

Closing the Doors to Justice:  
A Critique of *Pimentel v. Dreyfus* and the Application of  
Legal Formalism to the Elimination of Food Assistance  
Benefits for Legal Immigrants

*Hannah Zommick\**

I. INTRODUCTION

The Statue of Liberty, with her torch illuminating the New York Harbor, has for years welcomed immigrants from all over the world and from all walks of life—the “huddled masses yearning to breathe free.”<sup>1</sup> Unfortunately, in today’s post-recession climate where massive government cuts are the topic of daily news, many valuable programs designed to welcome, help, and aid immigrants are being targeted for elimination.

On December 29, 2010, the Washington State Department of Social and Health Services (DSHS) adopted a regulation that, as of February 1, 2011, would eliminate, in whole or in part, basic food assistance for approximately 10,581 Washington households, affecting 14,350 individuals.<sup>2</sup> These households all had one thing in common: at least one member of the household was receiving basic food assistance from Washington State’s Food Assistance Program for legal immigrants (FAP).<sup>3</sup>

One of these households was that of Ms. Monica Navarro Pimentel, a mother of three and a survivor of domestic violence.<sup>4</sup> With the assistance of FAP, Ms. Pimentel was able to support herself and her children.<sup>5</sup> For Ms. Pimentel and other survivors of domestic violence, the loss of

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\* J.D. Candidate, Seattle University School of Law, 2014; B.A., Political Science, Spanish and Portuguese Studies, University of Washington. Many thanks to the Law Review staff for their editorial assistance and to my family, especially Itai Rosenberger, for all the love and support.

1. Emma Lazarus, *The New Colossus*, POETS, <http://www.poets.org/viewmedia.php/prmMID/16111> (last visited May 28, 2014).

2. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1103 (9th Cir. 2012).

3. *Id.*

4. *Id.* at 1102.

5. Brief of Amicus Curiae Legal Momentum in Support of Plaintiff-Appellee at 18, *Pimentel v. Dreyfus*, 670 F.3d 1096 (9th Cir. 2012) (No. 11-35237).

this critical food assistance makes it substantially more difficult to survive independently from their abusers.<sup>6</sup>

In response to DSHS's decision to eliminate FAP, Ms. Pimentel filed a class action lawsuit to enjoin the State from eliminating the program.<sup>7</sup> She challenged the elimination as a violation of the Fourteenth Amendment's Equal Protection and Due Process clauses.<sup>8</sup> Initially, a trial court granted a preliminary injunction, enjoining the State from eliminating these benefits.<sup>9</sup> The Ninth Circuit Court of Appeals, however, reversed and vacated the lower court's ruling and the injunction, finding that Ms. Pimentel and, therefore, the class she represented did not have standing to bring an Equal Protection or Due Process challenge to the State's decision.<sup>10</sup>

In July 2012, FAP<sup>11</sup> had not been completely eliminated but was reduced by fifty percent by the Washington State legislature.<sup>12</sup> The legislature estimated that it could save approximately thirty million dollars over the next two years by cutting the program,<sup>13</sup> but at what cost to the thousands of individuals and families who had relied on FAP to survive?

The possible elimination of and the fifty percent reduction in FAP have had a devastating impact on the immigrant community in Washington State. With these cuts, approximately 14,000 Washington State chil-

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6. *Id.*

Termination of food assistance affects multiple categories of battered immigrant women and their children. For example, loss of food benefits undermines the ability of battered women to leave their abusers, and also endangers battered women who have separated from their abusers, because, in addition to the hardships of hunger and malnourishment, such women face additional harm when their inability to feed their children drives them back into the abusive relationships they were trying to flee.

*Id.* at 12.

7. Ms. Pimentel was represented by Columbia Legal Services. *Pimentel*, 670 F.3d at 1096.

8. The 14th Amendment states, "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

9. *Pimentel*, 670 F.3d at 1105.

10. *Id.* at 1111.

11. The official title of the program is the Food Assistance Program (FAP); however, it is also referred to as State Food Assistance and sometimes abbreviated as SFA. *Compare State Food Assistance Program (FAP)*, WASH. ST. DEP'T OF SOC. & HEALTH SERVICES, <http://www.dshs.wa.gov/onlinecso/fap.shtml> (last visited May 28, 2014), with *Policy Brief: State Food Assistance*, CHILDREN'S ALLIANCE, 1 (Jan. 10, 2013), [www.wsahnc.org/download/State\\_Food\\_Assistance\\_policy\\_brief.pdf](http://www.wsahnc.org/download/State_Food_Assistance_policy_brief.pdf).

12. 2011 Wash. Sess. Law 78.

13. Zach Smith, *Food Assistance for Legal Immigrants Will Drop by Half*, OLYMPIAN (June 30, 2012), <http://www.theolympian.com/2012/06/30/2159204/food-assistance-will-drop-by-half.html>.

dren lost access to food assistance benefits.<sup>14</sup> One recipient of FAP, Hidai Johnny of the Marshall Islands, told KUOW News that the fifty percent reduction means that his family—which includes himself, his wife, their newborn, his grandparents, and a cousin—will have to manage with two hundred dollars less each month to pay for food.<sup>15</sup> Hidai’s story is just one of many.<sup>16</sup>

This Comment contends that the Ninth Circuit’s opinion in *Pimentel v. Dreyfus* employed a legal formalist approach and that by applying this framework, the court prevented legal immigrants, who were caught between the strict eligibility restrictions of welfare reform, from asserting their rights through the justice system.<sup>17</sup>

The legal formalist approach “treats the law as a set of scientific formulae or principles that are derived from the study of case law. These principles create an internal analytical framework which, when applied to a set of facts, leads the decision-maker [sic], through logical deduction, to the correct outcome in a case.”<sup>18</sup> On the other hand, legal realism includes the use of social conditions as another variable in reaching a decision<sup>19</sup> “in lieu of mere reliance on legal rules [that] may advance outdated or dysfunctional policies.”<sup>20</sup>

This Comment asserts that the *Pimentel* court missed an opportunity to promote greater access to the justice system for the immigrant community when it used legal formalism to deny Ms. Pimentel’s Fourteenth Amendment claims and to reject alternative bases for her discrim-

14. Press Release, Children’s Alliance, Majority of Senate Supports Fully Funding State Food Assistance (Mar. 19, 2013), available at [http://www.childrensalliance.org/sites/default/files/Majority\\_Senate\\_Supports\\_Food\\_Assistance\\_1.pdf](http://www.childrensalliance.org/sites/default/files/Majority_Senate_Supports_Food_Assistance_1.pdf).

15. Lesley McClurg, *Legal Immigrants Hit Hard by State Budget Cuts*, KUOW (July 2, 2012), <http://www2.kuow.org/program.php?id=27207>.

16. A letter signed by twenty-six state senators sent to the Washington State Senate Ways and Means Committee in support of reinstating FAP stated, “At a time when an estimated one-in-four Washington children live in food-insecure households, the 2011 cut to State Food Assistance deepened the economic inequality for many of the youngest Washingtonians.” *Letter: Senators in Support of State Food Assistance*, CHILDREN’S ALLIANCE, 1 (Mar. 26, 2013) [http://www.childrensalliance.org/sites/default/files/Majority\\_Senate\\_Supports\\_Food\\_Assistance\\_26.pdf](http://www.childrensalliance.org/sites/default/files/Majority_Senate_Supports_Food_Assistance_26.pdf) [hereinafter *State Senator Letter*].

17. Inspiration for this Comment came from an Op-Ed written by Robert Westley, the LOCHEF Professor of Legal Ethics & Professional Responsibility at Tulane University Law School. Robert Westley, *Constitutional Formalism Denies Aid to Legal Immigrants*, JURIST-FORUM (Mar. 17, 2012), <http://jurist.org/forum/2012/03/robert-westley-pimentel.php>.

18. Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1, 10–11 (2009).

19. “[F]or the legal realists, a reliance on legal rules alone was misplaced, because rules often contained concepts such as ‘reasonableness’ that were subject to varied interpretations . . .” *Id.* at 11.

20. *Id.*

ination and property interest claims. Part II provides background information on the establishment of FAP, which was created in response to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. This Part discusses the positive impact the creation of FAP had on the immigrant and larger community, and the crisis that has resulted from the reduction of funding for this program. Part II also provides the procedural history of the *Pimentel* case. Part III further analyzes the court's decision in the context of legal formalism. Part IV introduces alternative methods that the court could have used, instead of legal formalism, to determine if Ms. Pimentel would succeed on the merits of her claims. Finally, Part V includes a brief conclusion.

## II. THE CREATION AND ELIMINATION OF FAP

This Part first discusses how the history of food assistance in the United States and in Washington State shaped the present allocation of food assistance benefits with regard to immigrants. It then discusses how the procedural history of Ms. Pimentel's case shows legal formalism's ability to alter the outcome of a case.

### *A. History of SNAP and FAP*

Government food assistance is a recent part of the United States' history. The first federal food assistance program, the Food Stamp Program, lasted from 1939 to 1943.<sup>21</sup> At its peak, four million people participated in the program.<sup>22</sup> The program ended in 1943 because "the conditions that brought the program into being—unmarketable food surpluses and widespread unemployment—no longer existed."<sup>23</sup> Needless to say, over the next twenty years, many senators, representatives, and, most notably, President John F. Kennedy worked to reinstate a federal government food assistance program. In fact, President Kennedy's first Executive Order called for an expansion of food assistance for the poor.<sup>24</sup> In February of 1961, he initiated a food stamp pilot program that would become, under President Johnson's administration, a permanent federal

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21. *A Short History of SNAP*, U.S. DEP'T OF AGRIC. FOOD & NUTRITION SERVICE, <http://www.fns.usda.gov/snap/rules/Legislation/about.htm> (last modified Apr. 26, 2012). "The idea for the first FSP is credited to various people, most notably Secretary of Agriculture Henry Wallace and the program's first Administrator Milo Perkins." *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

government program established as law under the Food Stamp Act of 1965.<sup>25</sup>

Today, the federal food assistance program is called Supplemental Nutrition Assistance Program (SNAP); in Washington, the program is administered locally by DSHS.<sup>26</sup> Although the federal program went through many different renditions since its enactment,<sup>27</sup> most legal immigrants were eligible to receive federal food assistance subject to the program's income qualifications up until the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).<sup>28</sup>

PRWORA is commonly known and referred to as the Welfare Reform Act.<sup>29</sup> This sweeping welfare reform legislation was passed by a Republican-controlled Congress, united under its "Contract with America,"<sup>30</sup> and signed by then-President Bill Clinton, who had promised during his campaign to "end welfare as we know it."<sup>31</sup> Title IV (Restriction Welfare and Public Benefits for Aliens) of PRWORA dramatically restricted eligibility requirements for federal and state welfare benefits. Title IV's policy statement reiterates that "[i]t continues to be the immigration policy of the United States that aliens within the Nation's borders not depend on public resources to meet their needs . . . [and] the availability of public benefits not constitute an incentive for immigration to the United States."<sup>32</sup> The Act created new classifications for the eligibility of legal immigrants. It defined who were "qualified aliens,"<sup>33</sup> which effectively served to disqualify almost all legal immigrants that had previously received this aid. "Qualified aliens" included people lawfully admitted for permanent residence; asylum seekers; refugees; immigrants paroled

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25. *Id.*

26. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1101 (9th Cir. 2012).

27. The 2008 Farm Bill changed the name of the program to the Supplemental Nutrition Assistance Program (SNAP) as a way to fight the stigma the term "food stamps" had acquired. *A Short History of SNAP*, *supra* note 21.

28. *Pimentel*, 670 F.3d at 1099.

29. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 (1996).

30. Katherine Anne Paddock Betcher, Note, *Revisiting the Personal Responsibility and Work Opportunity Reconciliation Act and Calling for Equality: Problematic Moral Regulations and the Changing Legal Status of LGBT Families in a New Obama Administration*, 31 WOMEN'S RTS. L. REP. 104, 114 (2009). The "Contract with America" was a Republican conservative moral and economic philosophy based around President Reagan's 1985 State of the Union Address and heavily emphasized curtailing welfare spending. *Id.*

31. David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1289 & n.55 (2004).

32. 8 U.S.C. § 1601(2)(A)–(B) (2012).

33. 8 U.S.C. § 1641 (2012).

into the United States for at least one year; immigrants whose deportation was being withheld; immigrants who had been granted conditional entry; certain Cuban and Haitian entrants; and certain victims of battery or extreme cruelty by a spouse or other family members.<sup>34</sup> All other legal immigrants that did not fit within these categories were no longer eligible for the federal funds.<sup>35</sup>

PRWORA also implemented additional criteria that a “qualified alien” must meet in order to be eligible for federal benefits. The most relevant criterion for this Comment’s focus is the requirement that the individual maintain her qualified status for five or more years to be eligible.<sup>36</sup> States that administer SNAP are required under PRWORA to extend eligibility to classes of “qualified aliens.”<sup>37</sup> However, states are able to create their own eligibility requirements for legal immigrants that are neither barred from receiving nor required to receive benefits.

Under the Emergency Supplemental Appropriations Act of 1997, states were given the option to issue benefits to individuals who were ineligible to participate in the federal food stamp program solely as a result of section 402 or 403 of PRWORA (8 U.S.C. § 1612 or § 1613),<sup>38</sup> which included the citizenship and alien-status requirements that barred Ms. Pimentel.

In response to the Emergency Supplemental Appropriations Act and the PRWORA eligibility restrictions, Washington State enacted FAP for legal immigrants in 1997.<sup>39</sup> Under FAP, legal immigrants are eligible to receive food assistance if (1) they meet the pre-PRWORA alien-status requirements of the Food Stamp Act; and (2) their ineligibility for federal food stamps is due solely to PRWORA’s alien-status eligibility provisions, as defined in Washington Administrative Code § 388-424-0020.<sup>40</sup>

FAP was championed through both chambers of Washington’s legislature with bipartisan support and was passed unanimously in both chambers.<sup>41</sup> In fact, Washington was among the first of eleven states to create food assistance programs for those legal immigrants not eligible to

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34. *Id.* § 1641(b)–(c).

35. *Id.*

36. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1100 n.5 (9th Cir. 2012).

37. 8 U.S.C. § 1622(b)(1)–(3) (2012).

38. 7 U.S.C. § 2016(i) (2012).

39. WASH. REV. CODE § 74.08A.120 (2013).

40. *See* WASH. ADMIN. CODE § 388-424-0025 (2013).

