Constitutional Law – Subjecting the Commonwealth’s Adoption of PRWORA’s Eligibility Criteria to Strict Scrutiny—Finch v. Commonwealth Health Insurance Connector Authority, 946 N.E.2d 1262 (Mass. 2011)

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In reviewing statutes that burden a fundamental right or discriminate on the basis of a suspect classification, courts use the strict scrutiny standard of judicial review.1 Within the confines of the Massachusetts Constitution, suspect classifications are subject to strict scrutiny, and include classifications based on sex, race, color, creed and national origin.2 To overcome strict scrutiny, a statute must be “narrowly tailored to further a legitimate and compelling governmental interest.”3

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Where a statute either burdens the exercise of a fundamental right protected by our State Constitution, or discriminates on the basis of a suspect classification, the statute is subject to strict judicial scrutiny . . . . All other statutes, which neither burden a fundamental right nor discriminate on the basis of a suspect classification, are subject to a ‘rational basis’ level of judicial scrutiny.

Id. at 640-41.

2 See MASS. CONST. art. CVI (stating “[e]quality under the law shall not be denied or abridged because of sex, race, color, creed or national origin”); Cote-Whitacre, 844 N.E.2d at 640 (describing suspect classifications as “those of sex, race, color, creed, or national origin.”); see also Powers v. Wilkinson, 506 N.E.2d 842, 846, n. 11 (Mass. 1987) (noting the only suspect classifications are sex, race, color, creed and national origin).

3 Cote-Whitacre, 844 N.E.2d at 640 (quoting Aime v. Commonwealth, 611 N.E.2d 204, 209 (Mass. 1993)); see also Commonwealth v. Weston W., 913 N.E.2d 832, 842 (Mass. 2009) (outlining the
Massachusetts Supreme Judicial Court in *Finch v. Commonwealth Health Insurance Connector Authority* addressed the level of scrutiny that applies to the classification of legally residing aliens who were excluded from a program established to help obtain state required health insurance. In addition to acknowledging the application of strict scrutiny for the classification of legally residing aliens in this context, the Supreme Judicial Court provided clarity in the distinction between national origin and alienage under Article 106, and supported the policy and goals that initially motivated the Massachusetts legislature to ensure all residents have at least minimal health insurance.

Threshold to pass strict scrutiny in Massachusetts). The Court in Weston noted that in order to pass the strict scrutiny standard “the ordinance must be narrowly tailored to further a legitimate and compelling governmental interest and be the least restrictive means available to vindicate that interest.” *Weston W*, 913 N.E.2d at 842. Alternatively, when subject to the rational basis standard of judicial review, the test applied is less stringent and looks to whether “an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.” *English v. New England Med. Ctr., Inc.*, 541 N.E.2d 329, 333 (Mass. 1989) (Stevens, J., concurring) (quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 452).

In comparison to all other states, Massachusetts has taken the most steps towards addressing the health care issues of cost and access for its residents. *Id.* at 107. See also *Tricia A. Bozek, Comment, Immigrants, Health Care and the Constitution: Medicaid Cuts in Maryland suggest that Legal Immigrants do not Deserve Equal Protection of the Law*, 36 U. BALT. L. REV. 77, 99 (2006).
Massachusetts General Law ch. 111M, § 2(a), requires all state residents over the age of eighteen to obtain creditable health insurance as long as it is affordable. To further this requirement, the legislature created the Commonwealth Health Insurance Connector Authority ("Connector"), and established the Commonwealth Care Health Insurance Program ("Commonwealth Care") as the Connector's premium assistance program. Commonwealth Care works in connection with MassHealth to ensure health care is accessible to low-income residents of the Commonwealth. As a companion program to MassHealth, Commonwealth Care assists residents ineligible for MassHealth, namely low-income residents who do not have children and are not disabled. While both state and federal funding support Commonwealth Care in paying the premium remainders of enrollees, the federal government does not provide funding


As of July 1, 2007, the following individuals age 18 and over shall obtain and maintain creditable coverage so long as it is deemed affordable under the schedule set by the board of the Connector, established by chapter 176Q: (1) residents of the commonwealth; or (2) individuals who become residents of the commonwealth within 63 days, in the aggregate. Residents who within 63 days have terminated any prior creditable coverage, shall obtain and maintain creditable coverage within 63 days of such termination.

Id.

8 See Finch, 946 N.E.2d at 1265 (discussing the creation of Commonwealth Care and the Connector). Under Commonwealth Care, residents pay part of the health insurance premium based upon by a sliding scale, and the remainder of the premium is covered by the Connector. Id. Commonwealth Care was created "with the declared purpose of ‘reducing uninsurance in the [C]ommonwealth.’” Id. at 1266 (quoting MASS. GEN. LAWS ch. 118H § 2) (codifying Commonwealth Care); Amy M. Lischko, Sara S. Bachman & Alyssa Vangel, Issue Brief: The Massachusetts Commonwealth Health Insurance Connector: Structure and Functions, THE COMMONWEALTH FUND, May 2009, at 1-2 (providing an overview of the goals, creation and structure of Connector and Commonwealth Care) available at http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2009/May/Issue%20Brief.pdf.

9 Robert W. Seifert, Fact Sheet: The Basics of MassHealth, MASSACHUSETTS MEDICAID POLICY INSTITUTE, Sept. 2008, at 1-2. Prior to passing M.G.L. ch. 111M, § 2(a) in 2006, the Commonwealth sought to provide health care access to its residents through MassHealth based on their income relative to federal poverty levels. Id. at 1. However, MassHealth’s assistance primarily supports two groups of low-income residents: families with children and the disabled. Id. at 2. Consequently, a portion of the Commonwealth’s low-income population is not covered by MassHealth. Id. at 2.

