning the eligibility of qualified aliens for public benefits in this chapter, a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be

⁸ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 U.S.C. and 42 U.S.C.).

⁹ Lanelle K. Polen, *Salvaging a Safety Net: Modifying the Bar to Supplemental Security Income for Legal Aliens*, 76 WASH. U. L. Q. 1455, 1455 (1988) (quoting the President's Statement on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. Papers 1328 (Aug. 22, 1996)).

¹⁰ Kristina M. Oven, *The Immigrant First as Human: International Human Rights Principles and Catholic Doctrine as New Moral Guidelines for U.S. Immigration Policy*, 13 NOTRE DAME J.L. ETHICS & PUBLIC POL'Y 499, 509 (1999)(referencing 8 U.S.C.A. § 1601(2)(A)).

self-reliant in accordance with national immigration policy.¹¹

Title IV of the PRWORA set forth regulations that addressed immigrant access to state and federal agency benefits.¹² Title IV terminated illegal immigrants' eligibility for Temporary Assistance for Needy Families (TANF, formerly Aid to Families with Dependent Children (AFDC)), food stamps, Supplemental Security Income (SSI), or Medicaid.¹³

One of Title IV's most notable characteristics was that it distinguished the immigration population into two categories: "qualified" and "unqualified" immigrants.¹⁴ Section 1621 provides that:

(a) In general.

Notwithstanding any other provision of law and except as provided in subsections (b) and (d) of this section, an alien who is not—

- (1) a qualified alien (as defined in section 1641 of this title),
- (2) a nonimmigrant under the Immigration and Nationality Act [internal citation omitted], or
- (3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C. 1182(d)(5)] for less than one year,

is not eligible for any State or local public benefit (as defined in subsection (c) of this section).¹⁵

"Qualified" immigrants are lawful, permanent residents, refugees/asylees, persons paroled into the U.S. for at least one year, and battered spouses and children with a pending or approved spousal visa or a petition for relief under the Violence Against Women Act.¹⁶ "Unqualified" immigrants include undocumented immigrants, students with foreign visas, foreign visitors, asylum applicants, people applying for an adjustment of immigrant status, and those for whom deportation has been suspended or withheld.¹⁷ Unqualified immigrants lost their eligibility for social services after the

¹¹ 8 U.S.C. § 1601 (2000).

¹² Liza Cristol-Deman & Richard Edwards, *Closing the Door on the Immigrant Poor*, 9 STAN. L. & POL'Y REV. 141, 141 (1998).

¹³ Wendy Zimmerman & Karen C. Tumlin, PATCHWORK POLICIES: STATE ASSISTANCE FOR IMMIGRANTS UNDER WELFARE REFORM, at 1 (URB. INST. OCCASIONAL PAPER NUMBER 24, 1999). (outlining non-citizen benefits which were restricted by legislation).

¹⁴ 8 U.S.C. § 1621 (2000).

¹⁵ 8 U.S.C. § 1621(a) (2000).

¹⁶ 8 U.S.C. § 1641(b) (2000).

¹⁷ Claudia Schlosberg, *Not-qualified Immigrants' Access to Public Health and Emergency Services After the Welfare Law*, National Health Law Program, ¶3 (Jan. 12, 1998), available at <http://www.healthlaw.org/pubs/19980112immigrant.html> (last visited Oct. 14, 2002) (listing those who are generally ineligible for benefits).

PRWORA, and are now subject to the welfare laws of the state in which they reside.¹⁸

Since the passage of the PRWORA, Congress has taken some steps to restore limited social benefits to certain immigrant groups, such as children, the elderly and disabled.¹⁹ In addition, over half the states have opted to provide certain benefits to legal immigrants.²⁰ This comment focuses on the denial of benefits to unqualified or illegal immigrants in Texas.

B. The PRWORA's Constitutionality

The PRWORA has left a heavy political stamp on national immigration policy: states now have broad authority to determine immigrant benefits.²¹ Until the PRWORA's passage, the federal government had authority over "which immigrants [were] admitted and how they [were] treated once here."²² This right was specifically established in Article I of the United States Constitution, which granted Congress the right "to establish a uniform Rule of Naturalization"²³

1. The Importance of Uniformity

Alexander Hamilton, in *The Federalist No. 32*, explained the necessity for Congress to create uniformity in immigration policy.²⁴ He expressed that power over naturalization must "necessarily be exclusive, because if each State had the power to prescribe a distinct

¹⁸ *Id.*

¹⁹ Zimmerman, *supra* note 13, at 8 (referring to The Balanced Budget Act of 1997, P.L. 105-33, August 4, 1997 and The Agriculture Research, Extension and Education Reform Act of 1998, P.L. 105-185, June 23, 1998 which restored some benefits to immigrants). *See also id.* at n.2-3.

²⁰ Zimmerman, *supra* note 13, at 3 (noting that nearly half of states have implemented a substitute method of assistance to immigrants to provide benefits even when federal funds will not cover the cost of the program).

²¹ *Id.* at 1-2 (referring to the power of the states to set eligibility requirements for federal benefits and to choose whether to implement state-funded substitute benefits).

²² *Id.* at 19 (alluding to two Supreme Court decisions in 1876 and the federal legislation which followed). *See* discussion of seminal cases *infra* Part II(B)(ii).

²³ U.S. CONST. art. I, § 8, cl. 4 (providing, in full, that Congress shall have the power "to establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States").

²⁴ THE FEDERALIST NO. 32 (Alexander Hamilton), available at <http://www.law.emory.edu/FEDERAL/federalist/feder32.html>. (delineating immigration law as one of three instances where federal powers should completely usurp state's autonomy).

rule, there could not be a uniform rule."²⁵ Scholars have suggested that this quote illustrates the founders' desire to establish a practically and politically sound immigration policy that strengthened both domestic and foreign relations.²⁶ Both Congress and the courts have supported this position by requiring uniformity in the area of naturalization.²⁷

Congress has exercised its plenary power through passing legislation which reaffirmed the idea of uniform immigration law.²⁸ For example, the very first federal immigration law in 1882 included a "head tax" of 50 cents per immigrant in response to the growing influx of immigrants entering the country at the time and the federal government's inability to provide for them.²⁹ The law also mandated that immigrants who were "convicts, lunatics, idiots," or other persons likely to become wards of the state were not allowed to be accepted for citizenship purposes.³⁰ Later legislation provided that any alien lawfully admitted shall be deported who "has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry."³¹ The most recent immigration legislation, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, buttresses this idea of uniform immigration policy.³²

²⁵ *Id.* (explaining the rationale behind the clause which gives Congress power to prescribe a uniform rule for naturalization that binds all states).

²⁶ Cristol-Deman, *supra* note 12, at 144.

²⁷ *Id.* (referring to the lead case interpreting the uniformity requirement, *Kharaiti Ram Samras v. United States*, 125 F.2d 879 (9th Cir. 1942), which held that uniformity related only to geography in the context of naturalization).

²⁸ See *McCullough v. Maryland*, 17 U.S. 316, 421 (1819) (explaining the broad scope of Congress' plenary powers in passing federal legislation: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."). Regarding the PRWORA and immigrant health care, Congress' "ends" were elucidated in 8 U.S.C. § 1601 (2002). See also discussion *supra*, Part II(A) (explaining Congress' reasons for the 1996 welfare overhaul).

²⁹ See Karen M. Longacher, *Losing the Forest For the Trees*, 11 TEMP. INT'L & COMP. L.J. 429, 433-34 (1997) (discussing immigration laws from 1800 to 1914).

³⁰ *Id.*

³¹ See Richard A. Boswell, *Restrictions on Non-citizens' Access to Public Access to Public Benefits*, 42 UCLA L. REV. 1475, n.26 (1995) (discussing the 1952 immigration statute).

³² Pub. L. No. 104-193, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.).

2. Equal Protection Argument

The PRWORA, however, steps outside the limits of traditional Congressional immigration policy and threatens immigration law uniformity by allowing states, and not the federal government, the opportunity to decide immigrant benefits.³³ This change implicates several constitutional issues.³⁴

One such constitutional challenge will probably come from the Equal Protection clause of the Fourteenth Amendment.³⁵ The PRWORA can trigger an equal protection argument because it uses the suspect classification of alienage to determine whether immigrants are eligible for certain governmental benefits.³⁶

The U.S. Supreme Court deemed "alienage" a suspect classification during the 1970's.³⁷ Statutes implicating alienage are reviewable under the judicial lens of "strict scrutiny."³⁸ Strict scrutiny requires that any state restriction on rights be narrowly tailored to further the state's compelling interest in order to be deemed constitutional.³⁹

"Alienage," however, should not be confused with "alien status." The U.S. Supreme Court has differentiated the meaning of the "alienage" from "alien status" by holding that the latter "is the product of conscious, indeed unlawful, action."⁴⁰ Therefore, classifications that discriminate against undocumented aliens (like Texas'

³³ Zimmerman, *supra* note 13, at 1 (inferring that the federal government was essentially "passing the buck" to the states regarding immigration benefits in the PRWORA).

³⁴ Cristol-Deman, *supra* note 12, at 144 (noting that the constitutional challenges to the PRWORA may involve the Uniform Naturalization Clause of Article 1, the Tenth Amendment, and the Fourteenth Amendment of the U.S. Constitution).

³⁵ *Id.* at 145; see also U.S. CONST., amend. 14, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

³⁶ Cristol-Deman, *supra* note 12, at 146 (indicating that the 1960's Warren Court stirred controversy when deciding the role of the Fourteenth Amendment in cases involving access to state-provided benefits).

³⁷ GERALD GUNTHER AND KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 720 (13th ed. 1997) (recognizing that the 1970's Burger Court invalidated several state restrictions on immigrant aliens).

³⁸ *Id.*

³⁹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1985).

