

SALVAGING A SAFETY NET: MODIFYING THE BAR TO SUPPLEMENTAL SECURITY INCOME FOR LEGAL ALIENS

I. INTRODUCTION

In 1996 Congress passed legislation designed to “end welfare as we know it.”¹ As promised, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”)² substantially changed the system of federal, state, and local public assistance programs. Although PRWORA’s policies have affected many individuals and families, legal aliens³ in the United States have been among the most heavily impacted.⁴

1. President’s Statement on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, PUB. PAPERS 1328 (Aug. 22, 1996). “While far from perfect, this legislation provides an historic opportunity to end welfare as we know it and transform our broken welfare system by promoting the fundamental values of work, responsibility, and family.” *Id.*

2. Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 8 U.S.C. and 42 U.S.C.).

3. The *United States Code* defines an alien as “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3) (1994). A national of the United States is a person who is either a citizen of the United States or who, though not a citizen of the United States, “owes permanent allegiance to the United States.” 8 U.S.C. § 1101(a)(22) (1994). Natives of American Samoa and Swains Island are the only significant group of individuals who are nationals but not citizens. *See* Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453, 1458 n.19 (1995). Aliens can be divided into two groups: immigrants and nonimmigrants. Nonimmigrants are individuals whose stay in the United States is typically intended to be temporary. *See id.* Examples include tourists, students, temporary workers, and others. Conversely, all aliens who are not nonimmigrants are immigrants. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 2-3 (2d ed. 1997).

Traditionally, two groups of aliens have been eligible for public benefits: legal immigrants and persons “permanently residing under color of law” (“PRUCOLs”). Legal immigrants, or legal permanent residents, are those who have been “lawfully accorded the privilege of residing permanently in the United States” under United States immigration laws. 8 U.S.C. § 1101(a)(20) (1994). The definition of PRUCOL varies between benefit programs, but generally includes individuals who have received asylum, *see* 8 U.S.C. § 1158 (Supp. III 1997), those who have been “paroled” into the United States at the discretion of the Attorney General, *see id.* § 1182(d)(5) (Supp. III 1997), and some individuals who are residing in the United States with the knowledge of the Immigration and Naturalization Service (“INS”) and whom the INS does not plan to remove. *See* Legomsky, *supra*, at 1459; *see also infra* note 40. In this Note, the term “legal aliens” encompasses both legal permanent residents and individuals with PRUCOL status. This Note does not address the situation of aliens unlawfully present in the United States.

4. Though legal immigrants represented only approximately 5% of the public assistance rolls nationwide, they initially absorbed 40% of the welfare cuts. *See* George Soros, *Immigrants’ Burden*, N.Y. TIMES, Oct. 2, 1996, at A23; *see also infra* note 69. For example, initially 1,500,000 noncitizens lost their food stamps as a result of PRWORA. *See* Editorial, *Food Is No Luxury: White House Should Seek Restoration of Aid for Legal Immigrants*, L.A. TIMES, Dec. 17, 1997, at B6. PRWORA “booted 900,000 adult legal immigrants out of the food stamp program,” along with 600,000 children. *Id.* As many as 500,000 elderly and disabled immigrants nearly lost their Supplemental Security Income

Before PRWORA, legal aliens generally became eligible for Supplemental Security Income ("SSI")⁵ after five years in the United States.⁶ Now, PRWORA prohibits legal immigrants who entered the United States after August 22, 1996 from accessing SSI until after they naturalize.⁷ PRWORA also limits food stamps⁸ for legal aliens and grants states the option to deny legal aliens public benefits including Temporary Assistance to Needy Families ("TANF"),⁹ Medicaid,¹⁰ and other federal means-tested programs.¹¹

SSI is unique among federal public assistance programs.¹² It is the only program to provide a flexible cash benefit to very low income elderly, blind,

before the Balanced Budget Act of 1997 provision restored the benefits. *See Mercedes Olivera, Immigrant Advocates Say Changes Welcome but Incomplete*, DALLAS MORNING NEWS, Nov. 26, 1997, at 28A; *see also infra* notes 86-90 and accompanying text. But immigrants arriving after August 22, 1996 "get nothing" if they become disabled. *Id.*

5. SSI is a federal program that provides cash assistance to low income blind, elderly, and disabled individuals. *See* 42 U.S.C. §§ 1381-1385 (1994 & Supp. II 1996); *see also infra* notes 16-30 and accompanying text (describing history of SSI).

6. *See infra* notes 47-48 and accompanying text.

7. *See* 8 U.S.C. § 1612(a) (Supp. III 1997). For a discussion of problems related to naturalization, *see infra* notes 74 and 86.

8. *See* 8 U.S.C. § 1612(a). The Food Stamp Act of 1964 created the food stamp program. *See* Pub. L. No. 88-525, 78 Stat. 703 (1964) (codified at 7 U.S.C. §§ 2011-2025 (1994 & Supp. III 1997)). Congress enacted the Food Stamp Act to "safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households" and to strengthen the nation's agricultural economy. 7 U.S.C. § 2011 (1994). The food stamp program enables eligible households to exchange government vouchers for food from approved markets. *See* 79 AM. JUR. 2D *Welfare Laws* § 26 (1975); *see also infra* note 78.

9. TANF is a cash welfare block grant to the states that replaces Aid to Families with Dependent Children, the Job Opportunities and Basic Skills Training Program, and the Emergency Assistance Program. *See* STAFF OF H.R. COMM. ON WAYS AND MEANS, 104TH CONG., SUMMARY OF WELFARE REFORMS MADE BY PUBLIC LAW 104-193, THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT AND ASSOCIATED LEGISLATION 14 (Comm. Print 1996). TANF's goals are "to increase State flexibility in providing assistance to needy families so that children may be cared for at home; end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; prevent and reduce the incidence of out-of-wedlock pregnancies; and encourage the formation and maintenance of two parent families." *Id.*

10. Medicaid is a comprehensive medical assistance program. It provides medical coverage for families with dependent children, and aged, blind, and disabled individuals, including those under the SSI program, whose income is insufficient to afford necessary medical services. *See* 42 U.S.C. §§ 1396a-1396h, 1320a (1994 & Supp. II 1996). *See generally* 79 AM. JUR. 2D *Welfare Laws* § 38 (1975).

11. Although PRWORA does not specify the programs considered means-tested, its original incarnation, the Personal Responsibility Act, listed 61 programs as federal means-tested programs. *See* H.R. 3500, 103d Cong. § 601(d) (1993). The list included federal housing, community development, nutrition, employment, and utility assistance programs. *See id.*

12. As a federal program, SSI has provided consistent, predictable, dignified assistance to its beneficiaries. *Cf. infra* notes 26-29 and accompanying text (highlighting problems with earlier state administration). Thus, Congress has praised SSI's role as "a 'safety net' for low income Americans." Edward R. Roybal, *Foreword* to SUBCOMM. ON RETIREMENT INCOME AND EMPLOYMENT OF THE H.R. SELECT COMM. ON AGING, 100TH CONG., SUPPLEMENTAL SECURITY INCOME (SSI): CURRENT PROGRAM CHARACTERISTICS AND ALTERNATIVES FOR FUTURE REFORM at III (Comm. Print 1988).

and disabled individuals.¹³ SSI's modest assistance has been essential in ensuring a minimum standard of living for this vulnerable population.¹⁴

This Note examines the bar to SSI access for legal aliens.¹⁵ Part II

13. Because SSI is a cash supplement rather than a targeted benefit, like food stamps, housing vouchers, or Medicaid, it can be applied toward the recipient's most pressing needs, which may vary from month to month. For example, SSI can be used for rent, home repairs, utility payments, food, medicine, or other necessities, while food stamps can only be used for food, housing vouchers only for housing, and Medicaid only for medical care.

14. The program is designed to "assure a minimum level of income to people who are aged, blind or disabled and who have limited income and resources." HARVEY L. MCCORMICK, *SOCIAL SECURITY CLAIMS AND PROCEDURES* § 791, at 405 (4th ed. 1991). It provides "a small income supplement for needy adults and a flexible grant for families facing tough times." Richard Wolf, Editorial, *When Compassion and Cutbacks Collide—Tough Choices Loom over SSI Reductions*, USA TODAY, Nov. 1, 1995, at 7A; see *infra* notes 35-36 and accompanying text. In fact, an annual income generated solely from SSI is typically 25% below the federal poverty level. See, e.g., LEATHA LAMISON-WHITE, U.S. DEPT OF COMMERCE, *POVERTY IN THE UNITED STATES: 1996*, at A-4 (1997). SSI "is not a luxury . . . It is a lifeline." *Good News for Disabled Children*, ST. PETERSBURG TIMES, Dec. 20, 1997, at 18A.

15. Rather than discussing the constitutionality of the SSI bar in detail, this Note focuses on the provision in its statutory and policy contexts. Nevertheless, a few constitutional points provide a useful background.

The Supreme Court has held that Congress has the authority to premise eligibility for public benefits on citizenship status. In *Mathews v. Diaz*, 426 U.S. 67 (1976), the Court held that Congress's plenary power over immigration extends to the power to distinguish based on alienage in determining eligibility for public benefits. The three appellees in the case were resident aliens lawfully residing in the United States for less than five years who had been denied Medicare Part B. See *id.* at 70. Appellees challenged a federal rule that prohibited legal aliens over 65 from accessing Medicare Part B until they had resided in the United States for over five years. See *id.* at 70-71. The trial court held that the statute was unconstitutional under the Due Process Clause. See *id.* at 73. The Supreme Court, reversing, held that Congress maintained authority to distinguish between classes of aliens and citizens in distributing welfare benefits. See *id.* at 83. The Court noted that it was "obvious that Congress has no constitutional duty to provide all aliens with the welfare benefits provided to citizens." *Id.* at 82 (emphasis omitted). The Court noted that although both aliens and citizens are protected by the Due Process Clause, numerous federal statutes (including statutes regulating federal employment, private employment, and investments by aliens) treated aliens and citizens differently. See *id.* at 78. The Court stated that it was "unquestionably reasonable" for Congress to premise alien eligibility for public benefits on "the character and duration of his residence." *Id.* at 83. The Court also held that neither the character nor the duration of residence requirements was wholly irrational in determining alien eligibility for benefits. See *id.*

Although *Mathews* affirmed Congress's authority to deny public benefits based on citizenship status, commentators have chronicled distinctions between the constitutional treatment of aliens on matters "inside" immigration law and on matters "outside" the laws of admission, removal, or naturalization. See T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965. On matters "inside" immigration law, the Supreme Court has long held that Congress maintains plenary power over immigration. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring) ("this Court . . . has recognized that the determination of a selective and exclusionary immigration policy was for the Congress, and not for the Judiciary"); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (holding that power to exclude or expel aliens is vested in political departments of government). Though the Supreme Court defers significantly to Congress even on matters "outside"

discusses the history of SSI as a program benefiting the low income elderly and disabled. Additionally, Part II details the history of alien eligibility for SSI. Part III suggests that, in light of safeguards incorporated in immigration law and SSI program requirements, such a bar is unnecessary. Part IV proposes a modification to the current SSI bar which accounts for its most serious shortcomings.

II. HISTORY

A. *Development of the SSI Program*

In June 1934, President Franklin Delano Roosevelt called for the creation of a national social program to provide individuals with economic security against "the hazards and vicissitudes of life."¹⁶ In particular, the President envisioned a program to insulate individuals from poverty during unemployment and old age.¹⁷ Within the month, President Roosevelt established the cabinet-level Committee on Economic Security to study income security problems and to prepare recommendations for promoting

immigration law, the Court has held in a series of cases that aliens must here be accorded the same constitutional protections as citizens. *See Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (Fourth Amendment); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (First Amendment); *Wong Wing v. United States*, 163 U.S. 228 (1896) (Fifth and Sixth Amendments).