10 Id. Through Commonwealth Care, residents ineligible for MassHealth who are at up to 300 percent of the federal poverty level have access to subsidized health care coverage. Seifert, supra note 9, at 2.
for lawfully residing aliens. Despite the federal funding restrictions, aliens legally residing in Massachusetts are eligible to participate in Commonwealth Care, but at a great cost to the Commonwealth, as state funding completely covers their premium remainder.

In 2009, the Massachusetts legislature passed an appropriations bill that altered the eligibility provisions of Commonwealth Care by adopting the federal eligibility standards set forth in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"). The bill addressed the Commonwealth’s economic status in light of mounting fiscal pressures from the recession and the great costs imposed by Commonwealth Care. To compensate for the alteration to Commonwealth Care eligibility, the Massachusetts legislature approved the creation of the Commonwealth Care Bridge Program ("Commonwealth Bridge") to provide health insurance for those once eligible residents who were now ineligible. However, Commonwealth Bridge was

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11 Finch, 946 N.E.2d at 1266-67 (discussing the sources of federal and state funding). Massachusetts supports Commonwealth Care through funds from the Commonwealth Care Trust, which was established by M.G.L. ch. 29, § 2000. Id. at 1266. This fund is maintained by money gathered from a variety of sources including employer contributions and free rider surcharges. Id. at 1266-67. Federal support for Commonwealth Care is received through the Medicaid demonstration project § 1115 of Social Security Act. Id. at 1267.

12 Id. (stating that Massachusetts covered the total cost of premium remainders for federally ineligible aliens). As a result of federal funding restrictions, two eligible residents, at a minimum, could be enrolled for the same cost to the Commonwealth as the cost of one federally ineligible resident. Id. As of August 2009, 29,000 lawfully residing aliens were enrolled in Commonwealth Care. Finch, 946 N.E.2d at 1266.


14 Anna C. Tavis, Note, Healthcare for All: Ensuring States Comply with the Equal Protection Rights of Legal Immigrants, 51 B.C. L. REV. 1627, 1629-30, 1641, 1653 (2010). Due to great budget restraints from the recession, the Massachusetts legislature had to step back from its universal health care goal. Id. at 1653. State tactics to address fiscal concerns while still protecting programs directed at voting constituents have included applying cutbacks to programs for legal aliens. Id. at 1629-30.

15 Finch, 946 N.E.2d at 1268. Funding for Commonwealth Bridge is contingent on funding from
less comprehensive than Commonwealth Care, imposed higher costs on enrollees, and did not cover all lawfully residing aliens. On February 25, 2010, a group of aliens legally residing in the Commonwealth ("Finch"), but ineligible for Commonwealth Care or Commonwealth Bridge, filed an action in county court on the grounds that their rights had been violated under the Massachusetts Constitution.

A single justice of the Supreme Judicial Court reserved and reported four questions for the court to consider. The four questions before the court were:

"Federal Medicaid reimbursements under the American Recovery and Reinvestment Act or a similar provision.” Id.; see 2009 MASS. ACTS ch. 65 § 31(b). The Commonwealth “may establish . . . a health insurance plan in which a person who cannot receive federally-funded benefits as of July 1, 2009 under said sections . . . of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 . . . and who is also an eligible individual pursuant to section 3 of chapter 118H of the General Laws, may enroll effective September 1, 2009 through June 30, 2010.” Id.

Those who are ineligible for Commonwealth Bridge include: “aliens whose income exceeded 300 percent of the Federal poverty level prior to August 31, 2009, but since has declined . . . [and aliens] who either did not reside in the Commonwealth or failed to enroll in Commonwealth Care prior to August 31, 2009, but would presently be eligible but for their alienage.” Id. at 1268; Commonwealth Care Bridge, MASSRESOURCES.ORG, http://www.massresources.org/commonwealth-care-bridge.html (last visited Mar. 4, 2012). While Commonwealth Bridge provided the majority of the benefits afforded by Commonwealth Care, its benefits did not include dental, vision, hospice or skilled nursing care. Id. Moreover, while Commonwealth Bridge used the same income categories to determine cost as Commonwealth Care and matched Commonwealth Care's lowest premium cost, it did not cover those who sought enrollment after August 31, 2009. Id.; see also MA Supreme Court Rules in Favor of Equal Health Care Coverage for Immigrants, MASSACHUSETTS IMMIGRANT AND REFUGEE ADVOCACY COALITION, http://www.miracoalition.org/en/press-room/easyblog/entry/ma-supreme-court-moves-to-restore-immigrants-health-care-coverage (last visited Mar. 4, 2012) (acknowledging Commonwealth Bridge's higher out of pocket costs and fewer services offered).

Finch, 946 N.E.2d at 1268. Originally, Finch alleged violations of their rights under both the United States and Massachusetts Constitutions. Id. However, when the Connector removed the case to Federal District Court under federal question jurisdiction, Finch amended their complaint, removing any federal claims and only alleged violations of their rights under the Massachusetts Constitution. Id. Upon Finch's motion, the case was remanded to state court. Public Case Information, Supreme Judicial Court and Appeals Courts of Massachusetts, Supreme Judicial Court for Suffolk County, Case Docket: SJ-2010-0103 available at http://www.ma-appellatecourts.org/display_docket.php?dno=SJ-2010-0103. The Connector then filed notice for removal with the United States District Court for the District of Massachusetts. Id. Finch subsequently amended the complaint and filed a motion to remand to state court. Id. That same day, Judge William G. Young entered order for remand to the Supreme Judicial Court. Id.

