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1996

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### Recommended Citation

Lolita K. Buckner Inniss, California's Proposition 187 - Does It Mean What It Says - Does It Say What It Means - A Textual and Constitutional Analysis, 10 *Geo. Immigr. L.J.* 577 (1996)

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# ARTICLES

## CALIFORNIA'S PROPOSITION 187—DOES IT MEAN WHAT IT SAYS? DOES IT SAY WHAT IT MEANS? A TEXTUAL AND CONSTITUTIONAL ANALYSIS

LOLITA K. BUCKNER INNISS\*

“[S]ay what you mean,” the March Hare went on.

“I do,” Alice hastily replied; “at least—at least I mean what I say—that’s the same thing, you know.”

“Not the same thing a bit!” said the Hatter. “Why, you might just as well say that ‘I see what I eat’ is the same thing as ‘I eat what I see’!”  
Lewis Carroll, *Alice’s Adventures in Wonderland* 73 (Grosset & Dunlap Publishing 1996) (1946).

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## I. INTRODUCTION

Recently, via the initiative and referendum process,<sup>1</sup> Californians were presented with Proposition 187, the stated purpose of which was to prevent "illegal aliens" in the United States from receiving the benefits of public services in the State of California.<sup>2</sup> It was passed by the voters of California on November 8, 1994, in the general election by a margin of fifty-nine percent to forty-one percent, and became effective the following day. As a result of a number of actions filed challenging the initiative, many of its provisions became the subject of a preliminary injunction.<sup>3</sup>

Nicknamed "SOS" for "save our state," Proposition 187 raised the ugly specter of xenophobia and racism at a time when Californians, like the residents of many states, were faced with budget shortfalls, reductions in essential services, and record unemployment. In this context, the "illegal"<sup>4</sup>

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1. The California Constitution provides for a process called initiative and referendum, whereby voters can propose laws, statutes and amendments, and enact them at the polls:

The legislative power of this State shall be vested in a Senate and Assembly which shall be designated "The Legislature of the State of California," but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature.

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The first power reserved to the people shall be known as the initiative. . . . The second power reserved to the people shall be known as the referendum.

CAL. CONST. art. I, § 4.

For a thorough treatment of the initiative and referendum process, see Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527 (1994); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990); and Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 13-15 (1978). As Bell notes, "direct democracy, carried out in the privacy of the voting booth, has diminished the ability of minority groups to participate in the democratic process. Ironically, because it enables the voters' racial beliefs and fears to be recorded and tabulated in their pure form, the referendum has been a most effective facilitator of that bias, discrimination, and prejudice which has marred American democracy from its earliest day."

2. The Findings and Declarations portion of Proposition 187 provided as follows:

The People of California find and declare as follows:

That they have suffered and are suffering personal injury and damage caused by the criminal conduct of illegal aliens in this state.

That they have a right to the protection of their government from any person or persons entering this country unlawfully.

Therefore, the People of California declare their intention to provide for cooperation between their agencies of state and local government with the federal government, and to establish a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California.

3. On December 14, 1994, the United States District Court, Central District of California, granted plaintiffs' motions for preliminary injunction prohibiting operation and enforcement of provisions 4, 5, 6, 7, and 9 of Proposition 187, and further prohibiting promulgation or dissemination of any regulations concerning these provisions. *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 764 (C.D. Cal. 1995).

4. Those persons who are neither permanent residents nor holders of valid visas, nor persons otherwise authorized to be present in the United States are often referred to as "illegal" aliens. Aside from being highly inflammatory, this term is also highly imprecise, as it covers under its vast pejorative penumbra a host of persons, from students or visitors who entered the country while properly documented whose visas later lapsed, to persons who may have committed crimes abroad and then entered the country surreptitiously without documentation.

alien seemed a convenient scapegoat to account for the financial ills of California.<sup>5</sup> This is particularly true as it has become fashionable for states to attempt to turn back the cost of providing services to illegal aliens to the federal government.<sup>6</sup>

Two questions are posed here regarding Proposition 187: What does it say? What does it mean? This Article seeks to provide answers as to what the statute says by examining its actual text, and also to discuss the constitutional concerns raised by the statute. One such constitutional concern is the Supremacy Clause, as it is not clear that the state of California may legislate in the area of immigration. In fact, the issue of preemption is at the crux of a recent federal district court decision regarding Proposition 187.<sup>7</sup> Another area of concern is the Fourteenth Amendment, given the initiative's concern with aliens.<sup>8</sup> Proposition 187, therefore, has the dubious distinction of potentially offending the Constitution on numerous bases.

Although preemption may provide a handy device for analysis, it is possible that proposed and recently enacted changes in federal law may make further discussion of constitutional issues more necessary to the analysis.<sup>9</sup> For purposes of analysis in this Article, no other California state constitutional provisions will be discussed. It is noteworthy, however, that there might be interpretations of various constitutional provisions under California constitutional law which might differ somewhat from federal provisions. This is so because of California's declaration of independent constitutional rights.<sup>10</sup>

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5. See Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 B.Y.U. L. REV. 1139, 1162-63 (1993) (citing GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 236-38 (abr. ed. 1958)). See also Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 2 (1984). Schuck writes, "[a]t the psychological and emotional levels, immigration generates complex public attitudes toward outsiders and newcomers. Especially during periods of economic distress, a recurrent nativism has tapped the dark wellsprings of racial and religious bigotry in America, releasing forces that have profoundly shaped the character of immigration and national politics." *Id.*

6. Recent examples are the efforts by high immigration states such as California, Texas, Florida, Arizona, New Jersey and New York to recover from the federal government the cost of providing for undocumented persons. Thus far, the states have been unsuccessful in the lower federal courts, and at least one state, Florida, is appealing to the Supreme Court. See *New York is Blocked in Bid to Get U.S. to Pay for Immigrants*, WALL ST. J., Apr. 29, 1996, at B4.

7. *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

8. Aliens are "persons" under the Fourteenth Amendment of the Constitution, and are guaranteed due process of law by the Fifth Amendment. This is equally true for aliens who are here illegally. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 368-69 (1886). The Supreme Court has also held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the federal government. *Mathews v. Diaz*, 426 U.S. 67, 77-79 (1976). As Gerald L. Neuman remarks in *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1426 (1995), while alienage discrimination at the state level is subject to strict scrutiny, discrimination by Congress merits only rational basis review.

9. For example, the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996" which was signed into law on August 22, 1996, dramatically altered alien access to federal means-tested programs. Popularly referred to as the "Welfare Reform Bill," the Act narrows the categories of eligible aliens. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

10. CAL. CONST. art. I, § 24. See also Rachel A. Van Cleave, *A Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter Initiative in California*, 21 HASTINGS CONST. L.Q. 95, 96-98 (1993). Van Cleave discusses the use of the initiative in California to effectively change the state's

One aspect of the meaning of the initiative which is not discussed in detail in this Article, but which looms over any analysis of Proposition 187, is the initiative's social impact. As Gerald Neuman observes in his discussion of immigration in the first century of this country's history, "the legal invalidity of state restrictions would be unimportant so long as the restrictions were actually enforced, or potential immigrants were deterred by the belief that they would be enforced."<sup>11</sup> The greatest impact that Proposition 187 may have is just that: with or without injunctions preventing enforcement of certain provisions of the statute, and despite how courts may decide as to the ultimate constitutional validity of many of its provisions, some aliens have already been, and may continue to be, hindered by wrongful attempts at enforcement, or by fear of enforcement.<sup>12</sup> Thus, in addition to legal or textual analysis of the statute, we must also concern ourselves with the fact that such provisions can even be seriously proposed as law, given the potential harmful impact, and given the ill will they engender, which may be long in dissipating.

The adoption of Proposition 187 is a dramatic illustration of the widely held image of the alien as "Other," as the stranger among us.<sup>13</sup> Drafters and proponents of Proposition 187 are using it for more than its monetary economies. They are using it as a weapon in a deliberate attempt to force a confrontation between anti-immigrant and pro-immigrant forces.<sup>14</sup> Viewed in this light, Proposition 187 becomes a part of a larger philosophical and

constitution by limiting the doctrine of independent state grounds. Californians may still look to independent state grounds in the analysis of constitutional rights such as a right to privacy and to freedom of expression, as well as the right to a public education, a right not guaranteed under the federal constitution.

11. Gerald L. Neuman, *The Lost Century of Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1837 n.20 (1993).

12. For example, several news sources reported that two girls in the Los Angeles area said that they were denied a pizza after the clerk at the shop asked for their green cards. See, e.g., Peter Hecht, *A "Freedom Summer"—1990s Style*, SACRAMENTO BEE, July 30, 1995, at A1. Although it was not clear whether or not the story was apocryphal, there were instances in which undocumented persons failed to seek services. A number of persons feared seeking medical treatment according to affidavits filed in *League of United Latin American Citizens*, 908 F. Supp. 755.

13. See, e.g., KENNETH L. KARST, *BELONGING TO AMERICA 2* (1989) (citing Simone de Beauvoir's use of the term "Other" to connote a sense of not belonging (THE SECOND SEX XIX-XX (Random House ed. 1993) (1949))). In *The Second Sex*, de Beauvoir develops the notion of the Other in her discussion of women *vis a vis* men. She states:

He is the Subject, he is the Absolute—she is the Other.

The category of the *Other* is as primordial as consciousness itself. In most primitive societies, in most ancient mythologies, one finds the expression of a duality—that of the Self and the Other.

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In small-town eyes all persons not belonging to the village are "strangers" and suspect; to the native of a country all who inhabit other countries are "foreigners"; Jews are "different" for the anti-Semite, Negroes are "inferior" for American racists, aborigines are "natives" for colonists, proletarians are the "lower class" for the privileged.

Simone de Beauvoir, *The Second Sex* xl-xli (Random House ed. 1993) (1949).

14. Johnson, *supra* note 5, at 1167. Johnson suggests that part of the animus is clearly racial, and Johnson here cites to a Los Angeles Times article, wherein Republican presidential candidate Patrick Buchanan states: "If we had to take a million immigrants in say, Zulus, next year, or Englishmen, and put them up in Virginia, what group would be easier to assimilate and would cause less trouble for the people

political battle. However, both proponents and opponents of the initiative should be wary of fighting a war outside of the words of the statute. If there is to be a battle, it should be fought, or at least initiated, on the four corners of the document.

## II. WHAT DOES IT SAY?—PROVISIONS OF PROPOSITION 187

Proposition 187 denies public education, non-emergency health care and public social services to those who are not legally in this country. It requires providers of services, such as health care facilities, educators, social workers and law enforcement officers, to verify the immigration status of individuals and to report suspected undocumented aliens to the United States Immigration and Naturalization Service (INS) and other authorities.<sup>15</sup>

Educators at the primary and secondary school level will be required to verify the citizenship, residency or immigration status of all students, and of the students' parents. Upon either an actual determination or suspicion that a student or his parents are not lawfully present in this country, educators will be required to notify the parents that school services will be terminated after ninety days if lawful presence cannot be proven.<sup>16</sup> These provisions on education limit access to public colleges and universities as well.<sup>17</sup> Further, Proposition 187 makes it a crime to produce fraudulent documentation regarding immigration status, or to use such documents to conceal one's citizenship or resident alien status.<sup>18</sup>

### A. Findings and Declaration

The preamble to Proposition 187 is particularly provocative. In the Findings and Declarations section, as it is termed, the drafters state that the people of California "have suffered and are suffering personal injury and damage caused by the criminal conduct of illegal aliens" in California.<sup>19</sup> This section goes on to state that the people of California "have a right to the protection of their government from any person or persons entering this country unlawfully."<sup>20</sup>

### B. Penal Code Amendments

The provisions of Proposition 187 that amend the California Penal Code address the manufacture and distribution of "false documents" as well as the

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of Virginia?" *Id.* (citing Douglas Jehl, *Buchanan Raises Specter of Intolerance*, L.A. TIMES, Mar. 17, 1992, at A1).

15. See Appendix.

16. CAL. EDUC. CODE § 48215 (West 1995).

17. CAL. EDUC. CODE § 66010.8 (West 1995).

18. CAL. PENAL CODE §§ 113-14 (West 1995).

19. See Appendix.

20. *Id.*

use of such documents.<sup>21</sup> The first clause states that "any person who manufactures, distributes, or sells false documents to conceal the true citizenship or resident alien status of another person is guilty of a felony," and imposes a seventy-five thousand dollar fine and a five-year prison sentence.<sup>22</sup>

Another amendment to the penal code is a provision which calls for the cooperation of law enforcement agencies in California with the INS if any person arrested is suspected of being in violation of federal immigration laws.<sup>23</sup> The first portion of the amendment details procedures which local law enforcement agents shall follow regarding a person who is arrested and suspected of being present in the United States in violation of immigration laws. These procedures include determining if the person is either a lawful permanent resident, a temporary resident, or a person who is present in violation of the laws.<sup>24</sup> The second portion then describes the scope of the verification process, and indicates that such verification may include questions regarding the individual's date or place of birth, date of entry into the United States, and demands for documentation indicating legal status.<sup>25</sup> The section further requires law enforcement officials to "notify" the individual of his or her apparent status as an illegal alien, and to "notify" the individual that, apart from criminal justice proceedings, he or she must obtain legal status or leave.<sup>26</sup> The final two portions of this section require that the Attorney General of California be notified of the alien's apparent illegal status and provided any additional information requested; and also prohibit the drafting of any laws preventing or limiting the enforcement of the regulations.<sup>27</sup>

### C. *Public Social Services*

The provisions of Proposition 187 which amend the California Welfare and Institution Code,<sup>28</sup> affecting the rights of aliens to public social services, begins with a statement of purpose which purports to carry out the intentions of the people of California that no one but citizens of the United States and lawful permanent residents may receive public social service benefits. The statement of purpose further indicates that the intent of such amendments is to ensure that all persons employed in the providing of such services shall "diligently protect" such funds from misuse. The section also indicates that services may also be provided to persons lawfully admitted for a temporary period of time.

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21. CAL. PENAL CODE § 113 (West 1995).