In spite of the *Mathews* decision, some have suggested that public benefits should be considered "outside" immigration law and that Congress must accord aliens the same constitutional protections as accorded citizens in this area. *See, e.g.,* Stacy S. Kahana, *Crossing the Border of Plenary Power: The Viability of an Equal Protection Challenge to Title IV of the Welfare Law*, 39 ARIZ. L. REV. 1421 (1997); Connie Chang, Comment, *Immigrants Under the New Welfare Law: A Call for Uniformity, a Call for Justice*, 45 UCLA L. REV. 205 (1997). *But see* *Abreu v. Callahan*, 971 F. Supp. 799 (S.D.N.Y. 1997) (holding PRWORA's restrictions on SSI and Food Stamps for legal aliens constitutional). For further discussion of the constitutional debate over alien eligibility for public benefits, see Jeffrey A. Needelman, Note, *Attacking Federal Restrictions on Noncitizens' Access to Public Benefits on Constitutional Grounds: A Survey of Relevant Doctrines*, 11 GEO. IMMIGR. L.J. 349 (1997).

16. Presidential Message to the Congress Reviewing the Broad Objectives and Accomplishments of the Administration (June 8, 1934), reprinted in STATUTORY HISTORY OF THE UNITED STATES: INCOME SECURITY 63 (Robert B. Stevens ed., 1970) [hereinafter INCOME SECURITY]. President Roosevelt believed that "[f]ear and worry based on unknown danger contribute to social unrest and economic demoralization. If, as our Constitution tells us, our Federal Government was established among other things 'to promote the general welfare,' it is our plain duty to provide for that security upon which welfare depends." *Id.*

17. *See id.* Prior to the passage of the Social Security Act of 1935, states had operated their own public assistance programs to benefit the low income elderly. *See* DIANA M. DI NITTO, SOCIAL WELFARE: POLITICS AND PUBLIC POLICY 131-32 (4th ed. 1995). As early as 1914, Arizona established a pension program for its aging population. In 1915, the territory of Alaska also established a pension program for its elderly residents. By 1935, thirty states had developed some type of assistance program for their elderly residents. *See id.* at 131. But during the Great Depression, some states had to default on payments to elderly residents and in others "grants were entirely inadequate." S. REP. NO. 74-628, at 5-6 (1935).

financial stability.¹⁸

The Committee determined that any economic security program had to have as its primary goal “the assurance of an adequate income to each human being in childhood, youth, middle age, or old age—in sickness or in health.”¹⁹ The Committee recommended a two-part program: a federal insurance program for retired workers and a safety net program for the needy elderly who would not benefit adequately from the insurance program.²⁰

The Committee’s recommendations became the basis of the Social Security Act of 1935.²¹ The 1935 Act also created Aid to the Blind (“AB”).²² In 1950 Congress added Aid to the Permanently and Totally Disabled (“APTD”), patterned after the Committee’s safety net program for the elderly, known as Old Age Assistance (“OAA”).²³ OAA, AB, and APTD were all state-administered precursors to the current SSI program.²⁴

18. See Executive Order Establishing the Committee on Economic Security and the Advisory Council on Economic Security (June 29, 1934), reprinted in *INCOME SECURITY*, *supra* note 16, at 64-65. The Committee on Economic Security consisted of the Secretary of Labor, the Attorney General, the Secretary of Agriculture, and the Federal Emergency Relief Administrator. See *id.*

19. REPORT TO THE PRESIDENT OF THE COMMITTEE ON ECONOMIC SECURITY (January 15, 1935), reprinted in NATIONAL CONFERENCE ON SOCIAL WELFARE, THE REPORT OF THE COMMITTEE ON ECONOMIC SECURITY OF 1935 AND OTHER BASIC DOCUMENTS RELATING TO THE DEVELOPMENT OF THE SOCIAL SECURITY ACT 23 (1985). The Committee also concluded that the “one almost all-embracing measure of security is an assured income.” *Id.*

20. See *id.* at 45-46. The Committee asserted that all individuals were entitled to a “decent subsistence in their own homes.” *Id.* at 48. But the Committee recognized that the federal retirement program would not satisfactorily provide for all elderly persons, particularly those who had been unable to work in their younger years or those whose contributions would not entitle them to income sufficient for a “reasonable subsistence.” *Id.* at 47-48. Congress echoed the Committee’s conclusions, stating that the Social Security Act’s public assistance provisions would support those individuals who had been unable to “build up adequate provisions for their old age” earlier in life. S. REP. NO. 74-628, at 7 (1935).

21. Pub. L. No. 74-271, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 301-1397).

22. See Pub. L. No. 74-271, § 1002, 49 Stat. 620, 645 (codified as amended at 42 U.S.C. § 1202 (1994)), repealed by Social Security Amendments of 1972, Pub. L. No. 92-603, § 303(a)-(b), 86 Stat. 1329, 1484 (repeal ineffective with respect to Puerto Rico, Guam, and the Virgin Islands). Like the Social Security Act’s public assistance plan for the elderly, AB provided grants to the states to support the blind. The Senate Committee’s Report noted that “[w]hile it is very desirable that the blind should be encouraged and assisted to become self-supporting, it must be recognized that many will always need assistance. Even younger blind people will frequently need help, until they have established themselves.” S. REP. NO. 74-628, at 22 (1935).

23. See Social Security Act Amendments of 1950, ch. 809, tit. III, pt. 5, sec. 351, § 1402, 64 Stat. 477, 555 (codified as amended at 42 U.S.C. § 1352 (1994)), repealed by Social Security Amendments of 1972, Pub. L. No. 92-603, § 303(a)-(b), 86 Stat. 1329, 1484 (repeal ineffective with respect to Puerto Rico, Guam, and the Virgin Islands). The House Ways and Means Committee noted that “[s]ome of the most acute economic distress in the nation is among needy persons under age 65 who have disabilities other than blindness that prevent self-support.” The Committee concluded that “[t]hese unfortunate individuals should be able to get public assistance with Federal help, just as needy persons who are blind or suffering from the infirmities of old age are provided aid.” H.R. REP. NO. 81-1300, at 53 (1949).

24. Congress authorized appropriations to states for OAA, AB, and APTD pursuant to the

In 1972 Congress created SSI by nationalizing OAA, AB, and APTD as a single program under Title XVI of the Social Security Act.²⁵ Congress declared three goals for the newly-formed SSI program: 1) to create a unified income assistance program;²⁶ 2) to eliminate the large disparities²⁷ between eligibility standards among the states;²⁸ and 3) to reduce the stigma of welfare by administering the program through the Social Security Administration.²⁹ Beginning in 1974, the federal government assumed full responsibility for the program's management.³⁰

B. General Eligibility Requirements

To be eligible for SSI, an individual must meet both substantive and minimum income requirements.³¹ Currently, three groups of individuals qualify for SSI: the elderly, the blind, and the disabled.

To be considered elderly, an individual must be over age 65.³² To be considered blind, an individual must have vision no better than 20/200 in his or her better eye with a corrective lens or tunnel vision of 20 degrees or less in his or her better eye with a corrective lens.³³ To be considered disabled, an individual must be unable to work because of a "medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months."³⁴

Secretary of Health and Human Services' approval of each state's assistance plans. *See* 42 U.S.C. §§ 301, 1202, 1352 (1974), *repealed by* Social Security Amendments of 1972, Pub. L. No. 92-603, § 303(a)-(b), 86 Stat. 1329, 1484 (repeal ineffective with respect to Puerto Rico, Guam, and the Virgin Islands).

25. *See* Social Security Amendments of 1972, Pub. L. No. 92-603, sec. 301, §§ 1601-1602, 1611-1616, 1631-1634, 86 Stat. 1329, 1465-1478 (codified as amended at 42 U.S.C. §§ 1381-1383c (1994 & Supp. II 1996)).

26. *See* S. REP. NO. 105-36, at 94 (1997).

27. For example, West Virginia paid its OAA recipients an average of \$50 per month in 1964, while Wisconsin paid an average benefit of \$111. *See* DiNITTO, *supra* note 17, at 132.

28. *See* S. REP. NO. 105-36, at 94.

29. *See id.* Congress hoped to enhance the efficiency of the program and to "eliminate the demeaning rules and procedures that had been part of many State-operated, public-assistance programs." *Id.*

30. *See* DiNITTO, *supra* note 17, at 133.

31. Additionally, an individual must be an actual resident of the United States. SSI recipients who leave the country for 30 days or more cannot receive SSI until they have been back in the United States for at least 30 days. *See* Barbara Samuels, *Representing the Elderly Client of Modest Means with Social Security/SSI Claims*, in 10TH ANNUAL ELDER LAW INSTITUTE: REPRESENTING THE ELDERLY CLIENT OF MODEST MEANS 15 (PLI Litig. & Admin. Practice Course Handbook Series No. D-263, 1998).

32. *See* 42 U.S.C. § 1382c(a)(1)(A) (1994).

33. *See id.* § 1382c(a)(2).

34. 42 U.S.C. § 1382c(a)(3)(A) (Supp. II 1996). In addition, a disabled individual's physical or

In addition to meeting the substantive requirements, an individual must also meet income eligibility requirements. To be income eligible, an individual must satisfy two conditions. First, monthly income, including other sources of public assistance, must total less than the standard benefit.³⁵ Because SSI is a program of last resort, applicants must claim all other benefits to which they are entitled before they can qualify for SSI.³⁶ Second, the value of a prescribed set of assets may not exceed fixed limits.³⁷ Also, living arrangements are factored into the determination of SSI eligibility.³⁸

C. Alien Eligibility for SSI Before PRWORA

Before PRWORA, several classes of noncitizens retained eligibility for SSI. Legal permanent residents³⁹ and aliens permanently residing under color of law ("PRUCOL")⁴⁰ were eligible for SSI while in the United States,

mental impairment or impairments must be

of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for the work.

42 U.S.C. § 1382c(a)(3)(B) (1994); *see also* S. REP. NO. 105-36 (1997).

35. *See* 42 U.S.C. § 1382(a); *see also* S. REP. NO. 105-36. In 1998 the standard benefit was \$494. *See infra* note 121 and accompanying text. Income is defined as cash, earnings, checks, and items received "in kind," such as food or shelter, but not including government-administered social services, like food stamps or housing assistance. 42 U.S.C. § 1382a (1994 & Supp. II 1996). The first \$240 per year of income is excluded from the calculation, *see id.* at (b)(2)(A), and the first \$780 per year of earned income is excluded along with one-half of the remainder of earned income. *See id.* at (b)(2)(B)(i)(A)-(C).

36. *See* DiNITTO, *supra* note 17, at 133.

37. Assets valued in determining SSI eligibility include real property, personal belongings, savings and checking accounts, cash, and stocks. *See* 42 U.S.C. § 1382(a)(1) (1994); 20 C.F.R. § 416.1201(b) (1998). The current maximum asset level is \$2,000 for an individual and \$3,000 for a cohabiting married couple. *See* 42 U.S.C. § 1382(a)(3). Assets not included in determining SSI eligibility include the individual's home regardless of its value, *see* 42 U.S.C. § 1382b(a)(1); 20 C.F.R. § 416.1216; household goods and personal effects with an equity value of \$2000 or less, *see* 42 U.S.C. § 1382b(a)(2)(A); 20 C.F.R. § 416.1216; \$4,500 of the current market value of a car (its value is completely excluded if it is used for travel for medical treatments or to employment), *see* 42 U.S.C. § 1382b(a)(2)(A); 20 C.F.R. § 416.1218; burial plots for the individual and immediate family members, *see* 42 U.S.C. § 1382b(a)(2)(B); 20 C.F.R. § 416.1231; and a maximum value of \$1,500 of life insurance policies combined with an individual's burial fund, *see* 42 U.S.C. § 1382b(d); 20 C.F.R. § 416.1230.