⁴⁰ *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

advisory opinion) will probably be subject to a more deferential, rational relationship standard and be upheld.⁴¹

Nonetheless, it is important to note how the nation's highest court has previously ruled on states' abilities to limit government benefits to immigrants, period.⁴² The first four cases in the "equal protection" section—*Takahashi v. Fish and Game Commissioner*, *Shapiro v. Thompson*, *Graham v. Richardson*, and *Mathews v. Diaz*—concern limitations on government services to legal immigrants or citizens. The last case, *Plyler v. Doe*, concerns a public benefit to illegal immigrants. An analysis of how each case would apply to Texas' current illegal immigrant health care situation will follow each case recitation.

a. Legal Immigrants

1. *Takahashi v. Fish & Game Commissioner*⁴³

Takahashi was one of the first cases the U.S. Supreme Court addressed concerning the constitutionality of denying public benefits to immigrants based on alienage. In *Takahashi*, the respondent Torao Takahashi was a Japanese-born man who became a resident of California in 1907.⁴⁴ Although he was allowed to live in California, Takahashi was prohibited from becoming a U.S. citizen due to then-existing federal law.⁴⁵ From 1915 to 1942, Takahashi applied for and received a commercial license to fish within a three-mile radius off of California's Pacific coastline.⁴⁶ After the U.S. declared war on Japan and Germany in 1942, however, California passed a

⁴¹ Marisa Ann Tostado, *Comment: Alienation: Congressional Authorization of State Discrimination Against Immigrants*, 31 LOY. L. REV. 1033, 1049 (1998).

⁴² Cristol-Deman, *supra* note 12, at 146 (highlighting various United States Supreme Court cases that analyze illegal immigrants' access to state benefits).

⁴³ *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (holding that it was unconstitutional for the state of California to deny a commercial fishing license to a Japanese-born man because he was not a U.S. citizen).

⁴⁴ *Id.* at 412.

⁴⁵ *Id.* (explaining that, pursuant to the then-existing law of 8 U.S.C. §703, only immigrants with preferred racial and color requisites could become American citizens). Note one of the *Takahashi* opinion demonstrates that citizenship eligibility gradually became available to persons of varying race, color, and ethnicity as history progressed. For example, Africans became eligible in 1870 (16 Stat. 254, 256), Europeans earned eligibility in 1940 (54 Stat. 1137, 1140), Chinese were granted status in 1943 (57 Stat. 600, 601), and Filipinos and Indians became eligible in 1946 (60 Stat. 416). It was suggested that Japanese were excluded from this preferred group because of war-time prejudices. *Id.*

⁴⁶ *Id.* (noting that fishing was Mr. Takahashi's primary source of income).

law barring the issuance of commercial fishing licenses to any person ineligible for citizenship under federal law.⁴⁷

Takahashi brought a mandamus action in a Los Angeles County Superior Court to compel California's Fish and Game Commission to issue him a commercial fishing license.⁴⁸ The case traveled through California's appellate circuit and eventually reached the U.S. Supreme Court.⁴⁹ The Court ultimately ruled that the equal protection clause applied to legal immigrants and citizens alike, because it embodied "a general policy that 'all persons' lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."⁵⁰

Under a *Takahashi* analysis, Texas' denial of public benefits to illegal immigrants would be constitutional. Texas counties could not provide public health benefits to undocumented immigrants because they are not "lawfully" residing in the state. Therefore, they would not be entitled to any "legal privileges" offered by the state. A court reviewing the Texas Attorney General's opinion under a *Takahashi* judicial lens would allow it to stand.

2. *Shapiro v. Thompson*⁵¹

Shapiro and its sister cases⁵² gave the U.S. Supreme Court the opportunity to decide whether state statutes in Connecticut, the District of Columbia, and Pennsylvania, which "denied welfare assistance to persons who had not resided in those jurisdictions for the year immediately preceding their application for benefits," were constitutional.⁵³

The U.S. Supreme Court held that these required waiting periods created an illegal classification under the Fourteenth Amend-

⁴⁷ *Id.*; see CAL. FISH & GAME CODE §990 ("A commercial fishing license may be issued to any person other than a person ineligible to citizenship.").

⁴⁸ *Takahashi*, 334 U.S. at 414 (noting that Takahashi brought suit in 1945, after he had been released from a U.S. military camp where the government had several Japanese-born persons during World War II); See also *Korematsu v. United States*, 323 U.S. 214 (1943) (suspending a conviction for Korematsu, who violated a military order which prohibited all persons of Japanese-born ancestry from inhabiting certain designated portions of the West Coast during World War II).

⁴⁹ *Takahashi*, 334 U.S. at 415 (indicating that the Court granted certiorari to decide the importance of federal-state relationships and constitutionally protected liberties).

⁵⁰ *Id.* at 420.

⁵¹ *Shapiro v. Thompson*, 394 U.S. 618 (1969).

⁵² *Washington v. Legrant*, 394 U.S. 618 (1969); *Reynolds v. Smith*, 394 U.S. 618 (1969).

⁵³ Cristol-Deman, *supra* note 12, at 146.

ment between those who had lived in the respective jurisdictions for more than one year and those who had not.⁵⁴ Although the states certainly had compelling state interests in advancing these time restrictions, these interests were not strong enough to override equal protection rights and the fundamental right to travel.⁵⁵

Shapiro held that discrimination in welfare eligibility against non-state citizens was unconstitutional; it did not address benefits to non-U.S. citizens. Therefore, a *Shapiro* analysis would probably render Texas' denial of preventive health care to non-citizens constitutional. Illegal immigrants in Texas would not be entitled to the same rights as legal immigrants or citizens. Therefore, they would not have access to state preventive health care services.

3. *Graham v. Richardson*⁵⁶

Graham v. Richardson, a seminal United States Supreme Court case, grappled with whether states could condition their welfare benefits on either a beneficiary's U.S. citizenship status or resident alien status.⁵⁷ The respondents in *Graham* were women who had resided and worked in their respective states for several years, but did not qualify for state welfare benefits because of their lack of citizenship.⁵⁸ Arizona and Pennsylvania sought to justify these restrictions on the basis of the "compelling state interest" that states should have the option of favoring their own citizens in the "distribution of limited resources such as welfare benefits."⁵⁹

⁵⁴ *Shapiro*, 394 U.S. at 627 (pointing out that being in the wrong classification could mean the difference between having food, shelter, and other life necessities for a year).

⁵⁵ *Id.* (indicating that the compelling state interests advanced by Pennsylvania, Connecticut, and D.C. included preserving the fiscal integrity of public welfare systems and discouraging indigents to travel to jurisdictions with easy welfare eligibility requirements); *See also* United States v. Guest, 383 U.S. 745 (noting the Court's recognition of the fundamental right to travel from one state to another); *Cf.* *Truax v. Raich*, 239 U.S. 33 (1915) (demonstrating that courts have upheld certain legitimate state interests over the rights of illegal immigrants).

⁵⁶ *Graham v. Richardson*, 403 U.S. 365 (1971) (noting that this case was considered together with No. 727, *Sailer v. Leger*, a case on appeal from the U.S. District Court for the Eastern District of Pennsylvania).

⁵⁷ *Id.* (highlighting that Arizona and Pennsylvania were the states whose welfare laws were implicated).

⁵⁸ *Id.* (noting that 64-year old Carmen Richardson, born in Mexico, had resided in Arizona since 1956; Scottish-born Elsie Mary Jane Leger had lived in Pennsylvania since 1965; and Beryl Jarvis, a Panamanian native, had lived in Pennsylvania since 1968). All three women were denied state welfare benefits because they were not citizens. *Id.*

⁵⁹ *Id.* at 372 (relying on Justice Benjamin Cardozo's reasoning in *People v. Crane*, 214 N.Y. 154, 108 N.E. 427 (1915), where Cardozo opined, "To disqualify aliens is discrimination

The Court rejected the states' argument, concluding that a state's desire to preserve limited resources for its own citizens was not strong enough to usurp equal protection rights.⁶⁰ Quoting *Shapiro*, the Court held that "the saving of welfare costs cannot justify an otherwise invidious classification."⁶¹ This case buttressed the notion that constitutional liberties were extended to all persons legally in the United States, not just all citizens.

In *Graham*, like *Takahashi* and *Shapiro*, the U.S. Supreme Court held that states could not discriminate against resident aliens who were lawfully in the country. Resident aliens, or legal immigrants, were entitled to the same state privileges as U.S.-born citizens. *Graham*, though, did not address state benefit eligibility for illegal immigrants. For this reason, illegal immigrants in Texas could not use *Graham* to support their fight for access to government health benefits.

4. *Mathews v. Diaz*⁶²

The issue presented in *Mathews v. Diaz* was whether Congress could condition an illegal immigrant's eligibility for participation in a Medicare supplemental insurance program based on continuous residence in the United States for five years and permanent residency.⁶³ The appellees in this case were Cuban refugees who had resident alien status, lived in Florida, were all over the age of 65, and who had been denied Medicare Part B coverage based on their citizenship status.⁶⁴

The U.S. Supreme Court held that though all persons lawfully in the country were protected by the Due Process Clause, they were not all similarly entitled to all the benefits of U.S. citizenship.⁶⁵ Congress' plenary power over naturalization and immigration law al-

indeed, but not arbitrary discrimination. . . The state in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens rather than that of aliens."

⁶⁰ *Id.* at 374; *Cf.* *Truax v. Raich*, 239 U.S. 33 (1915).

⁶¹ *Graham*, 403 U.S. at 375.

⁶² *Mathews v. Diaz*, 426 U.S. 67 (1976).

⁶³ *Id.* at 69.

⁶⁴ *Id.* at 69-70 (indicating that the Social Security Act of 1932, 42 U.S.C. §1395o, set forth such restrictions); *See also* 42 U.S.C. §1395k (providing that the Medicare Part B program covers certain doctors' costs, home health care, outpatient physical therapy, and other medical care).

⁶⁵ *Mathews*, 426 U.S. at 78 (emphasizing in note 13 of the opinion that Title 8 of the United States Code is founded on distinctions between U.S. citizens and aliens).

lowed it to formulate laws that treated citizens and non-citizens differently.⁶⁶ This treatment, though different, was not necessarily "invidious."⁶⁷ The federal statute that limited Medicare benefits to U.S. citizens was constitutional.

