

***Soskin v. Reinertson: An Analysis of the Tenth  
Circuit’s Decision to Permit the State of Colorado to  
Withhold Medicaid Benefits from Aliens Pursuant to  
the Personal Responsibility and Work  
Opportunity Reconciliation Act***

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I. INTRODUCTION

One of Congress’s primary motives in passing the Personal Responsibility and Work Opportunity Reconciliation Act (also known as the Personal Responsibility Act, hereinafter, the “Act”) was to “remove the incentive for illegal immigration provided by the availability of public benefits.”<sup>1</sup> It attempted to achieve this objective in part by permitting states to decide whether certain aliens would or would not receive various public benefits, including Medicaid.<sup>2</sup> This legislation marked the first occasion in which the federal government had delegated to the states its previously exclusive authority over immigration matters, and since its enactment it has sparked considerable debate regarding its constitutionality.

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<sup>1</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105, (codified as amended at 8 U.S.C. § 1601(6)).

<sup>2</sup> *See id.*

A number of states have taken advantage of Congress's offer to deny benefits to aliens; not surprisingly, two state high courts have also weighed in on the Act's constitutional implications.<sup>3</sup> The federal judiciary, however, had remained silent on the topic until the United States Court of Appeals for the Tenth Circuit decided to uphold the Act against a challenge to a Colorado law in *Soskin v. Reinertson*.<sup>4</sup> This Comment analyzes the court's reasoning and how well it stands up to various criticisms. Part II discusses the history of the federal immigration power and how it has evolved to its present state. It examines the various sources of this power, both textual and extraconstitutional, as well as how the power has been defined by the Supreme Court of the United States. Part III analyzes *Soskin* in light of existing immigration jurisprudence. It compares the Tenth Circuit's reasoning with the Supreme Court's holdings in *Graham v. Richardson*<sup>5</sup> and *Mathews v. Diaz*.<sup>6</sup> Part III also argues that *Soskin* is highly questionable under the *Graham/Mathews* rubric, and that Supreme Court precedent does not support the *Soskin* majority's reasoning. Part IV examines the various arguments, aside from those explicitly elucidated in *Soskin*, put forth in favor of and against Congress's ability to devolve its immigration authority to the states. It explores both jurisprudentially-based and policy-based arguments against the backdrop of *Soskin*. Finally, Part IV addresses the important questions of how this will affect both the states and the aliens residing within them, and whether this legislation has had (or can possibly have) the deterrent effect that Congress envisioned.

## II. THE FEDERAL IMMIGRATION POWER

The United States government's exclusive authority to make laws relating to aliens and immigration has been well established for over a century. In developing what has come to be known as the plenary power doctrine, the Supreme Court has drawn both directly from the Constitution and from the doctrinal concept of the inherent authority residing in all sovereign nations. While the text of the Constitution does not explicitly bestow the government with complete authority in the realm of immigration, there are several specific grants. These include the Foreign Commerce Clause,<sup>7</sup> which the Supreme Court has held includes

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<sup>3</sup> See *Doe v. Comm'r of Transitional Assistance*, 773 N.E.2d 404 (Mass. 2002); *Aliessa v. Novello*, 754 N.E.2d 1085 (N.Y. 2001).

<sup>4</sup> 353 F.3d 1242 (10th Cir. 2004).

<sup>5</sup> 403 U.S. 365 (1971).

<sup>6</sup> 426 U.S. 67 (1976).

<sup>7</sup> U.S. CONST. art. I, § 8, cl. 3.

the “bringing of persons into the ports of the United States,”<sup>8</sup> the Naturalization Clause, which vests Congress with the power “to establish an uniform rule of naturalization,”<sup>9</sup> and the treaty power, which permits the President, “with the advice and consent of the Senate,”<sup>10</sup> to make treaties with foreign nations. Certain international treaties have included provisions that affect non-citizens within the jurisdiction of the United States, and as such this clause has been considered contributory to the federal immigration power.<sup>11</sup>

Despite these clauses, which grant federal authority in certain contexts pertaining to immigration, it is clear that the Constitution does not explicitly grant to the federal government plenary authority to control all immigration matters. For this reason the Supreme Court has not relied solely, or even primarily, on the Constitution to support its formulation of the plenary power doctrine. The Court instead turned to the principle of inherent sovereignty to justify this now-embedded facet of American jurisprudence. A considerable line of Supreme Court decisions in the late nineteenth and early twentieth centuries<sup>12</sup> relied upon the ancient global concept that each nation has the exclusive and immutable ability to make and enforce laws regarding aliens, because this ability is “inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers.”<sup>13</sup> The Supreme Court has consistently held that immigration-related laws, no matter how unfair, oppressive, or inimical to American values they may seem, are solely within the province of the executive and legislative branches of the federal government and are thus “largely immune from judicial inquiry.”<sup>14</sup> This immensely broad power has, throughout the past century, periodically resulted in the passage of laws that blatantly smack of nativism and prejudice. Consequently, the plenary power doctrine has at times been harshly criticized on a number of grounds.<sup>15</sup>

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<sup>8</sup> *Fong Yue Ting v. United States*, 149 U.S. 698, 712 (1893).

<sup>9</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>10</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>11</sup> *See, e.g.*, Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

<sup>12</sup> *See Fong Yue Ting*, 149 U.S. 698; *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Chae Chan Ping v. United States* 130 U.S. 581 (1889).

<sup>13</sup> *Kleindanst v. Mandel*, 408 U.S. 753, 765 (1972).

<sup>14</sup> *Hirsiades v. Shaughnessy*, 342 U.S. 580, 589 (1952).

<sup>15</sup> *See Gabriel J. Chin, Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (arguing, *inter alia*, that racial elitism, not economic protectionism, was, and continues to be, the primary motivating factor behind the plenary power doctrine); *see also Alexander Aleinikoff, Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L. L. 862 (1989) (arguing that laws permitting deportation of aliens for speech or expression otherwise protected by the First Amendment are paradoxical); Peter H. Schuck, *The Transformation*

Nonetheless, this doctrine is firmly entrenched both in the United States and abroad.<sup>16</sup>

But the plenary power doctrine, as sweeping as it may be, does not relieve our government from its duty to uphold the Constitution. The Supreme Court has held that all aliens—even unlawful ones—enjoy certain guarantees of due process.<sup>17</sup> Due process, however, has proven to be quite an elastic term, and the Court has made clear that satisfaction of its demands is almost always contingent upon the individual and his circumstances. Thus, in *Mathews*, the Court stated that “the fact that . . . aliens and citizens alike[] are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship . . . .”<sup>18</sup> The *Mathews* court was confronted with the question of whether Congress has the authority to pass legislation that discriminates against aliens. The challenged federal law required aliens to reside continuously in the United States for at least five years before they could be eligible for participation in the Medicare Part B insurance program.<sup>19</sup> The petitioners argued, and the U.S. District Court for the Southern District of Florida agreed, that the requirement violated aliens’ Fifth Amendment right to due process.<sup>20</sup> The government then appealed directly to the Supreme Court, which overturned the lower court ruling. In doing so the Court emphasized this nation’s long history of legislatively differentiating citizens from non-citizens, listing a great number of federal laws that assign rights, privileges, and prohibitions to citizens that plainly differ from those assigned to aliens.<sup>21</sup> The Court went on to explain the government’s justifications in making these distinctions, relying upon the concept of political sovereignty discussed above.<sup>22</sup> The Court had no difficulty holding that Congress was empowered to discriminate against aliens as a class, and spent only a short time discussing this established authority.<sup>23</sup> It was, however, somewhat more troubled by discrimination within the alien class against aliens who had not resided in the country for more than five years, and in

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*of Immigration Law*, 84 COLUM. L. REV. 1 (1984) (arguing that the policy of excluding immigration-related laws from constitutional scrutiny is antiquated and ripe for reform).