22. CAL. PENAL CODE § 114 (West 1995).

23. CAL. PENAL CODE § 834b(a) (West 1995).

24. CAL. PENAL CODE § 834b (b)(1) (West 1995).

25. CAL. PENAL CODE § 834b (b)(1) (West 1995).

26. CAL. PENAL CODE § 834b (b)(2) (West 1995).

27. CAL. PENAL CODE §§ 834b (b)(3) & (c) (West 1995).

28. CAL. WELF. & INST. CODE § 10001.5 (West 1995).

Going beyond the statement of purpose, the section sets forth steps which must be taken by any public entity which determines or reasonably suspects that a person who has applied for public social services is an alien in the United States in violation of federal law. Such an entity is required first to deny the benefits requested, and then to notify the applicant in writing of his or her apparent illegal status and that the person must either obtain legal status or leave the United States. The entity must also notify the State Director of Social Services, the Attorney General of California, and the INS of the apparent illegal status of the applicant for benefits, and must cooperate in providing other information requested by these agencies.

#### D. *Publicly-Funded Health Care Services*

The section of Proposition 187 which amends the California Health and Services Code concerning publicly funded health care services begins with a statement of purpose virtually identical to that in the public social services section.<sup>29</sup> This section limits receipt of non-emergency medical care to citizens and lawfully admitted permanent or temporary residents. The provisions requiring health care facilities to deny services to persons determined or reasonably suspected to be present in the country in violation of federal law are potentially offensive on due process grounds. The section on notification to aliens of their apparent illegal status and notification of other agencies by public medical service providers also mirrors the sections concerning public social services.

#### E. *Provisions on Education*

Proposition 187 amends the California Education Code to prevent any public elementary or secondary school from admitting or allowing "the attendance of any child who is not a citizen of the United States, an alien lawfully admitted as a permanent resident, or a person who is otherwise authorized under federal law to be in the United States."<sup>30</sup>

This section then goes on to require that information regarding the status of both children and their parents shall be provided to the State Superintendent for Public Instruction, the Attorney General of California, and the INS, as well as to the parents of the children. The "notices" provided to the parents of the children either determined to be illegally present or suspected to be illegally present are required to state that an existing pupil may not continue to attend school after ninety calendar days from the date of the notice, unless legal status is established. The section on education also contains provisions regarding public post-secondary education that will forbid the admission, enrollment, or attendance of persons determined not to

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29. CAL. HEALTH & SAFETY CODE § 130 (West 1995).

30. CAL. EDUC. CODE § 48215 (West 1995).



be either citizens, lawfully admitted permanent residents, or otherwise authorized to be present under federal law.<sup>31</sup>

#### F. *Attorney General Cooperation*

This section mandates that the reports transmitted by local government entities to the Attorney General of the State of California pursuant to other sections of Proposition 187 also be transmitted to the INS.<sup>32</sup> This section further requires that the state Attorney General maintain "on-going and accurate records of such reports," and that the office provide any other information requested by any other governmental entity.<sup>33</sup>

#### G. *Amendment and Severability*

This concluding section details the extent to which provisions in Proposition 187 may be amended, and contains a severability clause protecting the balance of the provisions in the event that any are found invalid.<sup>34</sup> Amendment may occur only upon roll call vote entered in the journal in which two-thirds of the membership concurs, or by a statute approved by the voters.

### III. WHAT DOES IT MEAN?—PROPOSITION 187 AND THE CONSTITUTION: THE FEDERAL POWER TO REGULATE IMMIGRATION VERSUS STATE POWER

In analyzing the constitutionality of Proposition 187, it is necessary to turn to basic issues: governmental organization and the exercise of power versus the protection of the freedoms of citizens (and non-citizens) by constitutional provisions.<sup>35</sup> Does the government have the power to act regarding immigration? Looking to the federal government, this question can be answered in the affirmative. Although the U.S. Constitution does not speak directly to the issue of immigration, Article One could be said to give the federal govern-

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31. CAL. EDUC. CODE § 66010.8 (West 1995).

32. See Appendix.

33. *Id.*

34. *Id.*

35. Judge Jerre S. Williams, in his book *CONSTITUTIONAL ANALYSIS* provides a basic method for constitutional analysis. Judge Williams writes:

It is not analytically sound to consider the organization of the federal government and its relationship to state governments before considering the constitutional aspects of individual liberty because constitutional questions concerning the protection of individual liberty arise in all constitutional cases, including those allocating governmental power to the national government or the state governments.

JERRE S. WILLIAMS, *CONSTITUTIONAL ANALYSIS* 35 (1979).

This concept however presents a dilemma in the consideration of federal immigration law and the constitutional rights of aliens. As Hiroshi Motomura describes in *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992), this is a mainstream approach which does not describe immigration law at the federal level. Because of the long dependence upon the plenary power doctrine, under which the executive branch and Congress have far reaching authority in immigration matters, the individual liberty interests of aliens in immigration matters were often not considered worthy of discussion.

ment certain power over it. In the area of immigration law, it has become clear that the federal government, with a few limited exceptions, holds supreme power.<sup>36</sup> Most significantly, Congress has the authority to devise a uniform rule of naturalization.<sup>37</sup> In addition, the Migration Clause<sup>38</sup> and the War Clause<sup>39</sup> provide potential bases for Congressional power over immigration.

In early cases it was the Commerce Clause, however, which was most often cited as the basis of express constitutional power giving Congress' authority in the area of immigration. This authority flowed from Congress' authority to regulate commerce across national borders.<sup>40</sup> The perceived source of Congress' right to make rules regarding immigration has shifted from its basis on the Commerce Clause to the view that control over national borders is one of the inherent rights of sovereignty.<sup>41</sup> The federal power over immigration is plenary; that is, it is based on the notion of an implied federal immigration power which is "inherent in the very notion of a sovereign State."<sup>42</sup> The plenary power doctrine, as it is known, has come to be the basis for immigration decisions by the federal government involving the entry and presence of aliens in the country.<sup>43</sup> This is true even where those decisions may appear to reduce or limit the constitutional rights of aliens relative to citizens.<sup>44</sup>

The general view concerning cases involving state regulation of immigration has been that they demonstrate a gradual diminution in the authority of the states in the area of immigration. It has even been argued that a state's acts on issues concerning aliens and their entrance into the country is not "immigration law" at all, and that such law did not exist until 1875 when the first federal immigration statute was enacted.<sup>45</sup> It is misleading, however, to conclude that the history of immigration in the United States is a history

36. See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

37. U.S. CONST. art. I, § 8, cl. 4.

38. U.S. CONST. art. I, § 9, cl. 1 provides: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight. . . ." It is not clear that this power is completely relevant to immigration however. In the *Passenger Cases*, 48 U.S. 283 (1849), the justices disagreed as to whether this clause applied only to the migration of slaves, or whether it could be applied to immigrants as well.

39. U.S. CONST. art. I, § 8, cl. 11. Again, as in the case of the Migration or Importation clauses, the Justices in the *Passenger Cases* also disagreed as to whether this clause covered the regulation of aliens who were not nationals of countries against whom the United States had declared war. See 48 U.S. 283.

40. See *Passenger Cases*, 48 U.S. 283; *Head Money Cases*, 112 U.S. 580 (1884).

41. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

42. STEPHEN H. LEGOMSKY, *IMMIGRATION LAW AND POLICY* 17 (1992).

43. THOMAS ALEXANDER ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION PROCESS AND POLICY* 14-15 (1985).

44. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 80 (1970).

45. Motomura, *supra* note 35, at 1626. Professor Motomura argues that there are two categories of immigration law, subconstitutional immigration law, or "true" immigration law, which he defines as the interpretation and application of statutes, regulations, or administrative guidelines, and constitutional immigration law, which he defines as the application of constitutional norms and principles to test the validity of immigration rules in subconstitutional form. The actions of Congress and executive agencies since 1875 have been for the most part of the subconstitutional variety. *Id.*

starting with and limited to the development of federal legislation. A look at the history of cases involving state immigration reveals a clear cut body of law permitting to the states certain well-defined acts regarding immigration as it applies to actual entry of aliens into the country, and gradually defining the theories under which a state might act.

The fact is that the earliest examples of federal immigration policy adopted were to a great degree the same types of prohibitions which had been seen at the state level. In 1875 and in 1882, federal statutes were enacted barring the admission of criminals, prostitutes, idiots, lunatics, and persons likely to become a public charge.<sup>46</sup> These provisions merely echoed state pronouncements. Neither of these acts was subjected to judicial scrutiny,<sup>47</sup> which could have been a good measure of their validity because the types of areas regulated had long been seen as state responsibilities. Part of the 1882 legislation involved assessment charges for the entry of aliens, much like those assessed on the state level.<sup>48</sup> Although it had been conceived of at the state level, the collection of a tax assessed per entering aliens, or "head money," was permitted at the federal level.<sup>49</sup>

In many of the early cases where the states acted in the area of immigration, their actions came into conflict with federal schemes. In *Gibbons v. Ogden*,<sup>50</sup> the Supreme Court invalidated a monopoly over New York steam boat regulations. In that case, for the first time, the carriage of passengers was included in the meaning of commerce. However, it was noted in *Gibbons v. Ogden* that some actions which might be regulated by Congress under the

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46. Act of March 3, 1875, Ch. 141, 18 Stat. 477; Act of August 3, 1882, Ch. 376, 22 Stat. 214.

It is interesting to note, in comparing the language of the federal statute with the typical language of state statutes on the same subject, that vague and generalized concerns about the entry of unaccompanied and widowed women in early state statutes, language which pointedly referred to potential indigents who could not give good accounts of "himself or herself" were seemingly transformed at the federal level into a prohibition against "prostitutes." The 1875 act cited above was in fact commonly referred to as the Alien Prostitution Importation Act, and explicitly forbade the importation of women into the United States for purposes of prostitution.

Such a view of single alien women as being potentially given to vice is seen implicitly in the court's opinion in *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), a case in which a Japanese woman who came into the United States for the purposes of meeting her husband, a Japanese man who had sent for her, was denied admission into the United States. The court made much of the fact that the woman did not know where her husband lived, therefore questioning either the existence of the marriage or the woman's veracity. The woman in *Nishimura Ekiu* was in fact excluded under the 1882 Act referred to above, as a person who had no apparent means of support and was therefore likely to become a public charge. However, according to Frank F. Chuman, she was a 25-year-old who had been married for two years to a man who had been in the United States for one year. She was not unlike a "picture bride," a Japanese woman secured for marriage to a Japanese national living in the United States through the exchange of photographs. *THE BAMBOO PEOPLE* 12-13 (1976). For a further discussion of the importation of women to the United States for marriage see Note, *Mail Order Brides: Gilded Prostitution and the Legal Response*, 28 U. MICH. J.L. REF. 197, 200 (1994). This note also discusses the explicit exclusion of Chinese prostitutes and later Chinese women in general.

47. Although the case of *Nishimura Ekiu*, 142 U.S. 651, explored certain aspects of the Immigration Act of 1882 prohibiting the entry of persons who were subject to become a public charges, this was not *per se* the focus of the case.

48. See, e.g., *Passenger Cases*, 48 U.S. 283.

49. *Head Money Cases*, 112 U.S. 580.

50. 22 U.S. (9 Wheat.) 1 (1824).

commerce power might also be regulated by a state under its police power, if there is no actual conflict between the state regulation and federal legislation.<sup>51</sup> In *Mayor of New York v. Miln*,<sup>52</sup> the Court upheld the state's power to demand that the master of a vessel provide data concerning the vessel after a transatlantic voyage. The theory behind *Miln* was that states have the right to police their shores, and that a law requiring that certain data be provided by the masters of vessels was part of the "right, [and] the bounded and solemn duty of a state, to advance the happiness and prosperity of its people, and to provide for its general welfare."<sup>53</sup> Only the dissent in *Gibbons v. Ogden* suggested that the federal commerce power was exclusive.<sup>54</sup>

Later, the *Passenger Cases* invalidated what was then an increasingly common practice among states, notably Massachusetts and New York, of demanding outright per person fees ("head taxes") for each alien on board.<sup>55</sup> After the invalidation of the head tax, officials in New York recognized that to continue to charge such fees would be impermissible. New York, however, continued to cling to its efforts to "protect" against the entry of so called high risk aliens, persons who were maimed, blind, or of limited mental capacity. The new scheme consisted of designating such alien passenger charges as "commutation fees." This, too, was ultimately deemed impermissible.

In *Henderson v. Mayor of New York*,<sup>56</sup> the Court concluded that notwithstanding the decision in *Mayor of New York v. Miln*, it was impermissible for the State of New York to demand that the master of a ship arriving at the port of New York from a foreign port report in writing biographical information on every non-citizen passenger, and then to require the owner or consignee of the vessel to give a bond for each such person, or in the alternative to give a fixed sum per passenger. The Court found unpersuasive the State of New York's argument that the statute was not a regulation of commerce in that the requested bond was a suitable regulation under the state's police power to protect against the expense of supporting persons who are "paupers or diseased, or helpless women and children, coming from foreign countries."<sup>57</sup>

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51. *Id.* at 203. In discussing the right of states to enact inspection laws regarding goods, the Court stated:

That inspection laws may have a remote and considerable influence on commerce will not be denied; but that a power to regulate commerce is the source from which a right to pass them is derived, cannot be admitted. The object of the inspection laws, is to improve the quality of the articles produced by the labor of a country; to fit them for exportation, or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form an immense portion of legislation, which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves.

*Id.*

52. 36 U.S. (11 Pet.) 103 (1837).

53. *Id.*

54. *Gibbons*, 22 U.S. at 226.

55. *Passenger Cases*, 48 U.S. 283.

56. 92 U.S. 259 (1876).

57. *Id.* at 268.

Rather, as the Court stated, “[i]n whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect” and if it is apparent that the statute was to compel the payment of monies for every passenger brought in, it is void.<sup>58</sup> It is noteworthy that despite the federal government’s determination that such schemes to impose taxes or payments for the entering of aliens were impermissible in these cases, the issue was very clearly one of supremacy of the federal government over the states in this particular area of “commerce,” as immigration was coming to be viewed. Congress undoubtedly believed that the nature of the schemes used to charge per person fees in order to guarantee against the entry of undesirable aliens was useful in regulating immigration, as the federal government itself adopted a similar plan in 1882.<sup>59</sup>

Outside of these cases implicating the federal commerce power, there still existed an entire area of cases in which the states were permitted to act. States were allowed to act in the area of immigration from early in our history under circumstances in which the federal government did little in the same arena. State regulation of immigration can, in fact, be divided into several major categories of legislation which have been enacted over the history of our country.<sup>60</sup> The regulation of the movement of criminals, sick, and poor people was very often linked in the language of immigration statutes.<sup>61</sup>

One commonly encountered state regulation addressing immigration limited the movement of criminals. Some of the original colonies of the United States often served as lands of exile for convicts from Britain.<sup>62</sup> For example, Georgia was home to a large settlement of persons convicted for nonpayment of debt.<sup>63</sup> An early concern of the colonies was to prevent further importation of felons.<sup>64</sup>

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58. *Id.* at 268-69.