38. *See* DiNITTO, *supra* note 17, at 133. When an SSI recipient resides with another person and receives support from such person, this support reduces the maximum eligibility requirement by one-third. Therefore, the SSI recipient would be eligible to receive up to two-thirds of the full SSI benefit. *See* 42 U.S.C. § 1382a(a)(2)(A); *see also* DiNITTO, *supra* note 17, at 133.

39. *See supra* note 3.

40. *See id.* The SSI program defines PRUCOL as an alien "residing in the United States with the knowledge and permission of the Immigration and Naturalization Service and that agency does not

assuming they met the program's substantive and income requirements.

For over 100 years, however, U.S. law has prohibited immigration by any individual likely to become a public charge.⁴¹ Consequently, aliens with a foreseeable need for SSI prior to admission are categorically ineligible to immigrate.

The "public charge" restriction can be overcome if an individual files an affidavit of support on behalf of the immigrant.⁴² Such an affidavit states that the individual will "sponsor," that is, be financially responsible for, the immigrant if necessary to ensure that the immigrant will not rely on public assistance.⁴³ An affidavit filed for this purpose must be filed by the person petitioning for the alien's admission.⁴⁴

In addition, if a sponsored alien applied for SSI after arrival, the sponsor's

contemplate enforcing [the alien's] departure." 20 C.F.R. § 416.1618. The Immigration and Naturalization Service does not contemplate enforcing an alien's departure if it is the "policy or practice of [the] agency not to enforce the departure of aliens in the same category or if from all the facts and circumstances in [the alien's] case, it appears that the Immigration and Naturalization Service is otherwise permitting [the alien] to reside in the United States indefinitely." *Id.* Others eligible for SSI as PRUCOLs include refugees, asylees, parolees, and individuals awaiting voluntary departure. *See The Use of Supplemental Security Income and Other Welfare Programs by Immigrants: Hearings Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 104th Cong. 6 (1996) [hereinafter *Judiciary Hearings*] (statement of Carolyn Colvin, Deputy Commissioner for Programs, Policy, Evaluation, and Communications of the Social Security Administration).

A refugee is defined as:

(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail him or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such circumstances as the President after appropriate consultation . . . may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion

8 U.S.C. § 1101(a)(42) (Supp. III 1997).

Aliens applying for asylum must also meet the statutory definition of a refugee. *See id.* § 1158(b)(1). But such aliens must make their application for asylum after they are in the United States, rather than from abroad. *See id.* § 1158(a). Because refugees and asylees enter the United States fleeing from persecution, they typically arrive in the United States with few resources. *See Judiciary Hearings, supra*, at 6 (statement of Carolyn Colvin). SSI has been an essential source of steady assistance to individuals in these immigration statuses. *See id.*

41. *See* 8 U.S.C. § 1182(a)(4). Congress first imposed this restriction in 1882. *See* Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214; *see also* 3A AM. JUR. 2D *Aliens and Citizens* § 808 (1986); Richard A. Boswell, *Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. REV. 1475, 1482-87 (describing practical application of public charge provision).

42. *See* 8 U.S.C. § 1182(a)(4)(C)(ii).

43. *See id.* § 1183a(a)(1).

44. *See id.* § 1182(a)(4)(C)(ii); *see also* MCCORMICK, *supra* note 14, § 873, at 122-23 (4th ed. Supp. 1997)

income would be “deemed” available to the alien when determining the alien’s eligibility for public benefits.⁴⁵ Thus, an alien is unable to meet the income requirements unless the alien’s sponsor is also impoverished. Essentially, counting a sponsor’s income raises the alien’s income above the threshold to receive SSI. Moreover, all of the sponsor’s income would be considered to be the alien’s without regard to the sponsor’s other financial responsibilities.⁴⁶

Before 1993 a sponsor’s income was deemed available to the alien for three years.⁴⁷ In 1993 Congress temporarily increased the deeming period for SSI from three to five years to finance an extension of the Emergency Unemployment Compensation program.⁴⁸ The deeming period officially returned to three years in 1996,⁴⁹ however, the SSI bar enacted in PRWORA has made this return virtually irrelevant.

D. Controversy over Alien Usage of SSI

During the late 1980s and early 1990s, the number of noncitizens receiving SSI increased. Between the years of 1986 and 1993, the number of noncitizens receiving SSI grew fifteen percent annually.⁵⁰ In 1982 noncitizens represented three percent of all SSI recipients; by 1993, they composed nearly twelve percent.⁵¹ Total numbers of noncitizen SSI

45. See 42 U.S.C. § 1382j (Supp. II 1996); *Growth of the Supplemental Security Income Program: Hearings Before the Senate Comm. on Finance, 104th Cong. 39* (1995) [hereinafter *Finance Hearings*] (statement of Dr. Susan Martin, Executive Director, United States Commission on Immigration Reform).

46. In other words, even though the sponsor’s income was most likely expended on the sponsor, his or her family, the alien, and possibly other families, it was counted toward the alien’s income as though 100% of the sponsor’s income was available to the alien.

47. See 42 U.S.C. § 1382j (1988). When Congress first enacted the SSI program in 1972, it did not include a deeming period for alien eligibility. In response to concern that aliens were applying for SSI “a very short period after their entry into the country,” Congress enacted the three-year deeming period in the Social Security Disability Amendments of 1980. S. REP. NO. 96-408, at 81 (1979); see Social Security Disability Amendments of 1980, Pub. L. No. 96-265, sec. 504, § 1621, 94 Stat. 441, 471.

48. See Unemployment Compensation Amendments of 1993, Pub. L. No. 103-152, § 7(a)(1), 107 Stat. 1516, 1519 (codified as amended at 42 U.S.C. § 1382j (1994)). The increase from three to five years took effect on January 1, 1994. See *id.* § 7(a)(2).

49. See 42 U.S.C. § 1382j (Supp. II 1996).

50. See *Finance Hearings, supra* note 45, at 60 (statement of Jane Ross, Director of Income Security, United States General Accounting Office).

51. See *id.* SSI use by immigrants is concentrated among two groups: elderly immigrants and refugees. See *Judiciary Hearings, supra* note 40, at 73 (statement of Michael Fix, Jeffrey S. Passel, and Wendy Zimmermann, The Urban Institute). Elderly immigrants constitute 28% of SSI recipients, but only 9% of the overall elderly population in the United States. See *id.* Refugees use public benefits at higher rates than U.S. citizens for several reasons: 1) refugees have left possessions and resources behind in their former home countries as they fled persecution; 2) they generally have fewer economic

recipients grew from 151,000 in 1983 to 683,000 in 1993.⁵²

Several factors led to the growth in noncitizen usage of SSI. First, immigrant admissions to the United States increased overall during the 1980s and 1990s.⁵³ Specifically, admissions grew from approximately 500,000 per year in the early 1980s to 900,000 per year in 1993.⁵⁴ In fact, thirty percent of the population growth of the United States in the 1980s and 1990s can be attributed to immigration.⁵⁵ As overall immigration has increased, so too have the subgroups of elderly and disabled immigrants eligible for SSI.⁵⁶

Second, noncitizens are less likely than citizens to qualify for Social Security, which is based on U.S. employment history.⁵⁷ As originally contemplated by Congress and the Committee on Economic Security, Social Security is the primary income source for most older adults in the United States, and in many cases, Social Security alone provides income sufficient to preclude SSI eligibility. Elderly immigrants are less likely than citizens to receive Social Security because they often have not been in the United States long enough to compile the requisite work history before retirement.⁵⁸ Because they are less likely to receive Social Security, such noncitizens are more likely to be eligible for need-based SSI.⁵⁹

Third, the Social Security Administration itself had undertaken enhanced outreach efforts to individuals eligible for SSI.⁶⁰ These efforts contributed to the expansion of the SSI rolls among the general public as well as among

and family ties to the United States than other immigrants; and 3) many refugees suffer from physical or mental ailments. *See id.* In addition, many refugees enter the United States with "disabilities that prevent their immediate entry into the workforce." *Id.* at 35 (statement of Dr. Susan Martin).

52. *See Finance Hearings, supra* note 45 (testimony of Jane Ross).

53. *See* Michael E. Fix & Jeffrey S. Passel, *Setting the Record Straight*, PUB. WELFARE, Spring 1994, at 7.

54. *See id.*

55. *See id.*

56. *See id.* The population of elderly immigrants has increased more quickly than that of disabled immigrants. To this day, disabled immigrants face significant barriers to entry based on the public charge provision discussed *supra* note 41 and accompanying text. For a thoughtful discussion of this issue, see John F. Stanton, Note, *The Immigration Laws from a Disability Perspective: Where We Were, Where We Are, Where We Should Be*, 10 GEO. IMMIGR. L.J. 441 (1996).

In addition, the Immigration Reform and Control Act of 1986 permitted almost three million undocumented aliens to legalize their immigration status. *See Judiciary Hearings, supra* note 40, at 6 (testimony of Carolyn Colvin). Subject to income and substantive eligibility requirements, these immigrants became eligible for SSI after legalizing their status. *See id.*

57. *See Judiciary Hearings, supra* note 40, at 36 (testimony of Dr. Susan Martin).

58. *See* Jeffrey S. Passel & Michael Fix, *U.S. Immigration in a Global Context: Past, Present, and Future*, 2 IND. J. GLOBAL LEGAL STUD. 5, 14 (1994).

59. *See id.* This is in keeping with the original intention that SSI provide support to individuals who would not benefit from Social Security. *See supra* note 20 and accompanying text.

60. *See Judiciary Hearings, supra* note 40, at 75 (statement of Michael Fix, Jeffrey S. Passel, and Wendy Zimmermann).

noncitizens.⁶¹ Additionally, in particular areas of the country, translator fraud may have helped unqualified aliens access SSI.⁶² Although actual increases to the SSI rolls through fraud appear minimal, the issue's volatility drew attention to the increasing numbers of noncitizens receiving SSI.⁶³

In 1995 Congress began investigating overall growth of the SSI program.⁶⁴ Concurrent considerations, including a desire to balance the federal budget⁶⁵ and discernable anti-immigrant sentiment⁶⁶ led Congress to

61. *See id.*

62. *See id.* at 78.

63. *See id.* In August 1995 the General Accounting Office released a report on SSI fraud that examined the issue of translator fraud. *See id.* at 42 & n.1 (testimony of Jane Ross). The report offered three suggestions to combat translator fraud, including adopting an agency-wide policy for eliminating translator fraud, networking with other state and local agencies to combat fraud, and using Social Security Administration interpreters for all bilingual interviews, instead of permitting the use of outside interpreters. *See id.* at 9-10 (statement of Carolyn Colvin).

64. *See id.* at 41-42 & n.1 (testimony of Jane Ross). Between 1990 and 1994, the total number of SSI recipients increased twenty percent.