This case may be the most persuasive in supporting Texas' stance on illegal immigrant medical care, because it concerns both immigration rights and government-provided health services. The following quote particularly supports the Texas Attorney General's decision:

The fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for all aliens. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests.⁶⁸

In *Mathews*, even resident aliens who were lawfully in this country were not entitled to the same government services to which U.S. citizens were entitled. If *legal* immigrants did not have access to such benefits, it would be hard for *illegal* immigrants in Texas to argue that they had a right to these services, either.

b. Illegal Immigrants

1. *Plyler v. Doe*⁶⁹

Plyler v. Doe evolved out the Texas federal court system into the U.S. Supreme Courtroom.⁷⁰ In 1975, the State of Texas had amended its education laws to withhold any state tax monies from school districts that enrolled children who were not legally admitted into the country.⁷¹ The question presented before the court in

⁶⁶ *Id.* at 80.

⁶⁷ *Id.*

⁶⁸ *Id.* (reaffirming that resident aliens are not entitled to all the privileges to available to a U.S. citizen).

⁶⁹ *Plyler v. Doe*, 457 U.S. 202 (1982).

⁷⁰ *Id.* at 206 (noting that the case was first filed in the United States District Court for the Eastern District of Texas). This legislation also created lawsuits in the Southern, Western, and Northern Districts of Texas. *Id.* at 209. All were eventually consolidated in the Southern District. *Id.*

⁷¹ *Id.* at 205 (highlighting that school districts were also supposed to deny enrollment of illegal immigrant school children); *See also* TEX. EDUC. CODE ANN. §21.031 (Vernon Supp. 1981) (providing that "a legally admitted alien is one who has documentation that he or she is legally in the United States. . ."). *Id.*

Plyler was whether states could deny access to free public education to undocumented school-age children.⁷²

The U.S. Supreme Court ruled that denying children the opportunity to be educated was a violation of the Equal Protection clause. The Court held that illegal immigrants were "persons" guaranteed certain constitutional rights under the Fifth and Fourteenth Amendments.⁷³

At first blush, *Plyler's* clear refusal to allow states to invidiously discriminate against immigrants bolsters the argument that illegal immigrants should have access to preventive health care in Texas.⁷⁴ However, "*Plyler* and its dicta may ultimately do more harm than good with respect to challenges to provisions dealing with undocumented immigrants."⁷⁵ The Court in *Plyler* specifically rejected the idea that the status of "illegal alien," which is different from "alienage," was a "suspect class."⁷⁶ The Court also noted that illegal aliens create their own status as a result of a personal voluntary action to enter the country in violation of U.S. criminal laws.⁷⁷

Furthermore, although *Plyler* held that education was a fundamental right that could not be usurped, health care has never been deemed such a fundamental right. For this reason, even a *Plyler* analysis, which deals with illegal immigrant benefits, would probably render the Texas advisory decision on undocumented immigrant health care constitutional.

These cases —*Takahashi*, *Shapiro*, *Graham*, *Mathews*, and *Plyler*—give a snapshot view of how the United States Supreme Court has ruled when considering equal protection issues and immigrant eligibility for government benefits. Although each case discusses access to a different form of public benefit, i.e.: fishing licenses, welfare benefits, medical care, or the right to public education, it appears that the Court has usually deemed state restrictions based on alienage as illegal. However, the Court in *Plyler* more recently clarified that while alienage is a suspect class, undocumented status is

⁷² *Plyler*, 457 U.S. at 205.

⁷³ *Id.* at 210; *See also* *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953) and *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (upholding the Court's belief that illegal aliens are protected under the U.S. Constitution's due process and equal protection rights).

⁷⁴ *Cristol-Deman*, *supra* note 12, at 149.

⁷⁵ *Id.*

⁷⁶ *Plyler*, 457 U.S. at 219, n. 19; *see* *Cristol-Deman*, *supra* note 12, at 149 (observing that *Plyler's* dicta may damage illegal immigrants' access to publicly funded services).

⁷⁷ *Plyler*, 457 U.S. at 219, n. 19.

not.⁷⁸ Therefore, classifications that discriminate against undocumented aliens will be subject to a more deferential, rational relationship standard.⁷⁹

Due to the fact that the Texas Attorney General's ruling is premised on alien status and not alienage, it will probably survive an equal protection attack.⁸⁰

3. *The Plenary Power Argument*

Most scholars believe that the Fourteenth Amendment constitutional argument will be moot, however, because federal courts will approach the PRWORA as immigration legislation, not an equal rights matter.⁸¹

Given Congress's plenary power over immigration, courts will utilize a reduced, rational basis judicial standard of review when analyzing constitutional challenges to the PRWORA.⁸² As scholar Liza Cristol-Deman notes, "[b]ecause Congress can exercise complete control over immigration regulation, separation of powers concerns dictate the use of the lowest standard of judicial review for federal immigration laws."⁸³ For this reason, courts will probably hold that the PRWORA is constitutional.

Congress's legitimate concerns about immigrants and self-sufficiency, combined with its plenary power to rule over all matters of immigration and naturalization, likely means that the PRWORA will withstand constitutional scrutiny. For these reasons, the PRWORA, and most state responses that evolve from it (like Texas' stance on illegal immigrant health benefits) will probably endure any level of constitutional scrutiny.

C. *The PRWORA's Effect on Texas*

Despite the fact that the PRWORA was passed in 1996, its impact on immigrant health policy in Texas was not fully realized until

⁷⁸ *Plyler*, 457 U.S. at 220 (holding that undocumented status for children is not "an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action).

⁷⁹ Tostado, *supra* note 41, at 1049.

⁸⁰ Tex. Atty. Gen. Op. JC-0394, 2001 WL 78664 (Tex. A.G.).

⁸¹ See, e.g., Cristol-Deman, *supra* note 12, at 146 (pointing out that the court in *Takahashi* viewed the issue as one of immigration and naturalization, and thus just "accepted the state's justification that the legislature's intent was to preserve state resources.").

⁸² Tostado, *supra* note 41, at 1039.

⁸³ *Id.* (commenting that special judicial deference is given to Congress regarding immigration law).

2001 when the Texas Attorney General clarified the effects of the Act.⁸⁴ Previously, state law required county hospital districts to provide health services to all indigent county residents.⁸⁵ Specifically, the Indigent Health Care and Treatment Act required county hospital districts to provide free or discounted care to all needy residents.⁸⁶ Harris County, which includes Houston, the largest metropolitan area in Texas, continued to function under this state law even after the enactment of the PRWORA.⁸⁷

The Harris County Hospital District (the District) is one of the largest public health systems in the country.⁸⁸ The District is composed of two general hospitals (each with trauma units), a psychiatric hospital, eleven community clinics, and other facilities.⁸⁹ State law required the district to "furnish medical aid and hospital care to indigent and needy persons residing in the district."⁹⁰ In order to receive this care, prospective patients had to produce proper documentation of indigence.⁹¹

The District officials learned that many facilities within the District required different forms of documentation.⁹² While official district policy permitted applicants to use a range of identification to verify their eligibility, some facility clerks required applicants to produce a Texas driver's license, which undocumented immigrants could not get.⁹³ Due to these inconsistent documentation require-

⁸⁴ See Op. Tex. Att'y Gen. No. JC-0394 (2001) (finding that, pursuant to federal law, undocumented immigrants could not have access to most publicly-funded preventive health care services).

⁸⁵ Op. Tex. Att'y Gen. No. H-703 (1975); see also TEX. CONST. art. IX, §§ 4, 9 (providing that hospital districts "shall assume full responsibility for providing medical and hospital care to needy inhabitants of the county.").

⁸⁶ TEX. HEALTH & SAFETY CODE §61.052 (Vernon 2001).

⁸⁷ See John Suval, *Paying the Price: Hospital District Officials Wanted a Simple One-Sentence Policy on Immigrant Health Care. What They Got Instead was a Criminal Probe and Plenty of Politics*, THE HOUSTON PRESS, Oct. 11-17, 2001 at 30, 33 (noting that Harris County continued to treat patients regardless of whether they were in the United States legally).

⁸⁸ *Id.* at 33.

⁸⁹ *Id.*

⁹⁰ TEX. HEALTH & SAFETY CODE §281.002 (Vernon 2000) (providing Texas counties with the authority to create their own hospital districts).

⁹¹ TEX. HEALTH & SAFETY CODE §61.006 (Vernon 2000) (stating that the Texas Department of Health shall establish guidelines for various counties to follow in providing indigent health care).

⁹² Suval, *supra* note 87, at 33 (characterizing documentation requirements as obstacles to immigrants seeking health care).

⁹³ *Id.* (detailing the problems that many aliens had renewing their "gold cards."). At the time, "gold cards" were required to get indigent medical care in Harris County. *Id.*

ments, facilities denied discounted medical treatment to many poor illegal immigrants in Harris County.⁹⁴

This problem became a bureaucratic nightmare.⁹⁵ Immigrant advocates asserted that the district's lack of a uniform policy on undocumented immigrants contributed to mass confusion and the erratic administration of medical treatment.⁹⁶ Indeed, the *Houston Catholic Worker*, a local grassroots newspaper, reported "medical services to the Spanish-speaking in Harris County [were] in a state of crisis."⁹⁷

Consequently, the Hospital District, under new leadership, realized that it needed to create a uniform policy regarding eligibility requirements for county indigent medical care, especially with regard to undocumented immigrants.⁹⁸ Aware of the PRWORA's language cutting illegal immigrant social services, and anxious to create a consistent admission policy pursuant to state law, the district sought advice from the Texas Attorney General's office in Austin, Texas.⁹⁹

II. THE ATTORNEY GENERAL'S ADVISORY OPINION

On January 25, 2001, Harris County Attorney Michael Fleming asked the Texas Attorney General to address the issue of, "[w]hether the Harris County Hospital District may provide discounted health care to persons residing in Harris County, without regard to their immigration or legal status."¹⁰⁰

⁹⁴ *Id.* (discussing the effect that the haphazard documentation policies had on immigrants seeking medical treatment).

⁹⁵ *See id.*

⁹⁶ Suval, *supra* note 87 at 34 (describing the Houston Immigration and Refugee Coalition's concerns about the situation).

⁹⁷ *Id.* at 34 (reporting that the aforementioned article was written by Louise Zwick, a co-founder of Casa Juan Diego in Houston, a medical clinic which provided preventive health services to anyone).