59. Act of Aug. 3, 1882, ch. 376, 22 Stat. 214.

60. Neuman, *supra* note 11, at 1840. Neuman’s exploration is an historical account of immigration prior to the twentieth century and attempts to explode the myth that the United States had more or less open borders prior to the enactment of federal legislation in the 1870s and 1880s.

61. In *Henderson, and Commissioners of Immigration v. North German Lloyd*, 92 U.S. 259, 268 (1875) the Supreme Court considered statutes from New York and Louisiana which were almost identical in language, which required ships’ captains bringing in immigrants from foreign ports to post bond for all such passengers. The Court described New York’s position as to the purpose of the statute as one “suitable . . . under the power of the State to protect its cities and towns from the expense of supporting persons who are paupers or diseased, or helpless women and children, coming from foreign countries.” In *Miln*, 36 U.S. at 142, such regulation was seen as “necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from the unsound and infectious articles imported.”

62. J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660-1800* 472 (1986). According to Beattie, transportation to the Americas took place as early as 1600, principally as a condition of a royal pardon.

63. See generally, PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT AND BANKRUPTCY 1607-1900* (1974). Coleman notes however that Georgia, like North Carolina, South Carolina and Virginia, had at one time sought to attract defaulting debtors as settlers during periods of low immigration to the colonies.

64. Virginia, Maryland and Massachusetts resisted vigorously the entry of convicted felons; Virginia and Maryland passed laws against it in the 1670s. With the passage of the English Transportation Act in 1718 and thus increased numbers of transports, Virginia again responded with legislation, which was however, disallowed by England. BEATTIE, *supra* note 62, at 479, 505.

Another area of immigration concern was public health regulation. States have long legislated on the subject of health and immigration. In *Compagnie Francaise De Navigation A Vapeur v. Louisiana*,<sup>65</sup> a French steamship company challenged the State of Louisiana's enforcement of a statute which empowered local boards of health to exclude healthy persons from localities infested with contagious or infectious disease, without regard to whether such person came from within or outside the state. With the growth of the tuberculosis epidemic in the late 1800s, those carrying the disease were often branded as immoral and careless, and many states took stringent measures to stop the entry of such persons.<sup>66</sup>

State statutes regulating the immigration of the poor were very often based upon the English poor law system of settlement.<sup>67</sup> In Massachusetts, for example, legislation enacted in 1794 imposed a penalty on anyone who knowingly brought a pauper or indigent into any town in the Commonwealth, and failed to remove such person.<sup>68</sup> Over the next several years, Massachusetts amended its regulations to require payment of bonds or security, a practice which was challenged and ultimately overturned by the Supreme Court.<sup>69</sup> The state of Massachusetts still persisted in its efforts to prevent the entry of impoverished persons, amending and modifying its regulations several times during the nineteenth century.<sup>70</sup>

In addition to the state immigration regulations affecting criminals, the sick, and the poor, there were also more specific state regulations regarding slavery and the movement of blacks, both slave and free. It has been argued that such regulations do not properly fit into any discussion of immigration, with the most often cited reason being that slavery was not voluntary movement on the part of the slaves.<sup>71</sup> However, immigration regulations affecting criminals, the poor and the sick, categories more readily accepted as belonging to a discussion of immigration regulations, very often involved an aspect of "involuntary" transportation.<sup>72</sup> Thus, it was clear early on that the

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65. 186 U.S. 380 (1900).

66. Lawrence O. Gostin, *Tuberculosis and the Power of the State: Toward the Development of Rational Standards for the Review of Compulsory Public Health Powers*, 2 U. CHI. L. SCH. ROUNDTABLE 2190, 2201 (1995) ("Like the modern HIV epidemic, there were innocent, as well as guilty, victims of tuberculosis. For some, tuberculosis was merely an unfortunate result of underlying social conditions—crowded housing, poor sanitation, inadequate nutrition due to poverty.")

67. Neuman, *supra* note 11, at 1848.

68. *Id.* at 1849.

69. *Passenger Cases*, 48 U.S. 283.

70. Neuman, *supra* note 11, at 1849-51.

71. *Id.* at 1837. Neuman offers a counter to this argument by citing to *Plyler v. Doe*, 457 U.S. 202, 219-20 (1982). In *Plyler v. Doe*, the court speaks of children of illegal immigrants as being unlike their parents, who, having "elect[ed] to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited, to deportation." 457 U.S. at 219-20. The children in such instances "can affect neither their parents' conduct nor their own status." *Id.*

72. Criminals were often given no choice as to whether they were transported; this was also true of the infirm and the poor, who often found themselves being transported to America due to a series of reasons which left so little to the will of the immigrant as to be considered compulsory. See generally BEATTIE, *supra* note 62.

vast majority of immigration legislation which existed in the early years of this country was at the state level.<sup>73</sup>

With the increase in the enactment of federal pronouncements regarding immigration in the late nineteenth and early twentieth centuries, it became increasingly clear that such state legislation could and would be challenged on Supremacy Clause grounds, going beyond specific Commerce Clause concerns. A seminal case involving such a challenge was *Hines v. Davidowitz*.<sup>74</sup> In *Hines*, an appeal was taken from a district court decree which restrained the Commonwealth of Pennsylvania from enforcing the provisions of the Pennsylvania Registration Act against an alien. The Pennsylvania Registration Act<sup>75</sup> required all aliens age eighteen or older, with some exceptions, to register each year and provide certain information enumerated by statute, as well as other information and details that the Pennsylvania Department of Labor might request. Further, aliens were required to pay a one dollar annual registration fee, and receive and carry an alien registration card at all times, which could be demanded at any time by any police officer or agent of the Department of Labor and Industry. Production of the card was also required in order to obtain a license to drive or to register a motor vehicle. Those non-exempt aliens who failed to register were subject to a fine of not more than one hundred dollars and imprisonment for not more than sixty days, or both. Failure to carry or exhibit the card was also punishable by fine or imprisonment.

The appellants challenged the Pennsylvania statute on four grounds: 1) that the act was invalid in that it attempted to regulate an area wherein the national law was supreme; 2) that the act denied equal protection of the laws to aliens residing in Pennsylvania; 3) that the act exceeded Pennsylvania's constitutional power in requiring registration of aliens without the consent of Congress; and 4) that the act violated Section 16 of the Civil Rights Act of 1870.<sup>76</sup> The Court quickly dispensed with all but the Supremacy Clause claim, finding that in the context presented it was necessary only to decide the issue of whether the Congress had, by its actions, foreclosed enforcement of Pennsylvania's registration law.<sup>77</sup>

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73. Neuman, *supra* note 11.

74. 312 U.S. 52 (1940).

75. PA. STAT. ANN. tit. 35, §§ 1801-06 (1940).

76. 42 U.S.C. § 1981 (1988). This statute was formerly codified in Title 8, U.S. Code, Aliens and Nationality, 16 Stat. 140, 144, 8 U.S.C. § 41: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

77. *Hines*, 312 U.S. at 62. Although the *Hines* Court declined to decide the issue of whether § 16 of the Civil Rights Act prevented discrimination against aliens in the setting, the issue was later settled in *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948). It is interesting to note that while § 16 was part of the post slavery legislation intended to assure the rights of freed slaves, it was at one point included in the laws regarding alienage and nationality and later realigned with modern-day Civil Rights Legislation.

Shortly after the enactment of Pennsylvania's registration law, Congress enacted its own registration law.<sup>78</sup> The federal act called for a single, as opposed to an annual, registration of all aliens age fourteen or older, as well as for the provision of any additional information which might be prescribed by the Commissioner with the approval of the Attorney General. The federal act also called for the finger-printing of all registrants and the secrecy of all files. There was no requirement that aliens carry a registration card, and only the willful failure to register was made a criminal offense.<sup>79</sup> Given the federal statute, the Court found for the appellants, stating that "the regulation of aliens is so intimately blended and intertwined with the responsibilities of the national government, that where it acts, and the state also acts on the same subject, 'the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.' "<sup>80</sup>

The Court in *Hines*, though making an important statement concerning when state legislation may conflict with federal legislation, declined to provide any ground rules for analysis of other such cases; the Court instead referred to a variety of standards employed in making such conclusions in prior cases.<sup>81</sup> The reach of *Hines* is therefore limited to its facts.

In modern case law it is well settled that in certain instances the states may act in the area of immigration. Generally, such Supremacy Clause analysis starts with a discussion of *De Canas v. Bica*.<sup>82</sup> In *De Canas*, the Supreme Court recognized that the states do have some authority to act with respect to illegal aliens where such actions are in keeping with federal objectives and further a legitimate state goal. *De Canas* clearly enunciates that simply because a statute has aliens as its subject, it is not *per se* invalid. In other words, there is no congressional intent to "occupy the field" of immigration.<sup>83</sup> Rather, *De Canas* sets forth the following criteria for determining whether a state statute that concerns "illegal aliens" is preempted by federal

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78. The Alien Registration Act, 8 U.S.C. § 1302 (1988), was enacted in 1940. Act of June 28, 1940, ch. 439, 54 Stat. 670.

79. Although at the time of enactment, as the Court in *Hines* notes at 312 U.S. 60-61, there was no requirement that aliens carry with them a registration card "to be exhibited to the police," subsequent amendment of the federal legislation resulted in just such a requirement. 8 U.S.C. § 1304 explicitly requires that aliens over the age of eighteen *shall* carry or have in their possession at all times any certificate of alien registration or alien registration receipt card issued to him pursuant to the original 1940 Act.

80. *Hines*, 312 U.S. at 66.

81. *Id.* at 67. The court stated:

There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting, contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick.

*Id.* (footnotes omitted).

82. 424 U.S. 351 (1976).

83. *Id.*



immigration law: 1) Whether the statute is a constitutionally proscribed regulation of immigration; 2) Whether such state regulation, even if not preempted by the Supremacy Clause, is required because the "nature of the subject permits no other conclusion" or because "Congress has ordained it;" and 3) Whether the statute burdens or conflicts in any manner with any federal statutes or treaties.<sup>84</sup>

Applying the first criterion of *De Canas* to Proposition 187, whether the statute is a prohibited regulation of immigration, requires a close look at the statute's provisions. Regulation of immigration has been defined as a determination of who should or should not be admitted into the country, the conditions under which legal entrants should remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.<sup>85</sup> States are granted no such powers under the Constitution; therefore, they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States.<sup>86</sup>

Does Proposition 187, with its focus on aliens, run up against the Supremacy Clause and fall flat on its provisions? Such a result would mean a determination that the initiative in its entirety was an attempt to legislate in the area of immigration in a way the states were not permitted. This result is unlikely, since, as was clear in *De Canas*, states may legislate in the area of immigration and are free to create regulations which would not conflict with federal provisions.

The first section of the initiative, concerning the penalties for the manufacture, distribution, and sale of documents to conceal citizenship closely parallels federal provisions regarding these activities.<sup>87</sup> The next provision concerns the cooperation of local law enforcement agencies in California with the INS.<sup>88</sup> Mandating cooperation between the agencies of the state and local government with the federal government does not, on its face, suggest a constitutionally impermissible scheme. Even the establishment of a system of required notification can be viewed as complementary to federal notification systems.

As to whether the "nature of the subject permits no other conclusion," or that "the Congress has unmistakably so ordained," the opponents of Proposition 187 have a great burden to uphold. The *De Canas* court indicated that "[s]tates possess a broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws are only a few examples."<sup>89</sup> If the

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84. *Id.*

85. *Hines*, 312 U.S. at 69.

86. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948).

87. *See* 8 U.S.C. § 1324c (1992).

88. CAL. PENAL CODE § 834b (a) (West 1995).

89. *De Canas*, 424 U.S. at 356.

purpose of Proposition 187 is, as the preamble states, to protect California citizens from "injury," is the regulation then a health and welfare statute which similarly would be permissible under the state's broad power?<sup>90</sup> Or is it essentially an economic regulation, in which case it may be subject to an entirely different scrutiny?

#### IV. PREEMPTION AND BEYOND—SOME ADDITIONAL CONSTITUTIONAL CONCERNS

Once *De Canas* established that the states can indeed legislate in the area of immigration, the most immediate stumbling block to the validity of any such legislation under the Supremacy Clause becomes whether there is any federal legislation to counter the state legislation. In the wake of *De Canas*, a preemption analysis of immigration-related state legislation can go only as far as existing conflicting federal statutes will take it. Given the fact that federal legislation may, under political and other pressures, change to restrict alien and immigrant rights, a full and cogent analysis would seem to almost require one to go beyond preemption issues in considering the constitutionality of the various provisions. Though ripeness and standing issues raised by the provisions may limit the potential for frontal challenges to the statute, these issues are nonetheless well worth considering.<sup>91</sup>

##### A. Findings and Declarations

The nature of the "personal injury" suffered, or of the "criminal conduct" referred to in the Findings and Declarations section of Proposition 187 is not clear. Even if it is made clear, the "right" to be protected from such an injury is equally vague. The states, as well as the federal government, clearly have the power to create criminal laws or other legislation which protects the life and property of individual citizens from intrusion from other private citizens. This is generally considered part of a state's power to legislate in the area of health, safety and welfare.<sup>92</sup> This protection is not, however, a "right" in the sense of a liberty interest. As the Court noted in *Deshaney v. Winnebago*

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90. Under the Tenth Amendment of the U.S. Constitution, states have broad latitude in legislating in the area of health and welfare.