<sup>16</sup> See EMER DE VATEL, *THE LAW OF NATIONS* (Joseph Chitty ed., T. & J.W. Johnson & Co. 1876) (1758) (positing that all nations possess certain powers from the point of their inception as sovereign entities).

<sup>17</sup> See *Wong Tang Sung v. McGrath*, 339 U.S. 33 (1950); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931).

<sup>18</sup> *Mathews v. Diaz*, 426 U.S. 67, 78 (1976).

<sup>19</sup> See *id.* at 69.

<sup>20</sup> See *id.* at 73.

<sup>21</sup> See *id.* at 78-80.

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

favor of those who had.<sup>24</sup> This species of discrimination, the Court found, was not as neatly justified under the plenary power doctrine because aliens were not being uniformly discriminated against.<sup>25</sup> Instead, the law could be viewed as beneficial to some aliens and detrimental to others.<sup>26</sup>

On this matter, the Court began by reiterating that Congress has no duty to provide all aliens with the benefits available to citizens.<sup>27</sup> Obviously Congress is also not forbidden from providing some portion of such benefits to aliens, so the pertinent question before the Court was whether “the party challenging the constitutionality of the particular line Congress has drawn [can advance] principled reasoning that will at once invalidate that line and yet tolerate a different line separating some aliens from others.”<sup>28</sup> The Court here essentially inquired whether the classification Congress made had a rational basis relating to a legitimate government objective; the answer to the inquiry, not surprisingly, was that it did. The Court stated that “both the character and the duration of [an alien’s] residence” are reasonable factors to weigh in considering whether he should be eligible to receive public benefits.<sup>29</sup>

The permissive standard set forth in *Mathews* stands in sharp contrast to the Court’s treatment of *state* laws that discriminate against aliens. In *Graham v. Richardson* the Supreme Court held that any such state legislation must be struck down as violative of the Equal Protection Clause unless it can withstand strict judicial scrutiny.<sup>30</sup> The Court’s reasoning was based largely on the fact that alienage has been deemed a suspect classification,<sup>31</sup> which means that any state law discriminating on the basis of alienage must advance a compelling state interest by employing the least restrictive means possible.<sup>32</sup> The states are beholden to this heightened level of scrutiny because they, unlike the federal government, are not exempted from constitutional constraints by way of the plenary power doctrine.<sup>33</sup> *Graham* involved two state statutes, one that created a fifteen-year residency requirement for receipt of public benefits,<sup>34</sup> and another that denied public assistance to aliens altogether.<sup>35</sup>

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<sup>24</sup> *See id.* at 80-81.

<sup>25</sup> *See id.* at 80.

<sup>26</sup> *See id.* at 81.

<sup>27</sup> *See id.* at 82.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 83.

<sup>30</sup> *Graham v. Richardson*, 403 U.S. 365 (1971).

<sup>31</sup> *See id.* at 371-72; *see also* *Takahashi v. Fish and Game Comm’n*, 334 U.S. 410 (1948).

<sup>32</sup> *See, e.g., Bernal v. Fainter*, 467 U.S. 216 (1984).

<sup>33</sup> *See Graham*, 403 U.S. at 377.

<sup>34</sup> ARIZ. REV. STAT. ANN. § 46-233 (1962).

The State appellants in *Graham* sought to justify the challenged statutes on the basis of the states' "special public-interest" in advocating their own citizens' welfare by allocating state resources so as to benefit members of the state at the expense of non-citizens.<sup>36</sup> While the Court conceded that it had in the past upheld statutes that favored citizens at the expense of non-citizens, none of those statutes involved the withholding of public benefits from aliens in order to ensure disbursement to citizens.<sup>37</sup> Moreover, the Court expressed doubt over "the continuing validity of the special public-interest doctrine . . . ."<sup>38</sup> The fact that a suspect classification was imposed by the two appellant states was of central significance to the Court, and no doubt solidified its decision to reject the special public-interest doctrine in this context.<sup>39</sup> The Court stated that "[t]he saving of welfare costs cannot justify an otherwise invidious classification."<sup>40</sup> While a special public-interest argument may have been found sufficient to justify a non-suspect classification, the Court concluded that, because the classification was premised upon alienage, the states were obligated to show a compelling interest in order to validate it.<sup>41</sup> The states' fiscal motives did not meet this demanding threshold, and the Court therefore found the laws in violation of the Equal Protection Clause.<sup>42</sup>

While the Court might have stopped there, it instead offered another reason why the states could not discriminate against aliens. Immigration, the *Graham* Court announced, is "an area constitutionally entrusted to the Federal Government."<sup>43</sup> If Congress, "in the exercise of the superior authority in this field, has enacted a complete scheme of regulation . . . states cannot . . . conflict or interfere with, curtail or complement, the federal law . . . ."<sup>44</sup> The Court concluded that Congress's federal policy entailed a "complete scheme," and that state legislation in this realm was therefore entirely foreclosed.<sup>45</sup> Five years later, the *Mathews* Court reflected upon and expanded this language in order to permit federal discrimination against this suspect class.<sup>46</sup>

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<sup>35</sup> PA. STAT. ANN. tit. 62, § 432.2 (1967).

<sup>36</sup> *Graham*, 403 U.S. at 372.

<sup>37</sup> *See id.* at 373.

<sup>38</sup> *Id.* at 374.

<sup>39</sup> *See id.* at 575-76.

<sup>40</sup> *Id.* at 375 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)).

<sup>41</sup> *See id.* at 376.

<sup>42</sup> *See id.*

<sup>43</sup> *Id.* at 378.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *See Mathews*, 426 U.S. 67.

The *Graham* Court also addressed one final issue. The state of Arizona had argued that a federal law authorized the implementation of its discriminatory statute, and that the state was therefore acting in concert with uniform federal immigration law.<sup>47</sup> The Court managed to evade the difficult question of whether Congress's immigration power was delegable, concluding that the statute did not grant the authorization that Arizona claimed.<sup>48</sup> However, in its treatment of this claim the Court tipped its hand as to its position on the matter. The statute was admittedly ambiguous and was unaccompanied by significant legislative history, and may have been interpreted in Arizona's favor.<sup>49</sup> However, the Court found that if the statute "were to be read so as to authorize discriminatory treatment of aliens at the option of the States . . . serious constitutional questions are presented."<sup>50</sup> The Court did not explicitly state that Congress was forbidden from delegating its power; such a statement would have been dictum in any event. Still, the Court's comment that "statutes should be construed whenever possible so as to uphold their constitutionality"<sup>51</sup> at least suggests that it did not believe the immigration power may be passed down to the states.<sup>51</sup>

*Graham* and *Mathews* are unequivocal in their respective holdings: Congress can pass legislation discriminating against aliens with virtual impunity, and the states are forbidden from doing so in the absence of a compelling interest. The Personal Responsibility Act, however, has created a situation aptly described by the *Soskin* court as falling "somewhere in between."<sup>52</sup>

### III. *SOSKIN*'S TREATMENT OF THE PERSONAL RESPONSIBILITY ACT

Congress enacted the Personal Responsibility Act in 1996. Its passage came partially in response to a growing reliance among

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<sup>47</sup> According to the state's argument, section 1402(b) of the Social Security Act authorized a durational residency requirement for aliens. *Graham*, 403 U.S. at 380. That section provides: "The Secretary [of Health, Education and Welfare] . . . shall not approve any plan which imposes, as a condition of eligibility for aid to the permanently and totally disabled under the plan . . . [a]ny citizenship requirement which excludes any citizen of the United States." 42 U.S.C. § 1352(b). The state argued that the provision forbidding citizenship requirements from preventing citizens from receiving benefits could be read to authorize a provision that would prevent non-citizens from receiving benefits. *Graham*, 403 U.S. at 380. The Court rightly pointed out that "[o]n its face, the statute does not affirmatively authorize, much less command, the States to adopt durational residency requirements . . ." *Graham*, 403 U.S. at 381.