MASS. R. CIV. P. 64. Massachusetts Civil Procedure Rule 64 permits a case to be reported to the Supreme Judicial Court, and permits a single justice of the Supreme Judicial Court to reserve any question of law to be considered by the full court. Id.; see Finch, 946 N.E.2d at 1265. The
1. Does the protection against discrimination on the basis of "national origin," as enumerated in art. 106 of the Amendments to the Massachusetts Constitution, include protection against discrimination on the basis of alienage, i.e., one's immigration status?[2] 2. If the answer to question one is negative, does any other provision of the Massachusetts Constitution provide special protection against discrimination on the basis of alienage beyond the general contours of equal protection?[4] 3. If the answers to question one and to question two are negative, should a State classification based on alienage be subject to a "rational basis" standard of review under the Massachusetts Constitution to determine whether there is a rational relationship between the disparity of treatment between citizens and aliens and some legitimate governmental purpose?[6] and 4. If the answer to either question one or to question two is affirmative, what level of judicial scrutiny should be applied to the classification contained in § 31(a), especially in light of the character of the Commonwealth Care program and the nature of its funding mechanisms?[19]

The court ultimately answered the first three questions in the negative, and as such did not address the fourth question.[20] The court remanded the case to the county court with instructions to subject the statute to strict judicial scrutiny in accordance with Article 106 of the Massachusetts Constitution.[21]

In 1976, the Commonwealth adopted Article 106, which replaced Article 1 of the Amendments to the Massachusetts Constitution, and stated:

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring,

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[2] Finch, 946 N.E.2d at 1265 (outlining the four questions reserved and reported).
[4] Id. at 1280 (discussing why it was unnecessary for the court to address the fourth question).
[6] Id. (summarizing the court's reasoning why strict scrutiny need be applied).
possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because sex, race, color, creed or national origin.\textsuperscript{22}

Since its adoption, the classifications expressly listed in Article 106 have been subject to strict scrutiny review.\textsuperscript{23} In ascertaining the meaning of provisions in the Massachusetts Constitution, including the meaning of amendments, courts have long interpreted provisions in “the sense most obvious to the common intelligence.”\textsuperscript{24} Regarding the classifications expressly listed in Article 106, the Massachusetts Supreme Judicial Court has not held the definition of national origin to include alienage.\textsuperscript{25} The support for excluding alienage from national origin is rooted in the fact that, at the time of the Commonwealth's adoption of Article 106, the alienage classification was recognized within equal protection jurisprudence, yet was omitted from the suspect classifications expressly listed in the 1976 amendment.\textsuperscript{26}

\textsuperscript{22} MASS. CONST. art 1, amended by MASS. CONST. art. 106; see Weston \textit{v.}, 913 N.E.2d at 840 (noting Article 106 amends Article 1 of the Massachusetts Constitution). Article 106 differs from Article 1 in that “people” replaced “men,” and includes the addition of “Equality under the law shall not be denied or abridged because sex, race, color, creed or national origin.” MASS. CONST. art. 1.

\textsuperscript{23} Commonwealth \textit{v.} King, 372 N.E.2d 196, 206 (Mass. 1977). The court noted that these classifications are subject to strict scrutiny under the Fourteenth Amendment to the U.S. Constitution. \textit{Id}.

\textsuperscript{24} Buckley \textit{v.} Secretary of Commonwealth, 355 N.E.2d 806, 809 (Mass. 1976) (quoting Yont \textit{v.} Secretary of the Commonwealth, 176 N.E. 1, 2 (Mass. 1931)) (addressing how to interpret a provision of the Massachusetts Constitution). “It was written to be understood by the voters to whom it was submitted for approval. It is to be interpreted in the sense most obvious to the common intelligence.” Yont, 176 N.E. at 2.

\textsuperscript{25} \textit{See} Commonwealth \textit{v.} Carleton, 641 N.E.2d 1057, 1059 (1994) (supporting proposition that the court has not interpreted national origin to apply only to those born outside of the U.S.). The Supreme Court provided that “national origin’ on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came.” Espinoza \textit{v.} Farah Mfg. Co., 414 U.S. 86, 88 (1973). In contrast, Black’s Law Dictionary defines “alien” as a “foreigner, one born abroad; a person who owes allegiance to a foreign government; in this country, a person born outside of the United States and unnaturalized under our Constitution and our laws.” BLACK’S LAW DICTIONARY 84 (9th ed. 2009).

\textsuperscript{26} \textit{See} MASS. CONST. art. 106; Graham \textit{v.} Richardson, 403 U.S. 365, 372 (1971) (concerning lawfully residing alien’s eligibility to participate in state assistance programs in Arizona and Pennsylvania); Mathews \textit{v.} Diaz, 426 U.S. 67, 78-79 (1976) (holding application of rational basis review appropriate for federal law denying government benefits due to alienage). The Supreme Court’s decisions have established that classifications based on alienage are inherently suspect and subject to close judicial scrutiny. \textit{Graham}, 403 U.S. at 372. Aliens as a class are an example of a “discrete and insular minority . . . for whom such heightened judicial solitude is appropriate.” \textit{Id}. In his dissent, Justice Douglas provides that a classification based on alienage aligns with a
Today, a major issue concerning equal protection violations based on alienage involves PRWORA, which marked a change in Congress' overarching eligibility standards for federal public benefits by excluding lawfully residing aliens until they have satisfied a five-year residency requirement. PRWORA contains a provision permitting, but not requiring, states to match the federal eligibility standards for aliens in public assistance programs funded solely by the state. This provision presents a new dimension for equal protection jurisprudence, creating a situation that falls somewhere between the facts of the Supreme Court precedent set forth in Mathews v. Diaz and those in Graham v. Richardson. In Mathews, the Supreme Court acknowledged Congressional plenary power in the immigration field permits discrimination solely on the basis of alienage, and when a state acts in accordance with a binding Congressional immigration decision, this Congressional power calls for a rational basis review of the state action. On the other side of the spectrum, in Graham, the Supreme Court held classification based on national origin by emphasizing both exclusions are based on a preference for those born in the United States. Espinoza, 414 U.S. at 96 (Douglas, J., dissenting).

Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in 8 U.S.C. §§ 1601-1646 (2006)). One motivation behind PRWORA was the immigration policy of the United States, providing that "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 the availability of public benefits not constitute an incentive for immigration to the United States." Id. § 1601(2); see also Doe v. Comm'r of Transitional Assistance, 773 N.E.2d 404, 407 (Mass. 2002) (summarizing the impact and purpose of PRWORA); Tavis, supra note 14, at 1636-37 (noting federal eligibility prior to PWRORA included legally residing aliens).

A State is authorized to prohibit, limit, or restrict the eligibility of aliens for public assistance programs provided under State law. Id.


403 U.S. 365 (1971). See supra note 26 (discussing Supreme Court cases involving equal protection and alienage classification); see also Tavis, supra note 14, at 1639, 1651 (recognizing PRWORA presents a new challenge to the rational basis – strict scrutiny analysis).

Mathews, 426 U.S. at 79-80, 84-85 (applying rational basis review when states act in accordance with binding Congressional immigration decision). When Congress makes a binding decision on immigration policy, the standard of review applicable to the Congressional action is applied even if the State is taking the action in question. See id. at 79-80. Recognizing the differences between the relationship of aliens with the federal government and state governments, the Supreme Court acknowledged that classification based on alienage is a "routine and normally legitimate part" of the daily operation of the federal government because the Constitution provided Congress the power to exercise control over travel across the U.S. borders. Id. at 84-85. However, states do not share that same legitimate justification. Id.; see also U.S. CONST. art. I, § 8, cl. 4 (stating that "[t]he Congress shall have Power . . . throughout the United States . . . [t]o establish an uniform Rule of Naturalization); Soskin v. Reinerston, 353 F.3d 1242, 1254 (10th Cir. 2004) (summarizing the Supreme Court precedent proposition). Under Mathews, the federal government can "treat
that when a state independently makes an immigration decision, the state cannot rely on the rational basis standard of review that would apply had Congress mandated the action. As a result, Supreme Court precedent concerning state action in the field of immigration focuses on whether a state acted independently or in response to a Congressional mandate. Consequently, this precedent does not address the situation created by PRWORA, in which Congress authorizes, but does not mandate, state action concerning immigration.

Without a Supreme Court decision addressing states’ adoption of PRWORA, the question whether state action in the immigration field will default to the rational basis review of Congress or strict scrutiny has created a judicial divide across state and federal courts. In Soskin v. Reinertson, the Tenth Circuit addressed Colorado’s decision to terminate a state-funded Medicaid coverage extension to lawfully residing aliens. In aliens differently so long as the difference in treatment has a rational basis.” Soskin, 353 F.3d at 1253-54.

32 Graham, 403 U.S. at 382 (citing Shapiro v. Thompson, 394 U.S. 618, 641 (1969)) (recognizing “Congress does not have the power to authorize individual States to violate the Equal Protection Clause”). When a State chooses to act independently in the immigration field based on its own authority, it is not afforded the ability to rely on Congress’s plenary authority and thus, the State action is subject to strict scrutiny. See id. at 376; see also Soskin, 353 F.3d at 1254 (summarizing the Supreme Court precedent proposition). Under Graham, states are not permitted “on their own . . . [to] treat aliens differently from citizens without a compelling justification.” Id. “The fact that a State may act within a given a realm provided it does not conflict with federal legislation, does not also imply that when so acting it may make invidious distinctions without regard to the constitutional equal protection guarantee.” Shapiro, 394 U.S. at 634.

33 Compare Mathews, 426 U.S. at 84-85 (addressing judicial review for state action in response to Congressional immigration mandate), with Graham, 403 U.S. at 372 (discussing judicial review for independent state action in the field of immigration).

34 See supra note 33 and accompanying text; see also Tavis supra note 14 at 1638-39 (acknowledging PRWORA is an “unprecedented step” involving Congressional plenary immigration power).

35 See Tavis, supra note 14, at 1645-51 (discussing different approaches taken by various courts in absence of Supreme Court decision). The judicial divide in federal and state courts appears to diverge based upon whether the program in question concerns a state-funded or joint federal and state-funded public benefit program. Id. at 1650. Compare Aliessa v. Novello, 754 N.E.2d 1085 (N.Y. 2001) (concerning legally residing immigrants ineligible for state-funded benefits program) with Guaman v. Velez, 23 A.3d 451, 466-69 (App. Div. 2011) (recognizing divergence in decisional law as to whether PRWORA creates a uniform rule for rational basis) and Soskin v. Reinertson, 353 F.3d 1242, 1244 (10th Cir. 2004) (concerning state removal of noncitizens from federal-state Medicaid).

36 353 F.3d 1242 (10th Cir. 2004).

37 Id. at 1244-45, 1247 (explaining the federal and state funding breakdown and the effects of PRWORA on that funding). The plaintiffs are legally residing aliens asserting the termination of their benefits violates both the equal protection clause and due process clause of the fourteenth
its holding, the Tenth Circuit emphasized the limitations PRWORA imposes on state discretion when taking action, and the connection that discretion has on effectuating national policy, to support a conclusion that PRWORA is more analogous to a binding Congressional decision to apply the rational basis test. The Superior Court of New Jersey adopted the reasoning of Soskin in Guaman v. Velez and emphasized the mirroring state and federal objectives that motivated New Jersey to adopt the federal eligibility standards of PRWORA. Thus, the Superior Court held that rational basis review was appropriate for the state action. In contrast, the New York Court of Appeals in In re Aliessa ex rel. Fayad v. Novello relied on Graham to subject a state statute to strict scrutiny because of the absence of uniformity in the adoption of PRWORA by states.

The issue of PRWORA and equal protection violations appeared at the forefront in Massachusetts in 2002 when the Supreme Judicial Court decided Doe v. Commissioner of Transitional Assistance. In Doe, the court addressed equal protection amendment. Id. at 1247. See also Brief of Defendant at 46, Finch v. Commonwealth Health Insurance Connector Authority, 459 Mass. 655 (2011) (No. SJC-10748). The situation surrounding Colorado's adoption of PRWORA is similar to the situation at hand in the Commonwealth. Id. As in Finch, Colorado established a separate assistance program funded solely by the state to cover legally residing aliens who were ineligible after the passing of PRWORA. Id.