91. For example, potential challengers may be limited in their attempts to bring challenges to sections of the initiative which present search and seizure issues under the Fourth Amendment, such as the Penal Code sections (see Appendix), as such challenges require an actual injury to the claimant. However, it may be interesting to speculate as to the reach of the Fourth Amendment in a case where an individual is required to provide vital and possibly harmful information about himself. In *Whalen v. Roe*, 429 U.S. 589 (1977), the Court discussed in a footnote the possibility of a broader liberty interest from the Fourth Amendment, the right to privacy. The appellees cited to language in *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Katz v. United States*, 389 U.S. 347 (1961)). Declining to find a right to privacy under the Fourth Amendment, the Court in *Whalen v. Roe* indicated that *Terry* and *Katz* involved "affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations." 429 U.S. at 604 n.32. If in fact such a right to privacy could be found to exist under the Fourth Amendment, then conceivably statutes infringing on that right might be subject to immediate challenge.

92. The Tenth Amendment of the U.S. Constitution permits the states to regulate the conduct of individuals through their police power.

*County Department of Social Services*, "nothing in the language of the Due Process Clause itself requires the state to protect the life, liberty and property of its citizens against invasion by private actors."<sup>93</sup>

Given the economic climate surrounding Proposition 187, it is most likely that the "personal injury" referred to in the introduction is a reference to economic harm. Forty percent of the undocumented aliens that have entered the United States are now in California.<sup>94</sup> The government of California spends over eight billion dollars each year for aliens both legal and illegal.<sup>95</sup> The government of California recently estimated that it spends 2.1 billion dollars per year to educate illegal alien children (though this estimate is thought to be eight hundred million dollars too high).<sup>96</sup> Clearly, there can be some redress for economic harm, but can such redress be in the form of a regulation which calls for criminal penalties for violators?<sup>97</sup>

No part of a statute may be deemed valid if it has an impermissible purpose, such as to discriminate.<sup>98</sup> Despite its lack of clarity, the findings and declarations clause may, to some extent, save Proposition 187 from a direct finding that it has such an impermissible purpose. The stated purpose of curbing the negative economic impact is not however, in and of itself, enough to support a constitutional challenge.<sup>99</sup>

## B. *Penal Code Amendments*

State cooperation with federal laws, and enforcement of the laws, is generally permissible.<sup>100</sup> It has been explicitly held that where state enforcement activities do not impair federal regulatory interests concurrent enforcement activity is permitted.<sup>101</sup> However, some provisions of the penal code

93. 489 U.S. 189, 195 (1989).

94. Deborah Sontag, *Illegal Aliens Put Uneven Load on States*, Study Says, N.Y. TIMES, Sept. 15, 1994, at A14, citing statistics from a study by the Urban Institute.

95. *Id.*

96. *Id.*

97. Economic harm is a tort which is recognized by a number of causes of actions in various states. Whether such harm is a subject for state action or prosecution is entirely another matter, except where that harm is through fraud or other identifiably criminal activities. In such matters, an individual might have redress in both the civil and the criminal arenas.

98. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

99. *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805 (1989). In *Calfarm*, the California Supreme Court reviewed a proposition which imposed reductions in insurance rates, and required the approval of the state Insurance Commissioner for any increases in rates. The statute also limited the power of insurers to refuse to renew policies. Insurers challenged the rollback and reduction provisions as being violative of the United States and California Constitutions in that the provisions were arbitrary, discriminatory and confiscatory. The court reviewed the challenged provisions and found that only one aspect of the statute was constitutionally impermissible, in that it deprived insurers of a fair and reasonable rate of return. In looking at the statute, the stated purpose of which was to relieve Californians of the burden of high insurance rates, the court stated, quoting from *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281 (Cal. 1978): "We do not consider or weigh the economic or social wisdom or general propriety of the initiative. Rather, our sole function is to evaluate [it] legally in the light of established constitutional standards." *Id.* at 814.

100. *Ker v. California*, 374 U.S. 23 (1953); *Miller v. California*, 357 U.S. 301 (1958).

101. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963).

amendments implicate personal rights and appear to go beyond what the Ninth Circuit has permitted in this area. Examples of this are seen in those provisions which permit questioning and verification of whether the person arrested is present "in violation of federal immigration laws." In *Gonzales v. City of Peoria*,<sup>102</sup> eleven persons of Mexican descent brought an action against the city of Peoria, Arizona and some of its police officers and public officials. The claim was that city police, acting under city policies, had engaged in a practice of stopping and arresting persons who appeared to be of Mexican descent based only on their race, without reasonable suspicion or probable cause. The individual claimants involved alleged that they had been stopped by police and were required to provide identification or proof of legal presence in the United States, and that persons who did not carry identification or documentation were detained at the county jail for release to immigration authorities. They alleged violation of the Fourth and Fourteenth amendments of the U.S. Constitution, and the Civil Rights Act of 1871.

After a finding for the defendants in the district court, the plaintiffs appealed. The Court of Appeals considered three issues stemming from the appellants' claims, the first and most important of which was whether the Peoria City Police had the authority under state and federal statutes to arrest for violations of the immigration law.<sup>103</sup>

The court in *Gonzales* found that while federal law does not preclude local law officers from enforcing criminal provisions of the Immigration and Naturalization Act, and in some instances permits arrests for certain of those criminal provisions, this authorization is explicitly limited to the criminal provisions of the Act.<sup>104</sup> What this means is that Proposition 187's requirements that law enforcement officers "verify" whether a person is simply in the United States "in violation of immigration laws" may exceed the scope of its authority, as such an inquiry may concern civil violations rather than criminal ones. *Gonzales* gives several examples of when a person might be present in the country in violation of immigration laws, yet not have committed a criminal offense.<sup>105</sup> Moreover, even as to criminal violations of

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102. 722 F.2d 468 (9th Cir. 1983).

103. *Id.* at 476. The Ninth Circuit also considered whether the City and the individual defendants were liable to the appellants for damages and alleged deprivation of their constitutional rights (discussing appellants claim under 42 U.S.C. § 1983), and whether the appellants were entitled to equitable relief to prevent future constitutional violations. *Id.* at 477.

104. *Id.* at 475-76.

105. The Court stated:

Many of the problems arising from the implementation of the City's written policies have derived from a failure to distinguish between civil and criminal violations of the [Immigration and Naturalization] Act. Several of the policy statements use the term "illegal alien," which obscures the distinction between the civil and criminal violations. . . . There are numerous reasons why a person could be illegally present in the United States without having entered in violation of section 1325 [8 U.S.C. § 1325, prohibiting unlawful entry, a crime]. Examples include expiration of a visitor's visa, change of student status, or acquisition of prohibited employment.

*Id.* at 476.

immigration law, not all offenses are subject to criminal penalties. In *INS v. Rincon-Jimenez*, the Ninth Circuit held that the crime of entering without inspection is not a "continuing offense" such as would subject a person to arrest or prosecution after the time of entry.<sup>106</sup>

Proponents of Proposition 187 may point to the fact that the section regarding law enforcement concerns inquiries made after a person has been arrested, and thus, the holding in *Gonzales* is inapplicable as to what areas into which an officer may inquire. While it is true that in *Gonzales* the claim was that officers stopped and arrested the claimants based only on their suspicions regarding their national origin or legal status in the country, and not on any other independent grounds, it is not clear that Proposition 187 requires such independent grounds for an arrest before a law enforcement officer can begin the "verification" process. The language of the section states that the officers will begin the process regarding a person who is arrested "if he or she is suspected of being in violation of federal immigration laws."<sup>107</sup> Does this mean an arrest that took place on independent grounds, or does it refer to an arrest that took place for the reason that, "if," the person is suspected of the immigration violation?

A local law enforcement officer may question a person about whether he has a "green card."<sup>108</sup> However, a stop or arrest based solely on a person's apparent "foreign" appearance is impermissible.<sup>109</sup> Moreover, even the lowest level of law enforcement intrusion, the "investigatory stop," requires at least *reasonable* suspicion that some crime is afoot.<sup>110</sup> Interestingly enough, the phrase "reasonable suspicion," while used liberally throughout other sections of Proposition 187, is conspicuously absent in the section on law enforcement.<sup>111</sup>

Though possibly this absence is the result of an oversight, the drafters of the provision could very likely have been operating under the belief that aliens illegally present in the United States have fewer Fourth Amendment protections. It is true that aliens at the border have very limited Fourth Amendment protection,<sup>112</sup> and that aliens may not assert the exclusionary

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106. 595 F.2d 1192 (9th Cir. 1979). *But see* *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (finding that entry after deportation is a continuing crime).

107. CAL. PENAL CODE § 834b(a) (West 1995) (emphasis added).

108. A "green card" is an alien registration card, which is actually salmon colored. Federal law requires all persons over the age of 18 to carry the card. 8 U.S.C. § 1324(a)(2) (1992). *See* *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 (10th Cir. 1984) (holding that a state trooper has general investigatory authority to inquire into immigration violations).

109. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

110. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

111. Sections where the "reasonable suspicion" language appears are: CAL. WELF. & INST. CODE § 10001.5 (West 1995) (public social services); CAL. HEALTH & SAFETY CODE § 130 (West 1995) (health care); CAL. EDUC. CODE § 48215 (West 1995) (primary and secondary education); CAL. EDUC. CODE § 66010.8 (West 1995) (post-secondary education).

112. *United States v. Montoya De Hernandez*, 473 U.S. 531, 537 (1985). In *Montoya De Hernandez*, the court stated: "Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border without probable cause or a warrant, in

rule for violations of the Fourth Amendment in deportation proceedings.<sup>113</sup> However, aliens, even those unlawfully present in the country, may assert Fourth Amendment rights in criminal proceedings.<sup>114</sup> Moreover, despite lessened Fourth Amendment rights at the border,<sup>115</sup> the standard for a detention, beyond a routine customs search, is reasonable suspicion.<sup>116</sup> The verification process which takes place after an arrest may also trigger concerns about the possibility of self-incrimination. Ostensibly, any questioning regarding immigration status which takes place under the mandate of Proposition 187 would occur after an arrest and therefore after the warning required by *Miranda v. Arizona* had been given.<sup>117</sup>

The sections amending the penal code requiring that arrested persons be notified of their status as aliens present in the country in violation of immigrations laws and informing them that they must either obtain legal status or leave, would appear to go beyond the scope of what local law enforcement officials may do under current law. Determinations as to who may stay in the country are made exclusively by the federal government.<sup>118</sup> Even aliens who may be subject to such a determination are entitled to some minimal due process, even when they have not actually entered the country.<sup>119</sup> Thus, a notice telling an individual to simply obtain legal status or leave appears to be blatantly defective.

The provisions of the penal code requiring the state Attorney General and the INS be notified of the apparent illegal status of an arrestee, and requiring provision of additional information requested by those entities are in keeping with what has been permitted in other state settings. For instance, in *United States v. Salinas-Calderon*<sup>120</sup> a Kansas highway patrolman stopped a vehicle which appeared to be driving erratically, and subsequently obtained information that led him to believe that at least some of the occupants had violated immigration laws. The trooper's detention of the occupants of the car while he contacted the INS was held permissible.<sup>121</sup>

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order to regulate the collection of duties and to prevent the introduction of contraband into this country." *Id.* at 537.

113. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

114. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

115. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973). *Almeida-Sanchez* gives examples of functional equivalents to the border, such as international airports and stations near the border.

116. *Montoya De Hernandez*, 473 U.S. at 541.

117. *Miranda v. Arizona*, 384 U.S. 436 (1966), holds that prior to any questioning after a person has been taken into custody, the person must be informed of his right to remain silent and be assured of a "continuous opportunity" to exercise that right. To this end, the accused must be informed that: (1) he has a right to remain silent (2) that any statement he does make may be used as evidence against him, and (3) that he has the right to the presence of an attorney, either retained or appointed. However, in *INS v. Lopez-Medina*, 468 U.S. 1032, 1038 (1984), the Court referred to numerous Court of Appeals decisions holding that the absence of *Miranda* warnings does not render an otherwise voluntary statement inadmissible for deportation purposes.

118. *Salinas-Calderon*, 728 F.2d 1298 (10th Cir. 1984).

119. See, e.g., *Landon v. Plasencia*, 459 U.S. 21 (1982).

120. 728 F.2d 1298.

121. *Id.* at 1301-02.

### C. *Exclusion of Aliens from Public Social Services*

The attempt to limit public benefits to aliens who have been termed either lawful permanent residents or lawful temporary residents raises questions in light of the holding in *Holley v. Lavine*.<sup>122</sup> In *Holley*, the State of New York enacted a regulation which provided that an alien who is unlawfully residing in the United States shall not be eligible for Aid to Families with Dependent Children (AFDC). The plaintiff was a Canadian citizen who entered the United States as a temporary non-immigrant student at the age of twelve, and remained in the United States even after she married and bore six children. She later separated from her husband and applied for AFDC, which she received for herself and her six children. After New York enacted its regulation, her benefits were terminated. Following unsuccessful appeals to state authorities, the plaintiff filed a complaint in the district court, against the Commissioner of the New York State Department of Social Services and the Commissioner of the Monroe County Department of Social Services. When the case was eventually heard on the merits, the plaintiff failed at the district court level, whereupon an appeal was taken to the Second Circuit.

There was no contest as to whether federal law governed the payment of AFDC benefits, since there was clearly a federal law on point.<sup>123</sup> However, federal regulations implementing federal law required that a state plan shall include otherwise eligible individuals who were either citizens of the United States, lawful permanent residents, or persons otherwise residing in the United States under color of law.<sup>124</sup>

The court in *Holley* set out to define the phrase "under color of law." The State of New York, unable to offer background material to the court to aid in its determination, nonetheless asked the court to take judicial notice that "millions of persons are unlawfully in the United States" and that their presence was "the cause of major financial burdens to the states and the nation because these illegal aliens claim unearned benefits from welfare systems."<sup>125</sup> The court found that the plaintiff fit into a very particular category in that she had revealed her situation to the INS, and had received a letter which stated that the INS had not initiated deportation proceedings against her, and that it had no immediate plans to do so.

To reach the finding that the plaintiff did in fact reside in the United States under color of law, the court narrowed its inquiry to the circumstances in the plaintiff's case, where there were official assurances that there would be no deportation proceedings in the immediate future. However, in defining the

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122. 553 F.2d 845 (2d Cir. 1977).

123. 42 U.S.C. § 601 (1992), the national Social Security Act, authorized the payment of funds to states which had submitted and had received approval of the Secretary of Health, Education and Welfare, plans for aid and services to needy families with children. The regulations implementing this section were codified at 45 C.F.R. § 233.50 (1995).

124. 553 F.2d at 848-49.