65. Congress manifested its interest in balancing the budget on several fronts. For example, the Republican party selected the constitutional Balanced Budget Amendment as an essential piece of its legislative agenda at the start of the 104th Congress. *See* David S. Broder, *Rebels Without a Pause; As They Seized Power in the House of Representatives, Newcomers Discovered that Revolution Demands as Much Stamina as Fervor*, WASH. POST, Dec. 3, 1995, at W08. New members of Congress introduced the Balanced Budget Amendment, H.R.J. Res.1, 104th Cong. (1995), on January 5, 1995. After passing the House on January 26, 1995, on March 2, 1995, it fell one vote shy of the two-thirds vote needed to pass the Senate. *See* Broder, *supra*, at W08. In addition, PRWORA's cuts in public benefits for legal immigrants represented significant savings in the federal budget. *See infra* note 69 and accompanying text.

66. Anti-immigrant activists directed most of their frustration at undocumented aliens. In 1995 California adopted Proposition 187, the "Save Our State" initiative, designed to limit the fiscal impact of undocumented aliens presently in California and to deter others from entering. *See* LEGOMSKY, *supra* note 3, at 1004. One well-known provision prohibited every public elementary and secondary school in the state from enrolling undocumented alien students. *See id.* Schools were required to verify the immigration status of every student, parent, or guardian, then submit the information to the Immigration and Naturalization Service ("INS"). *See id.* Proposition 187 also prohibited health facilities and social services receiving public funding from serving undocumented aliens in nonemergencies and required providers to verify their patients' immigration statuses. *See id.* Proposition 187 also required providers to submit immigration status information to the INS. *See id.*

In *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995), the court enjoined implementation of Proposition 187. The court held that California could not deny primary and secondary education to children based on immigration status. *See id.* at 785 (citing *Plyler v. Doe*, 457 U.S. 202 (1982)). The court also held that primary and secondary schools could not require proof of immigration in a child's enrollment process. *See id.* at 786. Furthermore, the court held unconstitutional all parts of Proposition 187 that required government workers, including educators, to report persons suspected of being undocumented to the INS. *See id.* at 779.

Additionally, within a year after California's Proposition 187, a number of states with high immigration levels filed claims against the federal government seeking reimbursement for the costs of providing services to undocumented immigrants. Arizona, California, Florida, New Jersey, New York, and Texas filed suits against the federal government seeking reimbursement for schooling, incarceration, and social services provided to undocumented aliens. *See* *Arizona v. United States*, 104 F.3d 1086 (9th Cir. 1997); *California v. United States*, 104 F.3d 1086 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 44 (1997); *Texas v. United States*, 106 F.3d 661 (5th Cir. 1997); *New Jersey v. United States*, 91

examine noncitizen SSI use especially closely.

E. Welfare Reform in 1996 and 1997

The issues discussed above converged in the debate over welfare reform, resulting in significant changes to alien eligibility for public benefits. In fact, PRWORA included special findings on welfare and immigration. These special findings emphasized self-sufficiency as the cornerstone of our national immigration policy and rejected the notion that public benefits should be an incentive for immigration.⁶⁷

F.3d 463 (3d Cir. 1996); *Padavan v. United States*, No. CIV. A. 94-CV-1341, 1995 WL 882225 (N.D.N.Y. Apr. 18, 1995), *aff'd*, 82 F.3d 23 (2d Cir. 1996); *Chiles v. United States*, 874 F. Supp. 1334 (S.D. Fla. 1994), *aff'd*, 69 F.3d 1094 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1674 (1996). Courts rejected all of the suits for reasons of nonjusticiability.

Furthermore, individuals voiced concerns about legal immigration directly to Congress. In testimony before the Senate Judiciary Committee's Subcommittee on Immigration, Robert Rector, Senior Policy Analyst at the Heritage Foundation, stated that "[t]he United States welfare system is rapidly becoming a deluxe retirement home for the elderly of other countries" and recommended that elderly aliens only be admitted to the United States as "guests" unable to apply for citizenship. *Judiciary Hearings*, *supra* note 40, at 110 (statement of Robert Rector). According to Daniel Stein, Executive Director of the Federation for American Immigration Reform, "[t]he public has questioned how long we can afford to provide public benefits to immigrants . . . when we ourselves, the citizens who built this great nation, have to absorb the rapid decline in all forms of public investment, capital plant improvement and basic social services." *Finance Hearings*, *supra* note 45, at 62 (statement of Daniel Stein). Meanwhile, as Congress deliberated welfare reform, it also made significant changes to the nation's immigration system in separate legislation. Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"), Pub. L. No. 104-208, 110 Stat. 3009, Div. C. (codified in scattered sections of 8 U.S.C.). IIRAIRA made changes to deportation and exclusion procedures (now called "removal" procedures), streamlined asylum and other procedures, and increased penalties for individuals in the United States unlawfully. *See id.*

67. *See* 8 U.S.C. § 1601 (Supp. III 1997). The special findings contained in "Statements of National Policy Concerning Welfare and Immigration" state:

- 1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.
- 2) It continues to be the immigration policy of the United States that—
 - A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and
 - B) the availability of public benefits not constitute an incentive for immigration to the United States.
- 3) Despite the principle of self-sufficiency, aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates.
- 4) Current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable of assuring that individual aliens not burden the public benefits system.
- 5) It is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy.
- 6) It is a compelling government interest to remove the incentive for illegal immigration provided

President Bill Clinton signed PRWORA into law on August 22, 1996.⁶⁸ At the time of its signing, PRWORA was projected to save fifty-five billion dollars over six years, with significant savings resulting from restricting alien access to public benefits.⁶⁹

PRWORA divides aliens into two groups for the purpose of determining eligibility for public benefits: "qualified aliens" and "unqualified aliens." Qualified aliens include aliens lawfully admitted for permanent residence, granted asylum, admitted as refugees, paroled into the United States, granted conditional entry into the United States, and those whose deportation is being withheld.⁷⁰ With few exceptions, aliens who do not fall within the statutory definition of qualified aliens and who are not nonimmigrants⁷¹ or humanitarian parolees⁷² are unqualified aliens and are ineligible for federal,

by the availability of public benefits.

7) With respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits in this chapter, a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.

Id. § 1601.

68. Though supporting other portions of PRWORA, President Clinton expressed deep disappointment over its immigrant-related provisions. "Legal immigrants and their children . . . should not be penalized if they become disabled and require medical assistance through no fault of their own. Neither should they be deprived of food stamp assistance without proper procedures or due regard for individual circumstances." President's Statement on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 11 PUB. PAPERS 1329 (Aug. 22, 1996).

69. See *Speaking Up for Immigrants*, N.Y. TIMES, Oct. 21, 1996, at A22. The provisions affecting aliens accounted for up to 40% of the savings realized in the legislation. See Soros, *supra* note 4, at A23. In August 1997, however, Congress restored SSI benefits to immigrants present in the United States as of August 22, 1996, resulting in lower actual savings. See *infra* notes 86-90 and accompanying text; see also *supra* note 4.

70. See 8 U.S.C. § 1641(a)-(b) (Supp. III 1997). In addition, certain battered aliens are treated as qualified aliens for the purposes of benefit eligibility. Aliens or their children who have been "battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse or parent's family residing in the same household as the alien and the spouse or parent consented to, or acquiesced in, such battery or cruelty," and who meet certain admissions criteria are treated as qualified immigrants though they may not otherwise meet the substantive requirements to be considered qualified aliens. *Id.* § 1641(c). In any event, the agency providing benefits must find a substantial connection between such battery or cruelty and the need for the benefits to be provided. See *id.*

71. Classes of "nonimmigrants" include foreign students, business visitors, tourists, and others whose plans include a temporary stay of fixed duration. See 8 U.S.C. § 1101(a)(15) (1994 & Supp. III 1997). For a full discussion of the categorization of nonimmigrants, see LEGOMSKY, *supra* note 3, at 223-89.

72. The Attorney General may parole individuals temporarily into the United States on a case-by-case basis for urgent humanitarian reasons or significant public benefit or for other reasons deemed in the public interest. An individual paroled into the United States under this provision is not counted toward the annual immigration quotas. See 8 U.S.C. § 1182(d)(5) (Supp. III 1997).

state, or local benefits.⁷³

Qualified aliens are also ineligible to receive SSI until they naturalize.⁷⁴ This bar is subject to limited exceptions. First, refugees, asylees, and aliens whose deportation are withheld may access SSI during their first seven years in the United States.⁷⁵ Second, lawful permanent residents who have worked forty qualifying quarters under the Social Security Act are eligible for SSI if they meet the other program requirements.⁷⁶ Third, qualified aliens who are

73. *See id.* §§ 1611, 1621. Exceptions to the bar on federal public benefits for unqualified aliens include: emergency medical treatment; short-term, non-cash, in-kind emergency disaster relief; public health assistance for immunizations and treatment of communicable diseases; and, subject to the approval of the Attorney General, programs which 1) deliver in-kind services at the community level, 2) do not condition the provision of assistance on the individual recipient's income or resources, and 3) are necessary for the protection of life or safety. *See id.* §§ 1611(b)(1)(A)-(D). Additionally, unqualified aliens receiving housing, community development, or financial assistance administered by the Secretary of Housing and Urban Development on August 22, 1996 could continue to receive such benefits. *See id.* § 1611(b)(1)(E).

74. *See id.* § 1612(a)(1), (3). Aliens generally become eligible for naturalization after five years of legal permanent residence in the United States. But naturalization applications have increased from approximately 200,000 per year in 1991 to over 1.5 million in 1997. *See Mike Swift, Immigrants Rushing to Citizenship: New Deportation Rules Cause Historic Surge in Citizenship*, HARTFORD COURANT, Nov. 2, 1997, at A1. This has resulted in procedural delays of up to two years. *See id.* Furthermore, naturalization is especially difficult for older immigrants who may have difficulty learning English or studying for the civics exam. *See infra* note 86.

75. The SSI bar

shall not apply to an alien until seven years after the date—

(I) an alien is admitted to the United States as a refugee under section 207 of the Immigration and Nationality Act [8 U.S.C. 1157];

(II) an alien is granted asylum under section 208 of such Act [8 U.S.C. 1158];

(III) an alien's deportation is withheld under section 243(h) of such Act [8 U.S.C. 1253(h)] (as in effect immediately before the effective date of section 307 of division C of Public Law 104-208) or section 241(b)(3) of such Act [8 U.S.C. 1231(b)(3)] (as amended by section 305(a) of division C of Public Law 104-208);

(IV) an alien is granted status as a Cuban and Haitian entrant (as defined in section 501(e) of the Refugee Education Assistance Act of 1980); or

(V) an alien is admitted to the United States as an Amerasian immigrant pursuant to section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriation Act, 1988 (as contained in section 101(e) of Public Law 100-202 and amended by the 9th proviso under MIGRATION AND REFUGEE ASSISTANCE in title II of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1989, Public Law 100-461, as amended).

8 U.S.C. § 1612(a)(2)(A)(i) (Supp. III 1997) (bracketed material in original).

Originally, Congress enacted a five-year time limitation for refugees and other aliens included under section 1612(a)(2)(A)(i). Congress raised the time limit to seven years in the Balanced Budget Act of 1997. Pub. L. No. 105-33, § 5302, 111 Stat. 251, 598 (codified as amended at 8 U.S.C. § 1612(a)(2)(A)(i) (Supp. III 1997)). The Budget Reconciliation Act made additional changes to PRWORA, discussed *infra* notes 85-90 and accompanying text.