41. *Final Bill Report: ESB 6098*, WASH. ST. LEGISLATURE (Apr. 17, 1997), <http://apps.leg.wa.gov/documents/billdocs/1997-98/Pdf/Bill%20Reports/Senate/6098.FBR.pdf>.

receive SNAP.<sup>42</sup> Washington was motivated by deep cultural and economic ties to non-citizens, a desire to have a welfare program that did not discriminate against any group of people, and the goal to ensure equal treatment for immigrants past, present, and future.<sup>43</sup>

Upon FAP's creation, the program was administered by DSHS alongside SNAP, under Washington's "Basic Food Program."<sup>44</sup> A household is eligible for Basic Food as long as one member of the household is eligible for either SNAP or FAP.<sup>45</sup> Households can receive both SNAP and FAP as long as the total household benefit does not exceed a maximum amount.<sup>46</sup> In Ms. Pimentel's case, her two youngest children were receiving SNAP because they are U.S. citizens, while she and her oldest son (both qualified aliens) received FAP.<sup>47</sup> "DSHS uses a single application form and a single eligibility-review form for food, medical, cash, and other public benefits."<sup>48</sup> Neither the application nor the eligibility-review form indicates that there are two separate funding sources or otherwise distinguishes between federally and state-funded food benefits.<sup>49</sup> DSHS does not communicate to recipients if they were found eligible to receive FAP or SNAP; recipients are informed simply whether they are eligible for the Basic Food Program.<sup>50</sup> This lack of distinction is important for the discussion of Ms. Pimentel's due process

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42. The other states include California, Florida, Illinois, Maryland, Massachusetts, Nebraska, New Jersey, New York, Rhode Island, and Texas. Stacy Dean & Kelly Carmody, *States Now Have the Option to Purchase Food Stamps to Provide Food Assistance to Legal Immigrants*, CTR. ON BUDGET & POL'Y PRIORITIES (Dec. 4, 1997), <http://www.cbpp.org/cms/index.cfm?fa=archivePage&id=statepur.htm>. For more information about the other states' approaches to these new programs, see Lauren E. Moynihan, *Welfare Reform and the Meaning of Membership: Constitutional Challenges and State Reactions*, 12 GEO. IMMIGR. L.J. 657, 674–75 (1998).

43. *Scrambling to Repair Immigrant Safety Net*, SEATTLE TIMES (Apr. 8, 1997), <http://community.seattletimes.nwsour.com/archive/?date=19970408&slug=2532769>. The *Seattle Times* noted that state legislators criticized the new federal welfare reform laws because they did "not reflect Washington's commitment to those legal immigrants within Washington's borders who have played by the rules and who live in our communities and participate in the American way of life, providing economic and cultural enrichment to Washington State's population." *Id.*; see also Kery Murakami, *Study, or Lose \$173 A Month*, SEATTLE TIMES, Feb. 25, 1997, <http://community.seattletimes.nwsour.com/archive/?date=19970225&slug=2525669>; Kery Murakami, *Locke Not Far from GOP Welfare Plan—Governor Takes a Tough Stance on Aid Limits, Required Work*, SEATTLE TIMES, Feb. 26, 1997, <http://community.seattletimes.nwsour.com/archive/?date=19970226&slug=2525852>.

44. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1101 (9th Cir. 2012).

45. *Id.*

46. WASH. ADMIN. CODE § 388-400-0045; WASH. ADMIN. CODE § 388-478-0060.9.

47. *Pimentel*, 670 F.3d at 1104.

48. *Id.* at 1101.

49. *Id.*

50. *Id.*

claims in regards to the notices she received about her approval for FAP and its subsequent elimination. This is discussed further in section C.<sup>51</sup>

### B. Impact of the Elimination of FAP

Almost fifteen years after Washington led the nation in affirming its commitment to provide for the state's legal immigrant population, Washington's reduction of FAP benefits by fifty percent and the possible elimination of the program has had drastic effects in the state. The cuts to FAP primarily impacted families of color,<sup>52</sup> which deepens racial inequality in Washington State. Before the reduction, FAP helped to feed an "estimated 12,000 children whose families [came] from places such as Mexico, Eritrea, Vietnam[,] and the South Pacific."<sup>53</sup> As a result of the cuts, the average benefit of \$115 per month per person was reduced to \$55 per month per person. This change means that families' food budgets were reduced to less than \$2 a day per person—an insufficient amount to purchase nutritious foods for a healthy diet.<sup>54</sup> The loss of benefits also "caused many families to visit hospitals and clinics because of belly ache known as 'Empty Stomach,'" resulting in medical bills these families could not afford to pay.<sup>55</sup>

FAP also serves as a form of economic stimulus for the state. Families that purchase food with these FAP benefits put money back into the local community.<sup>56</sup> The money families receive through FAP "go directly to community grocery stores across the state, making a \$9 local economic impact for every \$5 in benefits spent on food, according to the USDA. Eliminating the program would cause local communities to miss out on over \$100 million in economic impact. . . ."<sup>57</sup>

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51. See *infra* Part II.C.

52. *Hungry in Washington: September 2012*, CHILDREN'S ALLIANCE, 4 (Sept. 6, 2012), [http://www.childrensalliance.org/sites/default/files/Hungry\\_in\\_Washington\\_2012.pdf](http://www.childrensalliance.org/sites/default/files/Hungry_in_Washington_2012.pdf).

53. Press Release, Children's Alliance, Community Organizations Speak Up: Equal Benefits for Hungry Families (Feb. 13, 2014) [hereinafter *Equal Benefits for Hungry Families*], available at [http://www.childrensalliance.org/sites/default/files/Press\\_Release\\_Food\\_Assistance\\_Immigrant\\_Families.pdf](http://www.childrensalliance.org/sites/default/files/Press_Release_Food_Assistance_Immigrant_Families.pdf).

54. *Children, Opportunity and State Food Assistance*, CHILDREN'S ALLIANCE (Mar. 28, 2013), [http://www.childrensalliance.org/sites/default/files/Children\\_and\\_State\\_Food\\_Assistance\\_March2013.pdf](http://www.childrensalliance.org/sites/default/files/Children_and_State_Food_Assistance_March2013.pdf).

55. *Equal Benefits for Hungry Families*, *supra* note 53.

56. *The Facts About State Food Assistance*, CHILDREN'S ALLIANCE, 2 (Nov. 15, 2011), <http://www.childrensalliance.org/sites/default/files/FactsAboutStateFoodAssistance20111411.pdf>.

57. *Id.*

*C. Procedural History of Pimentel v. Dreyfus*

Ms. Pimentel was married to a United States citizen who was abusive.<sup>58</sup> In 2006, she filed an I-360 Self-Petition under the Violence Against Women Act (VAWA) of 1994.<sup>59</sup> Ms. Pimentel established a prima facie case that she was a victim of domestic violence for the Self-Petition and was granted legal status.<sup>60</sup>

Under Washington law, she and her oldest son become qualified aliens because of her status as a victim of domestic violence, and subsequently, they were eligible to receive FAP benefits.<sup>61</sup> Ms. Pimentel had received food assistance since 2005.<sup>62</sup> With this assistance, Ms. Pimentel was able to leave her abuser and support herself and her children independently.<sup>63</sup>

The fact that FAP and SNAP benefits are administered under the unified title of Washington's Basic Food Program raises the question of whether the state provided sufficient notice to FAP recipients regarding their eligibility for food assistance, as well as the elimination of the program. The first notice that Ms. Pimentel received in January 2011 informed her that the "state-funded Food Assistance Program (FAP) will end . . . because of state budget cuts. You don't have administrative hearing rights when a program ends."<sup>64</sup> Near the end of the letter, a line was included that stated, "[Y]ou may ask to have the case reviewed. You can also ask for an administrative hearing."<sup>65</sup> The letter also listed Ms. Pimentel and her son as members of the household receiving FAP benefits and the amount that the household would continue to receive once the FAP benefits were terminated.<sup>66</sup>

The second notice that Ms. Pimentel received was sent to all households that received a combination of FAP and SNAP benefits, and again Ms. Pimentel was notified of FAP's elimination and that she did not have administrative rights.<sup>67</sup> The notice included a description of FAP, and it was the first time that Ms. Pimentel learned that she and her son were on

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58. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1102 (9th Cir. 2012).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. See Brief for Legal Momentum as Amici Curiae Supporting Plaintiff-Appellee at 18, *Pimentel v. Dreyfus*, 670 F.3d 1096 (9th Cir. 2012) (No. 11-35237).