125. *Id.* at 849.

phrase "under color of law," the court did not confine itself to the narrow facts of the plaintiff's situation, stating that "the phrase obviously includes actions not covered by specific authorizations of law. It embraces not only situations within the body of the law, but also others enfolded by a colorable limitation. 'Under color of law' means that which an official does by virtue of power, as well as what he does by virtue of right."<sup>126</sup>

Arguably, proponents of the provisions providing services to only limited classes of legally admitted aliens could rely on *Sudomir v. McMahon*.<sup>127</sup> In *Sudomir*, illegal aliens residing in California who had applied for political asylum were found not to be permanent residents under color of law and were therefore ineligible for AFDC benefits. The court in *Sudomir* found that asylum applicants were not PRUCOL<sup>128</sup> because their presence had not been officially sanctioned by the INS. *Sudomir* notwithstanding, many cases since *Holley v. Lavine* have given greater rather than less breadth to the meaning of "under color of law" as it relates to PRUCOL status. With few exceptions, it has been the case that where the INS knows of the presence of aliens and fails to act on deportation the presence of such aliens can be said to be under color of law.<sup>129</sup>

Given the holding in *Holley v. Lavine*, a statute such as Proposition 187 which would grant public social services only to persons who are citizens or lawfully admitted temporary or permanent residents, while ignoring those persons who have obtained PRUCOL status, seems to be impermissible. Conceivably, the provision regarding persons lawfully admitted for a temporary period of time<sup>130</sup> could apply to PRUCOL aliens, but after the court's explication in *Holley v. Lavine*, there is certainly no requirement that a PRUCOL alien have been lawfully admitted. Further, there is no requirement that an individual be here for a temporary period, though, as in the case of the plaintiff in *Holley v. Lavine*, such temporary status may well be the start of what develops into PRUCOL status. Of course, in light of recent changes rendered by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, there may be a move towards redefining notions of PRUCOL status as it relates to means-tested programs.<sup>131</sup>

126. *Id.*

127. 767 F.2d 1456 (9th Cir. 1985).

128. PRUCOL is an acronym for permanent resident under color of law, and is frequently used as shorthand method for describing persons who are present in the United States with the implicit, if not the explicit authorization of the INS.

129. Department of Health & Rehabilitative Servs. v. Solis, 580 So. 2d 146, 148 (Fla.1991). In *Solis*, the Florida Supreme Court found that applicants for political asylum were eligible for PRUCOL status as defined by *Holley v. Lavine*. *Solis* cites to numerous cases wherein *Holley v. Lavine* has been followed, among them: *Berger v. Heckler*, 771 F.2d 1556 (2d Cir. 1985) (concerning supplemental social security benefits); *Industrial Comm'n v. Arteaga*, 725 P.2d 473 (Colo. 1987) (unemployment benefits); *St. Francis Hospital v. D'Elia*, 422 N.Y.S.2d 104 (App. Div. 1979) (medical assistance), *aff'd*, 422 N.E.2d 830 (N.Y. 1981); and *Cruz v. Commissioner of Pub. Welfare*, 478 N.E.2d 1262 (Mass. 1985) (medicaid).

130. CAL. WELF. & INST. CODE § 10001.5 (b)(3) (West 1995).

131. See *supra* note 9. The new Act limits eligibility for means-tested programs to those who are lawful permanent residents who have worked for particular periods of time or have been present in the



The section requiring notification to other agencies would probably be found permissible, in light of existing federal and state information sharing provisions already in place.<sup>132</sup> However, the notice to aliens provisions, as indicated above in the discussion of amendments to the Penal Code, would probably be found impermissible in light of the superior federal role in deportation. It is curious that the rules governing notification to aliens regarding public social services require that aliens be told of their apparent illegal status *in writing*, while in the law enforcement setting such notice may apparently be given verbally. The reasons for this are not clear, however, one may speculate that since in a law enforcement setting information of constitutional magnitude is commonly given verbally (e.g., *Miranda* warnings), there is little concern for written notice in this context.<sup>133</sup> Moreover, the written notice given in the area of public benefits may be an attempt to address due process concerns implicated in the denial of public benefits.<sup>134</sup>

#### V. EXCLUSION FROM SOCIAL SERVICES AND PROCEDURAL DUE PROCESS

The Due Process Clause of the Fourteenth Amendment, like other protections afforded by that amendment, extends to all persons within the territorial jurisdiction of the United States, regardless of nationality.<sup>135</sup> The provisions of Proposition 187 which appear to most burden these interests are those provisions which provide for "informing" the alien that he is in the country illegally, and then directing him either to correct his status or leave the country. This amounts to deportation without a hearing. Even aside from the Supremacy Clause issues which would not permit deportation by a state, if allowed, such a proceeding would require due process.<sup>136</sup> These provisions fly in the face of long established notions of the procedural due process doctrine which have developed over the years.

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country for particular periods. Though there are provisions for those like refugees or asylees who would have fit generally under traditional definitions of PRUCOL, it is unclear that a person such as the claimant in *Holley v. Lavine* would now be eligible for benefits.

132. An example is the federal SHARE program regarding INS information.

133. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the U.S. Supreme Court held that when an individual is taken into custody or otherwise deprived of freedom by the authorities, procedural safeguards must be employed to protect the privilege against self-incrimination. The Court provided that unless some other effective means are employed to inform individuals of their right to remain silent, and to assure that the exercise of the right will be honored, authorities must notify individuals of their right to remain silent, that anything said may be used against him in a court of law, that there is a right to have an attorney present during questioning, and that if an individual desires an attorney and cannot afford one, one will be provided without cost. In providing for these very important safeguards, the Court speaks of the need to inform the accused of his rights via "effective and express explanations," and does not require a writing to satisfy this requirement. *Id.* at 473. While the Court discusses the taking of a confession or statement in writing, *Id.* at 486, there is no prescription as to how exactly the rights should be given. As the Court states, "the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation." *Id.* at 490.

134. See *infra* discussion of procedural due process.

135. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

136. See *id.*

Historically, the Court has relied upon the premise that procedural due process must be based upon some underlying liberty or property right which is derived from either the state's positive law or some constitutional provision other than the Due Process Clause.<sup>137</sup> It is clear, however that in the area of social and medical benefits, some very specific and clear processes are due. For a state agency to determine that there is a reasonable suspicion to believe that a person has no legal immigration status and then deny services which that person had previously received or been deemed eligible for, amounts to a deprivation of a protected property interest.<sup>138</sup>

In *Goldberg v. Kelly*,<sup>139</sup> New York City residents receiving funds from federal AFDC or New York state's assistance program claimed that officials administering the programs had terminated, or were about to terminate benefits without prior notice or hearing, and that they were therefore being denied due process of law. Although no provisions existed for any hearing or notice of any kind, prior to the complaints, after they were filed, state and city officials adopted procedures for notice and hearing. Those complaining then challenged the constitutional sufficiency of these procedures. The district court found for the claimants, whereupon state officials appealed.

The amended state regulations which were the subject of the challenge required, among other things, that the local procedure must include giving the recipient a notice of the reasons for the termination at least seven days prior to the effective date of the proposed discontinuance or suspension.<sup>140</sup> There was also a requirement that the recipient be notified that upon request, the recipient could have the proposal reviewed by a local welfare official holding a position superior to that of the supervisor who approved the proposed discontinuance or suspension. The recipient could also submit a written statement demonstrating why his grant should not be discontinued or suspended.<sup>141</sup> The regulations further provided for expeditious review, and

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137. Edward L. Rubin, *Due Process and Administrative Law*, 72 CAL. L. REV. 1044, 1045 (1984). Rubin cites to *Meachum v. Fano*, 427 U.S. 215 (1976), in support of his ideas. In *Meachum v. Fano*, an inmate at a state prison argued that the Due Process Clause of the Fourteenth Amendment entitled him to a hearing before being transferred to a prison with less favorable conditions. *Meachum* is to a great degree tailored to situations which involve imprisonment and the procedures which are due in a situation wherein a person has already been duly convicted and thus properly subject to the loss of some liberty rights. It does, however, speak generally to what types of losses can be addressed under the Due Process Clause of the Fourteenth Amendment:

We reject at the outset the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), a university professor was deprived of his job, a loss which was surely a matter of great substance, but because the professor had no property interest in his position, due process procedures were not required in connection with his dismissal. We therefore held that it is the nature of the interest involved rather than its weight.

*Id.* at 224.

138. Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order at 51, *Gregorio T. v. Wilson* (Case No. 94-7654).

139. 397 U.S. 254 (1970).

140. *Id.* at 258.

141. *Id.*

expressly forbade the discontinuance or suspension of the benefits prior to the sending of notice or prior to the proposed effective date, whichever came latest.<sup>142</sup>

The holding in *Goldberg v. Kelly* requiring that the state provide a very specific notice and hearing to recipients subject to loss of benefits would appear to invalidate the notice provisions written into Proposition 187.<sup>143</sup> And yet, even given the detailed provisions of the New York regulations in *Goldberg*, the Court on review found that only a *pretermination* procedure would satisfy the demands of due process where welfare is concerned.<sup>144</sup> As the Court in *Goldberg v. Kelly* stated, "for qualified recipients, welfare provides the means to obtain essential food, clothing, housing and medical care."<sup>145</sup> The Court noted, just as the drafters of Proposition 187 undoubtedly recognized in including both social services and medical care, those ineligible for welfare assistance are very often rendered ineligible for participation in state medical programs.<sup>146</sup>

Are aliens included in any contemplation of due process rights in the area of social services or medical benefits? In *Goldberg v. Kelly*, the court seemed to include them, if we take literally the Court's words on the history of due process in this country: "From its founding, the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."<sup>147</sup> This reference falls squarely in line with what had already been stated in *Yick Wo v. Hopkins*<sup>148</sup> and *Shaughnessy v. Mezei*.<sup>149</sup>

*Goldberg v. Kelly* does not stand, however, as a bulwark against any attempted deprivation of benefits; the holding will not, it appears, protect those persons who have not previously applied and qualified for benefits. *Board of Regents v. Roth*<sup>150</sup> is fairly clear in stating that such procedural process applies only to those interests or rights which the claimant presently enjoys.<sup>151</sup> Conceivably, aliens who have not previously applied for social service or non-emergency medical benefits may derive no protection from

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142. *Id.*

143. In May of 1995, the State of California indicated that it would not, contrary to its earlier assertions, prepare regulations for the implementation of Proposition 187. Commentators have suggested that the reason for this is the State's intention to assert *United States v. Salerno*, 481 U.S. 739 (1987), for the proposition that a challenger to the constitutionality of a legislative act bears the burden of showing that there is no set of circumstances under which the act might be valid. However, it would appear that a more effective strategy would be to draft regulations, since in *Salerno*, one of the principal factors in the Court's approval of the legislation in question (a bail reform act) was that "the procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination." 481 U.S. at 751. Drafting of such regulations might also be useful to asserting the validity of Proposition 187 given the regulatory roadmap provided by *Goldberg v. Kelly*.

144. *Goldberg v. Kelly*, 397 U.S. at 263-64 (emphasis added).

145. *Id.* at 264.

146. *Id.* at 264 n.11.

147. *Id.* at 264-65.

148. 118 U.S. at 369.

149. 345 U.S. at 212.

150. 408 U.S. 564 (1972).

151. *Id.*

*Goldberg v. Kelly*. Additionally, the recently enacted Personal Responsibility and Work Opportunity Act of 1996<sup>152</sup> diminishes the guaranties of *Goldberg v. Kelly* for citizens as well as for aliens on welfare. This being the case, we may yet see the development of a new procedural due process standard in this area.

A. *Exclusion of Illegal Aliens from Publicly-Funded Health Care Services*

Like the provisions on public benefits, the provisions purporting to limit medical services are objectionable given the potentially wide category of aliens who are neither lawfully admitted permanent or temporary residents, yet who may be considered PRUCOL and thus eligible for services under federal law.<sup>153</sup> The provisions requiring notification to the State Director of Social Services, the Attorney General of the United States and the INS, however, also present issues regarding the right to privacy in medical treatment.

In *Whalen v. Roe*, a group of physicians and patients brought suit challenging the constitutionality of a New York statute which required that the state be provided with a copy of every prescription for certain drugs and which also provided security measures to protect that information once in the state's possession.<sup>154</sup> The claimants argued that the provisions were an unreasonable exercise of the state's police power, and the doctor-claimants argued more specifically that the statute impaired their rights to practice medicine free from unwarranted interference from the state. The bulk of the challenges concerned the invasion of protected Fourteenth Amendment liberty interests. Claimants believed that there was a possibility that a doctor or other person handling the information might disclose privileged information, that the security provisions would be improperly administered and that patients would be subjected to the revelation of confidential information.

The Supreme Court found against the physicians and patients on all of their claims. The Court went to great lengths in its opinion regarding the rejected privacy claims. Such claims, the Court indicated, usually fit into two distinct categories: one where there is an individual interest in avoiding disclosure of personal matters; and another where the individual interest is in making important decisions independently.<sup>155</sup> The physicians and doctors argued that both types of privacy were implicated in their case, in that the mere existence of a readily available data bank of patient information made some patients reluctant to use and some doctors reluctant to prescribe certain

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152. Pub. L. No. 104-193, 110 Stat. 2105.

153. The National Immigration Law Center, in its publication *GUIDE TO ALIEN ELIGIBILITY FOR FEDERAL PROGRAMS* (3d ed. 1994), finds that there are at least four categories of aliens who, though not lawful permanent residents, may be eligible for medicaid services: those granted "Family Unity;" those who have been classed as refugees or asylees; Cuban and Haitian parolees; those granted Deferred Enforced Departure; and asylum applicants.

154. 429 U.S. 589 (1977).

155. *Id.* at 599.

drugs.<sup>156</sup> In rejecting these privacy claims, the Court indicated that it is always possible that private information might be disclosed to the public, and that the ways in which this might occur were not sufficient reasons for invalidating the statute on privacy grounds. As to the concern about private disclosure to the New York Department of Health, the Court stated that the disclosures required by the statute were not sufficiently different from those which had been previously required under prior law, and did not differ meaningfully from other "unpleasant invasions of privacy" which are associated with health care.<sup>157</sup> The Court cited to several examples where disclosure of private medical information is required by statute: reporting requirements relating to venereal disease, child abuse, injuries caused by deadly weapons, and certifications of fatal death.<sup>158</sup> The Court also cited to the need for insurers to know private medical information about patients.<sup>159</sup>

One way in which the reporting required by health care facilities in Proposition 187 differs from the examples cited by the Court in *Whalen v. Roe* is that health care facilities are required under Proposition 187 to reveal patient information to organizations who are in no way concerned with either child welfare, mortality, or any other matter within the purview of public health or welfare. Proposition 187's reporting requirement in this area is also not necessary to the completion of a private health care function such as payment of bills by an insurer.