76. A lawfully admitted permanent resident alien is exempt from the SSI bar who—

(I) has worked 40 qualifying quarters of coverage as defined under title II of the Social Security Act [42 U.S.C. 401 et seq.] or can be credited with such qualifying quarters as provided under section 1645 of this title, and (II) in the case of any such qualifying quarter creditable for any period beginning after December 31, 1996, did not receive any Federal means-tested public

honorably discharged veterans of the U.S. military or who are on active duty in the U.S. armed services are eligible for SSI. Spouses and unmarried dependent children of veterans or individuals on active military duty are also eligible for SSI.⁷⁷ Noncitizens wishing to obtain food stamps are subject to similar restrictions.⁷⁸

Shortly after PRWORA's enactment, plaintiffs in New York filed suit against the federal government claiming that the SSI bar violated their due process rights. In *Abreu v. United States*,⁷⁹ legal permanent residents living in the United States on August 22, 1996 who were receiving or eligible for SSI argued that the SSI bar improperly discriminated between citizens and legal permanent residents under the Due Process Clause of the Fifth Amendment.⁸⁰ The court reviewed these claims under a rational basis standard.⁸¹ The court found a legitimate government interest in encouraging naturalization, promoting self-sufficiency, generating fiscal savings, and removing an incentive for immigration.⁸² The court held the SSI bar constitutional, reasoning that Congress rationally could have concluded that the bar would serve the legitimate government interests.⁸³ At least two other

benefit (as provided under section 1613 of this title) during any such period.

8 U.S.C. § 1612(a)(2)(B)(ii) (Supp. III 1997) (bracketed material in original). The term "quarter" means a period of three calendar months ending on March 31, June 30, September 30, or December 31. See 42 U.S.C. § 413(a)(1) (1994).

77. The SSI bar does not apply to an alien who is lawfully residing in any state and who is—
(i) a veteran (as defined in section 101, 1101, or 1301, or as described in section 107 of title 38) with a discharge characterized as an honorable discharge and not on account of alienage and who fulfills the minimum active-duty service requirements of section 5303A(d) of title 38,
(ii) on active duty (other than active duty for training) in the Armed Forces of the United States, or
(iii) the spouse or unmarried dependent child of an individual described in clause (i) or (ii) or the unremarried surviving spouse of an individual described in clause (i) or (ii) who is deceased if the marriage fulfills the requirements of section 1304 of title 38.

8 U.S.C. § 1612(a)(2)(C).

78. PRWORA as enacted would have eventually barred most legal immigrants from receiving food stamps, including those who had been receiving them before PRWORA. See 8 U.S.C. § 1612(a)(2)(A)(ii), (D)(ii). But, in 1998, Congress enacted the Agricultural Research, Extension, and Education Reform Act of 1998, Pub. L. No. 105-185, §§ 503-505, 112 Stat. 523, which reinstated food stamps for 250,000 legal immigrants, including seniors, persons with disabilities, and children. See Remarks on Signing the Agricultural Research, Extension, and Education Reform Act of 1998 and Exchange with Reporters, 34 WEEKLY COMP. PRES. DOC. 1190 (June 29, 1998). Still, many adult legal aliens remain ineligible for food stamps.

79. 971 F. Supp. 799 (S.D.N.Y. 1997).

80. See *id.* at 806.

81. See *id.* at 815. The court's analysis closely examined *Mathews v. Dias*, 426 U.S. 67 (1976), regarding the level of scrutiny to be applied to enactments premising public assistance eligibility on citizenship status. See *supra* note 15.

82. See *Abreu*, 971 F. Supp. at 816-19.

83. See *id.* at 819-21.

courts are in accord.⁸⁴

Congress modified the SSI bar in the Balanced Budget Act of 1997.⁸⁵ First, Congress permitted aliens receiving SSI as of August 22, 1996 to retain their SSI benefits.⁸⁶ In addition, Congress permitted qualified aliens residing in the United States on August 22, 1996 to retain eligibility for SSI if they later acquire it.⁸⁷ As mentioned previously, asylees, refugees, and aliens whose deportation has been withheld are eligible for SSI for the first seven years they are in the United States.⁸⁸ Originally under PRWORA, this period was only five years.⁸⁹ The Budget Reconciliation Act extended the SSI eligibility period from five to seven years for refugees, asylees, and aliens whose deportation had been withheld.⁹⁰

84. In *Rodriguez v. United States*, 983 F. Supp. 1445 (S.D. Fla. 1997), elderly, blind, and disabled legal aliens brought suit against the federal government for a violation of their equal protection rights under the Fifth Amendment. *See id.* at 1447. As in *Abreu*, the court evaluated the SSI bar under rational basis review. *See id.* at 1457. Applying an analysis identical to that employed in *Abreu*, the *Rodriguez* court likewise held the SSI bar constitutional. *See id.* at 1458; *see also* *Kiev v. Glickman*, 991 F. Supp. 1090 (D. Minn. 1998) (holding food stamps bar constitutional under same rationale).

In addition to their constitutional claims, plaintiffs in both *Abreu* and *Rodriguez* challenged retroactive application of the SSI bar to noncitizens already residing in the United States on August 22, 1996 under the Administrative Procedures Act. *See Abreu*, 971 F. Supp. at 821; *Rodriguez*, 983 F. Supp. at 1458. The *Abreu* court granted a preliminary injunction enjoining implementation of the bar on this ground. *See* 971 F. Supp. at 825-26. The *Rodriguez* court denied the government's motion to dismiss the plaintiffs' claims relating to retroactivity. *See* 983 F. Supp. at 1463. Congress eliminated retroactive application of the bar in the 1997 Budget Reconciliation Act. *See infra* notes 85-87 and accompanying text.

85. Pub. L. No. 105-33, §§ 5301-5308 111 Stat. 251, 597-601 (codified as amended at 8 U.S.C. § 1612 (Supp. III 1997)).

86. *See id.* § 5301, 111 Stat. at 597 (codified as amended at 8 U.S.C. § 1612(a)(2)(E) (Supp. III 1997)). The House of Representatives noted that the purpose of the change was to "smooth the transition [to loss of food stamps, which were later reinstated for some legal aliens] for those who were already receiving [cash] benefits." H.R. REP. NO. 105-149, at 1184 (1997). One newspaper had reported on the pressure faced by Congress, caused by images of elderly immigrants "struggling to learn English to pass the citizenship examination while battling poor health." Leonel Sanchez, *The Welfare of Immigrants: Confusion Over Aid Cut-Off Grows*, SAN DIEGO UNION TRIB., July 21, 1997, at B-1.

Reinstatement of benefits was a source of tremendous relief to aliens receiving SSI. Immigration advocates reported stories of despair and even suicide among aliens who feared losing SSI, their sole source of support. In most cases, the immigrants feared becoming a burden on their relatives. *See* Karen McAllister, *No Welfare, No Hope*, FRESNO BEE, Oct. 26, 1997, at A1. Local legal aid offices were flooded with requests for information on naturalization. *See* Arthur C. Helton, *Indigent Aliens Face Welfare Cuts, Deportation*, NAT'L L.J., Aug. 18, 1997, at C13.

87. *See* Pub. L. No. 105-33, § 5301, 111 Stat. 251, 597 (codified as amended at 8 U.S.C. § 1612(a)(2)(F) (Supp. III 1997)).

88. *See supra* note 72 and accompanying text.

89. *See* 8 U.S.C. § 1612(a)(2)(A) (Supp. II 1996).

90. *See* Pub. L. No. 105-33, § 5302, 111 Stat. 251, 598 (codified as amended at 8 U.S.C. § 1612(a)(2)(A) (Supp. III 1997)); *see also supra* note 72. The original five-year exemption was designed to allow refugees and asylees the opportunity to adjust to living in the United States. *See*

Qualified aliens generally become eligible for other means-tested federal benefits after five years in the United States.⁹¹ For designated means-tested federal benefits, including TANF, Medicaid, and social services block grant programs,⁹² states determine alien eligibility.⁹³ Although states may extend

H.R. REP. NO. 105-149, at 1182-83 (1997). Because of delays in adjusting to permanent resident status and increasing delays in the naturalization process, however, under the five-year exemption, many aliens would lose SSI and other welfare benefits "despite their attempting to naturalize at their earliest opportunity." *Id.* Extending the exemption to seven years from five years gives noncitizens "more time to naturalize while continuing to receive welfare benefits without interruption." *Id.*

91. See 8 U.S.C. § 1613(a) (Supp. III 1997). Some exceptions apply, however. See *id.* § 1613(b). Federal agencies are currently determining which federal programs will be considered "federal means-tested public benefits." See Claudia Kolker, *Area Agencies Weigh Effects of Immigration, Aid Reforms*, HOUSTON CHRON., Dec. 30, 1997, at 17. Still under consideration are "many 'gray area' programs," including public health center funding, Community Development block grants, and Maternal and Child Health block grants. *Id.* Currently, the federal government only enforces the provision on programs administered by government agencies, including primarily TANF and Medicaid. See *id.* Congress listed eleven assistance programs as exceptions to the five-year restriction on federal means-tested public benefits:

(A) Medical assistance described in section 1611(b)(1)(A) of this title [emergency medical services].

(B) Short-term, non-cash, in-kind emergency disaster relief.

(C) Assistance or benefits under the National School Lunch Act [42 U.S.C. 1751 et seq.].

(D) Assistance or benefits under the Child Nutrition Act of 1966 [42 U.S.C. 1771 et seq.].

(E) Public health assistance (not including any assistance under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.]) for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.

(F) Payments for foster care and adoption assistance under parts B and E of title IV of the Social Security Act [42 U.S.C. 620 et seq. and 670 et seq.] for a parent or a child who would, in the absence of subsection (a) of this section, be eligible to have such payments made on the child's behalf under such part, but only if the foster or adoptive parent (or parents) of such child is a qualified alien (as defined in section 1641 of this title).

(G) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (i) deliver in-kind services at the community level, including through public or private nonprofit agencies; (ii) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (iii) are necessary for the protection of life or safety.

(H) Programs of student assistance under titles IV, V, IX, and X of the Higher Education Act of 1965 [20 U.S.C. 1070 et seq., 1101 et seq., 1134 et seq., 1135 et seq., 42 U.S.C. 2751 et seq.] and titles III, VII, and VIII of the Public Health Service Act [42 U.S.C. 241 et seq., 292 et seq., 296 et seq.].

(I) Means-tested programs under the Elementary and Secondary Education Act of 1965 [20 U.S.C. 6301 et seq.].

(J) Benefits under the Head Start Act [42 U.S.C. 9831 et seq.].

(K) Benefits under the Job Training Partnership Act [29 U.S.C. 1501 et seq.]

8 U.S.C. § 1613(c)(2) (Supp. III 1997) (bracketed material in original).

92. Social services block grant programs are state-administered social service programs, such as child care or nutrition programs, which are supported through block grants from the federal government under subchapter XX of the Social Security Act. See 42 U.S.C. §§ 1397-1397f (1994 &

the period during which aliens are ineligible for TANF, Medicaid, and the social services block grant programs, they may not reduce the period of ineligibility to less than five years.⁹⁴

III. THE SSI BAR IN PRWORA IS UNNECESSARY

Even with the 1997 changes, the SSI bar is unnecessarily harsh. The current bar penalizes immigrants and families when the unforeseeable happens: the alien becomes disabled, the sponsor loses a job, or the sponsor or immigrant has a family emergency that depletes income and savings.⁹⁵ The SSI bar has limited exceptions that leave little room to account for extreme situations.⁹⁶ For example, aliens in the following hypothetical situations would be unable to receive SSI, even though they would meet the program's eligibility criteria and had affirmatively demonstrated at admission that they were unlikely to become public charges.⁹⁷

W.S., a healthy immigrant, receives a visa to come to the United States to work for a large corporation in December 1996. Two years after arrival, W.S. is seriously injured in a car accident and becomes permanently disabled. Now, W.S. no longer has a source of income, and because W.S. arrived on an employment visa, he may have no sponsor.⁹⁸ W.S. is not yet eligible to

Supp. II 1996); *see also* 8 U.S.C. § 1612(b)(3)(B) (Supp. III 1997).