64. *Pimentel*, 670 F.3d at 1103.

65. *Id.*

66. *Id.*

67. *Id.*

a different food program than her youngest children.<sup>68</sup> Neither this notice nor any previous communication from DSHS explained that Ms. Pimentel and her son were receiving state-funded assistance rather than federally funded assistance, and DSHS did not explain how this alien status determination was made. Similar to the first notice, the second notice ended informing Ms. Pimentel of her privilege to request an administrative hearing. As noted by the Ninth Circuit in its opinion, the second notice did not explain how DSHS determined that Ms. Pimentel and her son were “qualified aliens” eligible for FAP, but not SNAP.<sup>69</sup> The notice also did not show how DSHS computed the FAP or SNAP benefits in accordance with Washington Administrative Code § 388-450-0140.<sup>70</sup>

After the lawsuit commenced, Ms. Pimentel received a third notice from DSHS that explained which documents DSHS reviewed to determine who in the household was eligible for state-funded assistance instead of federally funded assistance.<sup>71</sup>

Ms. Pimentel’s case was first heard in the United State District Court for the Western District of Washington in February 2011. The judge entered a temporary restraining order and certified a class for the Equal Protection claim as well as a subclass for the Due Process claim.<sup>72</sup> The Equal Protection class comprised of 10,350 households, approximately 14,350 individuals who received

state-funded Basic Food benefits under FAP and received notification that these benefits would terminate . . . or are qualified aliens (or persons permanently residing in the United States under color of law) who in the future would be eligible for Basic Food benefits, but for the fact that they do not meet the citizenship and alien-status requirements of WAC 388-424-0020.<sup>73</sup>

The Due Process subclass comprised of Washington State residents who were receiving FAP and whose benefits were now being reduced or eliminated.<sup>74</sup> The district court applied the four-factor test set forth in *Winter v. Natural Res. Def. Council Inc.*, which is used when a plaintiff is seeking a preliminary injunction.<sup>75</sup> A plaintiff seeking a preliminary injunction must establish (1) the likelihood of success on the merits; (2) the

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68. *Id.* at 1104.

69. *Id.* at 1103.

70. *Id.* at 1104.

71. *Id.*

72. *Id.*

73. *Id.* at 1104–05.

74. *Id.* at 1105.

75. *Id.* (citing *Winter v. Natural Res. Def. Council Inc.*, 555 U.S. 7 (2008)).

likelihood of suffering irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the plaintiff's favor; and (4) that an injunction is in the public interest.<sup>76</sup> Courts employ a “sliding scale” approach when balancing these factors so that a stronger showing of one factor can offset a weaker showing of another.<sup>77</sup> The district court found that these four factors all weighed heavily in Ms. Pimentel's favor; it issued the injunction and applied a strict scrutiny standard of review to the proposed elimination.<sup>78</sup> The court enjoined Susan Dreyfus, the Secretary of DSHS, from terminating Ms. Pimentel's or other class members' state-funded food assistance while the litigation was pending. In addition, the court ordered the state to provide Due Process subclass members with individualized determination notices explaining their ineligibility for the federally funded SNAP program.<sup>79</sup>

In response to the district court's decision, Secretary Dreyfus appealed the ruling, and the Ninth Circuit Court of Appeals heard the case in August 2011. The Ninth Circuit reversed and vacated the lower court's ruling and the injunction, finding that Ms. Pimentel—and therefore the class she represented—did not have standing to bring an Equal Protection or Due Process challenge to the state's decision.<sup>80</sup>

The Washington State Legislature subsequently signed into law Engrossed Substitute House Bill 1086, which provided a supplemental operating budget for the remainder of fiscal year 2011 (i.e., until June 30, 2011), and mandated that FAP benefits “be fifty percent of the [SNAP] benefit amount.”<sup>81</sup>

### III. THE NINTH CIRCUIT COURT OF APPEAL'S LEGAL ANALYSIS

#### *A. Standard of Review: How the Court Decided Pimentel v. Dreyfus*

In *Pimentel*, the Ninth Circuit began by establishing that when reviewing a decision to grant or deny a preliminary injunction, the court will employ an abuse of discretion standard.<sup>82</sup> The Ninth Circuit applies a two-part test to determine whether the district court abused its discretion. First, the Ninth Circuit determines *de novo* “whether the trial court

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76. *Winter*, 555 U.S. at 20.

77. *Pimentel*, 670 F.3d at 1105.

78. *Id.*

79. *Id.* at 1104–05.

80. *Id.* at 1111 (reversing the district court's order granting the motion for the preliminary injunction, vacating the injunction, and remanding for further proceeding consistent with the opinion; opinion is without a dissent).

81. 2011 Wash. Sess. Law 78.

82. *Pimentel*, 670 F.3d at 1105.

identified the correct legal rule to apply to the relief requested.”<sup>83</sup> Second, it determines if the district court’s use of the correct legal standard was “(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.”<sup>84</sup>

The Ninth Circuit found error in the district court’s application of a strict scrutiny standard of review to the repeal of FAP because there was no threshold showing of discrimination. The Ninth Circuit found that the discrimination threshold was not met because the entire state-based program had been repealed, and the state-based program and the federal food stamp program were not comparable programs.<sup>85</sup>

### *B. The Court’s Application of Legal Formalism*

Legal formalism involves the strict application of precedents, mechanical jurisprudence, and the separation of legal reasoning from normative or policy considerations.<sup>86</sup> Some leading constitutional formalist theories include original intent,<sup>87</sup> original meaning,<sup>88</sup> and tradition.<sup>89</sup> These legal formalist theories share an important trait: the belief that using the past to determine the present and future is a desirable feature in constitutional interpretation. The legal formalist deference to prior case law and tradition becomes problematic, however, when dealing with what could be construed as a newly recognized fundamental right—food security. In fact, several countries around the world have already recognized that food security and access to affordable food is a fundamental right.<sup>90</sup>

In *Pimentel*, the Ninth Circuit stated that regardless of the level of scrutiny a court applies, a plaintiff must show that the state treated her differently from similarly situated individuals in order to state an Equal Protection claim of any kind.<sup>91</sup> A plaintiff must meet this threshold showing before a court may continue on to determine if the basis of the

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83. *Id.*

84. *Id.* (citing *Cal. Pharmacists Ass’n v. Maxwell-Jolly*, 596 F.3d 1098, 1104 (9th Cir. 2010), *cert. granted on other grounds*, 131 S. Ct. 992 (2011)).

85. *Id.* at 1106–08.

86. See Davis, *supra* note 18, at 9–10; see also Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 1 (2001); Richard A. Posner, *The Jurisprudence of Skepticism*, 82 MICH. L. REV. 827, 831 (1988).

87. The original intent theory is a “constant search for framers’ intent and the use of originalism as a basis for constitutional interpretation.” Chemerinsky, *supra* note 86, at 5.

88. *Id.* at 7.

89. *Id.* at 11.

90. *The Right to Food*, FOOD & AGRIC. ORG. OF UNITED NATIONS, <http://www.fao.org/worldfoodsummit/english/fsheets/food.pdf> (last visited May 28, 2014).

91. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1106 (9th Cir. 2012).

discrimination merits strict scrutiny.<sup>92</sup> The Ninth Circuit found that Ms. Pimentel could not compare former or current FAP recipients to the current SNAP recipients because SNAP is strictly federally funded and FAP is strictly state funded and thus has no bearing on the federally funded program.<sup>93</sup> These two groups of people were not “similarly situated” according to the court.<sup>94</sup> The Ninth Circuit held that because Ms. Pimentel did not point to other individuals in Washington that were receiving a “FAP-like, state-funded food assistance benefits,” the elimination of FAP did not constitute discrimination, “much less alienage-based discrimination.”<sup>95</sup> According to the Ninth Circuit, because Ms. Pimentel did not meet the “similarly situated” standard, the district court erred in applying strict scrutiny to the state’s decision to eliminate the program.<sup>96</sup>

The court’s application of this formulaic rule ignores the reality that the elimination of the program did affect people solely based on their alienage status. Members of the same household, of the same family unit, sharing the same food, were treated differently depending on their immigration status. In fact, as of November 2012, approximately two-thirds of the households that received FAP benefits also included someone who received SNAP benefits.<sup>97</sup> This disconnect from reality is demonstrated by the fact that Ms. Pimentel and her oldest son lost their food assistance benefits, but her youngest children, two U.S. citizens, did not.

The application of legal formalism is also seen in the court’s construction of the class members. The court created a *sui generis*<sup>98</sup> subgroup of legal immigrants who received FAP due to ineligibility for SNAP because of the PRWORA restrictions.<sup>99</sup> Because the court interpreted this class so narrowly, it was impossible to compare this group to other residents receiving food assistance in Washington and therefore impossible to discriminate against this subgroup. However, in reality, this means that people in the same household were not comparable, even though based on the notices from DSHS, it was never clear that there was such a distinction. Even so, because of the court’s adherence to legal formalism, Ms. Pimentel and the class of persons she represented—approximately 3,491 households—were never discriminated against be-

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92. *Id.*

93. *Id.* at 1107.

94. *Id.* at 1106–07.

95. *Id.* at 1109.

96. *Id.*

97. *Policy Brief: State Food Assistance*, *supra* note 11.

98. *Sui generis* means “of its own kind or class.” BLACK’S LAW DICTIONARY (9th ed. 2009).

99. *See Pimentel*, 670 F.3d at 1104–05.

cause none of them were eligible for federal food assistance, and they had all been excluded from receiving further aid from the state.

Courts have applied legal formalism by creating *sui generis* subgroups in the past. For example, in *Geduldig v. Aiello*, the Supreme Court reviewed a California disability insurance program that excluded pregnancy-related disabilities from its coverage for the insured.<sup>100</sup> The Court held that there was no gender discrimination because the law simply divided potential recipients into two groups based on a physical condition (not gender)—pregnant and non-pregnant persons.<sup>101</sup> The Court constructed a *sui generis* subcategory of pregnant women, which were only comparable to other members of the subgroup, meaning other pregnant women. Because everyone in the subgroup was equally not insured for pregnancy-related disabilities, the plaintiffs did not meet the threshold required to show that the class members were treated differently than similarly situated members, and therefore, failed to meet the threshold to show gender discrimination.<sup>102</sup> The Court seemed to stick its head in the sand by ignoring the obvious fact that only females can get pregnant, and therefore, would be the only group negatively impacted by this law.<sup>103</sup> This holding was overturned by the Pregnancy Discrimination Act of 1978.<sup>104</sup>

The Ninth Circuit in *Pimentel* followed the Supreme Court's example and narrowly constructed the subclass. Ms. Pimentel and the other class members were not categorized as legal immigrants, residents, or even as "qualified aliens" receiving food assistance, which would have allowed for a broader comparison and more "similarly situated" individuals. Instead, the court narrowly defined this subgroup, even though it cut across family lines, and there was no public acknowledgement by DSHS that there even was this distinction between SNAP and FAP recipients. The illogical outcomes of these cases demonstrate the importance

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100. *Geduldig v. Aiello*, 417 U.S. 484 (1974), *overruled by* *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669 (1983) *and by statute* in Pregnancy Discrimination Act, Civil Rights Act of 1964, §§ 701 et seq., 701(k), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e(k).

101. *Geduldig*, 417 U.S. at 496 n. 20.

102. *Id.* at 496.

103. *See id.* at 501–03 (Brennan, J., dissenting) ("In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination . . . I cannot join the Court's apparent retreat. I continue to adhere to my view that 'classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.'" (quoting *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973)).

104. Pregnancy Discrimination Act, Pub. L. No. 95–555, 92 Stat. 2076 (1978).

of how classes and subclasses are defined. The definition of each subclass essentially determines whether or not there are other individuals who are “similarly situated.”

#### IV. ALTERNATIVE METHODS TO GAIN STANDING AND TO PROMOTE ACCESS TO JUSTICE FOR LEGAL IMMIGRANTS

Courts and scholars have recognized that there are alternative methods to find standing for Equal Protection and Due Process challenges. One such scholarly theory is Charles Reich’s “New Property” concept, which has been recognized as a tool for “converting the due process clause into a tool of civil justice.”<sup>105</sup> Reich argued that a broader conception of property is essential to the preservation of civil liberties.<sup>106</sup> Rebecca Zeitlow also explores how welfare benefits came to be understood as positive entitlements, which are protected under the Due Process and Equal Protection Clauses.<sup>107</sup> She makes a compelling point, which rings true in the case of Ms. Pimentel: “People who are disempowered due to their race, class, or gender need a formalized, structured process so that their rights can be protected. They are, however, in grave danger of losing not only their benefits but the empowerment of due process as a result of current welfare reform measures.”<sup>108</sup>

This Part argues that the court should find a fundamental right to food security as a way to ensure that recipients of food benefits have a property interest in their state benefits and can fight for equal treatment. This Part also suggests that the court should have adopted a broader understanding of the construction of an Equal Protection subclass to ensure legal immigrants’ access to the justice system. Lastly, this Part examines the court’s treatment of Ms. Pimentel’s case in the larger context of states’ efforts to balance budgets while addressing the needs of the immigrant community.

##### *A. Finding a Fundamental Right to Food Security*

An alternative method to gain standing would be for the court to recognize Ms. Pimentel’s property interest in FAP by finding a fundamental right to food. The Ninth Circuit rejected Ms. Pimentel’s proce-

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105. Paul R. Verkuil, *Revisiting the New Property After Twenty-Five Years*, 31 WM. & MARY L. REV. 365, 365 (1990).

106. See Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771, 777, 785–787 (1964).

107. Rebecca E. Zietlow, *Two Wrongs Don’t Add up to Rights: The Importance of Preserving Due Process Rights in Light of Recent Welfare Reform Measures*, 45 AM. U. L. REV. 1111, 1121–24 (1996).

108. *Id.* at 1121.

dural due process claim because it stated that “it is unclear what property interest Pimentel alleges as the foundation for her procedural due process claim.”<sup>109</sup> The court went on to say that property interests are “created and their dimensions are defined by existing rules . . . that stem from an independent source such as state law.”<sup>110</sup> Because Washington State voluntarily chose to create this food assistance program, Ms. Pimentel and the members of the class were akin to “temporary beneficiaries of the state’s charity . . . and lack[ed] any standing to complain of discrimination when that assistance was withdrawn.”<sup>111</sup> However, if the court found that Ms. Pimentel did have a cognizable property interest in the FAP benefits—by finding a fundamental right to food—it could have found that she had standing to argue the merits of her case.

A right to food was first recognized internationally in the 1948 Universal Declaration of Human Rights and also included in the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>112</sup> In response to this commitment, the United Nations Human Rights Commission established the mandate of the Special Rapporteur on the right to food, who in subsequent reports created a more concrete and operational description of what this right entails.<sup>113</sup> While the United States has not ratified the ICESCR,<sup>114</sup> according to the Food and Agriculture Organization of the United Nations, twenty-two countries that have ratified the Convention have also included a right to food in their constitutions.<sup>115</sup>

Some scholars of international law theorize that the United States might be required under customary international law to adopt a right to

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109. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1110 (9th Cir. 2012).

