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Equal Protection and the Education of Undocumented Children

Kathleen McElroy LaValle

EQUAL PROTECTION AND THE EDUCATION OF UNDOCUMENTED CHILDREN

by Kathleen McElroy LaValle

> Ye shall have one manner of law,
> as well for the stranger, as for
> one of your own country[1]. . . .

In the month following the Texas attorney general's statement that all children in Texas were eligible for tuition-free, public education,[2] the state legislature effectively closed the classroom door to undocumented alien children.[3] Section 21.031 of the Texas Education Code, as amended in 1975, provides that state funds shall be available exclusively for the education of school-aged citizens and resident aliens.[4] While some districts have permitted enrollment of undocumented children through payment of tui-

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1. *Leviticus* 24:22 (King James version), *quoted in* Memorial Hosp. v. Maricopa, 415 U.S. 250, 261 (1974); Arteaga v. Literski, 83 Wis. 2d 128, 265 N.W.2d 148, 150 (1978).

2. TEX. ATT'Y GEN. OP. NO. H-586 (1975).

3. The children involved in the controversy are referred to more accurately as "undocumented aliens" than "illegal aliens." In addition to the negative connotation of the term "illegal," evidence shows that some of the children involved are in fact legally present in this country but are unable to procure the necessary documentation to permit their entry into school. *See In re* Alien Children Educ. Litigation, MDL No. 398 (S.D. Tex. July 21, 1980). * Editor's note: After this Comment went to the printer, this opinion was reported as *In re* Alien Children Educ. Litigation, 501 F. Supp. 544 (S.D. Tex. 1980).

In *In re Alien Children Education Litigation* a district judge ordered that the children in the school districts involved be admitted to the schools. The Court of Appeals for the Fifth Circuit stayed the order without an opinion. The stay was lifted, however, by United States Supreme Court Justice Powell, who stated that in the absence of a showing of extreme hardship, school districts should admit the children pending further action. Certain Named & Unnamed Non-Citizen Children v. Texas, 49 U.S.L.W. 3133, 3134 (Powell, Circuit Justice, 1980).

4. TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1980-1981). Pertinent subsections of § 21.031 read as follows:

> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
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> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.
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> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

Id. Prior to the 1975 amendment, § 21.031 read as follows:

> (a) All children without regard to color over the age of six years and under the age of 18 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

tion,[5] the practical effect of the statute has been the exclusion of the vast majority of undocumented children from the Texas public school system.[6] Fear of an overall decline in the quality of education,[7] concern for financially burdened border states,[8] and a discernible resentment toward the provision of services for those who have entered the United States unlawfully,[9] have combined to stage a controversy of high intensity. Underlying the conflicting social and economic interests, however, is the question of whether the legislature's classification of qualified students for the purpose of allocating state funds violates the equal protection clause of the fourteenth amendment.[10]

Following an initial discussion of standards of review under the equal protection clause, this Comment addresses the threshold question of whether undocumented aliens are protected under the equal protection clause. This Comment then examines constitutional precedents to determine if the Texas statute impinges upon a fundamental interest or constitutes a suspect classification, and discusses the appropriate level of judicial scrutiny occasioned by these findings. Finally, this Comment analyzes the state's interests in excluding undocumented children from Texas public

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(b) Every child in this state over the age of six years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission notwithstanding the fact that he may have been enumerated in the scholastic census of a different district or may have attended school elsewhere for a part of the year.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons over six and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

1969 Tex. Gen. Laws, ch. 21, § 21.031, at 2910-11.

5. *See* Doe v. Plyler, 458 F. Supp. 569 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980).

6. The statute technically only limits available state funds that are apportioned on an average daily attendance basis by excluding undocumented children from enrollment counts. Because this restriction on funds has compelled districts to exclude undocumented children from their classrooms, it would be sophistry to view this restriction purely as a matter of school finance policy. *In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 13 (S.D. Tex. July 21, 1980). Furthermore, the fact that a statute is not an absolute bar does not mean that it does not discriminate against a class. Nyquist v. Mauclet, 432 U.S. 1, 9 (1977).

7. *See In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 45 (S.D. Tex. July 21, 1980).

8. *See* Doe v. Plyler, 458 F. Supp. 569, 573 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980). The ineffectiveness of federal regulatory programs monitoring the entrance of undocumented aliens into the United States has aggravated the problems faced by border states.