<sup>48</sup> *Graham*, 403 U.S. at 380-81.

<sup>49</sup> *See id.* at 381.

<sup>50</sup> *Id.* at 382.

<sup>51</sup> *Id.* at 382-83 (quoting *United States v. Vultch*, 402 U.S. 62, 70 (1971)).

<sup>52</sup> *Soskin v. Reinertson*, 353 F.3d 1242, 1254 (10th Cir. 2004).

immigrants on public benefits in general, and on Medicare and Medicaid in particular Congress predicted the Act would result in about \$53 billion in savings, and almost \$24 billion, or 44%, of that amount was to be derived from the denial of benefits to legal aliens.<sup>53</sup> The Act set forth specific eligibility criteria that significantly reduced the number of aliens qualified to receive benefits within the U.S.<sup>54</sup> The largest change brought about by this Act was the new mandate that any alien must reside within the U.S. for at least five years before becoming eligible for benefits.<sup>55</sup> Numerous additional criteria for receipt of benefits were also included in the Act.<sup>56</sup> Several designated groups of aliens, however, were guaranteed benefits by the Act irrespective of the duration of their residency.<sup>57</sup>

In addition to setting definitive criteria for the grant or denial of public funds, the Act also permitted the states either to grant or deny certain public benefits to qualified aliens.<sup>58</sup> In other words, the federal government prohibited the states from providing benefits to any aliens (other than the narrow exempted classes) who have not resided in the country for five years, but it allowed the states to decide whether they would grant certain benefits once the five-year requirement has been

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<sup>53</sup> Cong. Budget Office, Federal Budgetary Implications of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, at 3 tbl.S-2 (1996) available at <http://cbo.gov/ftpdocs/46xx/doc4664/1996Doc32.pdf>.

<sup>54</sup> See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, §§ 401-403, 411-12, 110 Stat. 2113-24, 2148-53 (codified as amended in scattered sections of 8 and 42 U.S.C.).

<sup>55</sup> 8 U.S.C.A. § 1613 (West 2005).

<sup>56</sup> *Id.* Only “qualified aliens” are eligible for public benefits after a five-year residency period. “Qualified aliens” are defined as those aliens:

(1) [W]ho [are] lawfully admitted for permanent residence under the Immigration and Nationality Act (8 U.S.C.A. § 1101 et seq.); (2) [W]ho [have been] granted asylum under section 208 of such Act (8 U.S.C.A. § 1158); (3) [Who are] refugees . . . admitted to the United States under section 207 of such Act (8 U.S.C.A. § 1157); (4) [Who are] paroled into the United States under section 212(d)(5) of such Act (8 U.S.C.A. § 1182(d)(5)) for a period of at least 1 year; (5) [W]hose deportation[s] [are] being withheld under section 243(h) of such Act (8 U.S.C.A. § 1253(h)); (6) [Who [are] granted conditional entry pursuant to section 203(a)(7) of such Act as in effect prior to April 1, 1980 (8 U.S.C.A. § 1153(a)(7)); or (7) [W]ho [are] Cuban and Haitian entrant[s] (as defined in section 501(e) of the Refugee Education Assistance Act of 1980).

8 U.S.C.A. § 1641(b) (West 2005).

The Act permits aliens who have been subjected to domestic abuse while in the United States to become qualified for certain public benefits. 8 U.S.C.A. § 1641(c)(2005).

<sup>57</sup> See 8 U.S.C.A. § 1613(b) (West 2005) (Aliens exempted from the five-year requirement include active duty military or veterans, their spouses and dependent children, and aliens designated as refugees, among others.).

<sup>58</sup> See 8 U.S.C.A. § 1612(b) (West 2005) (The state may grant to or withhold from qualified aliens the following benefits: temporary assistance for needy families (“TANF”), Social Services block grants, and Medicaid.).

satisfied.<sup>59</sup> Colorado was one of the states to invoke this provision of the Act. After the federal statute's enactment in 1997, that state chose to continue providing uniform coverage to all of its residents despite Congress's decree that only certain aliens were entitled to receive benefits. This policy changed, however, in 2003, when the Colorado legislature decided that an "enormous budget shortfall" required drastic action.<sup>60</sup> In accordance with the Act, the legislature withdrew Medicaid benefits from all aliens not statutorily entitled by the Personal Responsibility Act to receive them.<sup>61</sup> A class of aliens challenged the state law, alleging it violated the Equal Protection Clause.<sup>62</sup>

The case quickly reached the Tenth Circuit.<sup>63</sup> Although the plaintiffs claimed that the Colorado law fell squarely within the prohibited class of laws under *Graham*, the *Soskin* court stated that "the issue is more nuanced" than it initially appeared.<sup>64</sup> Despite the *Graham* Court's seemingly strong indication that devolvability is beyond Congress's power, the *Soskin* court did not read the decision as such. The court stated that "if the [Supreme] Court had definitively decided that the distinctions made in Arizona law would be unconstitutional regardless of Congressional authorization, there would have been no cause for the Court to examine the legislative history that Arizona relied upon."<sup>65</sup> The *Soskin* court did not read *Graham* to suggest that devolvability was impermissible, but rather read it to require unequivocal legislative intent to permit state-based discrimination before it would address the issue.

The court next addressed the statement made in *Graham* that "Congress does not have the power to authorize the individual states to violate the Equal Protection Clause."<sup>66</sup> While this statement might be taken plainly to proscribe a delegatory law such as the Personal Responsibility Act, the *Soskin* court did not see it that way. Rather, the court viewed this statement as "almost tautological,"<sup>67</sup> and concluded that the pertinent inquiry was whether a devolution of the immigration power was in fact a constitutional violation.<sup>68</sup> The court seems to have reasoned that if the states can be clothed with the same broad authority to

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<sup>59</sup> *See id.*

<sup>60</sup> *Soskin v. Reinertson*, 353 F.3d 1242, 1246 (10th Cir. 2004).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1246-47.

<sup>63</sup> The law went into effect in April of 2003, and the Tenth Circuit's decision was published only nine months later, in January of 2004.

<sup>64</sup> *Id.* at 1254.

<sup>65</sup> *Id.*

<sup>66</sup> *Graham v. Richardson*, 403 U.S. 365, 382 (1971).

<sup>67</sup> *Soskin*, 353 F.3d at 1254.

<sup>68</sup> *See id.*

discriminate that Congress possesses, then equal protection becomes no more of a problem than it was in *Mathews*.<sup>69</sup>

The *Soskin* court was also faced with the task of reconciling another remark made in *Graham* that seems to deal a blow to any argument in favor of the Act's constitutionality. The *Graham* Court stated that "[a] congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene [the] explicit constitutional requirement of uniformity."<sup>70</sup> The *Soskin* majority emphasized the phrase "would appear to," and attempted to explain why that appearance is false.<sup>71</sup> The court pointed out that the constitutional uniformity requirement is restricted to the "Rule of Naturalization," and that the relationship between naturalization and eligibility requirements for public benefits is attenuated at best.<sup>72</sup> The court did not mention, however, that uniformity has been considered by the Supreme Court to be a cardinal objective in all aspects of immigration law—not just in the narrow realm of naturalization. Thus, in *Plyler v. Doe*, the Court stated that states are to adhere to federal classifications that they themselves could not impose, "if the Federal Government has by *uniform* rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass . . . ."<sup>73</sup> The majority also reasoned that the appearance of unconstitutionality is false because the plenary power doctrine derives primarily from the extraconstitutional notion of inherent sovereignty rather than from any one textual provision of the Constitution. Again, this assertion, while valid, ignores the fact that a single comprehensive policy toward the treatment of aliens has always been considered a fundamental objective in exercising the immigration power; whether this power has been deemed to flow directly from constitutional text or from a partially independent doctrine of inherent sovereignty is not relevant.