93. *See* 8 U.S.C. § 1612(b).

94. *See id.* § 1613(a). Under this section, qualified aliens would be barred from receiving all federal means-tested benefits, including TANF, Medicaid, and programs under the Social Services block grant program, for their first five years in the United States. *See* STAFF OF H.R. COMM. ON WAYS AND MEANS, 104TH CONG., SUMMARY OF WELFARE REFORMS MADE BY PUBLIC LAW 104-193, THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT AND ASSOCIATED LEGISLATION 34 (Comm. Print 1996). After the first five years, qualified aliens would remain subject to other limitations, including the state option to bar access to TANF, Medicaid, and Social Services block grant programs and sponsor to alien deeming. *See id.*

95. Carolyn Colvin, Deputy Commissioner for Programs, Policy, Evaluation and Communications of the Social Security Administration, expressed the concerns of the Clinton Administration, "A problem with an outright ban on SSI eligibility for sponsored immigrants for a specified number of years is that it would not be sufficiently flexible to help immigrants when they become disabled or the sponsor can no longer provide support." *Judiciary Hearings, supra* note 40, at 8. *See generally* Leslie P. Francis, *Elderly Immigrants: What Should They Expect of the Social Safety Net?*, 5 ELDER L.J. 229 (1997) (arguing that PRWORA is uncompassionate and unfair to elderly immigrants).

96. The vast majority of immigrants arriving after August 22, 1996 would be subject to the SSI bar for at least their first 40 quarters after their arrival, if not for longer. *See supra* notes 74-77 and accompanying text.

97. For a description of the public charge provision, *see supra* notes 41-44 and accompanying text.

98. Section 1183a(f)(4) requires the relative of an applicant for an employment-based visa to submit an affidavit of support if such relative filed the petition or has a significant ownership interest in the petitioning organization. *See* 8 U.S.C. § 1183a(f)(4) (Supp. III 1997).

naturalize and did not have a chance to work forty quarters before his accident.

G.M., a seventy-five year old grandparent, is brought over to the United States by her daughter D.M. in April 1997 to live with her and provide child care for D.M.'s children while D.M. works. D.M. signs an affidavit of support on behalf of G.M. One year after G.M.'s arrival in the United States, D.M. loses her job during a regional recession. D.M. is eligible to receive TANF for her children but no longer has the ability to support G.M. as well as herself, and TANF does not meet all of the children's needs. At age seventy-five, with limited English language skills, G.M. is unable to work outside the home.

Modifying the SSI bar does not preclude Congress from encouraging self-sufficiency among aliens and eliminating public benefits as an incentive to immigrate.⁹⁹ First, immigration law strongly discourages alien use of public assistance through a system of deterrents. Second, SSI regulations limit eligibility to individuals who meet stringent substantive and income requirements, and then the program provides barely subsistence-level income. Third, public policy indicates that the current bar undermines national interests and values apart from self-sufficiency and eliminating immigration incentives.

A. Immigration Law Deters Use of Public Benefits by Noncitizens

The SSI bar in its present form is duplicative. Provisions enacted in PRWORA and others already included in the Immigration and Nationality Act ("INA") achieve substantially similar results to the SSI bar without completely eliminating the SSI safety net. These provisions are restraints that ensure that only the neediest of aliens access public benefits.

First, under the INA, aliens must meet the requirement that they are unlikely to become a public charge before they will be admitted to the United States.¹⁰⁰ The public charge exclusion is the "single most common

99. See *supra* note 67.

100. See 8 U.S.C. § 1182(a)(4). The Attorney General or consular officer must consider the alien's age, health, family status, financial status, education, and skills when assessing the likelihood that an alien will become a public charge. See *id.* § 1182(a)(4)(B).

In addition, the Attorney General or consular officer may consider an affidavit of support when making such a determination. See *id.* Factors used to value an affidavit include the motivation of the sponsor, the sponsor's relationship to the applicant, and the sponsor's financial ability to provide the promised support. See LEGOMSKY, *supra* note 3, at 316 (citing State Department Foreign Affairs Manual, 9 F.A.M. § 40.41 n.6.2 (1993)). Thus, aliens who appear likely to request benefits in spite of a sponsor's affidavit may be screened out during the admission process.

affirmative, substantive basis for denials of immigrant visas.”¹⁰¹

In addition, becoming a public charge within five years after admission is a ground for deportation. To avoid deportation, aliens must affirmatively show that the reason they became a public charge arose after admission to the United States.¹⁰² Therefore, aliens may be unlikely to accept benefits other than in dire situations.

Second, affidavits of support filed by sponsors are now legally binding.¹⁰³ Making an affidavit legally enforceable against a sponsor obligates the government to request reimbursement from the sponsor for an alien’s public benefits use.¹⁰⁴ If the sponsor does not repay the government for the cost of benefits, then the government can sue the sponsor to recoup past expenditures on the alien.

In addition, PRWORA tightened the requirements for executing affidavits of support. With limited exceptions, only persons sponsoring the alien are allowed to execute an affidavit of support.¹⁰⁵ Furthermore, a sponsor’s income must now be at least 125% of the poverty level for a family size, which includes the sponsor’s family and the alien.¹⁰⁶ Where the sponsor’s

101. LEGOMSKY, *supra* note 3, at 316. In 1995 the Department of State made 14,335 public charge denials for immigrants and 2,929 for nonimmigrants. *Id.* (citing U.S. Dept. of State, Report of the Visa Office 1995).

102. “Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.” 8 U.S.C. § 1227(a)(5) (Supp. III 1997).

103. *See id.* § 1183a. Section 1183a prescribes that affidavits of support must be legally binding and also places restrictions on who could execute an affidavit on behalf of a potential immigrant. Specifically, affidavits of support must be contracts “legally enforceable against the sponsor by the sponsored alien, the Federal Government, any State (or any political subdivision of such State), or by any other entity which provides any means-tested public benefit.” *Id.* § 1183a(a)(1)(B). Before the 1996 amendments to section 1183a, the legal enforceability of affidavits of support was questionable. *See Judiciary Hearings, supra* note 40, at 37 (testimony of Dr. Susan Martin).

104. 8 U.S.C. § 1183a(b)(1)(A) provides that

Upon notification that a sponsored alien has received any means-tested public benefit, the appropriate nongovernmental entity which provided such benefit or the appropriate entity of the Federal Government, a State, or any political subdivision of a State shall request reimbursement by the sponsor in an amount which is equal to the unreimbursed costs of such benefit.

Id.

105. *See* 8 U.S.C. § 1183a(a)(1) (Supp. III 1997). Other family members or individuals, even if willing and capable, are not permitted to execute the affidavits of support. They may, however, be joint sponsors with the petitioning family member. Joint sponsors incur the same liability as petitioning sponsors. *See id.* § 1183a(f)(2), (5).

106. *See id.* § 1183a(f)(1)(E). A sponsor’s qualifying income must be demonstrated by “provision of a certified copy of the individual’s Federal income tax return for the individual’s 3 most recent taxable years and a written statement, executed under oath or as permitted under penalty of perjury . . . , that the copies are certified copies of such returns.” *Id.* § 1183a(f)(6)(A)(i). Significant assets of the sponsor or sponsored alien may also be used to demonstrate the means to maintain income, if such assets are available for the support of a sponsored alien. *See id.* § 1183a(f)(6)(A)(ii).

These provisions have been met with substantial concern by immigration advocates. For example,

income does not meet this requirement, other persons are allowed to be jointly and severally liable with the petitioner.¹⁰⁷ A sponsor must be a United States national or legal permanent resident and must be over age eighteen.¹⁰⁸ A sponsor who meets these qualifications is obligated to support the alien for forty quarters after the alien receives public benefits or until the alien naturalizes.¹⁰⁹

Legally binding affidavits of support significantly reduce the likelihood that the government will have to make unreimbursed payments to aliens in emergency situations. Because federal, state, and local governments can seek reimbursement from sponsors, the governments now have a direct route to collection of amounts spent on public benefits for noncitizens.¹¹⁰ The statute also authorizes the use of collection agencies in recouping government expenditures on unauthorized benefits paid to aliens.¹¹¹

Moreover, if an alien applies for and receives public benefits, the alien now creates financial liability for the sponsor. Notably, under the changes made by PRWORA, the sponsor will often be the person who petitioned for the alien's immigration and most likely a close family member: a parent, child, or spouse.¹¹² The likelihood of causing financial liability to a close family member would seem to serve as a meaningful deterrent to aliens attempting to access SSI in anything but the most desperate of situations.¹¹³

some have charged that the new sponsorship requirements are a "back door" method for limiting immigration to the United States. See Stanley Mailman & Stephen Yale-Loehr, *New Income Requirements for Sponsors*, N.Y. L.J., Dec. 22, 1997, at 3. Others have expressed the concern that requiring a sponsor to demonstrate an income of 125% of the poverty level will make it impossible for many individuals to afford to rejoin with their family members, even though the potential sponsors work full-time. Representative James McGovern noted, "This will eliminate hard-working people like janitors, nurses aides, and teachers aides from being reunited with their families We talk about family values, but this law will make it impossible to unite many families." Kathleen A. Shaw, *New Immigration Rules Put Sponsoring Families in a Bind*, TELEGRAM & GAZETTE (WORCHESTER, MASS.), Nov. 7, 1997, at A2.

107. See 8 U.S.C. § 1183a(f)(2), (5) (Supp. III 1997).

108. See *id.* § 1183a(f)(1)(A), (B).

109. See *id.* § 1183a(a)(2). After December 31, 1996, such quarters do not include any quarter in which the alien received any federal means-tested benefit. See *id.* at (a)(3)(A).

110. See *supra* note 108. In addition, a sponsor must notify the Attorney General and the State in which the alien resides of any change of the sponsor's address. See 8 U.S.C. § 1183a(d)(1). Notification must be made within 30 days of any change during the time that the affidavit remains enforceable. See *id.* Failure to comply may result in a fine ranging from \$250 to \$5,000. See *id.* § 1183a(d). This ensures that governments will be able to find sponsors if governments need to seek reimbursement.

111. See 8 U.S.C. § 1183a(b)(3). Remedies available to enforce an affidavit of support include property liens, ordered installment payments, garnishment, orders for specific performance, and payment of legal fees and other costs of collection. See *id.* § 1183(c).

112. See *supra* note 105 and accompanying text.

113. In fact, in light of the recent changes, legal practitioners have propounded only cautious use of affidavits of support to satisfy the public charge exclusion. In particular, practitioners have

B. SSI Regulations Prevent Assistance to Unqualified Applicants

SSI requirements provide a second set of safeguards against unnecessary SSI use by aliens.¹¹⁴ If PRWORA's restrictions on noncitizen access to SSI did not exist, aliens would still be subject to income and substantive eligibility requirements before receiving benefits. First, applicants must demonstrate that they are substantively eligible for SSI by confirming that they are either over the age of sixty-five, legally blind, or disabled.¹¹⁵ Candidates applying for SSI based on a disability must also demonstrate that their disability prevents them from working.¹¹⁶ Medical, professional, and other evaluations are required to establish substantive eligibility.¹¹⁷ Some commentators believe that recent publicity about potential SSI fraud has led to overenforcement of substantive disability requirements.¹¹⁸

expressed concern over sponsor liability for an alien's use of Medicaid. In cases where an alien's medical problems are serious or noninsurable, "the amount of liability could be astronomical. For this reason, affidavits of support should be responsibly used mainly for spouses, parents and children." Ronald H. Bonaparte, *Planning Immigration Through the Quota System and the New Contractual Affidavit of Support*, in 29TH ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 323 (PLI Corp. Law & Practice Course Handbook Series No. B-964, 1996).