9. *See* Hernandez v. Houston Independent School Dist., 558 S.W.2d 121, 124 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).

10. U.S. CONST. amend. XIV, § 1 provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

schools to determine whether the legislative classification can withstand a constitutional challenge under the equal protection clause.

I. THE STANDARD OF REVIEW UNDER THE EQUAL PROTECTION CLAUSE

Determining the level of judicial scrutiny to be employed in reviewing statutory classifications is the crucial issue in an equal protection analysis.[11] The inquiry begins with the proposition that a state need not accord identical treatment to all persons within its jurisdiction.[12] Examination of the relation between legislative classifications and state objectives, however, subjects this initial observation to exceptions. During the Warren Court era[13] the Court developed a two-tiered model, distinguishing between those classifications that should be subject to a rational basis test and those that should demand strict judicial scrutiny.[14] Under the rational basis or mere rationality test, statutory classifications receive a presumption of constitutionality, rebuttable only by a showing that the classifications bear no reasonable relation to the furthering of legitimate governmental objectives.[15] The practical effect has been to uphold classifications that are justifiable under any conceivable state of facts.[16] Strict scrutiny is triggered by the implication of a fundamental interest or by the recognition of a suspect classification.[17] In such cases the state must

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11. *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1068 (1969). While not creating substantive rights, the equal protection clause measures the validity of classifications created by state law. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 59 (1973) (Stewart, J., concurring).

12. *See* Reed v. Reed, 404 U.S. 71, 75 (1971); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809-10 (1969); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 111 (1949); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 82 (1911); Barbier v. Connolly, 113 U.S. 27, 31-32 (1885).

Although questions of federal preemption and international treaties have been raised, these issues will not be discussed herein. In *In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 72, 83, 86 (S.D. Tex. July 21, 1980), the court held that neither issue was controlling. *See generally* Catz & Lenard, *Federal Preemption and the 'Right' of Undocumented Alien Children to a Public Education: A Partial Reply*, 6 HASTINGS CONST. L.Q. 909 (1979).

13. The Warren Court era began in 1954 and ended in 1971.

14. *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). For a discussion of equal protection prior to the Warren Court era, see Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

15. Gunther, *supra* note 14, at 8; *see* Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955); Metropolis Theater Co. v. City of Chicago, 228 U.S. 61, 69 (1913).

16. In McGowan v. Maryland, 366 U.S. 420 (1961), the Court stated that the equal protection clause:

> permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Id. at 425-26.

17. For a discussion of fundamental interests, see Dunn v. Blumstein, 405 U.S. 330,

demonstrate that the challenged classification is necessary to the accomplishment of a compelling governmental interest.[18] The difference between the two standards has led to the observation that the strict scrutiny test is " 'strict' in theory and fatal in fact," in contrast to the rational basis test, which results in "minimal scrutiny in theory and virtually none in fact."[19]

This systematic approach to the review of state legislation has lost its neatness under the Burger Court. While the predicted wholesale reversal of equal protection advances has not taken place, the current Court has shown a reluctance to broaden the categories of fundamental interests and suspect classifications.[20] In contrast to its unwillingness to apply the strict scrutiny test, however, the Court has demonstrated a dissatisfaction with perfunctory application of the mere rationality alternative.[21] The result has been speculation over the appropriateness of an intermediate standard of review[22] that would require a state to prove that its classification is substantially related to an important governmental objective.[23] Recognition of an intermediate or middle-tier approach, however, does not eliminate the necessity of scrutinizing strictly those classifications affecting established fundamental interests or recognized suspect classifications. Before examining which level of judicial review should apply to the state's classification of undocumented children for the purpose of allocating public education funds, however, challengers to the Texas statute must demonstrate that the undocumented children may in fact invoke the benefits of the equal protection clause.

II. APPLICATION OF THE EQUAL PROTECTION CLAUSE TO UNDOCUMENTED ALIENS

The United States Supreme Court has never addressed directly the question of whether the equal protection clause of the fourteenth amendment applies to those aliens who have entered this country unlawfully.[24] A co-

336-43 (1972); Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969). For a discussion of suspect classes, see *In re* Griffiths, 413 U.S. 717, 721-22 (1973); Graham v. Richardson, 403 U.S. 365, 371-72 (1971); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964).