Soskin, 353 F.3d at 1255. The court held strict scrutiny was inapplicable because PRWORA provides states with the discretion to determine immigrant eligibility, but does not authorize states to act independently, or without limitation, on immigration policy. Id. In reaching this holding, the court focused on the fact that PRWORA "does not give the states unfettered discretion," rather states are limited to an "optional range of coverage." Id. In turn, when states decide against the optional coverage, the state is addressing "the Congressional concern that individual aliens . . . not burden the public benefits system." Id.


Id. at 467-69. The court reasons that although the adoption of PRWORA is not mandated, the adoption by New Jersey "mirrors federal objectives [and] corresponds to an identifiable Congressional policy." Id. at 468.

Id. at 469. Due to the connected federal and state objectives, the "flexible standard of review" is appropriate for the analysis of State constitutional violations. Id. at 470.


Id. at 1096-99 (noting "Graham v. Richardson is at the center of our analysis"). The statute in question denied lawfully residing aliens access to a state-funded benefits program. Id. There is no uniformity for how states adopt PRWORA, leaving states to freely discriminate. Id. If the policy was mandated it would be uniform and as such, the same policy would be adopted by every state in the same way. Id. Further, the court emphasized that the express language of the Constitution authorizes Congress to "establish [a] uniform rule of naturalization," by stressing the inclusion of the word "uniform." Id. at 433 (quoting U.S. CONST. art. I, § 8, cl. 4).

issues concerning the exclusion of lawfully residing aliens, based on federal and state residency requirements, from parallel public assistance programs—one program received funding from the Commonwealth and the federal government jointly, and the other program received funding from the Commonwealth exclusively.\textsuperscript{45} In determining the appropriate standard of review to apply to the exclusion of legal aliens based on the federal residency requirements, the court emphasized “[i]t is the general rule that State laws that discriminate against legal immigrants in the distribution of economic benefits are subject to strict scrutiny.”\textsuperscript{46} However, the court ultimately applied the rational basis standard of review, relying on the exception for instances where Congress is authorized to “establish uniform national guidelines and policies dictating how states are to regulate and legislate issues relating to aliens[.]”\textsuperscript{47} The court held the Commonwealth was “merely adopt[ing]” a binding Congressional decision within Congress’ plenary immigration power, and did not further elaborate how to address actions by the Commonwealth in response to noncompulsory Congressional decisions.\textsuperscript{48} As for the state residency requirement for the Commonwealth’s parallel supplemental program, the court concluded there was no equal protection issue at hand because the classification is one of residency, not alienage.\textsuperscript{49}

In \textit{Finch v. Commonwealth Health Insurance Connector Authority}, the Massachusetts Supreme Judicial Court addressed four questions concerning the adoption of the federal

\textsuperscript{45} \textit{Id.} at 407, 409-10. The Commonwealth uses the federal funding provided through the temporary assistance for needy families (“TANF”) program by combining that federal funding with state funding designated for transitional aid to families with dependent children (“TAFDC”). \textit{Id.} at 406-407. Upon the enactment of PRWORA, with its implementation of the five-year residency eligibility requirement for aliens to receive federally funded assistance, the Commonwealth adopted the same requirements. \textit{Id.} at 407. At the same time, the Commonwealth created a supplemental program for transitional aid, with a six-month residency requirement, that was funded solely by the Commonwealth to cover those aliens now ineligible for TANF. \textit{Id.} The court addressed the ineligibility of a group legally residing aliens because of the residency requirements of both the federal and state-funded, and state-funded temporary assistance programs. \textit{Id.} at 406-07.

\textsuperscript{46} \textit{Doe}, 773 N.E.2d at 409; \textit{see also} \textit{Graham}, 403 U.S. at 371 (addressing the language of the Fourteenth Amendment). “It has long been settled . . . the term ‘person’ . . . encompasses lawfully admitted resident aliens . . . and entitles . . . aliens to the equal protection of the law of the State in which they reside.” \textit{Graham}, 503 U.S. at 372.

\textsuperscript{47} \textit{Doe}, 773 N.E.2d at 410.

\textsuperscript{48} \textit{Id.} The court reasoned that it made “no sense” for Congress to have the authority to legislate national policy for immigration subject to rational basis review, while at the state level the implementation of those same policies would be subject to strict scrutiny. \textit{Id.}

\textsuperscript{49} \textit{Id.} at 411. The parallel state program is only available to aliens and offers no benefits to citizens. \textit{Id.}
PRWORA eligibility standards for Commonwealth Care.\textsuperscript{50} In answering the first question, the court focused on the express language of Article 106, namely what is embodied in the phrase “national origin.”\textsuperscript{51} The court concluded alienage is not within the confines of national origin, and, as such, discrimination based on alienage is not inherently discrimination against individuals with a national origin outside of the United States.\textsuperscript{52} To support this conclusion, the court relied on the Supreme Court’s definition of national origin, considered that the Supreme Judicial Court has never interpreted national origin to protect only those born outside of the United States, and that one maintains national origin despite the termination of one’s alien status after naturalization.\textsuperscript{53} The court then answered the second question—whether any other provisions in the Massachusetts Constitution provide special protection against discrimination on basis of alienage—in the negative because Finch did not argue any other provision aside from equal protection.\textsuperscript{54}