In concluding that the uniformity requirement is not fatal to the Act, the majority was also called on to explain why it declined to accept the reasoning of the Court of Appeals of New York, upon which the plaintiffs chiefly relied. In *Aliessa v. Novello*, the New York court struck down a law functionally equivalent to the Colorado law on the ground that it was subject to strict scrutiny, irrespective of the federal

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<sup>69</sup> *See id.* at 1254-55.

<sup>70</sup> *Graham*, 403 U.S. at 382.

<sup>71</sup> *Soskin*, 353 F.3d at 1256.

<sup>72</sup> *Id.* at 1256-57.

<sup>73</sup> 457 U.S. 202, 219 n.19 (1982) (emphasis added).

authorization afforded under the Act.<sup>74</sup> The *Aliessa* court also held that the Act itself was unconstitutional, stating that “it is directly in the teeth of *Graham* . . . .”<sup>75</sup> The *Aliessa* court took exception to the fact that the Act does not promote uniform immigration policy, but that it instead produces “potentially wide variation based on idiosyncratic concepts of largesse, economics and politics.”<sup>76</sup>

The *Soskin* court rejected the *Aliessa* court’s analysis of the Act. While it did concede that the justification for a relaxed standard of review in the case of federal immigration legislation is that it enables Congress to implement “national policy that Congress has the constitutional power to enact,”<sup>77</sup> the majority did not view the Act as diverging from that goal of uniformity. The court went on to state:

What Plaintiffs fail to consider is that a state’s exercise of discretion can also effectuate national policy. Recall that the [Act] does not give the states unfettered discretion. Some coverage must be provided to aliens; some coverage is forbidden. State discretion is limited to the remaining optional range of coverage. In exercising that discretion each state is to make its own assessment of whether it can bear the burden of providing any optional coverage.<sup>78</sup>

By this language it seems that the court is attempting to define the Act not to be a full and true devolution of Congressional authority at all, but merely a manifestation of Congressional intent, albeit one that permits some wiggle room within which the states are free to operate. By embracing this reading of the statute the court was able to avoid going so far as to hold that Congress’s plenary immigration power is inherently delegable to the states. Instead it held only that the power is delegable to the extent that it has been delegated in this particular statute.<sup>79</sup> This analysis raises an obvious question: to what extent may the power be delegated before the plenary power doctrine is fatally compromised? It would be a daunting judicial challenge to determine, in future cases involving delegatory immigration-related statutes, whether Congress has granted just enough discretion to the states or too much. Moreover, even within the bounds set by Congress in this Act, the majority seemed to dismiss the obvious potential for what the *Aliessa* court referred to as

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<sup>74</sup> 754 N.E.2d 1085 (N.Y. 2001).

<sup>75</sup> *Id.* at 1098.

<sup>76</sup> *Id.*

<sup>77</sup> *Soskin*, 353 F.3d at 1255.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

“wide variation” in state immigration policies;<sup>80</sup> it simply concluded that the finite nature of the states’ discretion works to validate the Act under *Graham*.<sup>81</sup>

The dissenting opinion in *Soskin* is grounded in the Equal Protection Clause.<sup>82</sup> The dissent maintained that the states may not discriminate on the basis of alienage, and that, therefore, the Colorado law must be subjected to strict scrutiny analysis.<sup>83</sup> Vital to this conclusion was the dissent’s staunch position that the immigration power must reside exclusively within the federal government.<sup>84</sup> Judge Henry explicitly rejected the devolvability theory espoused by the majority, opining that

[t]o permit a comprehensive Congressional devolution of its exclusive powers would be tantamount to saying “that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.”<sup>85</sup>

The dissent went on to endorse the *Aliessa* court’s view that uniformity is a necessary component of national immigration law.<sup>86</sup> The dissenting judge was particularly persuaded by the legislature’s admission that the Act embodies “a compromise on a difficult public policy question” because it allows the states to provide benefits to aliens in accordance with their respective budgetary constraints.<sup>87</sup> This statement, the dissent declared, proves that the Act does not engender any uniform policy, but rather condones “a patchwork of state policies.”<sup>88</sup> It seems that, unlike the majority opinion, which may be accused of having engaged in questionable semantic maneuvers in order to construe the Act as constitutional, the dissent chose instead to give the Supreme Court’s words their plainest and most obvious meaning. What the majority took to be “tautological”—the statement made in *Graham* that Congress may not “authorize the States to violate the Equal Protection Clause”—the dissent found dispositive.<sup>89</sup>

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<sup>80</sup> *Aliessa*, 754 N.E.2d at 1098.

<sup>81</sup> *Soskin*, 353 F.3d at 1255-56.

<sup>82</sup> *Id.* at 1265 (Henry, J., dissenting).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1274.

<sup>85</sup> *Id.* (quoting *Faux v. Raich*, 239 U.S. 33, 42 (1915)).

<sup>86</sup> *See id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *See id.* at 1275.

## IV. ARGUMENTS FOR AND AGAINST THE DEVOLVABILITY PRINCIPLE

At the heart of the *Soskin* decision is the notion that the plenary power doctrine may be supplemented, without violating the Constitution, so as to allow Congress to share its power with the states. Several commentators have weighed in on whether there is any room for a devolvability principle within federal immigration jurisprudence. These arguments take two basic forms: those based on jurisprudence and those based on public policy. Each group will be discussed in turn.

1. *Jurisprudentially-Based Arguments*

Constitutional arguments in favor of devolvability are difficult to formulate and defend primarily because there is an almost complete dearth of textual support for state-based immigration regulation. While it is true that the states were almost exclusively in charge of creating immigration standards and rules through the end of the nineteenth century,<sup>90</sup> this was due not to any affirmative grant, but to a “federal legislative vacuum.”<sup>91</sup> This vacuum was rapidly filled near the turn of the twentieth century by a stream of legislation setting a series of standards for immigration and naturalization.<sup>92</sup> The Supreme Court almost invariably approved of these laws, and in the process outlined the contours of the plenary power doctrine until it became the virtual *carte blanche* it is today.<sup>93</sup> The Supreme Court’s formulation of this doctrine has, as a direct result, withdrawn virtually all immigration power from the states.

Nevertheless, some legally grounded arguments can be advanced in favor of devolvability. First, and most simply, the federal plenary power, if it is truly plenary, may be understood to allow Congress to do whatever it pleases with it. William Cohen has suggested that the *Mathews* decision elicits exactly this presumption, claiming that “Congress’s [delegatory] power is limited only by the constitutional restrictions on the use of alienage classifications in federal legislation.”<sup>94</sup> As *Mathews* demonstrates, such constitutional restrictions consist only of the requirement that a law meet a rational basis standard. Cohen bases

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<sup>90</sup> See Gerald L. Neuman, *The Lost Century of American Immigration Law* (1776-1875), 93 COLUM. L. REV. 1833 (1993); see also Peter J. Spiro, *Learning to Live With Immigration Federalism*, 29 CONN. L. REV. 1627 (1997).

