TO LITIGATE OR NOT: THAT IS THE QUESTION—EVEN IF THE CONSTITUTION IS ON YOUR SIDE

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In 2001, the New York Court of Appeals unanimously ruled, in *Aliessa v. Novello*, that it was unconstitutional for New York State to bar immigrants who lawfully reside in the United States from receiving state-funded Medicaid benefits.[1] As one of the lawyers who successfully litigated *Aliessa* on behalf of the plaintiffs from its inception to its conclusion,[2] I was gratified to read Steven Sacco's thorough and comprehensive discussion of *Aliessa* and its progeny in his article, *In Defense of the Eligible Undocumented New Yorker's State Constitutional Right to Public Benefits*.[3]

Sacco's underlying thesis is that New York's constitution, as intimated by the *Aliessa* court, mandates the provision of essential state-funded public benefits to low-income undocumented New Yorkers who reside unlawfully in the United States.[4] Specifically, Sacco contends that based on the *Aliessa* court's interpretation of both the New York State Constitution's "care for the needy" provision[5] and its equal protection clause,[6] those constitutional provisions apply no differently to undocumented residents than they do to documented residents and citizens.[7] As such, Sacco argues, there is no constitutionally legitimate basis to deny public benefits to undocumented immigrants that otherwise must be provided to any other New York resident.[8]

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

2 My *Aliessa* co-counsel were Elisabeth R. Benjamin, Esq., M.P.H., currently Vice President of Health Initiatives, Community Service Society, New York City; and Constance P. Carden, Esq., formerly with the New York Legal Assistance Group.

3 Steven Sacco, *In Defense of the Eligible Undocumented New Yorker's State Constitutional Right to Public Benefits*, 40 N.Y.U. REV. L. & SOC. CHANGE 181 (2016).

4 *Id.* at 184. For purposes of consistency, these comments will use the terms "documented" and "undocumented" as Sacco does in his article. *See id.* at 185–86. As defined by Sacco, a "documented resident" is a non-U.S. citizen who has the Department of Homeland Security's (DHS) permission and/or acquiescence to reside in the United States, while an "undocumented resident" is a non-U.S. citizen who resides in the United States without DHS's permission or acquiescence. *Id.*

5 N.Y. CONST. art. XVII, §§ 1, 3 (amended 2001).

6 N.Y. CONST. art. I, § 11 (amended 2001).

7 Sacco, *supra* note 3, at 204.

8 *Id.* Undocumented New Yorkers are currently entitled to a number of public benefits. These benefits include emergency medical care, general health care benefits for children under nineteen years old, pregnancy-related medical care for pregnant women, and workers' compensation benefits.

This brief response to Sacco's article suggests that decisions to pursue constitutional rights litigation, such as that proposed by Sacco, should be based upon circumspect and careful consideration of political context, public support, and practical consequences, in addition to pedagogic legal analysis. Specifically, this article begins by addressing three strategic reasons why the *Aliessa* attorneys purposely limited the plaintiffs' class in *Aliessa* to documented immigrants. This article next discusses the importance of taking historical and societal contexts into account before litigating constitutional principles. Finally, this article submits that prudence is as important a factor as legal analysis in choosing to ask a single judge to expand a person's constitutional rights.

In litigating *Aliessa*, plaintiffs' attorneys were not unmindful that the constitutional claims we advanced on behalf of our clients were arguably equally applicable to undocumented immigrants living in New York. For tactical reasons, however, we deliberately limited plaintiffs' class in *Aliessa* to documented immigrants. First, to press the most compelling equitable considerations possible, plaintiffs' class included only those documented immigrants who were eligible for Medicaid benefits prior to 1997, but lost their eligibility for Medicaid benefits solely as a result of their immigrant status under New York's 1997 Welfare Reform Act.[9] Undocumented immigrants were not entitled to non-emergency Medicaid benefits either before or after the 1997 implementation of the Welfare Reform Act.

Second, given the nation's anti-immigrant sensibilities that were incorporated into the 1996 federal Personal Responsibility and Work Opportunity Reconciliation Act,[10] plaintiffs' attorneys sensed that an attempt to persuade the courts to mandate an extension of benefits to additional categories of immigrants, as opposed to merely a restoration of benefits to formerly eligible immigrants, could undermine the strength of plaintiffs' constitutional arguments.