\begin{footnotes}
\textsuperscript{50} See 946 N.E.2d at 1265; supra note 13 and accompanying text.
\textsuperscript{51} Finch, 946 N.E.2d at 1268-70. Since the court addressed equal protection more expansively in question three, the court focused only on what is embodied in the national origin phrase of Article 106. \textit{Id.} at 1269. Further, the court noted that if a classification is not expressly listed in Article 106, such absence does not mean strict scrutiny is inapplicable, but rather there is no express constitutional mandate requiring strict scrutiny be applied. \textit{Id.}
\textsuperscript{52} Id. at 1269-73. The court stated that “classification on the basis of alienage is not . . . a mere subset classification of the basis of national origin and discrimination against aliens is not inherently and necessarily discrimination against persons with national origin. . . outside the United States.” \textit{Id.} at 1270. Despite this initial conclusion, the court completed a full constitutional analysis, looking to the factors around which Article 106 was framed, and reached the same conclusion—alienage is not within the confines of “national origin” under Article 106. \textit{Id.} at 1271. After differentiating between alienage and national origin, the court explored the structure, plain wording and conditions in which Article 106 was framed, and concluded that such factors do not suggest Article 106 was intended to include classifications based on alienage. Finch, 946 N.E.2d at 1271. \textit{But see id.} at 1288-90 (Duffly, J., concurring in part and dissenting in part). Justice Duffly concluded question one should be answered in the affirmative. \textit{Id.} at 1288. In reaching this conclusion, Justice Duffly found support from the “intertwining of the concepts of national origin and alienage in Supreme Court jurisprudence . . . and art. 106 includes national origin among its enumerated protected classes.” \textit{Id.} at 1289.
\textsuperscript{53} Id. at 1289. Furthermore, the court stated it would view the exclusion of alienage from Article 106 as a “conscious choice” by the voters of the Commonwealth, rather than assume it was excluded due to “ignorance or mistake.” \textit{Id.} at 1272 (outlining the support for the conclusion that national origin does not include alienage). \textit{See also} 8 U.S.C. §§1421-1458 (2006) (recognizing naturalization can end status as an alien without impacting national origin); Mathews, 426 U.S. at 78 (noting numerous federal statutes that differentiate between citizens and aliens); Espinosa, 414 U.S. at 88 (defining national origin as “the country from which his or her ancestor came”).
\textsuperscript{54} Finch, 946 N.E.2d at 1272-73. Since Finch did not argue any other provision of the Massachusetts Constitution as a basis for protection on the grounds of alienage discrimination, the court stated any other claim, if such existed, had been waived. \textit{Id.} at 1273.
\end{footnotes}
In answering the third question, the court considered the opposing arguments of Finch and the Connector to address whether the state classification based on alienage should be subject to rational basis or strict scrutiny review under the Massachusetts Constitution.\textsuperscript{55} The court looked to \textit{Doe} for guidance, specifically referring to the general rule that strict scrutiny applies to state laws that discriminate against legal aliens in the distribution of an economic benefit.\textsuperscript{56} The court acknowledged that, in contrast to the situation in \textit{Doe}, the Commonwealth was not required to apply PRWORA's eligibility standards to Commonwealth Care.\textsuperscript{57} Without a mandate from Congress to adopt PRWORA's eligibility standards, the court held the Commonwealth was left with several options for eligibility.\textsuperscript{58} Furthermore, the court recognized that PRWORA distinguishes between eligible and ineligible aliens by looking to certain criteria, including national origin, and, in turn, similarly situated individuals are excluded based upon national origin, triggering the protections of Article 106.\textsuperscript{59} Therefore, the court concluded that the decision to adopt PRWORA must be reviewed under the standards applicable to the Commonwealth and not those of Congress.\textsuperscript{60} Recognizing the

\textsuperscript{55} Id. at 1273-74. Finch argued aliens are a "discrete and insular minority," and therefore, a classification on the basis of alienage is suspect, requiring state action discriminating on this classification to be subject to strict scrutiny. \textit{Id.} at 1274. In opposition, the Connector asserted rational basis review as the appropriate standard based on either the nature of program or the fact that the program adopts a federal classification. \textit{Id.}

\textsuperscript{56} Id. at 1274 (outlining the applicable general rule and reasoning from \textit{Doe}). \textit{See also} \textit{Doe}, 773 N.E.2d at 408-09.

\textsuperscript{57} Finch, 946 N.E.2d at 1274-77. The court provided an exception to the general rule for circumstances where Congressional authority permits the establishment of "uniform national guidelines and policies" which dictate how states regulate and legislate issues concerning aliens. \textit{Id.} at 1274. To support the conclusion that the Commonwealth does not need to apply PRWORA eligibility standards is that for the three years prior to the adoption of PRWORA standards, it was never raised that the Commonwealth was in violation of PRWORA. \textit{Id.} at 1276. Further support is found in the express language of PRWORA, which acknowledges federal indifference as to how states use their own funds as seen through the mere authorization, but not requirement, for states to limit eligibility. \textit{Id.} at 1276-77. Moreover, the court found PRWORA to be a Congressional statement that the federal government will be subsidizing benefits to citizens and eligible aliens. \textit{Id.} at 1277. The court held such a statement is a "financial impediment" and not a mandate. \textit{Id.}

\textsuperscript{58} Finch, 946 N.E.2d at 1277. The court acknowledged the Commonwealth had both discriminatory and nondiscriminatory policies at its disposal from which to select. \textit{Id.}

\textsuperscript{59} Finch, 946 N.E.2d at 1279. PRWORA distinguishes between classifications based on eligible and ineligible aliens by requiring the meeting of certain criteria including national origin, race and gender. \textit{Id.} Consequently, in some instances, similarly situated individuals are included or excluded because of their national origin. \textit{Id.}

\textsuperscript{60} Id. at 1276. The court concluded PRWORA is not a requirement, but rather "declares that federal policy will not be thwarted if states decide to discriminate against qualified aliens." \textit{Id.}
Commonwealth's well-settled equal protection jurisprudence, the court held that a strict scrutiny standard of review should be used to determine the constitutionality of Commonwealth Care's classification based on alienage.\(^6\) Based on the answers to and analysis of questions one, two, and three, the court did not need to answer question four.\(^6\)