⁹⁸ *Id.* (noting that the District's longtime CEO, Lois Jean Moore, left the District in 1999 amidst severe financial problems and management). Moore was soon replaced with John Guest, the former President of the Bexar County University Health System in San Antonio. *Id.* Guest had more than sixteen years of experience in the public and community health sector. *Id.*

⁹⁹ Op. Tex. Att'y Gen. No. JC-0394 (2001) (expressing the District's desire to continue to treat patients regardless of immigration status).

¹⁰⁰ *Id.*; see TEX. GOV. CODE §§ 402.041-402.045 (Vernon 1998) (authorizing the Texas Attorney General to issue written advisory opinions on request).

The Attorney General concluded that Texas counties could no longer provide preventive health care services to undocumented persons regardless of their residence within county lines pursuant to the PRWORA.¹⁰¹

Undocumented persons could, however, continue to receive emergency care, immunizations, and treatment for communicable diseases under the PRWORA.¹⁰² Federal statute 8 U.S.C. §1621(b) decreed that restriction of health services did not apply to:

- (1) Assistance for health care items and services that are necessary for the treatment of an emergency medical condition (as defined in section 1396b(v)(3) of title 42) of the alien involved. . . [and]
- (3) Public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.¹⁰³

Except for the health services specifically authorized by the PRWORA legislation, illegal immigrants were denied all other state funded health services.¹⁰⁴ The PRWORA preempted all local and state laws that provided services contrary to this provision.¹⁰⁵

The Attorney General's opinion explained that the only way to legally provide such preventive care services would be for Texas state policymakers to enact legislation that "affirmatively provides for such eligibility."¹⁰⁶ Pursuant to 8 U.S.C. §1621(d), states may provide such services under the following directive:

A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996 which affirmatively provides for such eligibility.¹⁰⁷

¹⁰¹ Op. Tex. Att'y Gen. No. JC-0394 (2001) (directing the Hospital District to only administer those services allowed under 8 U.S.C. § 1621).

¹⁰² *Id.*

¹⁰³ 8 U.S.C. § 1621(b)(1), (3) (1994 & Supp. V. 1999); see also the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. §1395dd (2000)(requiring a hospital to "provide for an appropriate medical screening examination within the capability of the hospital's emergency department . . ."). EMTALA defines an emergency medical condition as a condition that could either place the patient's health in jeopardy, seriously impair bodily functions, or cause serious bodily organ dysfunction. *Id.* This treatment is given without regard to citizenship status. *Id.*

¹⁰⁴ Op. Tex. Att'y Gen. No. JC-0394 at 2 (2001) (following the statutory mandate).

¹⁰⁵ *Id.* (citing *Doe v. Wilson*, 67 Cal. Rptr. 2d 187, 189 (Cal. App. 1997)).

¹⁰⁶ *Id.* at 3 (illuminating the way to continue to provide the same services to patients pursuant to the federal statute by passing an appropriate state law).

¹⁰⁷ 8 U.S.C. §1621(d) (2000).

Harris County officials then alleged that House Bill 1398 of the 76th Texas Legislature, which amended the Indigent Health Care and Treatment Act, qualified as legislation that could circumvent the PRWORA requirements.¹⁰⁸ This argument proved unpersuasive for the Attorney General, who noted that under the PRWORA's section 1621(d), the state must "affirmatively" give eligibility to illegal immigrants for enrollment in state-provided medical care.¹⁰⁹ House Bill 1398 failed to refer to citizenship in order to be entitled to such medical services.¹¹⁰

To support his argument, the Attorney General noted that the Texas Legislature previously granted illegal immigrants certain rights in other policy areas, and in these cases the legislature did so expressly.¹¹¹ For example, in 1997, the 75th Texas Legislature amended the Texas Family Code to provide that the Department of Protective and Regulatory Services could use state and federal monies for the protection of children and families "without regard to the immigration status of the child or the child's family."¹¹² Similarly (and in the same legislative term), the Legislature revised § 264.006 of the Family Code to further ensure that children in Texas, regardless of their citizenship status, would receive protection from abuse.¹¹³ The Attorney General determined that because the Texas Legislature did not include this citizenship language in House Bill 1398, it did not intend to provide preventive health care to undocumented immigrants.¹¹⁴ If the Legislature intended otherwise, as the Attorney General argued, it would have included the proper terminology as it did in the Family Code provisions.¹¹⁵

¹⁰⁸ Op. Tex. Att'y Gen. No. JC-0394 (2001); see also Julia M. Hernandez, *Undocumented Immigrants Face Curtailed Health Care Services*, HEALTH LAW PERSPECTIVES, HOUS. J. HEALTH L. & POL'Y INST. (August 28, 2002) at <http://www.law.uh.edu/healthlawperspectives/PublicHealth/010828Undocumented.html>.

¹⁰⁹ Op. Tex. Att'y Gen. No. JC-0394, at 3 (2001) (explaining that new legislation which meets the definition of "affirmative" will be necessary for the hospital district to continue treating undocumented immigrants).

¹¹⁰ *Id.* (rejecting the notion that any current legislation affirmatively provided for the treatment of illegal immigrants).

¹¹¹ *Id.*

¹¹² *Id.*; TEX. FAM. CODE ANN. § 264.004(c) (Vernon Supp. 2001).

¹¹³ Op. Tex. Att'y Gen. No. JC-0394, at 3 (2001); TEX. FAM. CODE ANN. § 264.006 (Vernon Supp. 2001).

¹¹⁴ Op. Tex. Att'y Gen. No. JC-0394, at 3 (2001) (comparing House Bill 1398 to other pieces of legislation that affirmatively grant rights).

¹¹⁵ *Id.*

The Attorney General concluded that H.B. 1398 did not affirmatively provide for undocumented immigrant medical care.¹¹⁶

House Bill 1398 does not expressly refer to the immigration status of aliens nor does it include any indication that the legislature intended it to provide that an alien 'not lawfully present in the United States' would be eligible for a state or local public benefit for which the alien was ineligible under the PRWORA.¹¹⁷

The Attorney General then addressed Harris County's constitutional argument.¹¹⁸ The county argued that 8 U.S.C. § 1621(d) violated the Tenth Amendment of the United States Constitution.¹¹⁹ The Tenth Amendment provides that, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹²⁰ The County alleged that section 1621 effectively forced states to draft and pass legislation specifically granting illegal immigrants access to preventive health care.¹²¹ This mandate, they argued, violated the premise that "Congress may not assume control over the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program."¹²²

The Attorney General disagreed with the argument that the PRWORA compelled states to enact or enforce a federal regulatory program.¹²³ Noting that federal statutes should be accorded a strong presumption of constitutionality, the Attorney General argued that the PRWORA simply provides states an option to circumvent the federal law through state provisions that affirmatively provide for such medical services.¹²⁴ Thus, the Attorney General concluded "[s]ection 1621(d) enable[d] each state to make decisions about public benefits for undocumented aliens based on its own circumstances."¹²⁵ Under constitutional law, Congress may encourage

¹¹⁶ *Id.*

¹¹⁷ *Id.* (indicating that House Bill 1398 will not allow for the District to continue treating undocumented aliens).

¹¹⁸ Op. Tex. Att'y Gen. No. JC-0394 (2001).

¹¹⁹ *Id.*

¹²⁰ U.S. CONST. amend. X.

¹²¹ Op. Tex. Att'y Gen. No. JC-0394 (2001).

¹²² *Texas v. United States*, 106 F.3d 661, 665-66 (5th Cir. 1997) (explaining the purpose of the Tenth Amendment); see also *New York v. United States*, 505 U.S. 144, 161-63 (1992) (discussing the history and evolution of this premise).

¹²³ Op. Tex. Att'y Gen. JC-0394, at 3 (2001) (arguing that states have discretion in creating policies to circumvent the PRWORA).

¹²⁴ *Id.* at 4.

¹²⁵ *Id.*

or urge a state to adopt laws consistent with federal policy.¹²⁶ Congress may not, however, compel a state to do so.¹²⁷ The Attorney General argued that the PRWORA would survive this constitutional challenge because section 1621(d) of the PRWORA did not compel states to deny healthcare to illegal immigrants; rather, it merely provided states the option of circumventing the federal law through state legislation.¹²⁸ The District was required to comply with the law.¹²⁹

Harris County also inquired about the penalties for violations of the PRWORA by providing illegal immigrants preventive health care services.¹³⁰ The Attorney General conceded that the PRWORA failed to specify any enforcement procedures.¹³¹ However, the Attorney General suggested that violations of the PRWORA could result in a withdrawal of federal and state funding such as Medicare and Medicaid monies because "the hospital district receives funds from Medicare and Medicaid and as a condition for receiving these funds, it must comply with applicable federal laws related to the health and safety of patients."¹³² The Attorney General also noted that the hospital district was responsible for the accounting and control mechanisms set forth by the County Commissioners Court or the Hospital District Board.¹³³

Attorney General Cornyn dismissed the public policy concerns raised by Harris County's brief to the state.¹³⁴ The Attorney General stated that the ethical and economical concerns of denying illegal immigrants primary health care services were matters best reserved for the Texas State Legislature to contemplate, not the Texas Attorney General's Office.¹³⁵

In sum, Texas Attorney General John Cornyn found that the PRWORA made undocumented immigrants ineligible for govern-

¹²⁶ See *New York v. United States*, 505 U.S. 144, 166 (1992) (holding that Congress may, short of outright coercion, exercise a number of constitutionally permissible methods to urge states to adopt a legislative program consistent with federal interests).

¹²⁷ *Id.*

¹²⁸ Op. Tex. Att'y Gen. JC-0394 (2001).

¹²⁹ *Id.*

¹³⁰ *Id.* at 1.

¹³¹ *Id.*; 8 U.S.C. § 1621 (2000).

¹³² Op. Tex. Att'y Gen. JC-0394 (2001).

¹³³ *Id.*; see also TEX. HEALTH & SAFETY CODE ANN. § 281.049 (Vernon 2001).

¹³⁴ Op. Tex. Att'y Gen. No. JC-0394, at 6 (2001).