Third, plaintiffs' attorneys concluded they had a better chance of success if they could persuade the courts to apply a strict scrutiny standard to analyze New York's discriminatory laws against plaintiffs' class. In light of Supreme Court precedent, plaintiffs' counsel believed that an argument

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Undocumented New Yorkers are not entitled to cash assistance or food stamps, and undocumented New York adults are not entitled to general health care benefits.

9 New York State Welfare Reform Act of 1997, N.Y. Laws of 1997, ch. 436, Part B; N.Y. Soc. Serv. Law § 122.

10 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2015 (PRWORA). Title IV of PRWORA rendered many categories of documented immigrants ineligible for federally funded Medicaid for five years or more, depending on their immigrant status. Title IV also barred federally funded Medicaid for documented immigrants who were not classified as "qualified aliens." *See* 8 U.S.C. § 1641.

that the strict scrutiny standard should be applied to undocumented immigrants was untenable.[11]

Needless to say, plaintiffs' attorneys were elated that the Court of Appeals ruled in their clients' favor on all three constitutional grounds they had urged, not just one.[12] Nonetheless, it did not go unnoticed by plaintiffs' attorneys that the *Aliessa* court did not expressly limit its analysis to documented immigrants. And as Sacco forcefully urges, the *Aliessa* decision suggests a constitutional construct that offers the possibility that, under the right circumstances, New York courts might hold that low-income undocumented immigrants, like their documented counterparts, are constitutionally entitled to state-funded benefits.

That obtaining public benefits for undocumented New Yorkers might theoretically be possible through constitutional litigation, however, does not address the equally critical question of whether constitutional litigation is the appropriate vehicle to achieve that outcome. Certainly, as Sacco's article makes abundantly clear, in the fifteen years that have elapsed since *Aliessa*, no court in the country, let alone in New York, has been asked to compel a government entity to provide publicly funded benefits to undocumented immigrants. And, *a fortiori*, no court has done so.

In fact, as Sacco recognizes, since 2001, only a handful of New York courts have addressed the government's failure to provide documented immigrants with the same level of public benefits provided to citizens, and none has granted immigrants' requests for equal benefits. Since *Aliessa*, the Court of Appeals has had only one occasion to consider *Aliessa*'s applicability to another case involving documented immigrants' access to public benefits. In *Khrapunskiy v. Doar*, the Court of Appeals distinguished *Aliessa* and held that it was a denial of neither equal protection safeguards nor New York's constitutional care for the needy obligations for New York to provide a higher level of cash benefits to disabled citizens than those provided to documented non-citizens.[13]

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11 *See* Plyler v. Doe, 457 U.S. 202, 223 (1982). In this case challenging Texas's allegedly discriminatory law, the Court stated: "Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'" *Id.* Jimenez v. Coughlin, 117 A.D.2d 1, 4–5 (3d Dep't 1986). "[W]e read . . . *Plyler* . . . as flatly holding that deportable aliens . . . do not constitute a suspect class for purposes of equal protection analysis." *See also* State v. Osman, 139 P.3d 334, 341 (Wash. 2006); State, Dep't of Revenue v. Cosio, 858 P.2d 621, 626–27 (Alaska 1993).

12 The *Aliessa* plaintiffs argued to the Court of Appeals that New York's newly implemented Medicaid laws violated New York's constitutional obligation to provide care to the needy and their right to equal protection under law under both New York's and the United States' equal protection clauses. *See* Pls.' App. Br., 2000 WL 34030636, 22–47 (N.Y. Dec. 26, 2000).

13 Khrapunskiy v. Doar, 909 N.E.2d 70, 77 (N.Y. 2009).

When *Aliessa* was decided, its significance as a landmark opinion that offered the possibility of shaping future litigation on behalf of immigrants' rights appeared evident. That so few courts have relied on *Aliessa*'s constitutional analysis to afford greater protections to immigrants is perhaps disheartening, but it is not unanticipated.

Recall that *Aliessa* was decided on June 5, 2001. Three months later, on September 11, 2001, several non-citizens, most of whom were documented, inflicted the most horrific attack that was ever perpetrated on American soil against American citizens. Barely seven years later, the United States suffered its most devastating economic crisis since the Great Depression. It is therefore hardly surprising that, at the very least, the country's political will to expand public benefits to non-citizens would have been exceedingly low during the past decade and a half. Given the historical and political realities of the times, perhaps it is more surprising that since *Aliessa*, at least three appellate courts outside New York State concurred with *Aliessa* that the states' deprivation of state-funded medical benefits violated the constitutional rights of documented immigrants.[14]

To petition the courts to compel New York State to provide, for the first time ever, publicly funded benefits to low-income undocumented immigrants is not a decision that should be made in a vacuum by considering only the potential strength of a theoretical constitutional argument. To the contrary, in deciding whether to use the judicial system to effect social change, impact attorneys must consider the historical and political context, community support, and other key factors that have little to do with the validity of the legal analysis.