The Court in *Whalen* dispensed with the physicians' claim that the New York statute impaired their right to practice medicine free from unwarranted interference. The Court reached this conclusion in part because previous statutes had required similar reporting of doctors, and thus the new statute added no additional or different burdens. More importantly, the Court found that to the extent that doctors had any claim at all regarding the possibility that the statute might induce patients to refuse medication, it was derived from their patients' own claims. Having already rejected the patients' claims on the issue, the Court disposed of the physicians' claim as well.<sup>160</sup>

Applying the Court's finding on the issue of a doctor's right to practice medicine uninhibited by the state to burdens placed on health care facilities by Proposition 187 would not necessarily result in a like finding. First, while it is true that the California statutes do in several cases impose a duty on doctors to report information to state agencies, there appears to have been no previously existing statute which imposes on health care providers the requirements of Proposition 187.<sup>161</sup> Second, the patients' claims to privacy

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156. *Id.* at 600.

157. *Id.* at 602.

158. *Id.* at 602 n.29.

159. *Id.* at 602.

160. *Id.* at 604.

161. California statutes require physicians or health care providers to report to state agencies where, for instance, child abuse is suspected (CAL. PENAL CODE § 11160 (1996)) or where certain contagious diseases are found (CAL. HEALTH & SAFETY CODE § 120250 (West 1995)). Proposition 187's reporting

which were rejected in *Whalen* may survive such scrutiny given a challenge to Proposition 187's reporting provisions. There is no pressing public or private health concern which is served by the provisions. While this is not a clearly stated prerequisite to the finding that a disclosure in such a setting does not invade privacy rights, this is surely implicit in the Court's detailed listing of such permissible disclosures.

Two other issues raised in *Whalen* which also arise for both health care providers and patients when disclosure is mandated are claims to freedom of association and individual anonymity. The Court in *Whalen* discussed these issues in a footnote to its opinion, stating that its decisions in the area of freedom of association protect that freedom "for the purpose of advancing ideas and airing grievances," not anonymity in the course of medical treatment.<sup>162</sup> The Court also noted that another factor in finding such an associational issue, even where medical records are concerned, would be an "uncontroverted showing of past harm."<sup>163</sup> This factor, according to the Court in *Whalen*, was absent in the claims of the physicians and patients. Conceivably, potential health care provider claimants might fare better in such a challenge to Proposition 187's reporting requirements, as several persons involved in dispensing health care had already set forth such assertions in affidavits filed with early challenging actions.<sup>164</sup>

#### VI. EXCLUSION OF UNDOCUMENTED ALIENS FROM PUBLIC ELEMENTARY AND SECONDARY SCHOOLS

Unlike the provisions concerning health care and social services, the provisions on education do not start with a statement of purpose, but rather, cut to the chase by directly detailing the provisions. Could it be that the drafters could think of no supportable purpose for such an amendment? Also, unlike the provisions involving law enforcement, and social and medical services, school attendance is not limited to only those aliens who are either lawful permanent or temporary residents, but is available to any person "otherwise authorized under federal law to be in the United States." This phrase is the closest that any portion of Proposition 187 comes to admitting the existence of and potential rights of PRUCOL aliens, though *Holley v. Lavine* explicitly states that the phrase "under color of law" includes actions not "covered by specific authorizations of law."<sup>165</sup> This seemingly gracious concession appears to permit school attendance to a broader group of aliens

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provisions for health care facilities are new in both sum and substance, and thus cannot be said to be merely reiterations of duties already imposed on health care providers.

162. 429 U.S. at 604 n.32 (citing *Bates v. Little Rock*, 361 U.S. 516, 522-23 (1960)).

163. *Id.* (citing *NAACP v. Alabama*, 357 U.S. 449, 454 (1958)).

164. Supplemental Exhibits and Declarations in Support of Application for Temporary Restraining Order, *Gregorio T. v. Wilson* (Case No. 94-7652). In this filing, the plaintiffs included several affidavits from physicians, administrators, social workers, and patients regarding medical care which many patients had foregone in fear of the consequences of Proposition 187.

165. 553 F.2d at 849.

than would be permitted service under other sections of Proposition 187. However, it is probably little more than a red herring designed to distract from the principal point of objection to this section: under *Plyler v. Doe*,<sup>166</sup> even *undocumented alien children* are entitled to attend school.

Given the holding of *Plyler v. Doe*, the requirement that school districts verify the legal status of each child enrolling in school appears to be impermissible. The provisions require, in addition, not only that children's immigration status be verified, but also that their parents' status be verified. Even assuming that it is permissible to use alien status as a basis for removing children from school, it is not clear why their parents' status is relevant. Adults unlawfully present in the United States may have children who are lawfully present or are citizens of the country.<sup>167</sup>

Providing information to others regarding a school child, and any aspect of his school record, violates long-standing provisions regarding privacy of school records.<sup>168</sup> Moreover, sending information to parents regarding their children's or their own apparently illegal status, and purporting to cut off the right to school attendance, seems to be impermissible without some sort of procedural due process.<sup>169</sup>

Similarly, where rights to school attendance are implicated, there is an existing property interest in educational benefits, as well as a liberty interest. In *Goss v. Lopez*,<sup>170</sup> several Columbus, Ohio public school students alleged that they had been suspended from public high school for up to ten days without a hearing pursuant to state regulations, and that their suspensions violated the procedural due process provisions of the Fourteenth Amendment. The suspensions were based upon various charges of misconduct against the students. Judgment was granted for the students both at the trial court level and before a three-judge appellate panel, whereupon the school administrators appealed.

The school administrators argued first that because there is no constitutional right to an education at public expense, the Due Process Clause does not protect against expulsions from the public school system. The Court rejected this contention out of hand, stating that the Fourteenth Amendment protects against the deprivation of life, liberty and property without due process of law, and that those protected interests are not generally created by the Constitution, but rather are defined independently.<sup>171</sup> The Court went on to say that even if the State of Ohio had not been constitutionally required to

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166. 457 U.S. 202 (1982). However, note that the recently debated Gallegly Amendment H.R. 4134 to the pending Immigration Bill would deny free public education to the children of undocumented aliens.

167. The Fourteenth Amendment of the U.S. Constitution provides that persons born in the United States are citizens of the United States. U.S. CONST. amend. XIV. In most instances, this is true regardless of the citizenship of their parents.

168. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975).

169. *Id.*

170. *Id.*

171. *Id.* at 572.

create and maintain a public school system, the state had in fact done so, and required its children to attend.<sup>172</sup>

Regarding Proposition 187, the State of California would similarly fail in making an argument that there is no constitutional right to an education, since, as in Ohio, California has created and maintained public schools, and mandated attendance.<sup>173</sup> Moreover, the Constitution of the State of California provides that education is a fundamental right.<sup>174</sup>

Liberty interests are somewhat harder to delineate than are property interests for purposes of due process analysis. Liberty interests are at stake when, for instance, physical liberty is restrained.<sup>175</sup> Liberty also encompasses all of the constitutional provisions which have been made applicable to the states by incorporation through the Fourteenth Amendment.<sup>176</sup> In discussing the liberty interests of the school children involved in *Goss v. Lopez*, the Court referred to a liberty interest in a person's good name, which may not be subject to arbitrary deprivation.<sup>177</sup> Because the students in *Goss v. Lopez* were alleged to have misbehaved, such charges, if sustained and recorded, could have caused damage to the students' future opportunities.<sup>178</sup> Here, a comparison with the effects of Proposition 187's suspension raises some interesting issues.

Students, or their parents, if determined to be in the country without federal authority, are potentially part of a class of persons who have committed a crime, and thus could arguably be entitled to fewer due process protections. In *Plyler v. Doe*, the Court declined to find that undocumented aliens are a suspect class such as would allow the application of strict scrutiny in the analysis of laws which seem to discriminate against them.<sup>179</sup> In so deciding, Justice Brennan noted that membership in the class of illegal aliens is itself a crime.<sup>180</sup> However, this is not necessarily the case, as was seen in *Gonzales v. City of Peoria*,<sup>181</sup> where unauthorized presence in the country did not lead to the conclusion that one violated *criminal* provisions of the immigration laws. Proposition 187 mandates delivery of a suspension notice upon either a determination or a reasonable suspicion that a student (or his parents) are in the country without authorization. No procedures are set

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172. *Id.* at 574.

173. CAL. EDUC. CODE § 48200 (West 1995).

174. CAL. CONST. art. IX, § 5.

175. *See, e.g., Meachum*, 427 U.S. 215; *Morrissey v. Brewer*, 408 U.S. 471 (1972).

176. The First, Fourth, and Sixth Amendments of the Bill of Rights are applicable to the states, as are most of the provisions of the Fifth and Eighth amendments. The Fifth Amendment's right to grand jury indictment has not yet been incorporated, nor has the Eighth Amendment's guarantee of freedom from excessive bail. The Second, Third, and Seventh Amendments have not been incorporated to any degree. *See, e.g., Twining v. New Jersey*, 211 U.S. 78 (1908); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Adamson v. California*, 332 U.S. 46 (1947).

177. 419 U.S. at 574.

178. *Id.* at 574-75.

179. 457 U.S. at 219, n.19.

180. *Id.*

181. 722 F.2d 468, 476 (9th Cir. 1983). *See supra* notes 102 to 108 for a discussion of *Gonzales*.



forth for reaching such a determination, or for developing such a suspicion; the provisions do not call for an initial finding of unlawful presence by an immigration court. If there were such a finding made of unlawful or particularly of criminal presence, then there might conceivably be a basis for reduced due process rights.<sup>182</sup>

#### VII. EXCLUSION OF UNDOCUMENTED ALIENS FROM PUBLIC POST-SECONDARY SCHOOLS

State regulations which potentially discriminate against alien college students have been addressed by the Supreme Court. In *Toll v. Moreno*,<sup>183</sup> alien students at the University of Maryland brought suit to challenge a state policy which denied non-immigrant alien students the right to be treated as state residents for purposes of reduced tuition and fees, regardless of whether they had otherwise met standards for state residency. The policy was challenged under several federal laws, as well as under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court found that the state's policy effectively conflicted with federal laws concerning the particular group of aliens in question, and invalidated the policy under the Supremacy Clause. The Court found no need to reach the due process and equal protection claims.<sup>184</sup> A significant factor in the case of the students in *Toll v. Moreno* and those affected by Proposition 187 is that the students in *Toll* held a lawful immigration status, that of G-4 nonimmigrants. Were those same students to seek admission to a public post-secondary school in California after the implementation of Proposition 187, they would apparently encounter no difficulties, as the provisions on post-secondary school expressly include the phrase "authorized under federal law" to be present.<sup>185</sup>

Because the provisions on post-secondary school are inoculated from Supremacy Clause attack, potential challengers of Proposition 187 must necessarily turn to due process and equal protection claims. Such claimants may have the benefit of heightened scrutiny designation for purposes of review of state actions.<sup>186</sup> Conceivably, a state scheme which discriminates against aliens in enrollment raises concerns about the creation of a permanent underclass, such as those addressed in *Plyler v. Doe*.<sup>187</sup> While the Court in *Plyler* was particularly concerned with the burdens placed on alien children by the inability to attend school without cost, such concerns might clearly be an issue in a society where higher education is one of the few egresses from a life of poverty.<sup>188</sup>

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182. *Meachum*, 427 U.S. 215 (discussing instances in which a person who has been convicted of a crime might be subject to a loss of liberty rights).

183. 458 U.S. 1 (1982).

184. *Id.* at 10.

185. CAL. EDUC. CODE § 66010.8(a) (West 1995).

186. *See Plyler v. Doe*, 457 U.S. 202 (1982).

187. *Id.*

188. According to an article by Steven A. Holmes, while the gap in secondary education between Blacks, Hispanics, and Whites is closing, there is still a wide disparity between Whites and Blacks because

### VIII. ATTORNEY GENERAL COOPERATION WITH THE INS

Also troublesome to liberty interests in this procedural due process analysis of Proposition 187 are the provisions regarding law enforcement. Law enforcement agencies would be required to "fully cooperate" with the INS.<sup>189</sup> Such cooperation in and of itself is not offensive to procedural due process.<sup>190</sup> However, the "verification" process by which law enforcement officers determine whether or not a person is or may be a person in the country without authorization is ripe for abuses and violations of the due process rights of arrestees. If a person is detained or arrested because of an alleged violation of an immigration law, that detention or arrest must meet federal constitutional standards.<sup>191</sup>

### IX. AMENDMENT AND SEVERABILITY

Proposition 187 contains a clause which provides for severability if any portion of the Act becomes invalid or if it is found invalid with reference to any person. Such invalidity "shall not affect any other provision or application of the act, which can be given effect without the invalid provision or application."<sup>192</sup> This provision anticipates the possibility that a court could find a provision or provisions of the proposition unconstitutional either on its face, or as applied. Normally, if a court finds that a statute is unconstitutional under any set of circumstances, then the entire statute must be stricken. Under this provision, however, if a court finds a provision to be invalid, then the invalid provision may be severed from the remainder of the statute. Under Proposition 187, severability is possible if the invalid portion can be removed without undermining the legal affect of the statute, and if the legislature intended the provision to stand even if other provisions were deemed impermissible.<sup>193</sup>

### X. THE OPINION OF THE DISTRICT COURT

After consolidation of several actions challenging the constitutionality of Proposition 187 in U.S. District Court, and after the entry of a preliminary injunction enjoining the implementation of sections four, five, six, seven, and nine of the initiative, two of the plaintiffs brought motions for summary judgment.<sup>194</sup>

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a higher proportion of Whites graduate from college. *Education Gap Between Races Closes*, N.Y. TIMES, Sept. 6, 1996, A18.

189. CAL. PENAL CODE § 834b (a) (West 1995).

190. See, e.g., the SHARE provisions concerning the INS and local governments.

191. *Gonzales*, 722 F.2d at 477.