<sup>91</sup> Spiro, *supra* note 90, at 1628.

<sup>92</sup> See *Chy Lung v. Freeman*, 92 U.S. 275 (1875); see also *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

<sup>93</sup> See *Fiallo v. Bell*, 430 U.S. 787 (1977); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

<sup>94</sup> William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 420 (1983).

this conclusion on the fact that the Supreme Court has thus far been unwilling to place any limits on the government's ability to deny benefits to aliens, and that therefore "it follows that congressional power to validate the most 'invidious' state alienage classifications is also limitless."<sup>95</sup> Although Cohen does not go any further in explaining why Congress's exclusive power includes the ability to compromise that exclusivity, it is not entirely illogical to assume that "plenary" means just that.

However, the fact that the Supreme Court has not yet placed any meaningful reins on Congress's immigration power does not mean that it will not do so. While the doctrine is based on the inherent sovereignty principle and, to some extent, the enumerated federal powers granted by the Constitution, it is nonetheless largely a judicially conceived body of law and is therefore malleable, despite a century-long trend of judicial deference. Indeed, commentators have questioned the validity and sustainability of the doctrine, and have in some cases gone so far as to predict its inevitable demise.<sup>96</sup>

Moreover, if plenary power over immigration finds its source in natural sovereignty then its only true limit may be where it can and, more importantly, cannot reside.<sup>97</sup> In other words, only the federal government can wield a power borne out of its own sovereignty; the power loses its legitimacy when a subordinate entity assumes control of it, whether that assumption is expressly countenanced or not. This view has been espoused by Barbara Arnold, who stated that "[t]o delegate a sovereign power is to tear it from its source," and that the devolution of a sovereign power is akin to "a flower cut from the vine"—just as the flower "wITHERS shortly afterward, so does the power of the sovereign cease to exist when separated from its source."<sup>98</sup>

Evidently, the *Soskin* majority held a view closer to Cohen's than to Arnold's, but it did not satisfactorily explain why it took this position. The court acknowledged that the immigration power is derived, at least in part, from inherent sovereignty,<sup>99</sup> and yet it included no discussion

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<sup>95</sup> *Id.*

<sup>96</sup> See Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 934 (1995) (observing a trend toward greater due process protections for aliens among lower federal courts, and predicting that this shift may "eventually lead the Supreme Court to clean the slate in one fell swoop.").

<sup>97</sup> See Barbara A. Arnold, *The New Leviathan: Can the Immigrant Responsibility Act of 1996 Really Transfer Federal Power Over Public Benefits to State Governments?*, 21 MD. J. INT'L L. & TRADE 225 (1997).

<sup>98</sup> *Id.* at 247 n.84.

<sup>99</sup> See *Soskin v. Reinertson*, 353 F.3d 1242, 1256 (10th Cir. 2004).

whether this peculiar source of power warranted special consideration as to its devolvability. On the contrary, the court merely treated the Act as a run-of-the-mill Congressional enactment, stating simply that “[o]nce Congress has expressed [national] policy, the courts must be deferential.”<sup>100</sup> In this way, it seems that the majority overlooked (or perhaps deliberately disregarded) an important distinction between this “policy” and the vast majority of federally-imposed policy. Although presented with a golden opportunity to do so, the majority chose not to engage the issue of devolvability—an issue at the very core of the question whether the Personal Responsibility Act is constitutional—in any meaningful way. Whether an act of willful evasion or merely an incomplete analysis, the opinion seems to appreciate neither the uniqueness nor the peculiar history of the plenary power doctrine.

Another jurisprudential argument that may be voiced in favor of devolvability stems from the only other area of equal protection jurisprudence in which the level of judicial scrutiny differs depending on whether the legislation is federal- or state-based: Native American law.<sup>101</sup> In *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, the Supreme Court upheld state legislation that almost certainly would not have survived a strict scrutiny analysis on the basis that it was enacted “under [the] explicit authority” of Congress.<sup>102</sup> The Court held that the congressional grant compelled it only to engage in a rational basis review.<sup>103</sup> *Yakima*, however, is not necessarily as helpful as it might initially seem in solving the devolvability problem for two reasons. First, as Michael Wishnie points out, the legislation under review in *Yakima* differs substantially from the Personal Responsibility Act.<sup>104</sup> The *Yakima* law worked to benefit Native Americans rather than to withdraw any benefits. The court’s holding was limited to non-harmful legislation, and thus did not address what the standard of review might be if state legislation discriminated against, rather than in favor of, Native

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<sup>100</sup> *Id.* at 1255.

<sup>101</sup> See *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (employing a rational basis review in response to a challenge of a federal law regarding hiring Practices at the Bureau of Indian Affairs); see also *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979) (stating that federal government may enact discriminatory legislation “that might otherwise be constitutionally offensive” because “[s]tates do not enjoy the same unique relationship with Indians” as the federal government).

<sup>102</sup> *Yakima*, 439 U.S. at 501.

<sup>103</sup> *Id.*

<sup>104</sup> See Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 561-65 (2001).

Americans.<sup>105</sup> Second, Wishnie proposes that the power over Indian affairs and the power over immigration are fundamentally different in nature, and that the former power appears more likely to be devolvable. This is because, while immigration matters necessarily involve interactions with the citizens and governments of other sovereign nations, the relationship between the government and Native Americans is strictly internal.<sup>106</sup> Furthermore, the blame for Native American oppression is shared by the states and the federal government, and consequently “the states too bear a special responsibility towards Native Americans.”<sup>107</sup>

In keeping with its avoidance of any discussion of the nature of the immigration power, the *Soskin* majority made no reference to *Yakima*. If it had decided to do so the court might have used that decision to bolster its own conclusion. At the very least, the *Yakima* decision illustrates that the possibility of devolution of an exclusively federal power<sup>108</sup> has not been entirely foreclosed by the Supreme Court. But beyond this threshold inference *Yakima* is of little help, due to qualitative differences both between the laws under review and between the governmental powers from which they derive.

A third jurisprudential argument supporting devolvability arises from the fact that while immigration regulation is controlled primarily by federal statute,<sup>109</sup> some of its aspects are dependent upon state law. Howard Chang observed several examples of such interaction, such as instances in which a marriage-based immigration visa hinges upon the marriage’s validity under state law<sup>110</sup> and instances in which federal

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<sup>105</sup> See *id.* at 562 n.91; see also *Morton*, 417 U.S. 535 (upholding a law requiring favorable employment consideration for Indians at the Bureau of Indian Affairs).

<sup>106</sup> See Wishnie, *supra* note 104, at 564.

<sup>107</sup> *Id.*

<sup>108</sup> The federal government’s exclusive power over Indian affairs is not rooted in a theory of inherent sovereignty to the extent that the immigration power is. The former power is premised mainly upon the Indian Commerce Clause and the Treaty Clause of the Constitution. See *McLanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 172 n.7 (1973). However, the Supreme Court has also suggested an additional, extraconstitutional source of the power lies in an established “guardian-ward status” between the government and Native Americans. See *United States v. Antelope*, 430 U.S. 641, 645 n.8 (1977). The Court has even gone so far as to classify the power over Indian affairs as a component of inherent sovereignty. See *United States v. Kagama*, 118 U.S. 375, 384-85 (1886) (holding that the power to ensure the welfare of Native Americans “must exist in [the federal] government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.”).

<sup>109</sup> See 8 U.S.C. § 1101-1537 (2005) (Immigration and Naturalization Act).