Undeniably, at different times in history, the judiciary, invoking constitutional doctrine, has been the catapult for social and political change in America. The United States Supreme Court, for example, gave women a constitutional right to have an abortion[15] and access to contraception;[16] it gave undocumented immigrant children a constitutional right to a public education;[17] it gave black children a constitutional right to attend school with white children;[18] it gave people of different races a constitutional right to marry each other;[19] and recently, it gave same-sex couples the constitutional right to marry.[20]

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14 *See* Finch v. Commonwealth Health Ins. Connector Auth. (Finch II), 959 N.E.2d 970 (Mass. 2012); Ehrlich v. Perez, 908 A.2d 1220 (Md. 2006); Kurti v. Maricopa Cty., 33 P.3d (Ariz. 2001).

15 Roe v. Wade, 410 U.S. 113 (1973).

16 Griswold v. Connecticut, 381 U.S. 479 (1965).

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

18 Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

19 Loving v. Virginia, 388 U.S. 1 (1967).

20 Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

None of these cases wound their way through the judicial system simply because an aggrieved plaintiff and her lawyer thought they had a valid constitutional argument. To the contrary, before seeking judicial intervention in these cases, the parties, lawyers, and community advocates worked together for years to create an organizing strategy, a public relations strategy, a legislative advocacy strategy, a fund-raising strategy, and a community support strategy. Before implementing a judicial strategy, plaintiffs were carefully vetted, lawyers were carefully chosen, potential amicus curiae were solicited, and the appropriate courts were selected. Litigation to extend constitutional rights may not always be successful, but without diligent and protracted planning, the odds of succeeding are dramatically reduced.[21]

Before deciding to litigate *Aliessa*, plaintiffs' attorneys deliberately and conscientiously weighed as many of these factors as possible. Critical to plaintiffs' attorneys' decision to file constitutional litigation was the fact that, from its creation in 1965 until 1997, New York's Medicaid program had provided Medicaid benefits to plaintiffs' class of documented

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21 Famously, Thurgood Marshall and his legal team exemplified this principle in their formulation and implementation of their strategy to end *de jure* racial segregation in public schools. As observed in Richard Kluger's sweeping history of *Brown v. Board of Education*, litigation challenging the unconstitutionality of racial segregation was only one component of a strategy that included boycotts, marches, a public relations campaign, and community organizing. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (Alfred A. Knopf 1975).

This principle is also demonstrated dramatically by the events leading to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court's extension of the constitutional right to marry to same sex couples. In *How Gay Marriage Won in the Supreme Court*, a scrupulously researched article published in *The Atlantic* one week after *Obergefell* was decided, journalist Molly Ball explained:

> [The *Obergefell*] decision wasn't solely or even primarily the work of the lawyers and plaintiffs who brought the case. It was the product of decades of activism that made the idea of gay marriage seem plausible, desirable, and right. . . .
> The fight for gay marriage was, above all, a political campaign—a decades-long effort to win over the American public and, in turn, the court. It was a campaign with no fixed election day, focused on an electorate of nine people. But what it achieved was remarkable: not just a Supreme Court decision but a revolution in the way America sees its gay citizens.

Molly Ball, *How Gay Marriage Won in the Supreme Court*, THE ATLANTIC (July 1, 2015), www.theatlantic.com/politics/archive/2015/07/gay-marriage-supreme-court-politics-activism/397052/ [https://perma.cc/R9QA-VNZH]

In contrast, Supreme Court Justice Ruth Bader Ginsburg has publicly expressed her concern that the public backlash against the right to abortion exists, in part, because advocates litigated the constitutional right to abortion before creating the political and social culture necessary to support it. *See* Emily Bazelon, *Backlash Whiplash: Is Justice Ginsburg right that* Roe v. Wade *should make the court cautious about gay marriage?*, SLATE (May 14, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/05/justice_ginsburg_and_roe_v_wade_caution_for_gay_marriage.html [https://perma.cc/5HUV-YU2A].

immigrants. Upon the adoption of its Welfare Reform Act of 1997,[22] New York State abruptly discontinued Medicaid eligibility for plaintiffs' class of previously-eligible immigrants. Plaintiffs' attorneys concluded that legal arguments to reinstate previously-provided benefits would be far more emotionally compelling than legal arguments to provide benefits to an entirely new group of beneficiaries.