192. See Appendix.

193. See, e.g., *United States v. Salerno*, 481 U.S. 739 (1987); *Dorchy v. Kansas*, 264 U.S. 286 (1924).

194. The five cases which were filed in opposition to the Proposition are:

(1) *League of United Latin American Citizens ("LULAC") v. Wilson*, Case No. CV 94-7569 MRP;

The district court ruled on the summary judgment on November 20, 1995.<sup>195</sup> In its ruling, the court first considered the severability of the provisions to determine if any portion of the initiative could stand, should any portion be stricken. After ruling that the entire initiative need not fall due to the weight of invalid portions, the court considered whether Proposition 187 is preempted by federal law, either under the *De Canas v. Bica* test,<sup>196</sup> or because of Congressional intent to occupy the field. The court declined for the most part to go beyond preemption analysis.

### A. Severability

The Court relied upon *Calfarm Insurance v. Deukmejian*<sup>197</sup> as authority in determining that an impermissible provision may be severable from the remainder of the initiative. In determining that the whole initiative need not fall due to an invalid provision, the court found the severability clause of section 10 of the Proposition instrumental in its analysis. Thus, the individual provisions must be reviewed separately when determining whether each may stand absent any impermissible clauses or language which might be stricken. The court pointed to the three-pronged test of *Calfarm* which reviewing courts must use in evaluating the severability of invalid statutory provisions. Such provisions "must be grammatically, functionally, and volitionally separable."<sup>198</sup>

Grammatical severability is a function of whether the provision can be "removed as a whole without affecting the wording of any other provision."<sup>199</sup> Functional severability describes the ability of a provision to stand on its own and to be capable of "separate enforcement."<sup>200</sup> Volitional severability describes whether or not the severance of a provision would continue to reflect the will of the people enacting the statute. As described by the court in citing to *Calfarm*, the overall question in reviewing severability of a challenged provision is whether remaining provisions "would likely have been adopted by the people had they foreseen the invalidity" of the challenged provision.

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(2) *Children Who Want an Education v. Wilson*, Case No. CV 94-7570 MRP;

(3) *Ayala v. Wilson*, Case No. CV 94-7571 MRP;

(4) *Gregorio T. v. Wilson*, Case No. CV 94-7652 MRP;

(5) *Carlos P. v. Wilson*, Case No. CV 95-0187 MRP.

On May 1, 1995, LULAC and the Gregorio T. plaintiffs filed summary judgment motions which argued that the Proposition was unconstitutional based upon federal preemption by the Immigration and Naturalization Act and other federal statutes. These plaintiffs were joined by other interested parties as well.

195. *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

196. *See supra* note 84, and accompanying text.

197. 48 Cal. 3d 805 (1989).

198. *League of United Latin American Citizens*, 908 F. Supp. at 766 (citing *Calfarm*, 48 Cal. 3d at 821).

199. *Id.* (citing *Calfarm*, 48 Cal. 3d at 822).

200. *Id.* (citing *People's Advocate Inc. v. Superior Court*, 181 Cal. App. 3d 316, 331-32 (1986)).

## B. Preemption

The court evaluated whether Proposition 187 is preempted by federal law by applying the three part test of *De Canas v. Bica*.<sup>201</sup> Applying part one, the court analyzed whether the initiative is an impermissible regulation of immigration. The result of that analysis was that Proposition 187, while a regulation of immigration, is not in its entirety necessarily impermissible. The benefits provisions, the court held, are permissible, as they do not require independent state determinations regarding the immigration status of individuals.<sup>202</sup> The notification, classification, and cooperation/reporting provisions of the initiative, however, are aimed solely at immigration, and are therefore impermissible.<sup>203</sup> These are provisions contained in specific portions of sections 4 through 9 of the initiative, and in the preamble.

Having indicated the general impermissibility of some of the sections, the court then applied *De Canas* to sections 4 through 9 of the initiative in order to lay out the precise redaction required under the doctrine of severability. The court applied each prong of *De Canas* to the provisions indicated. Most failed at the first prong.

In commencing with section 4, the section mandating law enforcement cooperation with the INS, the court addressed sections 4 (a), (b)(1), (b)(2), (b)(3) and (c). Section 4(a) requires law enforcement agencies to fully cooperate with the INS regarding persons arrested who are suspected of being in the United States illegally.<sup>204</sup> Section 4(b)(1) requires the arresting agency to attempt to verify the immigration status of the arrestee suspected of being present in the country in violation of federal immigration law. This section permits as one method of verification the questioning of such individuals regarding name, date and place of birth and date of entry into the United States.<sup>205</sup> Sections 4(b)(2) and (b)(3) require that arrested persons be notified of their "apparent" status as aliens whose presence violates immigration law, and requires that the agency notify the Attorney General of California and INS regarding such status.<sup>206</sup> Section 4(c) prohibits local government entities from inhibiting law enforcement cooperation.<sup>207</sup> All of these sections violate the first prong of the *De Canas* test in that they impermissibly regulate immigration by requiring agents of the state to make determinations as to who is and is not in the country in violation of immigration laws, by mandating that such findings be reported to state and federal authorities, and by requiring cooperation with the INS in order to ensure the departure of any such persons.<sup>208</sup>

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201. See *supra* text accompanying note 84.

202. *League of United Latin American Citizens*, 908 F. Supp. at 770.

203. *Id.* at 769-70.

204. CAL. PENAL CODE § 834b (a) (West 1995).

205. *Id.* § 4 (b)(1).

206. *Id.* §§ 4 (b)(2) & (b)(3).

207. *Id.* § 4(c).

208. *League of United Latin American Citizens*, 908 F. Supp. at 770.

The court then moved on to sections 5 and 6 of the initiative, noting that unlike section 4, these sections have a purpose beyond effecting the ouster of persons suspected of being unlawfully in the country. The benefits denial provisions of these sections are based on federal determinations regarding status and thus are not regulations of immigration as would be prohibited by *De Canas*. However, the court went on to state, sections 5(b), (c)(2) and 6(b), and (c)(2) contain classification, notification and reporting provisions which are objectionable in that they, like similar provisions of section 4, impermissibly require state agents to make independent determinations regarding the immigration status of individuals, and to report such findings to state and federal authorities.<sup>209</sup> Moreover, subsection (b) of sections 5 and 6 impermissibly creates a scheme for determining who is and is not entitled to be in the United States. This subsection refers only to persons who are citizens, lawfully admitted for permanent residence or lawfully admitted for a temporary period, effectively ignoring numerous classes of people who under a federal standard would be entitled to presence in the country.<sup>210</sup> The defendants in the matter unsuccessfully argued that the phrase "lawfully admitted" should be construed as "lawfully present" in order to bring the subsections in line with federal standards and thus salvage the subsections. The court rejected this contention, however, noting that the term "lawfully admitted" has its own particular meaning under the Immigration and Naturalization Act.<sup>211</sup> Even were the term to be replaced, the statute would not meet federal standards on this point.<sup>212</sup>

Thus, subsections 5 and 6(b), (c)(1) and (c)(2) were deemed impermissible and were preempted. Subsection (c)(1) of section 5 was allowed to stand. This subsection requires that state agents deny benefits to persons who are determined to be or suspected of being in the United States in violation of federal law. Because of its link to federal standards, the provision may remain. However, the portion of the subsection which permits state agents to make a determination as to such individuals, or to act regarding those even "reasonably suspected" of presence in violation of federal law, is objectionable on the grounds that it permits state agents to make a determination that only the INS can make. Rather than striking this provision, the court reformed it by severing the reasonable suspicion language, and by suggesting a state regulation which would require any actual determination regarding immigration status to be provided by the INS.<sup>213</sup>

Section 7 of the statute concerns the exclusion of "illegal aliens" from public elementary and secondary schools. The court duly noted that this section, like sections 5 and 6, contains classification, notification and coopera-

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209. *Id.* at 772.

210. *See supra* notes 128 to 131 for discussion of PRUCOL.

211. *League of United Latin American Citizens*, 908 F. Supp. at 772.

212. *Id.* at 771.

213. *Id.* at 773.

tion requirements which further the scheme to regulate immigration and are unnecessary to the goal of denying public education. Subsections (a), (b), and (c) of section 7 require the schools to verify students' immigration status in order to deny them access. Subsection (d) requires that schools verify the status of parents of such children. Subsection (e) requires that districts report to the state or the INS the "illegal" status of any parent, guardian, enrollee, or pupil. Section (f) mandates that the school districts cooperate fully in the transition of the child to a school in the child's country of origin.<sup>214</sup>

The court allowed that subsections (a), (b) and (c) achieve the goal of denying undocumented children access to school.<sup>215</sup> Assuming, *arguendo*, that this is a permissible goal, an additional obstacle is encountered in that subsections (d), (e) and (f) are not necessary to the purpose of denying a public education to students determined to be in the country "illegally," but rather are part of an impermissible scheme to regulate immigration and thus are preempted.<sup>216</sup>

The court noted, however, the seeming inutility of reaching an analysis of section 7 under *De Canas* given the U.S. Supreme Court's decision in *Plyler v. Doe*.<sup>217</sup> The district court reviewing Proposition 187 found that *Plyler's* holding that the Equal Protection Clause of the Fourteenth Amendment prohibits states from excluding undocumented alien children from public education is in conflict with section 7, and thus section 7 in its entirety is preempted by federal law.<sup>218</sup>

Section 8 of the statute denies public post-secondary education to persons not "authorized under federal law" to be in the United States, and requires institutions to verify the immigration status of each person enrolled or attending. This section further requires admissions officers to report any persons determined to be or reasonably suspected of being in the United States in violation of federal immigration law. The court found that subsections 8(a) and (b) are akin to the denial of benefits provisions of sections 5 and 6 in that they do not require determinations as to who may and may not remain in the country, and thus are permissible.<sup>219</sup> Subsection (c) however, has as its only purpose the regulation of immigration, and thus must be stricken. The court found further that it may be severed, as the other subsections may be implemented without it.<sup>220</sup>

Section 9 of the statute calls for the California Attorney General to cooperate with the INS by maintaining records of all reports received from state agencies regarding persons suspected of being in the country in violation of federal immigration law, and to transport this information to the

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214. *Id.* at 774.

215. *Id.*

216. *Id.*

217. 457 U.S. 202 (1982).

218. *League of United Latin American Citizens*, 908 F. Supp. at 773-74.

219. *Id.* at 774.

220. *Id.*

INS. This section, the court stated, has no other purpose than to impermissibly regulate immigration. The court found that it severable from the whole.<sup>221</sup>

Part two of the *De Canas* test concerns whether Proposition 187 is preempted because Congress intended to occupy the field. Having determined that some portions of sections 4 through 9 were impermissible under part one of the *De Canas* test, the court considered only the remaining provisions under part two of the *De Canas* test; sections 2 and 3 concerning criminal provisions, and some portions of sections 5 through 8. The court permitted these remaining provisions to stand, finding nothing in the Immigration and Naturalization Act which acts as a complete ouster of state authority to criminalize the production of documents, or to prevent the benefits denial called for under sections 5 through 8.<sup>222</sup>

Finally, the court applied part three of the *De Canas* test, whether the Proposition is preempted because it directly conflicts with federal law. First, the court considered the classification, notification and reporting provisions which it had already submitted to analysis under the first two prongs of *De Canas*. These provisions, the court found, violate the third prong as well as the first two, in that they conflict with federal laws concerning the deportation of aliens.<sup>223</sup> The court pointed to the list of grounds for deportation found in the Immigration and Naturalization Act and noted with particularity the requirement that the procedures outlined therein are to be the sole procedures for determining the deportability of aliens.<sup>224</sup>

The court then looked at the denial of benefits provisions under the third prong, and found that these provisions depend upon the classification and verification provisions of the statute for implementation. These provisions of the statute establish three "state-created categories of lawful immigration status:" citizens of the United States, aliens lawfully admitted for permanent residence, and aliens lawfully admitted for a temporary period of time.<sup>225</sup> The court found that these provisions fail to recognize numerous other persons who, though not falling into one of the three categories, are nonetheless authorized to be present in the United States and to receive certain federal benefits. The court cited by way of example those accorded refugee status, those granted political asylum or its corollary withholding of deportation, persons paroled into the United States or protected by family unity provisions, persons given temporary protected status or the often related deferred enforced departure status, those eligible for suspension of or stay of deportation, and battered immigrant women and children lawfully present in the country for various periods.<sup>226</sup>

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221. *Id.* at 775.

222. *Id.* at 776.

223. *Id.* at 776-77.

224. *Id.* at 777 (citing 8 U.S.C. § 1251(a) (1992)).

225. *Id.* at 777-78.

226. *Id.* at 778. Many of the persons enumerated are those often considered as PRUCOL aliens. PRUCOL is not a separate immigration status, and can be applied to persons who meet no specific

Because of this underinclusiveness of the categories, the court found that the classification scheme used to deny aliens social services, health benefits and education to be preempted under the third *De Canas* test. The court further found that much like the other sections found impermissible under *De Canas*, the offending subsections may be severed from the remainder of the initiative.<sup>227</sup>

The remaining verification provisions of subsection 5(c), 6(c), 7(b) and 8(b) fared no better under the third prong of *De Canas*. Although the court stated that these provisions are permissible to the extent that they rely upon federal standards for determining immigration status, these provisions are nevertheless preempted under the third prong of *De Canas*. The "reasonably suspects" language which permits implementation of the process of verification, though preempted, may be severed.<sup>228</sup>

In analyzing the benefits denial provisions the court went beyond a determination of whether denials are made based on federal standards and examines whether the preemption argument goes only to federally funded benefits. The court cited *Ray v. Atlantic Richfield Co.*,<sup>229</sup> in its discussions of whether any state-funded benefits may be denied. *Ray v. Atlantic Richfield Co.* is, the district court opined, unclear in this area. Moreover, there is no clear showing by the proponents of Proposition 187 that there are any wholly state-funded benefits in California to which the initiative could apply.<sup>230</sup>

*Ray v. Atlantic Richfield Co.* involved a Washington state law which regulated the size, design, and movement of oil tankers in Puget Sound. Atlantic Richfield and others challenged the law, contending among other things that the law was preempted by federal law in the field.<sup>231</sup> After a three-judge district court panel held the statute void in its entirety, the state appealed.<sup>232</sup> The Supreme Court held that some of the provisions of the Tanker Law were invalid under the Supremacy Clause in that they touched

statutory definition such as those enumerated by the court. The fact that a person can at anytime be defined as PRUCOL without reference to any other particular statutory grant of immigration status means that even had the initiative attempted to include those persons lawfully permitted to be present in the country, such as the enumeration of the court, there would still be the risk of excluding someone who could be termed PRUCOL under interpretations of case law.