<sup>110</sup> Howard Chang, *Public Benefits And Federal Authorization For Alienage Discrimination*, 58 N.Y.U. ANN. SURV. AM. L. 357 (2002) (citing *United States v. Sacco*, 428 F.2d 264 (9th Cir. 1970), *cert. denied*, 400 U.S. 903 (1970)).

deportation statutes on grounds of a crime that involves “moral turpitude” or is punishable by at least one year<sup>111</sup> depend on state criminal law.<sup>112</sup> This argument seems to suggest that the immigration power is susceptible of devolution because it is already being devolved in certain ways. Chang reasons that the disparity among state laws that are pertinent to immigration procedures results in the “delegat[ion of] some authority to the states” to govern deportation and exclusion of aliens.<sup>113</sup> One might infer that the interactive nature of immigration policy in some specific situations reveals that the “plenary” federal power is inherently linked to state law and thus is not as insulated from state influence as is widely supposed. The *Soskin* opinion may be read as expanding upon this already-existing interaction, and not merely placing a stamp of approval on a novel state power.

Plainly, though, this argument alone would not be sufficient to re-characterize the plenary power doctrine for two reasons. First, state laws that bear upon the federal scheme are not enacted for the purpose of regulating immigration. Indeed, state legislators almost certainly did not contemplate whether and in what circumstances aliens might be deported when devising criminal sentencing statutes. These state laws serve the primary purpose of governing the citizens of the state; their relevance to federal law is entirely incidental. The second reason that this argument fails is closely related to the first: even though state laws play a role in immigration law, the states have no say in what role such laws play. For example, the Immigration and Naturalization Act may require deportation of aliens who have committed crimes punishable by five years, or two years, or one day in prison, and the states would be beholden to that criterion. The power given to the states in the Personal Responsibility Act and ratified in *Soskin*, unlike the powers described above, allows the states purposefully to pass legislation that targets immigrants and dictates how they will be treated.

Perhaps the most compelling legally-based arguments in favor of a non-devolvability principle have already been discussed above: the first is found in the words of the *Graham* Court: “[a] congressional enactment construed so as to . . . adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene [the] explicit constitutional requirement of uniformity.”<sup>114</sup> This statement, although dictum, militates strongly against the devolvability of the immigration power. The second argument springs

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<sup>111</sup> *Id.* (citing 8 U.S.C. §§ 1182, 1227).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 360.

<sup>114</sup> *Graham v. Richardson*, 403 U.S. 365, 382 (1971).

from the notion that powers inherent in the sovereign must be exercised by the sovereign alone, and is expressed by Barbara Arnold.<sup>115</sup> These arguments can, however, be supplemented with several others.

One such argument is based in the text of the statute itself. Included in the section of the Personal Responsibility Act authorizing state discrimination is the following provision:

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 shall . . . be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.<sup>116</sup>

Notwithstanding the fact that this provision is a vain attempt to usurp from the judiciary the task of “say[ing] what the law is,”<sup>117</sup> it reveals that Congress assumed that the state laws would still be subject to strict scrutiny despite its authorization. The Supreme Court has held that fiscal motive such as that which is advanced through the Personal Responsibility Act cannot suffice as a compelling state interest,<sup>118</sup> and thus it is highly doubtful that Congress’s instruction to the courts to find a compelling interest in this particular species of fiscal motivation would withstand review.<sup>119</sup> If Congress had intended to extend the luxury of rational basis review to the states, then why would it have included this provision? The *Soskin* court addresses this language and finds no problem with it, stating that “to say that [Congress’s] statute would survive strict scrutiny is a far cry from Congress’s stating that the statute *should be* subject to such scrutiny.”<sup>120</sup> That may be so, but the provision nonetheless implies that Congress did not envision rational basis review of state-imposed benefit restrictions. It also implies that Congress questioned the constitutionality of its delegation of the immigration power, and therefore attempted to avoid the issue by including language that, if accepted, would ensure that the Act did not run afoul of *Graham*.

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<sup>115</sup> See Arnold, *supra* note 97, at 247.

<sup>116</sup> 8 U.S.C.A. § 1601(7) (West 2005).

<sup>117</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>118</sup> See *Soskin v. Reinertson*, 353 F.3d 1242, 1273 (10th Cir. 2004) (“The saving of welfare costs cannot justify an *otherwise invidious classification*.”).

<sup>119</sup> Although Congress technically categorizes the states’ interest as “assuring that aliens be self-reliant in accordance with national immigration policy,” the promotion of such “self-reliance” is clearly a way of conserving economic resources. 8 U.S.C.A. § 1601(7).

<sup>120</sup> *Soskin*, 353 F.3d at 1257.

Additional support for a non-devolvability argument can be gleaned from a long line of Supreme Court cases, in addition to *Mathews* and *Graham*, that emphatically place the immigration power exclusively in the hands of the federal government. In particular, the Court stated in *Chae Chan Ping v. United States* that this authority “cannot be granted away”<sup>121</sup> and is “incapable of transfer.”<sup>122</sup> Of course, the Court did not address, either in *Chae Chan Ping* or at any other time, whether statutory authorization of state action qualifies as a “transfer” or a “granting away.” The cases in which the Court expounded upon the nature of the immigration power invariably involved challenges of state laws enacted without any authorization analogous to the Act, and thus the issue has never been squarely presented. Still, the holding that the power is “incapable of transfer” is unaccompanied by any qualification by the court.<sup>123</sup>

If *Soskin*, or another case challenging the Personal Responsibility Act, does come before the Supreme Court for review, then the Court will be presented with three options: it may finally rein in the plenary power doctrine, deciding that the judicial policy of outright denial of constitutional protection in immigration matters is ripe for modification; it may reaffirm the plenary power doctrine yet again, and in so doing strike down the Act as an impermissible delegation of federal power; or it may uphold the doctrine and the Act. It seems, though, in consideration of the Court’s prior holdings, that something has to give, and that the latter scenario is unlikely. The Act represents an unprecedented departure from the plenary power doctrine—this is a fact the *Soskin* court failed to acknowledge, and one that our highest court must acknowledge if it is to justify the law under existing jurisprudence.

## 2. *Policy-Based Arguments*

The constitutional implications of the Personal Responsibility Act and of *Soskin*’s validation of it are nothing if not nebulous. Public policy rationales for and against state-imposed immigration regulation, on the other hand, have been clearly voiced, and can be analyzed independently of the legality of the Act.

Perhaps the strongest policy argument in favor of affording states the power to withhold benefits to aliens is that it is an effective way to control costs. Medicaid consumes an enormous chunk of state budgets nationwide; indeed, a representative of the National Governors’

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<sup>121</sup> 130 U.S. 581, 609 (1889).

<sup>122</sup> *Id.*

<sup>123</sup> *See id.*

Association recently revealed that last year, for the first time, Medicaid surpassed public education as the single largest expenditure among states.<sup>124</sup> Medicaid costs have continued to grow in recent years, with average increases of 10.2% per year from 2000 to 2003.<sup>125</sup> As a result, total combined federal and state spending has ballooned from \$205.7 billion in 2000 to \$275.5 billion in 2003. The single biggest cause of this leap has been an abrupt increase in the number of enrollees, which, in turn, was likely caused by the general economic downturn that has affected this nation for the past several years.<sup>126</sup>

Congress may or may not have taken the Medicaid juggernaut into account when passing the Personal Responsibility Act in 1996. The Act's stated intention was to prevent immigrants from perceiving the availability of any type of public benefit as an incentive to immigrate.<sup>127</sup> The fact cannot be ignored, however, that Medicaid is the most costly and most widely utilized state-administered public benefit program, and by a significant margin.<sup>128</sup> Various strategies to control the growth of Medicaid and to allocate its costs among the federal government, the states, and perhaps even beneficiaries, have been and will continue to be proposed. One such strategy employed by the states has been to restrict eligibility; thanks to the Personal Responsibility Act they can pursue this goal by denying benefits to aliens. This plan seems on the surface to be logical, especially in light of the increasing enrollment that has been the main cause of skyrocketing costs. Fewer eligible recipients should mean lower costs, as well as a more robust Medicaid system for those who do qualify.