Furthermore, when plaintiffs' attorneys filed their complaint in late 1998, the United States economy was in sound financial shape and continued to be sound through early 2001.[23] Consequently, any argument that the extension of benefits to plaintiffs' class would drain New York's ability to provide benefits to supposedly more deserving New Yorkers would be indefensible based on economic data.

Additionally, before the passage of the New York State Welfare Reform Act, plaintiffs' attorneys had been part of a large coalition of health care advocates and providers throughout New York that had organized to attempt to preserve health care benefits to New Yorkers. This coalition remained mobilized during the several years that *Aliessa* made its way through the courts to provide sustained public and community support for the litigation.

Finally, it is undeniable that *Aliessa* plaintiffs and their attorneys were the beneficiaries of luck in terms of historical timing. Both the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and the New York State Welfare Reform Act of 1997 reflected anti-immigrant views. However, until the September 11, 2001 terrorist attacks, which included the destruction of the World Trade Centers in New York City, those viewpoints were more theoretical than real.

The New York Court of Appeals issued its decision in *Aliessa* on June 5, 2001, barely three months before the terrorist acts of September 11. That day of terrorism marked the beginning of extreme anti-immigrant outlooks and ideologies that have since spread throughout the United States. Had the events of September 11 occurred three months earlier, the *Aliessa* decision might very well have been conspicuously different.

As Sacco observes, New York State legislation currently provides health care coverage to low-income undocumented immigrant children and emergency medical care to low-income undocumented adults and children. But like the federal government and most states, New York State has never

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22 *See* note 9, *supra*.

23 Kimberly Amadeo, *Unemployment Rate by Year Compared to Inflation and GDP*, THE BALANCE (Nov. 8, 2016), https://www.thebalance.com/unemployment-rate-by-year-3305506 [https://perma.cc/6X5H-FEEZ].

provided cash assistance or other state-funded benefits to low-income undocumented immigrants.

To give undocumented New York immigrants the same access to publicly funded benefits as citizens and documented immigrants may well be a laudable goal, but it is one without precedent in most states, including New York State. Such a goal may be less momentous than the goal of racial desegregation in public schools or marriage equality, but it is nonetheless one that would have a significant impact throughout New York. Under these circumstances, the strategies taken to achieve the goal of providing state-funded benefits to low-income undocumented immigrants warrant the same deliberate considerations that were warranted to achieve the goals of racial desegregation in public schools or marriage equality, especially if the strategies include a litigation strategy.

In short, a certain degree of caution is prudent before a litigation strategy is chosen, and, if chosen, before it is implemented, to achieve the goal of providing undocumented low-income immigrants with publicly funded benefits. Indeed, it may well be that given the apparent reluctance of various courts thus far, including the Court of Appeals, to expand *Aliessa*'s breadth beyond the facts presented in that case, a litigation strategy may not be the best course of action. To the contrary, for example, it may be that as in California, a well-planned legislative campaign to achieve the goal may be the better blueprint.

To be clear, these comments are not meant to suggest that the pursuit of equal treatment for undocumented immigrants with respect to state-funded benefits in the courts is not a legitimate strategy. But a litigation strategy to achieve constitutional rights for a class of people who have been accorded constitutional rights in only exceptionally limited circumstances will necessarily require considerable time, effort, and resources. Furthermore, despite Sacco's compelling legal analysis, it is impossible to predict whether a constitutional litigation strategy would be successful.[24]

To the contrary, these remarks are intended to suggest that regardless of the strength of a party's potential legal arguments, asking a court to create new constitutional rights is fraught with difficult challenges. If litigation to create a new constitutional right to public benefits for

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24 A legislative campaign to expand a group's legal rights or access to benefits can be repeated indefinitely if it is initially unsuccessful. In contrast, unsuccessful litigation intended to achieve the same result is extremely difficult, if not impossible, to undo. On the other hand, a litigation strategy that is part of a multi-strategy campaign to expand a group's rights or benefits that takes into account the possibility of a loss in court may well be reasonable. *See* Ben Depoorter, *The Upside of Losing*, 113 COLUM. L. REV. 817 (2013) (arguing that unsuccessful impact litigation can nonetheless have positive consequences).

undocumented immigrants in New York State is to be undertaken, it should be brought only after thoughtful and careful consideration and planning. The stakes are too high to do anything less.