In holding that alienage is not a subset of national origin under Article 106, but that the strict scrutiny judicial review standard applies to the Commonwealth's adoption of PRWORA's eligibility standards, the Massachusetts Supreme Judicial Court appropriately supported the underlying policies and goals that motivated the Massachusetts legislature to enact M.G.L. ch. 111M, §2(a).\(^6\) In her dissent, Justice Duffly challenged the court's exclusion of alienage from national origin, and pointed out that the historical context of Article 106 appears to lend itself to the reverse of the majority's interpretation.\(^6\) Justice Duffly argued the provisions in the Massachusetts Constitution are to be interpreted in “the sense most obvious to the common intelligence,” and Supreme Court jurisprudence at the time of Article 106's adoption had interlaced alienage and national origin.\(^6\) However, as the majority concludes, the

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The court's determination was based on the absence of a mandate from Congress and the classification's partial basis in national origin. \(\text{Id.}\)

\(^6\) Finch, 946 N.E.2d at 1276. "Settled equal protection law therefore requires that §31 (a) be reviewed under strict scrutiny." \(\text{Id.}\) at 1278. Further, the majority found it unnecessary to factor in Justice Gants' financial concern and scale of inequality analysis because both concerns were found to be irrelevant. \(\text{Id.}\) The financial concern was deemed irrelevant because the court's decision regarding standard of review has no binding effect on Commonwealth's budget. \(\text{Id.}\)

\(^6\) Finch, 946 N.E.2d at 1281. "We have answered neither question in the affirmative [and] [b]ased on our analysis of Question 3 . . . it is unnecessary to develop . . . intermediate scrutiny applicable to the classification." \(\text{Id.}\)

\(^6\) Id. at 1270, 1279. \textit{See supra} notes 25, 26 and 32 and accompanying text (addressing relevant cases of alienage and equal protection jurisprudence). \textit{See generally} Lischko, \textit{ supra} note 8 (outlining the goals of M.G.L. ch. 111M, §2(a)).

\(^6\) Finch, 946 N.E.2d at 1288 (Duffy, J., concurring in part and dissenting in part). \textit{See also} Espinoza, 414 U.S. at 96-97 (Douglas, J., dissenting). Justice Douglas argues there is no real distinction between alienage and national origin classifications because both evidence a preference to those born in the United States. \(\text{Id.}\) at 96; \textit{see also} Graham, 403 U.S. at 371-72. "[T]he Court's decisions have established that classifications based on alienage, like those based on nationality . . . are inherently suspect and subject to close judicial scrutiny." \(\text{Id.}\)

\(^6\) Finch, 946 N.E.2d at 1288 (Duffy, J., concurring in part and dissenting in part) (Citing: \textit{Espinoza}, 414 U.S. at 96-97, Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948), and Oyama v. California, 332 U.S. 633, 648 (1948)) (supporting Supreme Court jurisprudence of including alienage within national origin); \textit{see also Yont}, 176 N.E. at 2. According to Justice Duffy, it appears logical that the intent was to include alienage within Article 106's national origin. \textit{Finch}, 946 N.E.2d at 1288.
historical context argument also supports excluding alienage from national origin because alienage would not have been omitted if it were intended to be included in the protected classifications of Article 106. Although the historical context of Article 106 may support either side of the interpretation argument, two decisive factors indicate the court properly held that alienage is not a subset of national origin. First, the Supreme Judicial Court has never included alienage within the classification of national origin; and second, federal law explicitly acknowledges alienage ends with naturalization, while national origin is permanent. Despite this conclusion, the court ultimately found that the protections of Article 106 attach to the alienage classification of PRWORA because PRWORA’s eligibility is in part based on national origin classification.

The court’s decision to apply strict scrutiny to the Commonwealth’s adoption of PRWORA’s eligibility standards diverges from existing state and federal decisions that support an argument contrary to the Supreme Judicial Court ruling in Finch, and may undermine the narrow approach taken by the court. Unlike the Superior Court of New Jersey in Guaman, the Supreme Judicial Court had at its disposal PRWORA decisions from state and federal courts to serve as persuasive authority, despite the lack of a Supreme Court decision. Unlike the Superior Court of New Jersey, however, which cited the Soskin decision as guidance, the Supreme Judicial Court choose to focus purely on the relevant, but not completely analogous, Supreme Court decisions of Graham and Mathews, and Massachusetts precedent in Doe. There is strength to the

66 Finch, 946 N.E.2d at 1269-1273. In completing its analysis, the court does not rely merely on alienage’s absence from the express classifications in Article 106, but rather recognizes that despite such an absence, Article 106’s protections may still apply. Id. See supra notes 50-55 and accompanying text (outlining the majority opinion’s use of background and history of Article 106 to conclude alienage is excluded).

67 See supra notes 52-53 and accompanying text.

68 See supra note 25 and accompanying text. See also 8 U.S.C. §§ 1421-1458 (recognizing naturalization can end alien status with no impact on national origin).

69 Finch, 946 N.E.2d at 1276-77. While the court expressly excluded alienage from the classification of national origin, the court was able to use the national origin classification and the protections such a classification is afforded under Article 106. Id. Perhaps this is an illustration of a way to incorporate alienage into the national origin classification should issues arise in the future regarding an alienage classification. See id.; see supra notes 59-60 and accompanying text.

70 See generally Finch, 946 N.E.2d 1262 (relying only on Massachusetts and Supreme Court decisions in reaching decision). See supra notes 31-32, 37 and 40 (highlighting the judicial variances including Graham, Mathews, Guaman, and Soskin). In Finch, the Supreme Judicial Court excluded those state and federal court decisions in reaching their decision. See generally Finch, 946 N.E.2d 1262.

71 See generally Finch, 946 N.E.2d 1262; Guaman, 23 A.3d at 467 (outlining decisional law the court relied on in addressing standard of review to apply to PRWORA).