110. *Id.* at 1110. (citing *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005)).

111. Westley, *supra* note 17.

112. Oliver De Schutter, *Right to Food*, U.N. SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD, <http://www.srfood.org/en/right-to-food> (last visited May 29, 2014).

113. *Id.*

The right to food is a human right recognized under international law which protects the right of all human beings to feed themselves in dignity, either by producing their food or by purchasing it. . . . To purchase food, a person needs adequate incomes: the right to food consequently requires States to ensure that . . . social safety nets enable citizens to realize their right to adequate food.

*Id.*

114. *Status of International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTIONS (Mar. 8, 2014), [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en).

115. Some of these countries include Brazil, Bolivia, Columbia, Nigeria, Uganda, South Africa, India, and Pakistan. *The Right to Food*, *supra* note 90, at 2.

food.<sup>116</sup> However, the United States has persistently objected to and denied any legal obligations under statutory or customary international law, and therefore even if a right to food was considered customary international law, the United States would likely be exempt as a “persistent objector.”<sup>117</sup>

Although the right to food does not mean the right to be fed, it does require that the state guarantee accessibility, which means that food must be affordable.<sup>118</sup> While the Supreme Court has not recognized a fundamental right to food, the mission of the federal government’s food assistance program closely aligns with the internationally recognized elements of the right to food. The mission of the government’s food assistance program is to “increase food security and reduce hunger . . . by providing children and low-income people with access to food, a healthful diet, and nutrition education. . . .”<sup>119</sup> Similarly, an important element of the internationally recognized right to food is that “[i]ndividuals should be able to afford food for an adequate diet without compromising on any other basic needs, such as school fees, medicines[,] or rent.”<sup>120</sup> However, the result of the severe reduction of FAP made families, like Ms. Pimentel’s, have to do exactly this: choose between rent, food, and medical care.<sup>121</sup>

The Ninth Circuit expressed a legitimate concern that enjoining states from eliminating state-funded programs for the benefit of legal immigrants would deter states from establishing these programs in this first place.<sup>122</sup> However, finding a fundamental right to food would not require that a state government always provide a statutorily subsidized food program like FAP. Yet, it would require the government to find alternative means to promote the accessibility of food, which is already at the core of both the federal and Washington State’s missions with regard

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116. Lily Endean Nierenberg, Note, *Reconciling the Right to Food and Trade Liberalization: Developing Country Opportunities*, 20 MINN. J. INT’L L. 619, 630–31 (2011).

117. *Id.* at 631. A persistent objection to the establishment of a norm while it is becoming law may exempt the objector from such a norm (the so-called “persistent objector rule”). Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 538 (1993).

118. De Schutter, *supra* note 112.

119. *Nutrition Education and Promotion*, U.S. DEP’T OF AGRIC. FOOD & NUTRITION SERVICE, 7, (Mar. 2010), <http://www.fns.usda.gov/sites/default/files/NutritionEdRTC.pdf>.

120. De Schutter, *supra* note 112.

121. A letter signed by twenty-six state senators to the Washington State Senate Ways and Means Committee in support of reinstating FAP stated: “Cash-strapped families are skimping on grocery items that build children’s bodies and minds and keep elders healthy. While food banks are an extraordinary tool to fight hunger, they cannot fill the holes left in family budgets by the cut . . . .” *State Senator Letter*, *supra* note 16.

122. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1110 (9th Cir. 2012).

to food security.<sup>123</sup> These alternative means could include expanding school lunch programs—which provide free or subsidized school lunches and breakfasts to enrolled school children, regardless of immigration status—or expanding funding for food banks, meal plan programs, and community P patches.<sup>124</sup>

As discussed above, there has already been a movement in other countries to establish this fundamental right to food.<sup>125</sup> But how have other states in the Union dealt with this potential right? Is this a likely fundamental right for Congress or the United States Supreme Court to adopt?

The United States Supreme Court has historically been hesitant to find new non-textual fundamental rights that would require a higher standard of scrutiny. The Court noted in *Bowers v. Hardwick* that it was not “inclined to take a more expansive view of our authority to discover new fundamental rights. . . . The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”<sup>126</sup>

However, the Court has found non-textual fundamental rights when it determined that the right was so “‘implicit in the concept of ordered liberty . . . neither liberty nor justice would exist if they were sacrificed,’ or that it ‘[is] deeply rooted in the Nation’s history and tradition.’”<sup>127</sup> The Court actually explicitly overruled its holding in *Bowers* and found a fundamental right to privacy in *Lawrence v. Texas*,<sup>128</sup> nonetheless, the Court still declined to find a fundamental right to physician assisted suicide in *Washington v. Glucksberg*.<sup>129</sup>

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123. See *Food Assistance Program*, WASH. ST. DEP’T OF. AGRIC., <http://agr.wa.gov/FoodProg/> (last modified Nov. 20, 2012).

124. For more suggestions on alternative means to promote accessibility to food, see *10 Point Strategic Plan to End Childhood Hunger in Washington*, CHILDREN’S ALLIANCE, [http://www.childrensalliance.org/sites/default/files/10\\_pt\\_strategic\\_plan\\_ECHWA.pdf](http://www.childrensalliance.org/sites/default/files/10_pt_strategic_plan_ECHWA.pdf) (last visited May 29, 2014).

125. *The Right to Food*, *supra* note 90.

126. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

127. Irene L. Kim, *Defending Freedom of Speech: The Unconstitutionality of Anti-Paparazzi Legislation*, 44 S.D. L. REV. 275, 291 nn. 122 & 123 (1999) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–36 (1937); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

128. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). *Lawrence* is a great example of how a highly politically and emotionally charged issue can foster change and an expansion of fundamental rights. The court explicitly overruled *Bowers v. Harwick*, which upheld anti-sodomy laws, and it found that privacy surrounding intimate consensual sexual conduct was protected under the Due Process Clause. *Id.*

129. *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

Regarding a fundamental right to food, some states have taken steps that demonstrate that this right is, in fact, an important liberty interest.<sup>130</sup> PRWORA not only disqualified hundreds of thousands of legal immigrants from eligibility for benefits but also instituted certification periods, in some cases of up to three months, before other recipients could become eligible to receive food stamps.<sup>131</sup> However, several states, including Oregon, Florida, and Illinois, created exceptions for many categories of recipients so that they could avoid this waiting period,<sup>132</sup> recognizing the importance of immediate access to affordable food.

In contrast, the Sixth Circuit held in *Banks v. Block*<sup>133</sup> that food assistance recipients did not have a constitutionally protected right to these benefits after the expiration of these certification periods.<sup>134</sup> President Franklin Delano Roosevelt, however, famously included the right of access to adequate food in his “Second Bill of Rights,” introduced during the New Deal period, a further indication that this right is rooted in our nation’s history.<sup>135</sup>

However, with the Supreme Court’s reluctance to find non-textual fundamental rights and the United States’ persistent objections to a right to food under international law, it is unlikely that the Court or government will adopt this right. Therefore, it will likely not be a successful alternative method to gain standing for legal immigrants trying to access the justice system to protect food assistance benefits.

### *B. Broadening the Construction of Equal Protection Classes*

In regards to Ms. Pimentel’s Equal Protection claim, the Ninth Circuit could have adopted a broader interpretation of the certified class. The court cites to *Hong Pham v. Starkowski*<sup>136</sup> as authority for its narrow interpretation of the Equal Protection Clause.<sup>137</sup> However, *Hong Pham* is

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130. See Super, *supra* note 31, at 1346.

131. *Id.*

132. *Id.*

133. *Banks v. Block*, 700 F.2d 292, 298 (6th Cir. 1983).