¹³⁵ *Id.*

ment-provided preventive health care.¹³⁶ States could elect to provide such coverage, but only through passage of state legislation after August 22, 1996 affirmatively providing for such health care services.¹³⁷ Thus far, Texas has not passed such a statute; neither the Texas Health and Safety Code section 281.002 nor H.B. 1396 of the 76th Legislature demonstrated the requisite intent to provide such services to unqualified immigrants.¹³⁸ County hospital districts that provide free or discounted nonemergency health care treatment to illegal immigrants can be subject to certain federal and state penalties for violation of this federal law.¹³⁹

III. CASE DISCUSSION, ANALYSIS, AND POLITICS

The Attorney General's decision regarding illegal immigrant health care does not carry the weight of law.¹⁴⁰ Regardless of its lack of legal bite, this advisory opinion raised controversy within the state. The following section analyzes the Attorney General's reasoning in the opinion, and discusses the local political responses.

¹³⁶ *Id.* at 6 (arguing undocumented immigrants were ineligible for state provided preventive health care).

¹³⁷ *Id.* (arguing states could elect to provide immigrants with preventive health care services only if the statutory deadline was met).

¹³⁸ *Id.*

¹³⁹ Op. Tex. Att'y Gen. No. JC-0394, at 1 (2001). For an account of how other Texas counties have reacted to this Attorney General opinion, see Jim Yardley, *Immigrants' Medical Care is Focus of Texas Dispute*, N.Y. TIMES, Aug. 12, 2001 at §1 (reporting that both Montgomery and Nueces County hospital officials have cut services to more than three hundred undocumented immigrants within their county lines, while Bexar and Dallas Counties have chosen to continue the status quo); see also TX: *Attorney General Claims that Harris County Violates PRWORA in Providing Free Care to Undocumented Immigrants*, 20 NEWSLINE 8 (July 31, 2001), at http://www.naph.org/publications/index.cfm?publication_issue_id=2168&publication_article_id=450 (asserting that U.S. Representative Gene Green, a Houston-area congressman, has attempted to alleviate this issue by introducing legislation in the U.S. House of Representatives). Congressman Green introduced H.R. 2635 on July 25, 2001, in an effort to expand the PRWORA services to include primary and preventive care to all illegal immigrants. *Id.* It was estimated that passage of this legislation would provide preventive care for nearly 700,000 undocumented immigrants in Texas, saving the state money in costly emergency care. *Id.* The legislation was sent to committee and has not been acted upon since. *Id.*

¹⁴⁰ Office of the Attorney General Website, *Effect of Opinions*, available at: http://www.oag.state.tx.us/opinopen/opin_request_proc.htm (noting that, although not binding, Texas appellate courts have held that Attorney General Opinions are entitled to "great weight"); but see Amy Snow Landa, *Illegal care? Treating Undocumented Immigrants in Texas*, AMERICAN MEDICAL NEWS, available at: http://www.ama-assn.org/sci-pubs/amnews/pick_01/gvsa1001htm (reporting that despite the strong persuasive authority of the Attorney General's July 2001 opinion, some people regard it as "just one lawyer's opinion.").

A. Case Discussion and Analysis

The Attorney General's decision is legally correct. The PRWORA's language clearly states that illegal immigrants can obtain state benefits only if the state "affirmatively provides for such eligibility."¹⁴¹

Philip Bobbitt, a renowned constitutional scholar, outlined six modalities for the interpretation of statutes or other legal instruments in his legal treatise, *Constitutional Interpretation*.¹⁴² For our analysis, we utilize the most common and practical modality, the textual method.

Bobbitt's textual method analyzes the plain language of the statute to determine its meaning. Using this analysis, we find that the Texas Attorney General looked to the plain meaning of what the PRWORA intended in 8 U.S.C. § 1621(d). The Texas Attorney General defined "affirmatively" to mean "by way of assertion or express declaration."¹⁴³ Indeed, he cited the Oxford English Dictionary to clarify this directive.¹⁴⁴

Under a strict textual analysis, Texas has not affirmatively provided preventive health care for illegal immigrants. The Attorney General properly rejected the District's argument that the Indigent Health Care and Treatment Act amendments passed in 1999 affirmatively provided for such care.¹⁴⁵ Neither the Texas Health and Safety Code section 281.002, nor House Bill 1398, which Harris County also claimed qualified as appropriate state legislation, made any reference to immigrant status.¹⁴⁶ The Indigent Health Care and Treatment Act required a name, address, social security number (if

¹⁴¹ 8 U.S.C. § 1621(d) (2000).

¹⁴² PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION*, 12-13 (1991). Bobbitt outlined six modalities for statutory interpretation. The textual method analyzes the plain language of the statute to determine its meaning. The historical method uses legislative history and the drafters' or legislators' original intentions to determine the correct implementation of a statute. The structural method focuses on each branch of government and determines statutory construction based on the duties delegated to each branch. The doctrinal method looks at precedent to discern statutory construction. The fifth method, the prudential modality, focuses on the policy and consequences of the statute to determine its meaning. Lastly, the sixth method looks towards ethics and morality to determine the meaning of a statute. *Id.*

¹⁴³ Op. Tex. Att'y Gen. No. JC-0394 at 4 (2001); 1 Oxford English Dictionary 219 (2d ed. 1989).

¹⁴⁴ Op. Tex. Att'y Gen. No. JC-0394 at 4 (2001); 1 Oxford English Dictionary 219 (2d ed. 1989).

¹⁴⁵ See Op. Tex. Att'y Gen. No. JC-0394 (2001).

¹⁴⁶ TEX. HEALTH & SAFETY CODE ANN. § 281.002 (Vernon 2001); Tex. H.B. 1398 §16.007, 76th Leg., R.S. (1999) (providing no specific reference to medical services for unqualified immigrants).

available), proof of poverty status, and proof of county of residence for treatment.¹⁴⁷ It did not "assert" or make an "express declaration" for citizenship status as required by the PRWORA.¹⁴⁸ The Texas Attorney General reasoned that the PRWORA required express reference to immigrant status, and neither the legislative history nor the language of the bill provided for illegal immigrant eligibility.¹⁴⁹

The PRWORA's language and the legislative intent clearly require state legislatures to explicitly provide for illegal immigrant service eligibility.

B. The Politics

Controversy erupted soon after the Texas Attorney General declared that the PRWORA prohibited county hospital districts from providing preventive health care to illegal immigrants. The medical, media, political, legal and non-profit communities all either strongly condemned or supported this opinion.¹⁵⁰

Hospitals and other health care providers reacted negatively to the decision.¹⁵¹ Some doctors, for example, claimed that the Texas Attorney General's office effectively hindered them from pursuing their professional duty to heal.¹⁵² Dr. Jeff Starke, Chief of Pediatrics at Ben Taub General Hospital, claimed that such an order violated his Hippocratic oath.¹⁵³ To forbid doctors from treating a nonemergency illness, according to Starke, would be "morally reprehensible, and . . . contrary to every canon of modern medical ethics of which [he was] aware."¹⁵⁴

Some of the media jumped into the fray as well, arguing that the decision was bad public policy. An August 2001 editorial in the

¹⁴⁷ Tex. H.B. 1398 § 61.007(1)-(8), 76th Leg., R.S. (1999)(providing health care and critical treatment for the indigent citizens of Texas).

¹⁴⁸ 8 U.S.C. § 1621(d) (2000).

¹⁴⁹ Op. Tex. Att'y Gen. No. JC-0394, at 2 (2001).

¹⁵⁰ See Michael King, *Slamming the Hospital Door: Cornyn's Health-Care Opinion Neither Compassionate nor Conservative*, AUSTIN CHRONICLE, Aug. 24, 2001; Mark Levin, *YCT Files Complaint with Harris County DA on Health Care Services to Illegal Aliens in Violation of Federal Law*, YOUNG CONSERVATIVES OF TEXAS NEWS ADVISORY (July 30, 2001), available at www.yct.org/healthcare.html.

¹⁵¹ *Id.*

¹⁵² See Landa, *supra* note 140.

¹⁵³ *Id.*

¹⁵⁴ *Id.* (responding to how he would react if told that he could care for someone with tuberculosis, a communicable disease treatable under the PRWORA, but not someone with asthma, which is not considered as a treatable illness under the same legislation).

Austin Chronicle labeled Cornyn's opinion as "almost certainly lousy legal advice."¹⁵⁵ The columnist claimed the Attorney General's opinion denied illegal immigrants, who live, work, and pay taxes in Texas, access to services that they helped pay for.¹⁵⁶ Studies conducted by the National Immigration Forum, an immigration advocacy group, supported this contention.¹⁵⁷ These studies showed that immigrants, over the course of their lifetimes, pay about \$80,000 more in taxes than they use in government provided services.¹⁵⁸

Opponents of the Attorney General's opinion also highlighted the fact that the Texas Legislature would have to wait to respond adequately to this legal and political matter.¹⁵⁹ The Texas Legislature, unless convened by the Governor, meets every two years.¹⁶⁰ Having concluded their most recent session in the year 2001, the Legislature would not reconvene until the year 2003, absent a special session.¹⁶¹

On the political front, however, an organization called the Young Conservatives of Texas lauded the opinion. The University of Texas Law School chapter of this organization, headed by third year law student Mark Levin, publicly proclaimed that,

It is an abuse of power for hospital districts in Harris, Dallas, El Paso, and Bexar Counties to continue to illegally force taxpayers to underwrite free health care for every citizen of another country who illegally crosses the border. The Harris County Hospital District alone has doled out \$330 million in free medical care to illegal aliens over the last three years.¹⁶²

Levin went on to decree that Texas would become "Mexico's Nursing Home" if the state continued to provide illegal immigrants prophylactic health services.¹⁶³ To punctuate his fervor, Levin filed a

¹⁵⁵ See King, *supra* note 150 (claiming the Attorney General's opinion lacked a basis in sound legal policy and arguing the decision created a dangerous and negative precedent for illegal immigrant medical care).

¹⁵⁶ *Id.* (contending that, by denying undocumented immigrants the basic service of preventive health care, Texas was treating illegal immigrants as less than human).

¹⁵⁷ Oven, *supra* note 10, at 506 (referring to a July 1998 report issued by the group).

¹⁵⁸ *Id.* (explaining that the immigrant worker population is typically younger than the native-born American population; therefore, immigrants have more time to pay taxes into public programs for the elderly before they have the opportunity to utilize them).

¹⁵⁹ Landa, *supra* note 140, at 5.

¹⁶⁰ TEX. CONST. art. III, § 5.