The *Soskin* majority was certainly not oblivious to the economic realities facing Colorado when considering its decision. This is not to say that fiscal concerns drove the court to its outcome, but this rationale for denying benefits, while it comes in response to what is admittedly one of the largest budgetary problems facing our governments today, is not as sound as it may initially seem. The reason is that immigrants consume such a small part of total Medicaid expenditures. The State of Colorado estimated that implementation of its new stricter law would save the

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<sup>124</sup> Robert Pear, *Administration Looks to Curb Growth of Medicaid Spending*, N.Y. TIMES, Dec. 20, 2004, at A24.

<sup>125</sup> John Holahan and Arunabh Ghosh, *Understanding the Recent Growth In Medicaid Spending*, HEALTH AFFAIRS: THE POLICY JOURNAL OF THE HEALTH SPHERE (Jan. 26, 2005) at W5-52, available at <http://content.healthaffairs.org/cgi/content/full/hlthaff.w5.52/DC1>.

<sup>126</sup> *Id.* at W5-53.

<sup>127</sup> See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, (codified as amended at 8 U.S.C. § 1601(6)).

<sup>128</sup> See Pear, *supra* note 124.

government \$5.9 million in the first year of the law's implementation.<sup>129</sup> When these savings are compared with Colorado's total federal- and state-funded Medicaid spending—\$2.5 billion in Fiscal Year 2003<sup>130</sup>—it becomes apparent that the new Colorado law does not contribute to solving the Medicaid problem in any significant way. The decision to remove the only access to vital health services available to thousands of people has a tremendous impact on the lives of those people. The impact on the state budget, on the other hand, is so slight as to be considered negligible. Legal analysis aside, the benefits of this approach seem to be outweighed by the substantial societal detriments inflicted.

Moreover, while these immigrants are being denied the right to Medicaid, most of them will presumably remain residents of Colorado. Inevitably they will require various types of medical care, emergency and otherwise, for which providers will go uncompensated. At least if Colorado were to cover immigrants under Medicaid it would have the opportunity to subsidize the bill with matching federal funds. Without Medicaid, immigrants will no doubt receive fewer services, but they will continue to require emergency care and will continue to visit emergency rooms when they think they need treatment. Denial of Medicaid benefits to these people does not eliminate costs to the government completely; it does, however, require the state to bear these costs without federal assistance. Considering the paltry gains anticipated by the new law, it becomes questionable whether, in the long run, this policy is sound from an economic point of view.

The devolution of the immigration power has also been defended on the grounds that ensuring a uniform immigration policy is not necessarily beneficial to aliens. Howard Chang has pointed out that the goal of uniformity does not, as Michael Wishnie suggests,<sup>131</sup> coincide with the goals of promoting anticaste or antidiscrimination principles. Nationwide uniformity will not invariably translate into uniform access among aliens to public benefits; such a policy is also likely, in certain circumstances, to result in uniform denial nationwide.<sup>132</sup> *Mathews* makes clear that Congress could constitutionally eliminate all benefits to aliens

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<sup>129</sup> *Soskin*, 353 F.3d at 1246.

<sup>130</sup> Urban Institute estimates for Kaiser Commission on Medicaid and the Uninsured, based on Form 64, The Centers for Medicare and Medicaid Servs., (2004), available at <http://www.statehealthfacts.kff.org/cgi-bin/healthfacts.cgi?action=profile&area=Colorado&category=Medicaid+%26+CHIP&subcategory=Medicaid+Spending&topic=Total+Medicaid+Spending%2c+FY2003>.

<sup>131</sup> See Wishnie, *supra* note 104, at 553. (“[D]evolution would erode the antidiscrimination and anticaste principles that are at the heart of our Constitution and that long have protected noncitizens at the subfederal level.”).

<sup>132</sup> See Chang, *supra* note 110, at 363.

tomorrow if it chose. Accordingly, if the Supreme Court “had bound Congress with a constitutional constraint of uniformity in the political atmosphere of 1996, then Congress might have excluded immigrants from Medicaid . . . rather than leaving the question of immigrant access up to the states.”<sup>133</sup> Congress’s decision may be viewed as a means to provide supplemental benefits in addition to the minimum standard established in Washington. Thus, states wielding immigration authority do not become “laboratories of bigotry” as Wishnie forewarns, but “laboratories of generosity” that may elect to exceed federal baseline eligibility.<sup>134</sup>

This line of reasoning tracks that of the *Soskin* decision. The potential “laboratories of generosity” to which Chang optimistically refers would spring from the “national policy,” referred to in *Soskin*, that allows “discretion . . . limited to the remaining optional range of coverage” that is neither prohibited nor guaranteed under the Act.<sup>135</sup> The *Soskin* majority, like Chang, interpreted the Act as creating a minimum standard that may be exceeded, rather than as an invitation to proliferate a multitude of minimum standards. This reasoning does hold some merit, since, from an alien’s perspective, a permissive statute is clearly preferable to a flat federal prohibition of benefits. But perhaps Chang and others are being too presumptuous when they predict that in the absence of a devolutionary standard Congress would enact such sweeping reform as to deny access altogether. That *Mathews* condones such an action is beyond dispute; that Congress would ever support an outright denial to all aliens of all public benefits is highly speculative, and would further test the plenary power doctrine—perhaps even to the point of convincing the Supreme Court to re-examine *Mathews*.

Furthermore, to laud the Act’s permissive provisions as opening the door for state-level benevolence is to overlook the fact that states will not, in response to the Act, elect to augment their benefit packages or expand their eligibility criteria. The “laboratories of generosity” supposedly created by the Act will actually consist of those states that choose not to offer more benefits, but merely to maintain the levels of coverage that they provided before they were permitted to lower those levels. Colorado, bear in mind, did not pass legislation restricting Medicaid access until 2003.<sup>136</sup> Does that mean Colorado was a “laboratory of generosity” until 2003? The main flaw with this alternative conception of Congress’s devolution is that to embrace it fully

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<sup>133</sup> *Id.* at 364.

<sup>134</sup> *Id.* at 363-64.

<sup>135</sup> *Soskin v. Reinertson*, 353 F.3d 1242, 1255 (10th Cir. 2004).

<sup>136</sup> *See id.* at 1246.

one must ignore the starting points from which state legislatures are acting. When these legislatures are invoking their new power to discriminate against aliens, they are withdrawing benefits that had previously been available to aliens for a long period of time. Those states that have not yet chosen to withdraw benefits may or may not be refraining out of generosity. Those that have chosen to invoke the Act, however, are undeniably undertaking to discriminate.