134. Amy Camphill, Note, *More Bitter Than Sweet: A Procedural Due Process Critique of Certification Periods*, 109 COLUM. L. REV. 138, 141 (2009).

135. *Economic Bill of Rights*, FRANKLIN D. ROOSEVELT AM. HERITAGE CTR. MUSEUM, [http://www.fdrheritage.org/bill\\_of\\_rights.htm](http://www.fdrheritage.org/bill_of_rights.htm) (last visited May 29, 2014).

136. *Hong Pham v. Starkowski*, 16 A.3d 635, 648 (Conn. 2011) (“The relevant question in determining if state action discriminates on the basis of alienage” is whether the action “provides a benefit to citizens that it does not provide to some or all aliens because of their status as noncitizens.”) *Hong Pham* dealt with the state’s decision to eliminate a program that had been created to provide medical coverage to lawfully residing immigrants. *Id.* at 641. The program was administered in parallel to a similar program for U.S. citizens residing in Connecticut. *Id.* at 641–42.

137. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1109 (9th Cir. 2012).

a Connecticut Supreme Court case and is not binding authority in Washington or in the Ninth Circuit. In fact, just one month before *Pimentel*, the U.S. District Court for the District of Hawaii heard a case similar to *Hong Pham* and rejected the Connecticut Supreme Court's narrow interpretation of the test required by the Equal Protection Clause as an "absurd" interpretation.<sup>138</sup>

The U.S. District Court for the District of Hawaii in *Korab v. McManaman*<sup>139</sup> questioned the very premise that the court in *Hong Pham* (and thus the Ninth Circuit in *Pimentel*) based its decision on: for the Equal Protection Clause to apply, the court must decide "whether the state program provides a benefit to citizens that it does not provide to some or all aliens because of their status as noncitizens."<sup>140</sup> The court stated:

By limiting the inquiry to a particular program on its own as opposed to a state's provision of medical benefits to its residents through various different programs[,] generally, *Hong Pham* would allow a state to create separate programs that provide different benefits based on suspect classification (i.e., alienage, race, gender). A state could, for example, create one medical benefits program with limited benefits for African Americans, and another program with greater benefits for Caucasians. Under *Hong Pham*'s reasoning, there would apparently be no suspect classification based on race because neither individual program provides a benefit to one race that it does not provide to individuals of other races because of their race. Such an absurd (and insidious) result stands the Equal Protection Clause on its head.<sup>141</sup>

Moreover, *Hong Pham* is not rooted in federal jurisprudence.<sup>142</sup> There is, in fact, no binding authority in Washington State or in the Ninth Circuit that supports this narrow interpretation. Yet, despite this lack of authority, the *Pimentel* court narrowly defined the class for the Equal Protection claim and then, after applying the *Hong Pham* rationale, found no discrimination had taken place.<sup>143</sup> This narrow interpretation is also not consistent with jurisprudence in other federal circuit courts dealing

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138. 805 F. Supp. 2d 1027, 1037 (D. Hawaii 2011).

139. *Id.*

140. *Id.* at 1037 (citing *Hong Pham*, 16 A.3d 635).

141. *Id.* at 1036. In both *Hong Pham* and *Korab*, the measure being eliminated was a state-funded medical benefit program for legal immigrants.

142. This was a Connecticut Supreme Court case. *Hong Pham*, 16 A.3d at 648.

143. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1110 (9th Cir. 2012).

with the construction of Equal Protection subclasses.<sup>144</sup> For example, the First Circuit opined that the “formula for determining whether individuals or entities are ‘similarly situated’ for equal protection purposes is not always susceptible to precise demarcation.”<sup>145</sup> In *Dartmouth Review v. Dartmouth College*, the First Circuit outlined:

The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated . . . the ‘relevant aspects’ are those factual elements which determine whether reasoned analogy supports, or demands a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples.<sup>146</sup>

Had the *Pimentel* court followed the lead of the First Circuit and the district courts of Maine and Hawaii, and applied a broader less formulaic test to Ms. Pimentel’s claim, it would have found that she had standing to litigate her claim. The court could have then moved on to review the district court’s application of the *Winter* test regarding the preliminary injunction.

This test requires a plaintiff seeking a preliminary injunction to establish (1) the likelihood of success on the merits; (2) the likelihood of suffering irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the plaintiff’s favor; and (4) that an injunction is in the public interest.<sup>147</sup> On appeal, the State only challenged one prong of the court’s *Winter* factor test analysis.<sup>148</sup> The State did not challenge that Ms. Pimentel and the class members she represented were likely to suffer irreparable harm, nor did it challenge that the “balance of hardships and public interest weigh[ed] in the class’s favor.”<sup>149</sup> The State only challenged Ms. Pimentel’s likelihood of success on the merits of her claim—the first factor of the *Winter* test.<sup>150</sup> By applying a formulaic, narrow interpretation of an Equal Protection class, the Ninth Circuit precluded Ms. Pimentel from even arguing the merits of her claim.

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144. See *Barrington Cove, LP v. R.I. Hous. & Mortg. Fin. Corp.*, 246 F.3d 1, 8 (1st Cir. 2001); *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 16 (1st Cir. 1989); *Korab v. McManaman*, 805 F. Supp. 2d 1027, 1037 (D. Hawaii 2011).

145. *Barrington Cove*, 246 F.3d at 8.

146. *Bruns v. Mayhew*, No. 1:12-cv-00131-JAW, 2012 WL 5874812, at \*8 (D. Maine Nov. 20, 2012) (quoting *Dartmouth Review*, 889 F.2d at 19).

147. *Pimentel*, 670 F.3d at 1105.

148. *Id.* at 1106.

149. *Id.*

150. *Id.*

*C. State Budget Concerns and the Elimination of Programs  
for Legal Immigrants*

Like Washington State, many states have had to deal with trimming their budgets and deciding which programs will end up on the chopping block, and in several states the programs cut are those that provide benefits to legal immigrants.<sup>151</sup>

For example, as already discussed in section B, the Connecticut legislature chose to terminate a separate health care program that provided medical coverage to lawfully residing immigrants.<sup>152</sup> In *Hong Pham*, the Connecticut Supreme Court found that the decision to eliminate this program did not constitute discrimination on the basis of alienage.<sup>153</sup>

However, in *Finch v. Commonwealth Health Insurance Connector Authority*, the Supreme Court of Massachusetts found that the state legislature's attempt to bar legal immigrants from a state-funded health care plan violated the equal protections granted by Massachusetts State Constitution.<sup>154</sup> In 2009, Massachusetts created a slimmed-down version for legal immigrants of the state's health coverage plan provided to citizens.<sup>155</sup> In a unanimous opinion, the court held that "the discrimination against legal immigrants that [the state law's] limiting language embodies violates their rights to equal protection. . . ."<sup>156</sup> The court recognized that this decision will mean that Massachusetts will have to appropriate additional funds in order to comply; however, the court stated that "[f]iscal considerations alone cannot justify a [s]tate's invidious discrimination against aliens."<sup>157</sup> The district court in *Pimentel* also expressed a similar concern in its opinion, noting that "Plaintiff's and classes' suffering 'is far more compelling than the possibility of some administrative inconvenience or monetary loss to the government.'"<sup>158</sup>

However, in a more recent case with similar facts to *Finch*, another court went in a different direction. In early 2012, the Maine legislature

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151. In *Korab* (Hawaii), *Finch* (Massachusetts), *Hong Pham* (Connecticut), and *Bruns* (Maine), the programs that were eliminated or reduced were medical benefits programs. *Korab v. McManaman*, 805 F. Supp. 2d 1027, 1030 (D. Hawaii 2011); *Finch v. Commonwealth Health Ins. Connector Auth.*, 959 N.E.2d 970 (Mass. 2012); *Hong Pham v. Starkowski*, 16 A.3d 635, 637 (Conn. 2011); *Bruns v. Mayhew*, No. 1:12-cv-00131-JAW, 2012 WL 5874812 (D. Maine Nov. 20, 2012).