¹⁶¹ *Id.*

¹⁶² See Levin, *supra* note 150 (underlining that illegal immigrants would benefit from the crime of entering this country illegally).

¹⁶³ Suval, *supra* note 87, at 38 (quoting Marc Levin: "This question of whether to provide fee [sic] health care for all Mexican citizens is . . . critical because unlimited free American

complaint with the district attorneys of Dallas, El Paso, and Bexar Counties to register his approval of the Attorney General's opinion.¹⁶⁴

In reaction to the Attorney General's decision and these calls from the Young Conservatives of Texas, Houston District Attorney Chuck Rosenthal raised the stakes of non-compliance by threatening hospital employees with criminal sanctions if they continued to mispend public funds.¹⁶⁵ The District Attorney warned district hospital officials that the punishment could include jail terms of five to ninety-nine years for mispending public funds.¹⁶⁶ However, many Hospital District officials felt confident that investigatory probes would not lead to criminal charges.¹⁶⁷

Some supporters of the Attorney General's position also believed that, because entering the United States without authorization is a federal crime,¹⁶⁸ offering preventive and primary health care to undocumented immigrants effectively rewards criminals for breaking the law.¹⁶⁹

C. Summary

Despite its political controversy, the Attorney General correctly interpreted the PRWORA. The Texas Attorney General looked to the plain meaning of 8 U.S.C. § 1621 and made a technically precise interpretation of the law. To affirm something means to express or assert it.¹⁷⁰ To date, the Texas Legislature has failed to affirmatively grant illegal immigrants access to preventive health care in any state legislation. The statutory language and legislative intent of the

health care, which is far superior to the health services available in most parts of Mexico, surely encourages the ongoing flood of illegal immigration into Texas . . .").

¹⁶⁴ *Id.* (outlining the importance of the Attorney General's decision in controlling healthcare costs).

¹⁶⁵ See Hernandez, *supra* note 108, at 1 (outlining the potential criminal consequences if hospitals continued to mispend public funds).

¹⁶⁶ *Id.*

¹⁶⁷ Steve Brewer, *Hospital District Official Sees No Charges in Probe*, HOUS. CHRON., Aug. 24, 2001, at 34A (arguing the Harris County District Attorney's office lacked sufficient evidence to substantiate any potential criminal charges against named hospitals).

¹⁶⁸ 8 U.S.C. § 1325(a) (2000) (providing that illegal entrance into the United States constitutes a federal crime).

¹⁶⁹ Yardley, *supra* note 139, at 18 (noting that providing illegal immigrants with taxpayer funded medical care creates incentives for immigrants to illegally enter the U.S.).

¹⁷⁰ I Oxford English Dictionary 219 (2d ed. 1989)(defining the term "affirmatively").

PRWORA clearly indicates the Attorney General made the right decision.

Moreover, the Attorney General correctly called upon the Texas Legislature to amend this policy conundrum. The Attorney General interprets the law for government entities, rather than creating the law.¹⁷¹ The PRWORA clearly provides that states must draft legislation that grants illegal immigrants eligibility for state-funded preventive health care services if they wish to provide such services.¹⁷² The Texas Legislature, as representatives of the governed, should take into consideration the concerns of the medical, political, media, legal and non-profit communities and make this decision for Texans.

IV. POLICY IMPLICATIONS

The author contends that illegal immigrant health care is a matter for the state legislature, not the state courts or the Attorney General, to decide. The PRWORA's language clearly requires state legislatures to affirmatively provide for illegal immigrant preventive health services.¹⁷³ Legislatures are in a better position to weigh the moral and fiscal implications of denying health care to sick immigrants.

The following sections will discuss the ethics and economics of denying preventive health care to undocumented persons.

A. Denying Preventive Health Care—The Ethics

The Texas Legislature should contemplate the ethics of denying preventive health care to illegal immigrants in need of medical care. To many, the prospect of denying an ill child or an elderly person medical care for a chronic illness because of the lack of proper paperwork offends deep-seated notions of social, moral, and religious responsibility.¹⁷⁴

For many Americans, stories about undocumented immigrants suffering because they cannot receive medical care offend personal

¹⁷¹ See generally Office of the Attorney General Website, *Effect of Opinions*, available at: http://www.oag.state.tx.us/opinopen/opin_request_proc.htm.

¹⁷² *Id.*

¹⁷³ 8 U.S.C. § 1621(d) (2000).

¹⁷⁴ Phyllis Griffin Epps, *Where Every Man is an Island: A Comment on Immigrant Health Care*, HEALTH LAW PERSPECTIVES, HOUS. J. HEALTH L. & POL'Y INST., at <http://www.law.uh.edu/healthlawperspectives/PublicHealth/010831Where.html>.

notions of ethics.¹⁷⁵ An example of such a story already exists in Houston: Dr. Pat McColloster, a doctor at the Casa de Amigos medical clinic in Houston, recalls treating an undocumented house cleaner from Mexico for hypertension.¹⁷⁶ During one of the patient's routine visits, the doctor discovered a lump in the patient's breast.¹⁷⁷ A biopsy revealed a malignant tumor, and the woman underwent a radical mastectomy.¹⁷⁸ The patient returned once more to Casa de Amigos for treatment for her hypertension when the doctor noticed that the arm on the same side of her body as her mastectomy was "massively swollen."¹⁷⁹ Although he recommended that she continue with chemotherapy, she could not pay for treatment herself or qualify for state-funded treatment.¹⁸⁰ The doctor has not heard from this patient since then, and he speculates that her health has deteriorated without treatment.¹⁸¹ Unfortunately, this account is probably just one of many.

In the introduction to *For Profit Enterprise in Health Care* from the Institute of Medicine, Bradford Gray argues that:

Health care is a community service to which words such as caring and compassion and charity should apply—words that connote the family and the church, where the functions of caring for the sick once resided. The response to disease and disability should stem not from the fact that a market is created from peoples' misfortunes but from a humane response to their needs. The ideal is that the needs of the sick and unfortunate should be met by persons who, as a philosopher expressed it, are acting out of love rather than out of the expectation of gain¹⁸²

¹⁷⁵ *Id.*

¹⁷⁶ Suval, *supra* note 87, at 30 (indicating that the Casa de Amigos clinic is one of the medical facilities operated by the District).

¹⁷⁷ *Id.* (revealing that the woman underwent treatment at Ben Taub General Hospital). Ben Taub is another medical facility under the District's authority. See Harris County Hospital District Locations & Services at http://www.tmc.edu/hchd/Locations_and_Services.html (last visited Nov. 13, 2002).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 40.

¹⁸⁰ *Id.* (noting that the patient's "gold card" was never renewed). A "gold card" was necessary to receive non-emergency care in the Harris County hospital district. *Id.* at 30. Because clinics began requiring all forms of documentation in order to receive a card pursuant to the Attorney General's decision, this particular patient was unable to renew hers. *Id.*

¹⁸¹ Suval, *supra* note 87, at 40 (quoting Dr. McColloster, "It was a distinct possibility that the cancer had recurred because she had not finished her full course of chemotherapy . . .").

¹⁸² BRADFORD H. GRAY, *An Introduction to the Issues in FOR-PROFIT ENTERPRISE IN HEALTH CARE* 12-13 (Bradford H. Gray ed., Nat'l Acad. Press, 1986).

Many citizens feel a stirring in their social and moral consciences when they hear that indigent men, women, and children are denied health care.¹⁸³ The Texas Attorney General's opinion that denies illegal immigrants preventive health care will create more situations where one's health is balanced against a spreadsheet, and where people's consciences are balanced against their tax bills.¹⁸⁴

The Attorney General's opinion also challenges doctors' personal senses of morality. For example, Jeff Starke, MD, Chief of Pediatrics at Ben Taub General Hospital stated, "When you read the Hippocratic oath, it doesn't say anything about [a patient's] citizenship. It says I'm supposed to help people who come to me for help."¹⁸⁵

Physicians, as a consequence of this Texas case, must balance their role as agent for their patients with their role as agent for the hospital.¹⁸⁶ "Clearly, the highest ideals of medicine are not always fully realized in any sector of the health care sector . . . medical practice always involves a tension between altruism and self-interest."¹⁸⁷

Religious responsibility also factors into the dilemma of denying health care on the basis of illegal immigrant status. Judeo-Christian ethics extol the virtues of welcoming the unfortunate into one's care and hospice. For example, Exodus 22:21 states: "Do not oppress foreigners in any way. Remember, you yourselves were once foreigners in the land of Egypt."¹⁸⁸ Similarly, Mathew 25:35 proclaims: "For I was hungry and you gave Me something to eat; I was thirsty and you gave Me something to drink; I was a stranger and you took Me in."¹⁸⁹

Specifically, the Catholic Church has protested the provisions of the PRWORA that discriminate against immigrants.¹⁹⁰ The

¹⁸³ See Griffin Epps, *supra* note 174.

¹⁸⁴ See generally *id.*

¹⁸⁵ See Landa, *supra* note 140.

¹⁸⁶ GRAY, *supra* note 182, at 15 (highlighting physicians' fiduciary duty to patients compared to physicians' relationship with health care organizations).

¹⁸⁷ *Id.* at 14.

¹⁸⁸ Exodus 22:21.

¹⁸⁹ Matthew 25:35.