227. *Id.* at 778-79.

228. *Id.* at 779.

229. 435 U.S. 151 (1978).

230. *League of United Latin American Citizens*, 908 F. Supp. at 780.

231. There was also a claim that the law violated the Commerce Clause in that it is in the nature of a regulation requiring a uniform national rule, and that it impeded the free flow of interstate and foreign commerce. However, this claim was not sustained by the Court in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 152 (1978). Though such a claim was not brought in the initial challenge to Proposition 187, it is interesting to speculate as to the likelihood of the success of a direct Commerce Clause claim, or of such a claim as might be implicated under the Civil Rights Act of 1964, which is based to a great extent on the Commerce Clause. Title VI of the 1964 Civil Rights Act forbids state or local denial of federal program benefits when those benefits are administered by the state or local entity, and provides for the cessation of federal aid to local or state entities found to engage in discrimination who continue such activity after an order is issued to cease discrimination. Such entities may not discriminate on the basis of race, color, or national origin.

232. Jurisdiction in *Ray v. Atlantic Richfield Co.* was under 28 U.S.C § 2281, 2284.



upon areas where there was either existing conflicting federal regulation, or into areas where the federal government had made clear that it intended there to be no standards other than federal standards. The section in *Atlantic Richfield Co.*, which the district court apparently finds unclear, is the determination of whether a federal law touches a field "in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."<sup>233</sup> Because *Atlantic Richfield Co.* dealt with the subject of tanker regulation and the very specialized provisions of state law versus federal laws on the subject, perhaps the lack of clarity was that the Proposition 187 court could find no applicable standards which helped in its own analysis in the area of state created benefits.

Declining to fully analyze the issue of whether any state provided benefits could be denied under the initiative, the court moved on to a discussion of its finding that several laws regarding federal benefits would conflict with the application of the benefits denial provisions.<sup>234</sup> Among these are the Women, Infants and Children program,<sup>235</sup> and other child welfare services that are available to children regardless of immigration status. The court also found objectionable provisions of the initiative that would deny health care services to persons without lawful immigration status, and cited again several federal provisions which would conflict with the initiative.<sup>236</sup>

## XI. CONCLUSION

In analyzing Proposition 187, the court has, as might be expected, reached only the threshold supremacy issue in analyzing the provisions, eschewing other underlying constitutional grounds of challenge. The fairly elaborate analysis and attack which is now possible under a preemption analysis is the result of numerous federal provisions which are in conflict with Proposition 187. If some of our federal legislators are successful, many of the federal provisions providing services to various aliens will be severely restricted.<sup>237</sup> It is very likely, that the sort of analysis seen in this Article would be required.<sup>238</sup> Moreover, as was seen in the analyses of the various provisions, many of the sections which the district court deemed permissible under a preemption analysis are conceivably objectionable under other constitutional standards.

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233. *Atlantic Richfield Co.*, 435 U.S. at 157-58 (citing *Hines v. Davidowitz* 312 U.S. 52 (1941)).

234. *League of United Latin American Citizens*, 908 F. Supp. at 781-84.

235. 42 U.S.C. § 1786 (1992).

236. The court cited the Hill-Burton Act, 42 U.S.C. § 291 *et seq.*, the Public Health Services Act, 42 U.S.C. § 254(c), and the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395(dd). See also, Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

237. See *e.g.*, H.R. 4134 which proposes among other things denying free public education to undocumented children and preventing undocumented parents from collecting benefits on behalf of their children.

238. At least one recent commentator has noted that because of proposed changes to federal legislation, a preemption argument may "win a battle, not the war." Evangeline G. Abriel, *Rethinking Preemption for Purposes of Aliens and Public Benefits*, 42 UCLA L. REV. 1597 (1995).

Arguably, Proposition 187 and its state and federal progeny may serve to take us full circle, to the period in our history when states routinely legislated in the area of immigration. This is particularly true as we see states increasingly engage in acts which suggest a sovereignty of their own.

#### APPENDIX

California Proposition 187 (1994) provides:

#### PROPOSITION 187

#### INITIATIVE STATUTE—ILLEGAL ALIENS—PUBLIC SERVICES, VERIFICATION, AND REPORTING

#### PROPOSED LAW

The People of California find and declare as follows:

#### SECTION 1. *Findings and Declaration.*

That they have suffered and are suffering economic hardship caused by the presence of illegal aliens in this state.

That they have suffered and are suffering personal injury and damage caused by the criminal conduct of illegal aliens in this state.

That they have a right to the protection of their government from any person or persons entering this country unlawfully.

Therefore, the People of California declare their intention to provide for cooperation between their agencies of state and local government with the federal government, and to establish a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California.

#### SECTION 2. *Manufacture, Distribution or Sale of False Citizenship or Resident Alien Documents: Crime and Punishment.*

Section 113 is added to the Penal Code, to read:

« CA PENAL § 113 »

113. Any person who manufactures, distributes or sells false documents to conceal the true citizenship or resident alien status of another person is guilty of a felony, and shall be punished by imprisonment in the state prison for five years or by a fine of seventy-five thousand dollars (\$75,000).

#### SECTION 3. *Use of False Citizenship or Resident Alien Documents: Crime and Punishment.*

Section 114 is added to the Penal Code, to read:

« CA PENAL § 114 »

114. Any person who uses false documents to conceal his or her true citizenship or resident alien status is guilty of a felony, and shall be punished by imprisonment in the state prison for five years or by a fine of twenty-five thousand dollars (\$25,000).

SECTION 4. *Law Enforcement Cooperation with INS.*

Section 834b is added to the Penal Code, to read:

«CA PENAL § 834b»

834b. (a) Every law enforcement agency in California shall fully cooperate with the United States Immigration and Naturalization Service regarding any person who is arrested if he or she is suspected of being present in the United States in violation of federal immigration laws.

(b) With respect to any such person who is arrested, and suspected of being present in the United States in violation of federal immigration laws, every law enforcement agency shall do the following:

(1) Attempt to verify the legal status of such person as a citizen of the United States, an alien lawfully admitted as a permanent resident, an alien lawfully admitted for a temporary period of time or as an alien who is present in the United States in violation of immigration laws. The verification process may include, but shall not be limited to, questioning the person regarding his or her date and place of birth, and entry into the United States, and demanding documentation to indicate his or her legal status.

(2) Notify the person of his or her apparent status as an alien who is present in the United States in violation of federal immigration laws and inform him or her that, apart from any criminal justice proceedings, he or she must either obtain legal status or leave the United States.

(3) Notify the Attorney General of California and the United States Immigration and Naturalization Service of the apparent illegal status and provide any additional information that may be requested by any other public entity.

(c) Any legislative, administrative, or other action by a city, county, or other legally authorized local governmental entity with jurisdictional boundaries, or by a law enforcement agency, to prevent or limit the cooperation required by subdivision (a) is expressly prohibited.

SECTION 5. *Exclusion of Illegal Aliens from Public Social Services.*

Section 10001.5 is added to the Welfare and Institutions Code, to read:

«CA WEL & INST § 10001.5»

10001.5. (a) In order to carry out the intention of the People of California that only citizens of the United States and aliens lawfully admitted to the United States may receive the benefits of public social services and to ensure

that all persons employed in the providing of those services shall diligently protect public funds from misuse, the provisions of this section are adopted.

(b) A person shall not receive any public social services to which he or she may be otherwise entitled until the legal status of that person has been verified as one of the following:

- (1) A citizen of the United States.
- (2) An alien lawfully admitted as a permanent resident.
- (3) An alien lawfully admitted for a temporary period of time.

(c) If any public entity in this state to whom a person has applied for public social services determines or reasonably suspects, based upon the information provided to it, that the person is an alien in the United States in violation of federal law, the following procedures shall be followed by the public entity:

- (1) The entity shall not provide the person with benefits or services.
- (2) The entity shall, in writing, notify the person of his or her apparent illegal immigration status, and that the person must either obtain legal status or leave the United States.
- (3) The entity shall also notify the State Director of Social Services, the Attorney General of California, and the United States Immigration and Naturalization Service of the apparent illegal status, and shall provide any additional information that may be requested by any other public entity.

«CA WEL & INST Prec. § 130»

SECTION 6. *Exclusion of Illegal Aliens from Publicly Funded Health Care.*

Chapter 1.3 (commencing with Section 130) is added to Part 1 of Division 1 of the Health and Safety Code, to read:

CHAPTER 1.3. PUBLICLY-FUNDED HEALTH CARE SERVICES

«CA HLTH & SFTY § 130»

130. (a) In order to carry out the intention of the People of California that, excepting emergency medical care as required by federal law, only citizens of the United States and aliens lawfully admitted to the United States may receive the benefits of publicly-funded health care, and to ensure that all persons employed in the providing of those services shall diligently protect public funds from misuse, the provisions of this section are adopted.

(b) A person shall not receive any health care services from a publicly-funded health care facility, to which he or she is otherwise entitled until the legal status of that person has been verified as one of the following:

- (1) A citizen of the United States.
- (2) An alien lawfully admitted as a permanent resident.
- (3) An alien lawfully admitted for a temporary period of time.

(c) If any publicly-funded health care facility in this state from whom a person seeks health care services, other than emergency medical care as

required by federal law, determines or reasonably suspects, based upon the information provided to it, that the person is an alien in the United States in violation of federal law, the following procedures shall be followed by the facility:

(1) The facility shall not provide the person with services.

(2) The facility shall, in writing, notify the person of his or her apparent illegal immigration status, and that the person must either obtain legal status or leave the United States.

(3) The facility shall also notify the State Director of Health Services, the Attorney General of California, and the United States Immigration and Naturalization Service of the apparent illegal status, and shall provide any additional information that may be requested by any other public entity.

(d) For purposes of this section "publicly-funded health care facility" shall be defined as specified in Sections 1200 and 1250 of this code as of January 1, 1993.

SECTION 7. *Exclusion of Illegal Aliens from Public Elementary and Secondary Schools.*

Section 48215 is added to the Education Code, to read:

«CA EDUC § 48215»

48215. (a) No public elementary or secondary school shall admit, or permit the attendance of, any child who is not a citizen of the United States, an alien lawfully admitted as a permanent resident, or a person who is otherwise authorized under federal law to be present in the United States.

(b) Commencing January 1, 1995, each school district shall verify the legal status of each child enrolling in the school district for the first time in order to ensure the enrollment or attendance only of citizens, aliens lawfully admitted as permanent residents, or persons who are otherwise authorized to be present in the United States.

(c) By January 1, 1996, each school district shall have verified the legal status of each child already enrolled and in attendance in the school district in order to ensure the enrollment or attendance only of citizens, aliens lawfully admitted as permanent residents, or persons who are otherwise authorized under federal law to be present in the United States.

(d) By January 1, 1996, each school district shall also have verified the legal status of each parent or guardian of each child referred to in subdivisions (b) and (c), to determine whether such parent or guardian is one of the following:

(1) A citizen of the United States.

(2) An alien lawfully admitted as a permanent resident.

(3) An alien admitted lawfully for a temporary period of time.

(e) Each school district shall provide information to the State Superintendent of Public Instruction, the Attorney General of California, and the United States Immigration and Naturalization Service regarding any enrollee or pupil, or parent or guardian, attending a public elementary or secondary school in the school district determined or reasonably suspected to be in violation of federal immigration laws within forty-five days after becoming aware of an apparent violation. The notice shall also be provided to the parent or legal guardian of the enrollee or pupil, and shall state that an existing pupil may not continue to attend the school after ninety calendar days from the date of the notice, unless legal status is established.

(f) For each child who cannot establish legal status in the United States, each school district shall continue to provide education for a period of ninety days from the date of the notice. Such ninety day period shall be utilized to accomplish an orderly transition to a school in the child's country of origin. Each school district shall fully cooperate in this transition effort to ensure that the educational needs of the child are best served for that period of time.

SECTION 8. *Exclusion of Illegal Aliens from Public Postsecondary Educational Institutions.*

Section 66010.8 is added to the Education Code, to read:

«CA EDUC § 66010.8»

66010.8. (a) No public institution of postsecondary education shall admit, enroll, or permit the attendance of any person who is not a citizen of the United States, an alien lawfully admitted as a permanent resident in the United States, or a person who is otherwise authorized under federal law to be present in the United States.

(b) Commencing with the first term or semester that begins after January 1, 1995, and at the commencement of each term or semester thereafter, each public postsecondary educational institution shall verify the status of each person enrolled or in attendance at that institution in order to ensure the enrollment or attendance only of United States citizens, aliens lawfully admitted as permanent residents in the United States, and persons who are otherwise authorized under federal law to be present in the United States.

(c) No later than 45 days after the admissions officer of a public postsecondary educational institution becomes aware of the application, enrollment, or attendance of a person determined to be, or who is under reasonable suspicion of being, in the United States in violation of federal immigration laws, that officer shall provide that information to the State Superintendent of Public Instruction, the Attorney General of California, and the United States Immigration and Naturalization Service. The information shall also be provided to the applicant, enrollee, or person admitted.

SECTION 9. *Attorney General Cooperation with the INS.*

Section 53069.65 is added to the Government Code, to read:

«CA GOVT § 53069.65»

53069.65. Whenever the state or a city, or a county, or any other legally authorized local governmental entity with jurisdictional boundaries reports the presence of a person who is suspected of being present in the United States in violation of federal immigration laws to the Attorney General of California, that report shall be transmitted to the United States Immigration and Naturalization Service. The Attorney General shall be responsible for maintaining on-going and accurate records of such reports, and shall provide any additional information that may be requested by any other government entity.

SECTION 10. *Amendment and Severability.*

The statutory provisions contained in this measure may not be amended by the Legislature except to further its purposes by statute passed in each house by roll call vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the voters. In the event that any portion of this act or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect any other provision or application of the act, which can be given effect without the invalid provision or application, and to that end the provisions of this act are severable. CA Prop. 187 (1994)