114. Some scholars support allowing noncitizens to access SSI to the same extent as citizens. These commentators believe that by virtue of their admission for permanent residence, legal immigrants possess characteristics favorable to lasting membership in our society. See Legomsky, *supra* note 3, at 1466-67. "They have become at least close to being 'our own,' and they plan to stay. We should therefore care for them in much the same way that we care for our citizen residents." *Id.* Furthermore, to the extent that public benefits can be considered "a way station for riding out temporary storms, thus preserving human capital for future investment," it is in society's best interests that immigrants, like citizens, survive these storms to thrive and prosper. *Id.* at 1464-65. *But see* Wolf, *supra* note 14, at 7A (quoting Rep. Clay Shaw, "When you're cutting back, take care of your own citizens first.").

115. See *supra* notes 32-34 and accompanying text.

116. See 42 U.S.C. § 1382c(a)(3)(B) (1994). To be considered disabled, an individual's physical or mental impairment or impairments must be of such severity that the individual is not only unable to do his or her previous work, but cannot, considering the individual's age, education, and work experience, engage in any other kind of substantial gainful work. See *id.*; see also Bery v. Schweiker, 675 F.2d 464 (2d Cir. 1982). The impairment or impairments must "significantly limit[]" the applicant's physical or mental ability to do basic work activities. 20 C.F.R. § 416.920(c) (1998); see *Almonte v. Califano*, 490 F. Supp. 127 (S.D.N.Y. 1980) ("proving existence of one or more impairments does not, without more, establish 'disability'"). An individual who is working and whose work constitutes "substantial gainful activity" will not be considered disabled. 20 C.F.R. § 416.920(b).

117. See *Males v. Sullivan*, 726 F. Supp. 315 (D.D.C. 1989) (factors assessed include medical data and findings, expert medical opinion, subjective complaints, and claimant's age, education, and work history); *Rivera v. Harris*, 623 F.2d 212 (N.Y. 1980) (factors to be considered are objective medical facts, diagnoses or medical opinions based on such facts, subjective evidence of pain or disability). *But see* *Baxter v. Schweiker*, 538 F. Supp. 343, 351 (N.D. Ga. 1982) (noting that "mere presence of medical problems does not constitute disability in a supplemental security income case as there must also be disabling effects").

118. In one recent case, 181 of 300 individuals spanning four generations of a Georgia family received SSI disability benefits. See Editorial, *Fraud Case Illustrates Need for Agencies To Be Diligent*, ATLANTA J. & ATLANTA CONST., Jan. 8, 1998, at A14. This discovery has prompted

Second, an applicant's income must fall below a prescribed level.¹¹⁹ Most notably, sponsor-to-alien deeming provisions for SSI ensure that only the neediest aliens would be eligible for benefits.¹²⁰ By deeming the sponsor's income available to the alien, the only aliens to qualify substantively for SSI would be those whose own income added to that of their sponsors' totaled less than \$494 per month¹²¹—the threshold amount for any individual.¹²² Both earned and unearned income count toward determining income eligibility.¹²³ SSI payments then make up the difference between the applicant's prebenefit income and the maximum monthly income level.¹²⁴

Third, the Social Security Administration periodically reviews eligibility determinations to ensure that a recipient's income and substantive eligibility

renewed demands for oversight on SSI eligibility determinations by the Social Security Administration. *See id.* Over the past year, the Social Security Administration cut 135,000 disabled children from the SSI rolls during a redetermination period. In December 1997 Social Security Commissioner Kenneth Apfel ordered a re-examination of 45,000 cases after finding that retarded children had been cut from the rolls and that many families were misled about their opportunity to appeal. The cuts have been attributed to harsh interpretations of new SSI guidelines and tightened eligibility requirements. *See* Editorial, *Collateral Damage—Officials Admit that Thousands of SSI Cuts Were in Error*, PITT. POST-GAZETTE, Dec. 26, 1997, at A22.

119. *See supra* notes 35-38 and accompanying text.

120. "One conclusion that can be unequivocally drawn . . . is that the deeming policies have generally been effective in preventing sponsored immigrants from receiving federal welfare benefits during the deeming period." *See Judiciary Hearings, supra* note 40, at 37 (testimony of Dr. Susan Martin).

121. *See Social Security Administration: You May Be Able To Get SSI* (visited Jan. 25, 1998) <<http://www.ssa.gov/pubs/11069.html>>. In 1974 SSI's first year, an aged, blind, or disabled person with a yearly income of less than \$1,752 was eligible for SSI. *See id.* The yearly benefit level is now determined by factoring in cost-of-living increases each year. *See* 42 U.S.C. § 1382f (1994). In 1998 the annual maximum income level for a nonworking individual is \$6,168, (\$12,876 for a person who works) and \$9,132 for a married couple (\$18,804 if one or both spouses work). *See Social Security Administration: You May Be Able To Get SSI, supra*.

122. *See supra* notes 45-46 and accompanying text. In spite of PRWORA's bar, deeming provisions remain in the SSI regulations and still apply to those aliens who are exempt from the bar. *See supra* notes 74-78 and accompanying text.

123. *See* 42 U.S.C. § 1382(a) (1994). Earned income includes certain wages, earnings from self-employment, and royalties earned from publication. *See id.* § 1382a(a)(1). Unearned income includes many types of cash or in-kind support or maintenance, annuities, pensions and retirement benefits, prizes, awards, rents, dividends, and interest. *See id.* § 1382a(a)(2). The statute also contains specific exclusions from income. *See id.* at § 1382a(b). The first \$240 per year of income, in proportionally smaller amounts for shorter periods is excluded from consideration, *see id.* § 1382a(b)(2)(A), as is state or locally provided need-based assistance. *See id.* § 1382a(b)(6). Additional exclusions include property tax refunds, *see id.* § 1382a(b)(5), homegrown produce utilized by the household for its own consumption, *see id.* § 1382a(b)(8), emergency disaster relief, *see id.* § 1382a(b)(11), and several types of housing assistance. *See id.* § 1382a(b)(14).

124. *See* 8 U.S.C. § 1382(b) (Supp. III 1997). In 1998 the maximum monthly income for a single SSI applicant is \$494. *See supra* note 121 and accompanying text. Consequently, an individual who received \$200 per month in income from a pension plan, after the \$20 per month set aside, *see supra* note 123, would receive \$314 in SSI. An individual with no outside source of income would receive \$494.

still meet SSI guidelines.¹²⁵ Benefit adjustments are made following these periodic reviews.¹²⁶ Thus, SSI benefits are limited to those with current, ongoing need.

C. Public Policy Requires that the SSI Bar Be Modified

Public policy supports making SSI available to noncitizens under certain circumstances. First, the harshness of the bar undermines family reunification, one of the primary goals of the U.S. immigration system.¹²⁷ Potential sponsors may be deterred from petitioning to bring their family members to the United States knowing that there is no safety net to protect them in times of emergency.

Second, aliens as a group contribute significantly to the federal economy that finances SSI. Aliens disproportionately create jobs and help revitalize depressed neighborhoods through entrepreneurship.¹²⁸ Moreover, aliens pay more in taxes than they use in benefits.¹²⁹ As a group, they are only slightly more likely than U.S. citizens to utilize public benefits.¹³⁰ Consequently,

125. See 20 C.F.R. § 416.994 (1998). To determine whether an adult's disability continues, SSI administrators consider whether the recipient's medical condition has improved, and if so, whether the improvement is related to ability to work. See *id.* § 416.994(b). Medical improvement is considered related to the ability to work if the severity of the recipient's impairment has decreased, and the individual's functional capacity to do basic work activities has increased. See *id.* § 416.994(b)(1)(iii). Basic work activities are the "abilities and aptitudes necessary to do most jobs." Such activities include walking, standing, pushing, pulling, reaching, carrying, seeing, hearing, speaking, remembering, using judgment, dealing with changes, and "dealing with supervisors and fellow workers." *Id.* § 416.994(b)(iv).

126. See *id.* § 416.994(a).

127. The majority of immigration slots available each year are reserved for family members. Up to 480,000 immigrants enter the United States each year based on familial relationships with U.S. citizens or legal permanent residents, compared to 140,000 under employment based system. See 8 U.S.C. § 1151(c)(d) (1994 & Supp. III 1997); see also Richard A. Boswell, *Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. REV. 1475 (1995); Legomsky, *supra* note 3, at 1465; *supra* note 111.

128. For example, although only approximately 8.7% of the current U.S. population is foreign-born, small businesses, 18% of which are started by immigrants, account for up to 80% of the new jobs available in the United States each year. See *American Immigration Lawyers Association—About Immigration* (visited Oct. 26, 1998) <<http://aila.org/public/aboutimmigration.html>>. In addition, cities like Los Angeles, Miami, Dallas, and New York have benefited from immigrant entrepreneurship. For example, in Miami, the number of Cuban-owned businesses grew from 919 in 1967 to 28,000 in 1990. See National Immigration Forum Briefing Paper, *Immigrants and the Economy* (1994) (on file with author). Also, in New York, Korean immigrants, who represent 3% of the city's population, operate 1,100 delicatessens, grocery stores and liquors stores, 1,300 drycleaners, 700 general merchandising stores, over 600 fish markets, and 400 nail salons. See *id.*

129. The Urban Institute has estimated that immigrants pay \$25 billion more each year in taxes than they use on benefits. See Fix & Passel, *supra* note 53, at 13.

130. According to the March 1994 Current Population Survey, 6.6% of the foreign-born use AFDC, SSI, or General Assistance, compared to 4.9% of natives. Among nonrefugee immigrants of

aliens are denied benefits to which their taxes have contributed.

Third, conditioning SSI eligibility on citizenship cheapens the concept of naturalization. Although the majority of individuals who naturalize do so out of a desire to join the American polity and to show their allegiance to the United States, aliens may now be inclined to naturalize out a fear of being ineligible for benefits.¹³¹

Finally, the history and purpose of SSI direct that the program help alleviate poverty among the elderly, blind, and disabled.¹³² Poverty is at its most compelling when it is the result of unforeseeable or tragic circumstances. To deny the safety net of SSI to the truly needy beset by dire circumstances, regardless of citizenship status, is contrary to the purpose of SSI and contrary to public policy.¹³³

IV. PROPOSAL

Judicial invalidation of the SSI bar appears unlikely. Several courts have already upheld the bar's constitutionality.¹³⁴ Additionally, courts have been receptive only to administrative challenges relating to retroactive application of the bar, which is no longer at issue.¹³⁵ In contrast, Congress demonstrated its willingness to revisit PRWORA with the 1997 Budget Reconciliation Act¹³⁶ and the Agricultural Research, Extension, and Education Reform Act of 1998.¹³⁷ Consequently, statutory amendment presents the most viable means through which to modify the SSI bar.

working age, 2.0% of immigrants used some type of public assistance, compared to 3.7% of working age natives. *See id.* Though refugees use welfare at higher rates, there are moral and practical reasons for providing them with public assistance upon arrival. *See Welfare Reform: Hearings Before the Subcomm. on Human Resources of the House of Representatives Comm. on Ways and Means*, 104th Cong. 60 (1996) (statement of Rep. Xavier Becerra (D-CA)). "They are fleeing persecution, their departure is unplanned, and they arrive often traumatized by war. By sheer definition, these immigrants seek refuge." *Id.*

131. *See supra* notes 74 and 86. Although the threat of losing SSI for aliens in the United States before August 22, 1996 has been alleviated by the Balanced Budget Act of 1997, the same situation faces aliens who arrived in the United States after August 22, 1996. Many are likely to rush to citizenship at the earliest opportunity in order to be eligible for safety net benefits.