¹⁹⁰ Oven, *supra* note 10 at 532 (1999) (noting that, with less than one hundred days until the PRWORA's immigrant provisions went into effect, Bishop John Cummins of Oakland, California, sent a letter to all 535 members of Congress asking that Congress address "the most vulnerable legal immigrants among us: children, the elderly, the disabled, and those

Church called for a new worldwide perspective on immigrants' rights, calling upon countries to recognize every person's inherent human dignity.¹⁹¹ In June of 1996, Bishop Anthony M. Pilla of Cleveland, Ohio, extolled the virtue that Saint John witnessed and heard: "I command you to love each other in the same way that I love you."¹⁹² Bishop Pilla urged his audience to "treat the alien who resides with you no differently than the natives born among you; have the same love for him as for yourself The basic love for the stranger helps each person realize and respect the human dignity inherent within that stranger."¹⁹³

Other religions also advance the notion of caring for others. Judaism supports that "providing health care is not just an obligation for the patient and the doctor, but for society as well."¹⁹⁴ Similarly, Muslim doctors are instructed to "treat alike the rich and the poor, the master and the servant, the powerful and the powerless, the elite and the illiterate. God will reward him if he helps the needy."¹⁹⁵

The PRWORA offends notions of moral and religious ethics by not providing preventive health care to illegal immigrants. Nevertheless, ignoring the PRWORA and providing preventive health care is illegal under federal law. The Attorney General correctly interpreted that the PRWORA prevented states from offering such prophylactic services without legislation which affirmatively provides for such services.¹⁹⁶ The issue of providing preventive health care is one for the Texas Legislature to grapple with, not the Texas legal system. Texas policymakers should firmly consider the ethics of denying medical care to sick people and write legislation to provide limited state funded care to the illegal immigrant population.

who have sought our protection from persecution from abroad." (quoting National Conference of Catholic Bishops/United States Catholic Conference, *92-Year Old Immigrant Faces Homelessness Due to Welfare Law; Bishop Urges Corrective Legislation* (Apr. 25, 1997) at <http://www.nccbuscc.org/comm/archives/97-091.htm>)).

¹⁹¹ *Id.* at 533 (discussing the Catholic Church response to United States immigration reform).

¹⁹² *Id.* at 534 (quoting *John* 15:12).

¹⁹³ Oven, *supra* note 10, at 534 (quoting Bishop Pilla's address to his fellow bishops in the Summer of 1996).

¹⁹⁴ RELIGIOUS ACTION CENTER OF REFORM JUDAISM, *Issues: Jewish Values and Health Care*, available at <http://www.rac.org/issues/issuehc.html> (last visited Nov. 19, 2002).

¹⁹⁵ Ezzat Abouleish, M.D., *Contributions of Islam to Medicine in ISLAMIC MEDICINE*, available at <http://islam-usa.com/im3.html> (last visited Nov. 19, 2002).

¹⁹⁶ 8 U.S.C. § 1621(d) (2000).

B. Denying Preventive Health Care—The Economics

Individuals who cannot afford health care tend to delay seeking treatment.¹⁹⁷ Delayed treatment usually results in more serious health complications and higher medical bills.¹⁹⁸ Put simply, preventive care saves more money than costly emergency care.¹⁹⁹

Harris County records show that the Hospital District spent \$67 million in treating "unqualified" immigrants in fiscal year 2001.²⁰⁰ Taxpayers covered eighty-eight percent of the cost, insurance and Medicaid state reimbursements covered ten percent, and patients paid the rest.²⁰¹

These numbers seem to strengthen the argument to cut prophylactic health services to illegal immigrants. However, Harris County officials argue that the costs could be even more substantial if the District did not provide preventive health care services.²⁰² Treatable diseases, like high-blood pressure and diabetes, can develop into emergencies if not medically supervised.²⁰³ In addition, lack of prenatal care may result in untreated conditions that can cause detrimental, costly medical complications.²⁰⁴

Dr. Ron Anderson, President and Chief Executive Officer of Parkland Hospital and Health System in Dallas, Texas, agreed with this assessment.²⁰⁵ Offering routine primary care to illegal immi-

¹⁹⁷ Griffin Epps, *supra* note 174 (noting that this delay in seeking treatment occurs among the poor, immigrants and non-immigrants alike).

¹⁹⁸ *Id.* (stating that "treatment administered later in the progression of disease or injury is more likely to require more time and expense."). See also Sidney D. Watson, *Medicaid Physician Participation: Patients, Poverty, and Physician Self-Interest*, 21 AM. J. L. & MED. 191, 198 (explaining that patients who delay often incur more expensive treatment and longer hospital stays).

¹⁹⁹ Hernandez, *supra* note 108 (illustrating that access to preventive care results in less expense to the state).

²⁰⁰ Suval, *supra* note 87, at 33 (noting that most undocumented immigrants receive treatment in emergency rooms rather than through inpatient or outpatient visits).

²⁰¹ *Id.* (detailing payment allocations).

²⁰² *Id.* (explaining that emergency rooms would be even more crowded without preventive services).

²⁰³ *Id.* (noting that a number of undocumented immigrants work in service jobs that require close contact with the public and stressing the importance of keeping undocumented immigrants healthy in an effort to prevent communicable diseases from spreading).

²⁰⁴ THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *Maintaining Access to Prenatal Care for All Immigrant Women*, at <http://www.nyam.org/publications/newsletters/childhealth/maintainingaccess.pdf> (explaining that prenatal care is necessary to help prevent birth defects, death, and boost overall infant health).

²⁰⁵ Landa, *supra* note 140, at 2 (arguing that lack of preventive care will continue to overcrowd emergency rooms).

grants, according to Anderson, may prevent them from inundating hospital emergency rooms when their health conditions worsen.²⁰⁶ Under the Emergency Medical Treatment and Active Labor Act, all hospitals that operate emergency care facilities must treat every patient in an emergency; this federally mandated requirement results in overcrowding in emergency rooms and expensive medical bills.²⁰⁷

Ben Taub General Hospital Chief of Staff James Mattox, MD, concurred with this conclusion. Dr. Mattox warned that the Texas Attorney General's policy will "worsen an already overstressed situation, and at increased cost, because seeing someone in an emergency department is considerably more expensive than seeing someone in a clinic."²⁰⁸

Moreover, hospital emergency rooms may sacrifice care due to the increased number of patients involved. Dr. Mattox warned that the nearly four hundred patients Ben Taub treats everyday will increase twofold if undocumented immigrants are not permitted to receive preventive care.²⁰⁹ Hospital emergency rooms will be forced to balance an increased patient load with the same number of staff and resources at the risk of possibly jeopardizing the quality of care.

The Texas Legislature should consider the prospect that Texas taxpayers could actually save money by providing illegal immigrants with primary and preventive health care as opposed to providing only emergency medical care. Both the ethics and the economics of denying illegal immigrants primary medical care are appropriate concerns for the elected legislative branch of government, not the judiciary or the Attorney General. The Texas Legislature should carefully weigh these public policy concerns and consider drafting legislation that affirmatively provides unqualified immigrants with limited health care services.

V. THE STATES

This section focuses on how other states have reacted to the PRWORA's mandate limiting federally funded welfare benefits. Prior to the PRWORA's passage, only the federal government could

²⁰⁶ *Id.*

²⁰⁷ *Id.* For further information on EMTALA, see *supra* note 103.

²⁰⁸ *Id.* (explaining that Ben Taub General Hospital, which functions under the authority of the Harris County Hospital District, operates specialty and community based clinics for Harris County residents).

²⁰⁹ *Id.*

determine which immigrants were eligible for public benefits.²¹⁰ Now that states have a voice in the discourse on immigrant services, an amalgam of PRWORA-inspired local policies have sprouted throughout the country.²¹¹ This section focuses on the states of New York and California. New York and California, like Texas, have large immigrant populations.²¹² This section will explore how each state has interpreted the PRWORA. Finally, this section will also suggest how Texas should address illegal immigrant health services in the future.

A. New York

New York and Texas have had similar difficulties with respect to the public policy issue of providing illegal immigrants state-funded preventive medical care. In response to the PRWORA, the state of New York enacted a bill entitled Social Services Law Section 122.²¹³ This law terminated Medicaid for all unqualified immigrants.²¹⁴ However, unqualified immigrants who resided in New York under the color of law (termed "PRUCOLS") maintained eligibility if they received Medicaid as of August 4, 1997, suffered from AIDS, or were residing in certain licensed residential health care facilities.²¹⁵ PRUCOLS were distinguished from illegal immigrants in that "this designation is used to classify aliens of whom the INS is aware, but has no plans to deport."²¹⁶

On the other hand, legal, or "qualified," immigrants remained eligible for Medicaid provided they entered the country prior to August 22, 1996 and had continuously resided in the United States.²¹⁷

²¹⁰ Zimmerman, *supra* note 13, at 1 (noting that the United States Congress has amended some of the restrictions the PRWORA originally created).

²¹¹ *Id.* at 3 (stating that some states offer substantial assistance to immigrants).

²¹² *Id.*

²¹³ N.Y. SOC. SERV. LAW § 122(1)(c) (McKinney 2002); *Aliessa v. Novello*, 754 N.E.2d 1085, 1091 (N.Y. 2001) (holding that the New York statute which terminated Medicaid benefits for unqualified immigrants did not violate equal protection under the New York State Constitution).

²¹⁴ *Id.* at 1091-92; see also *supra* discussion in Part II (regarding qualified and unqualified immigrants).

²¹⁵ N.Y. SOC. SERV. LAW § 122(1)(c) (McKinney 2002).

²¹⁶ *Aliessa*, 754 N.E.2d at 1088 n.2; see generally Polen, *supra* note 9, at 1455, n.3 ("The definition of PRUCOL varies between benefit programs, but generally includes . . . individuals who are residing in the United States with the knowledge of the Immigration and Naturalization Service ("INS") and whom the INS does not plan to remove.").

²¹⁷ N.Y. SOC. SERV. LAW § 122(1)(b)(i) (McKinney 2002).

Immigrants entering the country after August 1996 were not eligible for such benefits until they lived in the country for five years.²¹⁸

The court in *Aliessa v. Novello* held that New York's Social Services Law section 122, which denied Medicaid benefits to people based solely on their status as legal aliens, was unconstitutional.²¹⁹ The plaintiffs, twelve immigrants, resided in New York state.²²⁰ Some plaintiffs were permanent residents who had green cards²²¹ and others resided in the United States under the color of law (PRUCOLS).²²² All the plaintiffs were terminally ill and would qualify for state funded Medicaid benefits but for the statute.²²³

The plaintiffs argued that section 122 violated a portion of the New York State Constitution which mandated aid to the needy.²²⁴ The New York State Constitution 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 from time to time may determine."²²⁵

The New York Court of Appeals ultimately ruled for the plaintiffs.²²⁶ The court in *Aliessa* determined that certain qualified and unqualified immigrants (PRUCOLS) were eligible to receive state Medicaid benefits.²²⁷

New York's approach differs from Texas' approach in that selected unqualified immigrants (PRUCOLS) are eligible for state

²¹⁸ *Id.* at (1)(b)(ii).