Peter Spiro has voiced a similar defense to the devolutionary principle, identifying state-derived discrimination as “the lesser evil.”<sup>137</sup> He has extolled a system of “steam-valve federalism,” in which the effects of a particular state’s discriminatory leanings are confined to that state, rather than being “visited on the rest of us by way of Washington.”<sup>138</sup> It is better for discriminatory “steam” to be released through a state legislative “valve,” argues Spiro, than to be allowed to exert pressure on the federal legislative process.<sup>139</sup> He, like Chang, predicts that a non-devolvability rule will invite a policy of “blanket ineligibility.”<sup>140</sup> Again, this assertion is nothing more than conjecture, and does not alone suffice to legitimize a devolutionary principle. Nevertheless, the “steam-valve” rationale has been acknowledged by Wishnie as “the principle policy defense of devolution.”<sup>141</sup> Wishnie finds the defense flawed however, challenging the contention that individual state actors have consistently succeeded in enacting national immigration legislation.<sup>142</sup> He further observes that judicial invalidation of impermissible state-imposed discriminatory laws “rarely has provoked frustrated states to seek to impose their anti-immigrant preferences at the national level.”<sup>143</sup>

For aliens, “steam-valve federalism” is no doubt a preferable alternative to blanket ineligibility. But it seems too presumptuous to suggest that the stifling of a state legislative valve would enable a small faction to effect such a drastic national policy shift. Chang and Spiro also

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<sup>137</sup> See Spiro, *supra* note 90, at 1637.

<sup>138</sup> *Id.* at 1627.

<sup>139</sup> *Id.* A single state has been the impetus for the passage of harshly restrictionist laws more than once. Spiro observes that California’s “intense alien sentiments . . . have led the rest of the country to restrictive federal legislation” on two occasions: California was responsible for the notorious Chinese exclusion laws of the late nineteenth century; and it was also California that forced passage of the Illegal Immigration Reform and Immigrant Responsibility Act in 1997, which enabled California (and, consequently, the other forty-nine states) to deny a range of benefits to undocumented aliens. See Spiro, *supra* note 90, at 1637.

<sup>140</sup> *Id.* at 1637.

<sup>141</sup> Wishnie, *supra* note 104, at 555.

<sup>142</sup> See *id.* at 556-57.

<sup>143</sup> *Id.* at 558.

assume that Congress would have had no compunction in cutting off aliens completely if it had not instead chosen to devolve its authority. The very reason that Congress engaged in this substantial departure from prior law was, perhaps, that it perceived a need for change and felt compelled to pursue an alternative to outright denial. Congressional consent to discriminatory policies that, in reality, have only been embraced by a handful of states is nowhere near as damaging to the alien class as blanket ineligibility would be. In short, an outright denial would not be imposed lightly, nor without a fight.

Spiro also argues in defense of devolvability that state authority over immigration policy will not lead states to a “race to the bottom”; that is, states will not inevitably legislate the most restrictive laws allowed by the Act.<sup>144</sup> It has been supposed that one state’s decision to restrict benefits will have the dual effects of driving aliens to more generous neighboring states and causing those states to deflect a potential influx by enacting discriminatory laws of their own.<sup>145</sup> Spiro describes the risk of this scenario as “slight,” though, because countervailing forces, both economic and political, will prevent a cyclical shrinking of public benefits.<sup>146</sup> In particular, he predicts that the global marketplace will act as a check on discriminatory sentiments.<sup>147</sup> States considering discriminatory legislation will, according to this defense, be wary of the possibility that foreign and alien-friendly commercial entities would take their business elsewhere in the face of such discrimination.<sup>148</sup> That states will take this potential economic consequence into account is theoretically possible; but this explanation against a race to the bottom may overestimate the economic influence that aliens are capable of exerting, even by way of their powerful benefactors in the business community. It seems unlikely that commercial entities would typically maintain such intense sympathy for aliens’ welfare as to suffer the considerable economic burden of packing up and reestablishing their businesses elsewhere. This type of response from businesses may be evoked in certain circumstances,<sup>149</sup> but whether market forces will

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<sup>144</sup> Spiro, *supra* note 90, at 1639.

<sup>145</sup> See Chang, *supra* note 110; see also Wishnie, *supra* note 104.

<sup>146</sup> Spiro, *supra* note 90, at 1640.

<sup>147</sup> See *id.*

<sup>148</sup> See *id.* at 1641.

<sup>149</sup> See *id.* at 1640. Spiro sets forth a hypothetical scenario exemplifying marketplace effects on a discriminatory law: “California is seen to mistreat Mexicans; Mexicans move their business to Texas; California stops mistreating Mexicans.” This scenario is overly simplistic and, although the author was only attempting to illustrate his point, he offers no tangible evidence that the marketplace would behave in this way.

generally be able to counterbalance a political trend toward discrimination is doubtful.

The *Soskin* opinion does not address the possibility of a race to the bottom, presumably because Colorado was among the first states to enact this type of legislation and there is not yet any indication that a cyclical curtailment of alien benefits is on the horizon. Yet the prospect should not be dismissed simply because it has not yet come to fruition, especially in light of the seemingly ubiquitous belt-tightening that has characterized state and federal government in recent years. Colorado will not likely be the last state to turn to the Personal Responsibility Act when considering budget cuts. How much of an impact the Act will have on the alien class as a whole is impossible to predict, but a trend towards widespread state-based discrimination is not out of the question. On the contrary, it is a very real threat, and represents a worst-case scenario that will (and should) prompt aliens and their advocates to continue to contest the constitutionality of the Act.

#### V. CONCLUSION

The Personal Responsibility Act has blurred the long-standing bright line drawn by the Supreme Court between federal and state authority to discriminate against aliens. The plenary power doctrine has taken its share of criticisms for being antithetical to fundamental equal protection and due process principles; but at least before the Personal Responsibility Act this potentially dangerous power resided only in Congress. Now, the Tenth Circuit has taken a substantial first step toward the extension of that power to the states. In doing so the court failed to delve deeply into either the constitutional implications of congressional devolution or the policy rationales supporting or attacking devolution. The majority's holding that "a state's exercise of discretion can . . . effectuate national policy"<sup>150</sup> does not answer the root question: is a national policy that promotes divergent state policies permissible?

The language invoked by the Supreme Court in *Chae Chan Ping* (the immigration power "cannot be granted away")<sup>151</sup> and in *Graham* ("Congress does not have the power to authorize the individual states to violate the Equal Protection Clause")<sup>152</sup> suggests that the answer is no. The *Soskin* decision marks the judicial approval of an unprecedented attempt by Congress to lend its previously exclusive power to the states. The majority in *Soskin* did not satisfactorily address the novelty of this

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<sup>150</sup> *Soskin v. Reinertson*, 353 F.3d 1242, 1255 (10th Cir. 2004).

<sup>151</sup> *Chae Chan Ping*, 130 U.S. at 609.

<sup>152</sup> *Graham*, 403 U.S. at 382.

congressional action, nor did it satisfactorily explain why the Act does not violate *Graham* in spite of the plain language of *Graham* indicating otherwise.

The documented aliens residing within our borders are very much a part of our society. They work full-time jobs and pay taxes, just as their citizen counterparts do. They are challenged to meet the ever-increasing burden of providing vital healthcare for themselves and their children. To withdraw this benefit from them, while it may modestly lower Medicaid expenditures, may not be beneficial in the aggregate. Aliens will continue to live and work in the United States, and they will continue to need and receive medical care. Denial of Medicaid benefits may result in nothing more than a shifting of costs from the Medicaid program to hospitals and other non-profit providers that have a duty to provide care to those who seek it regardless of their ability to pay. In this scenario everyone will lose—aliens will encounter great difficulty in receiving free care, and hospitals will become even more financially strained than they currently are. And this scenario may become even more undesirable for hospitals if a “race to the bottom” develops.

Although the constitutionality of the Personal Responsibility Act itself and the wisdom of the policy behind it are two different issues, both seem at least somewhat doubtful. The constitutionality of devolution will not be resolved once and for all until the Supreme Court reconciles *Soskin* and the Act with prior decisions such as *Chae Chan Ping* and *Graham*. Until then, aliens can only hope that more “laboratories of bigotry” are not created as a result of the Act.<sup>153</sup>

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<sup>153</sup> See Wishnie, *supra* note 104.