72 See supra notes 35, 37-41 and accompanying text (outlining the reasonings and holdings of
argument presented in Soskin that PRWORA is a binding congressional decision that merely offers states limited discretion in effectuating national policy, and there is also criticism for the failure to consider other state and federal judicial decisions when addressing the constitutionality of a state’s adoption of PRWORA.\textsuperscript{73} Despite the possible criticisms, however, the Supreme Judicial Court properly addressed PRWORA, as PRWORA blurs the situations addressed in Supreme Court precedent by delegating Congressional plenary power over immigration to the states.\textsuperscript{74} As a result, the court’s application of Doe utilized previous Supreme Court precedent without further complicating the situation by attempting to balance the existing persuasive authority offered by other state and federal courts.\textsuperscript{75} Without a direct Supreme Court decision, the Supreme Judicial Court’s approach was proper based on the court’s reliance on relevant Supreme Court and Massachusetts precedent, as well as the court’s choice to avoid persuasive yet nonbinding authority, which ultimately streamlined its analysis and decision, and allowed for the consideration of fiscal concerns and the goals of the Commonwealth’s health care legislation.\textsuperscript{76}

Finally, the court’s decision to apply strict scrutiny upholds the Commonwealth’s health care legislation goals, while also protecting the rights of legally

\textsuperscript{73} See Soskin, 353 F.3d at 1255-56; Guaman, 23 A.3d at 467. Both the Tenth Circuit’s decision in Soskin and the Superior Court of New Jersey’s decision in Guaman reference other state court decisions, including Supreme Judicial Court decisions. See Soskin, 353 F.3d at 1255-56 (referencing the Supreme Judicial Court decision of Doe); Guaman, 23 A.3d at 467 (referencing the Supreme Judicial Court decision of Finch). See also Brief for Defendant, supra note 37, at 46 (analogizing the PRWORA situations in Colorado and Massachusetts).

\textsuperscript{74} See supra notes 31-32 and accompanying text (outlining Graham and Mathews).

\textsuperscript{75} See supra notes 56-57 and accompanying text. In contrast to Graham and Mathews, PRWORA focuses neither on a binding Congressional immigration decision nor on a state attempting to act independently in the field of immigration, but rather presents an issue that falls between the two. See also Tavis, supra note 14, at 1639, 1651. In other words, PRWORA “takes the unprecedented step of attempting to delegate congressional plenary power over immigration to the states . . . [by] attempt[ing] to shield state restrictions on noncitizens from traditional scrutiny of review.” Id. at 1639.

\textsuperscript{76} See supra note 70 and accompanying text.
By enacting M.G.L. ch. 111M, §2(a), the Commonwealth took strides to ensure all residents have minimal health insurance. The Commonwealth created a model poised to serve as a template for national universal health care, and applying the rational basis test in this context would have undermined this progressive step forward by directly inhibiting health care access to a portion of residents. Taken together, the national recession and the unexpectedly high cost of Commonwealth Care created great fiscal concern, which encouraged the legislature's adoption of PRWORA. The unexpected cost of Commonwealth Care stemmed from the significant number of residents who depend upon the program for vital health care access. This heavy reliance on the program indicates how necessary and effective it is within the Commonwealth, and aligns with the legislature's intent to reduce the number of uninsureds. Moreover, this financially-driven initiative affects a group of residents who cannot vote, and are likely being treated poorly because of their lack of political power. Thus, looking beyond health care policy and fiscal concerns, the court, in applying strict scrutiny, illustrates the judicial system operating as intended, as "[m]inorities rely on the independence of the courts to secure their constitutional rights against incursions of the majority, operating through the political branches of the government."

In Finch v. Commonwealth Health Insurance Connector Authority, the Massachusetts Supreme Judicial Court determined the level of scrutiny to be applied to the

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77 See supra notes 6-7 and accompanying text.
78 See supra note 6 and accompanying text.
79 See Lischko, supra note 8, at 11; see also Cotton, supra note 6, at 97, 106-07 (noting that Massachusetts has taken steps further than other states in establishing universal health care).
80 See Tavis, supra note 14, at 1627. The recession has threatened universal health care as seen through the drastic change in course states have taken from their once generous health care initiatives. See id. at 1641, n.109; Lischko, supra note 8, at 6. In 2008, costs of the program exceeded estimates by more than $150 million due to higher than anticipated enrollment, extensive outreach, and public education. Id. But see COMMONWEALTH HEALTH INSURANCE CONNECTOR AUTHORITY, supra note 6 (noting that for fiscal year 2010, the Connector comprised just over one percent of the entire state budget).
82 MASS. GEN. LAWS ch. 118H, § 2 (2010) (declaring the purpose of Commonwealth Care); see Lischko, supra note 8, at 1.
83 See Tavis, supra note 14, at 1629-30.
classification of legally residing aliens whose access to Commonwealth Care had been terminated solely on the basis of alienage. After addressing four questions reserved and reported by a single justice of the court, the court found that the strict scrutiny standard applies to the Commonwealth’s adoption of PRWORA’s alienage classification. The court appropriately held strict scrutiny applies because PRWORA classifies, in part, on the basis of national origin, and the adoption of PRWORA’s eligibility standards is not a binding immigration decision from Congress, leaving the Commonwealth to decide which eligibility standards to utilize. The decision by the Massachusetts Supreme Judicial Court illustrates an attempt to address the constitutionality of state adoption of PRWORA absent a Supreme Court decision, and also supports the policy and goals that motivated the Massachusetts legislature to ensure minimal creditable health insurance to all residents.

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85 See supra note 6 and accompanying text; see generally Finch, 946 N.E.2d 1262.
86 See supra notes 18-20 and accompanying text (outlining the four questions and corresponding answers).
87 See supra notes 60-61 and accompanying text.
88 See supra note 5 and accompanying text.