152. *Hong Pham*, 16 A.3d at 639.

153. *Id.* at 648.

154. *Finch*, 959 N.E.2d at 973.

155. *Id.* at 977–78.

156. *Id.* at 984.

157. *Id.* at 976.

158. *Pimentel v. Dreyfus*, No. C11-119 MJP, 2011 WL 6131405, at \*10 (Feb. 17, 2011) (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983)).

passed a new law that requires legal immigrants to wait five years before applying for MaineCare Benefits, a state-funded health plan.<sup>159</sup> In *Bruns v. Mayhew*, the class action lawsuit's lead plaintiff, Hans Bruns, petitioned the court to grant a permanent injunction, which would enjoin the Commissioner of the Maine Department of Health and Human Services from enforcing this law.<sup>160</sup> Similar to Ms. Pimentel, Bruns challenged this law based on Equal Protection Clause grounds, arguing that "it discriminates against noncitizens in favor of citizens in the administration of MaineCare benefits."<sup>161</sup> In November 2012, the U.S. District Court for the District of Maine denied the Commissioner's motion to dismiss Bruns's claim, which appeared to be a sign that the court was moving towards adopting a broader construction of the Equal Protection class.<sup>162</sup> However, on March 14, 2013, the court ultimately denied Bruns's motion for the preliminary injunction, citing both *Pimentel* and *Hong Pham* in its rationale.<sup>163</sup> The court held:

Without the guidance of clear First Circuit precedent, the Court follows the well-reasoned legal analysis of courts in other jurisdictions, such as *Pimentel* and *Pham*. The Court concludes that it cannot award preliminary injunctive relief to the Plaintiffs because there were two separate programs distributing medical benefits to Medicaid-ineligible qualified aliens and citizens. Because citizens were statutorily unable to receive health benefits under the same state-sponsored program, the Plaintiffs are unable to show they were similarly situated with citizens for equal protection purposes. In other words, the Plaintiffs cannot show that the State engaged in selective treatment because Maine's 1997 law never included the Plaintiffs in a benefit group with citizens.<sup>164</sup>

Although the majority of cases that dealt with the elimination of a wholly state-funded public benefit program for legal immigrants have not found constitutional violations, there is still hope that, at least in Washington State, food assistance for legal immigrants will be protected and preserved. On March 19, 2013, twenty-six of the forty-nine state senators voiced their support to reinstate full funding for FAP for the

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159. Keith Shortall, *Suit Seeks to Restore Immigrant's MaineCare Benefits*, MAINE PUB. BROADCASTING NETWORK (Apr. 19, 2012), <http://www.mpbn.net/News/MaineNewsArchive/tabid/181/ctl/ViewItem/mid/3475/ItemId/21448/Default.aspx>.

160. *Bruns v. Mayhew*, No. 1:12-cv-00131-JAW, 2012 WL 5874812, at \*1 (D. Maine Nov. 20, 2012).

161. *Id.*

162. *Id.* at \*13.

163. *Bruns v. Mayhew*, 931 F. Supp. 2d 260, 273, 277 (D. Maine 2013).

164. *Id.* at 273 (internal citation omitted) (capitalization in original).

2013–2015 budget.<sup>165</sup> The senators signed a letter that was sent to the Senate Ways and Means Committee that, in part, stated:

For more than 15 years Washington state government has strategically leveraged resources to make sure that food stamps are available to help families when times are tough. The Legislature led the country in 1997 in establishing the State Food Assistance program. . . . At a time when an estimated one-in-four Washington children live in food-insecure households, the 2011 cut to State Food Assistance deepened the economic inequality for many of the youngest Washingtonians. . . . The legislature should restore these funds so that all children and families who need help filling the hunger gap are treated equally.<sup>166</sup>

The letter urged the Senate Ways and Means Committee to allocate \$42 million to restore the program in the 2013–2015 state budget.<sup>167</sup> This letter, along with the lobbying efforts of many community groups, helped preserve funding for FAP.<sup>168</sup> Although the legislature did not fully restore funding to FAP, on July 1, 2013, Governor Jay Inslee signed the 2013–2015 Biennium and 2013 Supplemental Budget, which increased the funding for FAP by 25% from the 50% reduction level of 2011.<sup>169</sup> Recipients will receive 75% of the SNAP benefit level.<sup>170</sup>

Although this was a victory for FAP recipients, it was short-lived. Recipients of both FAP and SNAP have been deeply impacted by the recent cuts to the federal food stamps program that went into effect on November 1, 2013, as well as the additional cuts that came with the new Farm Bill, passed by the U.S. Congress on February 5, 2014.<sup>171</sup>

## V. CONCLUSION

Access to the justice system is a powerful tool for anyone fighting against an injustice. One effective way to promote a greater access to the justice system is for the courts to employ a legal realist's approach when faced with Equal Protection and Due Process challenges. Legal realism,

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165. *State Senator Letter*, *supra* note 16.

166. *Id.*

167. *Id.*

168. *Communities Support State Food Assistance*, CHILDREN'S ALLIANCE, 1 (Feb. 7, 2014), [http://www.childrealliance.org/sites/default/files/Communities\\_Support\\_State\\_Food\\_Assistance\\_2014.pdf](http://www.childrealliance.org/sites/default/files/Communities_Support_State_Food_Assistance_2014.pdf).

169. S.B. 5034, 63rd Leg., 2013 2d Spec. Sess. (Wa. 2013), *available at* <http://leap.leg.wa.gov/leap/budget/lbns/1315Omni5034-S.SL.pdf>; *see also* *Communities Support State Food Assistance*, *supra* note 168.

170. S.B. 5034, 63rd Leg., 2013 2d Spec. Sess. (Wa. 2013)

171. *Equal Benefits for Hungry Families*, *supra* note 53.

unlike legal formalism, includes societal factors as variables in the legal analysis. This could include defining a subgroup more broadly in an Equal Protection claim in order to allow standing for members of vulnerable groups, which would have allowed Ms. Pimentel to argue the merits of her case and potentially preserve her benefits.

Because of the Ninth Circuit's application of legal formalism, Ms. Pimentel—and others that relied on FAP benefits to survive—lost. However, the courts often swing between times of adherence to legal formalism and legal realism. Had the Ninth Circuit applied a legal realist perspective to its review of the state's elimination of FAP and defined a broader class of members, similar to the First Circuit and the district courts of Hawaii and Maine, then it would have likely found that the district court did not abuse its discretion in granting the motion for the preliminary injunction. Ms. Pimentel could have argued her case based on the merits of the Equal Protection claim.

Another way to promote access to the justice system would be for the courts to find a fundamental right to food security and recognize that people, like Ms. Pimentel, have a property interest in state-funded food assistance. As of today, solidified by the Ninth Circuit's opinion in *Pimentel*, Washington State can provide "fair weather" food assistance and leave thousands of people without a basic necessity and an internationally recognized human right—the right to be able to access affordable food to feed one's self and one's family.

There is yet another powerful option beyond relying on constitutional and statutorily granted rights—the political willpower of the citizens of Washington State. The state legislature and the governor have already shown their support by increasing funding by 25% in the 2013 Operating Budget. However, with continued encouragement and calls to action from constituents, this author hopes that the legislature will completely restore funding to this program and reaffirm Washington's commitment to its immigrant population and to all families and individuals in need.