²¹⁹ *Aliessa*, 754 N.E.2d at 1098-99 (holding that the statute violates the Equal Protection clause of both the New York State and United States Constitutions).

²²⁰ *Id.* at 1088 (reporting that the immigrants were from countries such as Bangladesh, Belorussia, Ecuador, Greece, Guyana, Haiti, Italy, Malaysia, the Phillipines, Syria, and Turkey).

²²¹ *Id.* See also Immigration and Nationality Act, 8 U.S.C. § 1101 (20)(2)(2002) (defining "lawfully admitted for permanent residence" as being "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws. . .").

²²² *Aliessa*, 754 N.E.2d at 1088.

²²³ N.Y. SOC. SERV. LAW § 122 (McKinney 2002).

²²⁴ *Id.* at 1088-89. ("The putative class consists of 'all 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.'")

²²⁵ N.Y. CONST., art. XVII, § 1; *Aliessa*, 754 N.E.2d at 1092 (inferring that the plaintiffs are needy because they are sick and, therefore, should be provided more than just emergency aid).

²²⁶ *Aliessa*, 754 N.E.2d at 1093 (concluding that section 122 of the New York Social Services Statute violated the letter and spirit of the state constitution).

²²⁷ *Id.* at 1092 (noting that qualified aliens are those who entered prior to August 26, 1996).

Medicaid benefits. Texas does not recognize PRUCOLs for the purposes of granting state benefits to illegal immigrants.²²⁸ However, the court in *Aliessa* specifically stated that undocumented immigrants were not affected by the decision to become eligible for these health services.²²⁹ How the state of New York differentiates between unqualified PRUCOL immigrants who are eligible and those who are not eligible for primary health care remains unclear. Both populations are deemed "unqualified" by most legal standards.²³⁰ Regardless, New York denies certain unqualified immigrants access to preventive health care.²³¹

B. California

Infamous for its anti-immigrant rhetoric, the state of California has become a hotbed for immigration policy and politics in the last several years.²³² Undocumented immigrants in California are ten times more likely to receive Medicaid benefits for emergency treatment than undocumented immigrants in any other state.²³³ For this reason, "California stands out as the only state to aggressively pursue cutting unqualified immigrants off state and local benefits."²³⁴

California's reputation for discouraging immigration has been stoked in the media by unflattering events. For example, newspapers in 1998, reported that the California Coalition for Immigration Reform sponsored a highway billboard that read, "Welcome to California, The Illegal Immigration State. Don't Let This Happen to Your State. Call Toll Free—(877) NO ILLEGALS."²³⁵

²²⁸ See generally Op. Tex. Att'y Gen. No. JC-0394 (2001) (holding that no unqualified immigrants residing within Texas county lines are eligible for state primary and preventive health care services).

²²⁹ *Aliessa*, 754 N.E.2d at 1091, n.6 ("Illegal aliens . . . with whom we are not here concerned—are also non-qualified aliens.").

²³⁰ See Zimmerman, *supra* note 13, at 17 (defining an "unqualified immigrant" as either an undocumented immigrant, an applicant for asylum, a PRUCOL, or a person with temporary status, such as a student or tourist).

²³¹ *Aliessa*, 754 N.E.2d at 1091-92 (denying benefits to PRUCOL plaintiffs).

²³² See generally Zimmerman, *supra* note 13, at 5.

²³³ Schlosberg, *supra* note 17 (" . . . [U]tilization of emergency care by aliens in California far surpasses utilization in all other states.").

²³⁴ Zimmerman, *supra* note 13, at 5 (noting the difference in treatment between legal and illegal or qualified and unqualified, immigrants in California).

²³⁵ Owen, *supra* note 10, at 503 (citing David Reyes & Robert Ourlian, *Immigration Sign Removed Amid Threats*, L.A. TIMES, June 24, 1998, at A-1 as reporting that the sign was removed by the billboard owner when the Coalition of Hispanic Organizations in California announced that it would hold a rally to protest the racist sign).

Additionally, Proposition 187, spearheaded by former California governor Pete Wilson, created a national stir.²³⁶ In recommending Proposition 187, the California Assembly sought to bar undocumented immigrants from public services such as public education and Medicaid.²³⁷ Although the legislation passed, federal courts in California eventually deemed the proposition partially unconstitutional.²³⁸

California, like Texas and New York, chose to deny illegal immigrants preventive health care based on the PRWORA.²³⁹ In 1998, California abated legislation that previously authorized state funded prenatal care for pregnant unqualified immigrants.²⁴⁰ Since the PRWORA prohibited states and local governments from providing or funding routine, taxpayer-paid medical care for the benefit of illegal immigrants, Governor Pete Wilson, Kimberly Belshe (Director of the California Department of Health Services), and the Department of Health Services invoked emergency regulations to change state laws.²⁴¹ Wilson and Belshe authorized this action to bring California into compliance with the PRWORA's federal mandate.²⁴²

The emergency regulations explained that the PRWORA ". . . was enacted on August 22, 1996. Section 411 of this federal law [8 U.S.C. §1621] took effect immediately and requires the immediate termination of state or local government funded public benefits for aliens who are not qualified."²⁴³

A San Francisco trial court granted an injunction, preventing the emergency regulations from taking effect.²⁴⁴ However, the

²³⁶ Zimmerman, *supra* note 13, at 4.

²³⁷ *Id.*

²³⁸ *League of United Latin American Citizens v. Wilson*, 908 F.Supp 755, 786-87 (1995)(describing the federal district court's rationale for striking down Proposition 187).

²³⁹ *Doe v. Wilson*, 67 Cal. Rptr. 2d 187 (Cal. App. 1 Dist. 1997).

²⁴⁰ *Id.* at 190 n.1 (documenting that the California Assembly extended prenatal services as part of 1998 amendments to the state's Medi-Cal program).

²⁴¹ *Id.* at 190 (barring state aid to illegal immigrants, as provided by the PRWORA).

²⁴² *Id.* at 190-91.

²⁴³ *Id.* at 191 (noting that "Congress has determined that there is 'a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.'").

²⁴⁴ *Wilson*, 67 Cal. Rptr. 2d at 191-92 (highlighting that opponents to the emergency regulations first sought relief in the Central District of California, which ruled on Proposition 187's unconstitutionality). This detail is notable because, in this case, that court upheld the emergency regulation to deny illegal immigrants medical services. *Id.* The Honorable Mariana R. Pfaltzer asserted that, "the basis for her prior ruling holding Proposition 187 un-

Court of Appeals, First District in California reversed the injunction.²⁴⁵ The Court of Appeals held that the respondents correctly complied with federal standards.²⁴⁶

This case exemplifies that California, like Texas and New York, chose to deny illegal immigrants preventive and primary health care services. Indeed, *Doe v. Wilson* illustrates how California revoked legislation which had previously affirmatively provided medical care for unqualified immigrants.

C. A Suggestion for Texas

The Texas Legislature should strongly consider passing legislation that would provide preventive health care services for illegal immigrants. The services should be limited, however, to maintain PRWORA's mandate of immigrant self-sufficiency.²⁴⁷

A recent law review article has suggested offering undocumented immigrants in Texas prenatal care and screening and treatment for chronic and debilitating diseases.²⁴⁸ Legislation providing such limited services would be ideal because it would address both the economic and ethical concerns regarding illegal immigrant health care. Economically, this legislation could thwart expensive emergency care bills by treating diseases before they reach critical stages.²⁴⁹ Ethically, unborn children and chronically sick people would get the care they deserve without suffering.²⁵⁰

The Texas Legislature has the opportunity to make these changes in the Spring 2003 legislative session. The Legislature should use PRWORA's enabling directive to provide such limited preventive health care services to illegal immigrants in Texas.

constitutional was that the state proposition had created a conflict with the then existing federal law and Congress's plenary power over immigration matters. Therefore, the federal judge concluded it would make no sense to rule that appellants violated her injunctive order by attempting to implement the new federal law, PRWORA, which is now consistent with the provisions of Proposition 187." *Id.* at 192.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ 8 U.S.C. §1601 (2002).

²⁴⁸ Alexander Vivero Neill, *Comment, Human Rights Don't Stop at the Border: Why Texas Should Provide Preventative Health Care for Undocumented Immigrants*, 4 SCHOLAR 405, 432-36 (2002).

²⁴⁹ *Id.* at 436 (noting that this state-funding medical care would "allow hospital districts to preserve already strained resources by controlling costly emergency room visits and long term hospitalization").

²⁵⁰ *Id.* at 432-36.

VI. CONCLUSION

This comment focused on the July 2001 Texas Attorney General's opinion that barred Texas county hospital districts from providing preventive health services to undocumented immigrants. Although illegal immigrants can still receive medical care for emergency conditions, immunizations, and communicable diseases, the Attorney General's advisory opinion prevented unqualified immigrants from receiving other government medical benefits. This author advocates that the decision is a technically correct interpretation of state and federal regulations. Under current law, illegal immigrants are not be entitled to preventive health care in Texas. The Texas Legislature, however, has the opportunity to draft affirmative legislation providing for such care in the Spring 2003 legislative session. This opportunity should not be missed, given the ethical and economic repercussions of denying medical care to sick immigrants.

Part II of this comment focused on the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which provided the legal underpinning for the Attorney General's opinion. This analysis showed that the PRWORA, and its state created progeny, will not be vulnerable to an equal protection challenge. Rather, the legislation will most likely be upheld under Congress' plenary power doctrine. Part III discussed the intricacies of the Attorney General's opinion itself, and Part IV supported the opinion's legal analysis. Part IV also introduced the controversy the Texas Attorney General's opinion engendered: the medical profession, media, political realm, and legal sphere have all taken strong stances on whether the state should provide illegal immigrants with preventive health care.

Part V showcased the ethical and economic implications of denying illegal immigrants health care. Part VI demonstrated how New York and California, like Texas, dealt with the PRWORA by barring state provided medical care to undocumented immigrants.

This author argued that the Texas Attorney General's case was correctly determined. Current federal law prohibits Texas from providing preventive health care services to unqualified immigrants. Nevertheless, this author advocates that the Texas Legislature should extend services such as prenatal care and treatment for chronic and debilitating diseases to illegal immigrants for moral and economic reasons. Clearly, the policy and the politics of illegal im-

migrant health care are matters that will affect Texans for years to come.