132. *See supra* notes 12-14 and accompanying text. *See generally* Part II.A.

133. One commentator argues: "Like any other residents, immigrants develop the human needs, and experience the human suffering, from which social welfare laws are intended to provide relief. While legitimate distinctions can be drawn between immigrants and citizens, some needs are so basic that to refuse relief is inhumane." Legomsky, *supra* note 3, at 1464.

134. *See supra* notes 79-84 and accompanying text.

135. *See supra* note 84. Moreover, because the bar is absolute for noncitizens who do not fall within an exception, there is neither judicial nor administrative review of SSI denials for these noncitizens.

136. *See supra* notes 85-90 and accompanying text.

137. *See supra* note 78.

A. Amendment to Current Legislation

In order to permit truly needy noncitizens to access SSI, two amendments to PRWORA are required.¹³⁸ First, Congress should remove SSI from its list of “Specified Federal Programs” that are barred to noncitizens.¹³⁹ That would still subject potential SSI recipient’s to the five-year restriction on noncitizen use of federal means-tested benefits, however.¹⁴⁰ Therefore, Congress should also exclude SSI from the five-year restriction on noncitizen use of federal means-tested public benefits.¹⁴¹

Congress should amend 8 U.S.C. § 1613 as follows:

Five-year limited eligibility of qualified aliens for federal means-tested public benefit

a) In general

Notwithstanding any other provision of law and except as provided in subsections (b), (c), and (d) of this section, an alien who is a qualified alien (as defined in section 1641 of this title) and who enters the United States on or after August 22, 1996 is not eligible for federal means-tested public benefits for a period of five years beginning on the date of the alien’s entry into the United States within the meaning of the term “qualified alien.”

....

c) Application of term federal means-tested public benefit

(1) The limitation under subsection (a) of this section shall not apply to assistance or benefits under paragraph (2).

(2) Assistance and benefits under this paragraph are as follows:¹⁴²

...

(L). Benefits under the Supplemental Security Income Program [18 U.S.C. 1381 et seq.], provided that:

(i) In the case of an alien sponsored under 8 U.S.C. § 1183a, the alien’s income, including income deemed from a sponsor or sponsors, falls below the income eligibility level for SSI; or

(ii) In the case of an unsponsored alien, the condition qualifying the alien for SSI arose after the alien’s entrance in to the United States.

138. Although this Note focuses on restoring SSI eligibility for legal aliens, similar amendments could restore food stamp eligibility to these noncitizens. Other amendments, based on comparable reasoning, could restore TANF and Medicaid.

139. See 8 U.S.C. § 1612(a)(3)(A) (Supp. III 1997). Exceptions to the bar exist, but they apply to very limited populations. See *supra* notes 74-78 and accompanying text.

140. As a federally-administered program that assesses a prospective recipient’s income to determine eligibility, SSI would be considered a means-tested federal benefit. See *supra* note 91 and accompanying text.

141. See 8 U.S.C. § 1613(a).

142. For the current text of this subsection, see *supra* note 91.

These changes will remove durational bars on SSI for legal aliens. But substantive eligibility criteria remain, as do sponsor-to-alien deeming provisions.¹⁴³

B. Application

1. *W.S., an Un-sponsored Immigrant Who Is Now Permanently Disabled*

As noted in Part III, immigrant W.S. would be ineligible for SSI under the current system. Though meeting the substantive and income requirements for SSI,¹⁴⁴ PRWORA's bar would prevent W.S. from receiving SSI because he would not fit within the statute's limited exceptions.¹⁴⁵

Under the proposed amendment, however, W.S. would be eligible for SSI. As an un-sponsored alien, his SSI eligibility would depend upon whether his disability arose before or after his arrival in the United States.¹⁴⁶ In W.S.'s case, the disability which prevents him from working arose from injuries received in an accident two years after arriving in the United States. This disability led to loss of income, which also created financial eligibility for SSI. Without a bar or time limitation on legal alien access, W.S. would be eligible to receive SSI.

This result is justifiable because aliens who are admitted to the United States without sponsors previously demonstrated their capacity to support themselves. W.S. satisfied the screening mechanisms in the Immigration and Nationality Act that indicate financial self-sufficiency.¹⁴⁷ Consequently,

143. See 8 U.S.C. § 1631(a)-(b). Notably, the sponsor-to-alien deeming provisions enacted in PRWORA contain an indigence exception. Under this exception, if an agency administering a federal means-tested benefit determines that the noncitizen "in the absence of the assistance provided by the agency, [would] be unable to obtain food and shelter," even after taking the sponsor's income and other contributions to the noncitizen into account, then the sponsor's income deemed to the alien will only include the amount actually provided to the alien for the following 12 months. *Id.* § 1631(e). This allows an alien so situated to meet the substantive eligibility requirements for federal means-tested programs. Currently, because SSI is a "specified federal program" under 8 U.S.C. § 1612 rather than a "Federal means-tested public benefits program" under 8 U.S.C. § 1613, the indigence exception does not apply to SSI. *Id.* § 1631(a). Moreover, the exception makes no provision for indigent un-sponsored aliens, and does not suggest whether benefits could continue beyond 12 months to an alien whose sponsor remains impoverished.

144. See Part II.B.

145. See *supra* notes 74-78 and accompanying text.

146. If W.S.'s inability to work arose before his arrival in the United States, he would be ineligible for SSI and could also be deported as a public charge if he applied for public benefits. See *supra* notes 101-02 and accompanying text.

147. Under the public charge provision, W.S. affirmatively demonstrated prior to admission that he was unlikely to become a public charge. In fact, W.S.'s plight is all the more dramatic in light of his employment-based admissions status. Under the employment-based immigration program, a company

W.S.'s receipt of SSI is appropriately in keeping with SSI's purpose of supporting individuals with no other means of support.¹⁴⁸

2. *G.M., a Sponsored Immigrant Whose Sponsor Loses Her Job*

As noted in Part III, G.M. would also be ineligible for SSI under the current system. Although G.M. would meet the substantive criteria for old age assistance under SSI, the current bar prevents G.M. from receiving such assistance.¹⁴⁹

Under the proposed amendment, G.M. could receive SSI, at least for a limited period. In this case, G.M.'s need for SSI is precipitated not by her own disability but by her sponsor's financial crisis.¹⁵⁰ As a sponsored alien, G.M.'s eligibility for SSI would depend on her personal income combined with that of her sponsor, D.M. G.M. then could receive SSI for as long as this combined income fell below the income eligibility level for SSI.

This result is justifiable because PRWORA's sponsorship and deeming provisions require that sponsors demonstrate ability and intent to support their sponsored aliens before the aliens are admitted to the United States. For example, under PRWORA's provisions, D.M. had to execute a legally-binding affidavit indicating that she would support G.M.¹⁵¹ D.M. also had to establish her ability to support G.M. by demonstrating that her income was at least 125% of the poverty level.¹⁵² In addition, the government is entitled to

must petition on behalf of the immigrant for the immigrant's visa. Therefore, a company found W.S.'s skills so valuable that it undertook the visa process on his behalf. *See generally* LEGOMSKY, *supra* note 3, at 171-204 (describing employment-based visa system). Note, however, that where a relative of an immigrant is also a substantial owner of a petitioning company, such owner's income is deemed available to the immigrant. *See supra* note 98.

148. *See supra* note 23. SSI's income eligibility requirements would prevent W.S. from accessing SSI if he had any sources of support that would raise his income above the threshold eligibility level. For example, if W.S. had a working spouse, her income would be deemed available to W.S. under SSI regulations, most likely making him ineligible for SSI payments. *See* 20 C.F.R. § 416.1168 (1998). Similarly, if another person residing in W.S.'s household had responsibility for W.S.'s care, then that person's income would also be deemed to W.S. in determining his eligibility. *See id.*

149. *See supra* notes 74-78 and accompanying text.

150. In creating old age assistance, Congress assumed that, due to effects of the aging process, individuals beyond a certain age should not be expected to work outside the home (though many do). *See* DiNITTO, *supra* note 17, at 134.

151. Normally, a sponsor is obligated to support the sponsored immigrant until the immigrant has worked 40 qualifying quarters under the Social Security system. *See* 8 U.S.C. § 1183a(a) (Supp. III 1997). But as G.M. is 75 and baby-sits her grandchildren for D.M., it is unlikely that D.M. ever expected G.M. practically to work 40 qualifying quarters. Consequently, D.M.'s responsibility for G.M. extends until either G.M. naturalizes or for the duration of G.M.'s life. *See supra* notes 74 and 86.

152. *See* 8 U.S.C. § 1183a(b) (Supp. III 1997); *see also supra* note 106.

seek reimbursement from D.M. for the cost of G.M.'s SSI.¹⁵³ Permitting G.M. to temporarily receive SSI while D.M. is unable to support her and then later seeking reimbursement from D.M. ensures that G.M.'s immediate needs are met and that D.M. upholds her obligation as a sponsor.¹⁵⁴

C. Procedural Reinforcements To Ensure Integrity of the SSI Program

To enhance effectiveness, procedural reinforcements should accompany the proposed amendment to SSI.¹⁵⁵ First, the INS should undertake careful screening of sponsors to ensure that each sponsor can meet the statutory requirement of support.¹⁵⁶ Second, the Social Security Administration should enforce measures in the SSI application process designed to determine whether, in the case of an unsponsored alien, the alien's disability arose after entry; or, in the case of a sponsored alien, that the sponsor is truly indigent based on factors arising after the alien's admission to the United States. Third, the Social Security Administration should regularly reevaluate sponsors' income throughout an alien's receipt of SSI to affirm that aliens are not receiving SSI while their sponsors are able to support them.¹⁵⁷ Similarly, the Social Security Administration should make regular disability redeterminations for aliens receiving SSI based on disability.¹⁵⁸

V. CONCLUSION

In light of its purpose as a safety net, SSI should not be barred absolutely for most legal aliens. Current restrictions in immigration law will deter all but the most indigent noncitizens from seeking SSI benefits. In addition, income and substantive eligibility requirements in the SSI program prevent individuals who do not meet the program's standard of neediness from receiving benefits. Furthermore, the bar does not realistically account for

153. See 8 U.S.C. § 1183a(b). Though beyond the scope of this Note, additional statutory changes might provide a sponsor who has suffered a financial crisis the opportunity to reverse his fortunes before reimbursement proceedings are brought against him for benefits used by the sponsored alien. This would be particularly beneficial when a sponsor would be unable to immediately repay the government should proceedings be brought at the first opportunity.

154. But see *supra* note 106 for criticisms of the new sponsorship system.

155. The following preventive measures emphasize the importance of enforcing safeguards already included in SSI and immigration law. The Social Security Administration should consistently uphold these standards, thereby decreasing the risk of fraud and abuse.

156. See *supra* notes 103-09 and accompanying text.

157. Reevaluation of a sponsor's income could occur during regularly-scheduled redeterminations of eligibility, or at any other interval of time. See *supra* notes 125-26 and accompanying text.

158. This will help ensure that substantive eligibility requirements act as a safeguard against unnecessary use by both aliens and citizens. See *supra* notes 118, 125-26 and accompanying text.

emergencies and unforeseeable situations which safety net programs like SSI were designed to address.¹⁵⁹ Thus, Congress should act to modify the SSI bar and amend 8 U.S.C. § 1612(a)(3)(A) and 8 U.S.C. § 1613(c)(2).

Lanelle K. Polen

159. *See supra* notes 16-21, 96-99 and accompanying text.