18. *See In re* Griffiths, 413 U.S. 717, 721 (1973); Graham v. Richardson, 403 U.S. 365, 372-75 (1971); McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

19. *See* Gunther, *supra* note 14, at 8.

20. *See id.* at 10-11. *See also* Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 948 (1975).

21. *See* Gunther, *supra* note 14, at 20. *See also* Norwick v. Nyquist, 417 F. Supp. 913, 917 & n.7 (S.D.N.Y. 1976) ("In recent years, the Supreme Court has apparently been less willing to accord even those statutes involving non-fundamental, non-suspect categories the virtually automatic approval that such legislation had historically enjoyed.").

22. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1082-99 (1978).

23. *See* Craig v. Boren, 429 U.S. 190 (1976); Chatham v. Jackson, 613 F.2d 73, 80 (5th Cir. 1980); Comment, *Equal Protection and the Putative Father: An Analysis of Parham v. Hughes and Caban v. Mohammed*, 34 SW. L.J. 717, 722-28 (1980).

24. *See* Doe v. Plyler, 628 F.2d 448, 454-55 (5th Cir. 1980); Holley v. Lavine, 529 F.2d 1294, 1295-96 (2d Cir.), *cert. denied*, 426 U.S. 954 (1976). The issue, however, has been addressed in lower federal courts, suggesting that equal protection does apply to undocumented aliens. *See* Doe v. Plyler, 628 F.2d 448, 454-56 (5th Cir. 1980); Bolanos v. Kiley, 509

gent argument exists, however, for the proposition that challenges to extending such protection to undocumented aliens are not viable. As early as 1886, the Supreme Court ruled that the fourteenth amendment did not apply exclusively to the protection of citizens.[25] In *Yick Wo v. Hopkins*[26] the Court relied upon the presence of resident aliens within the territorial jurisdiction of the United States to reach the conclusion that such persons could invoke the guarantees of the fourteenth amendment.[27] The Court's interpretation is consistent with the legislative history of the fourteenth amendment[28] and the language of the equal protection clause, which provides that a state shall not "deny to any person within its jurisdiction the equal protection of the laws."[29]

Although the due process provisions of both the fifth and the fourteenth amendments extend to illegal aliens,[30] the failure of the Supreme Court to rule on the application of the equal protection clause to illegal aliens with the same certainty may be explained more accurately as a lack of opportunity than as a purposeful omission. An understandable hesitance exists on the part of unreported, illegal aliens to initiate proceedings under an equal protection claim when such actions might result in their expulsion.[31] In an

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F.2d 1023, 1025 (2d Cir. 1975); Commercial Standard Fire & Marine Co. v. Galindo, 484 S.W.2d 635 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.); Dezsofi v. Jacoby, 178 Misc. 851, 36 N.Y.S.2d 672 (Sup. Ct. 1942). *But see* Burrafato v. United States Dep't of State, 523 F.2d 554 (2d Cir. 1975) (denying standing to illegal alien under due process clause), *cert. denied*, 424 U.S. 910 (1976).

25. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). Equal protection provisions are universal in application and apply to all persons within the territorial jurisdiction. *Id.* When the issue was raised again in Wong Wing v. United States, 163 U.S. 228 (1896), Justice Field, concurring in part, noted that the argument against extending equal protection to all persons within the jurisdiction "was heard with pain" before the Court. *Id.* at 242-43.

26. 118 U.S. 356 (1886).

27. *Id.* at 369. Although the Bill of Rights provides no authority for aliens claiming admission into this country, constitutional guarantees to "persons" within the jurisdiction apply with equal force to resident aliens. Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring); *see In re* Griffiths, 413 U.S. 717, 719-20 (1973); Sugarman v. Dougall, 413 U.S. 634, 641 (1973); Graham v. Richardson, 403 U.S. 365, 371 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948); Truax v. Raich, 239 U.S. 33, 39 (1915); Wong Wing v. United States, 163 U.S. 228, 238 (1896).

28. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866):

> The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. . . .
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> . . . .
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> . . . It will, if adopted by the States, forever disable every one of them from passing laws trenching upon these fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction.

But see Sugarman v. Dougall, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting) (the equal protection clause was adopted purely to address racial discrimination).

29. U.S. CONST. amend. XIV, § 1.

30. *See* Mathews v. Diaz, 426 U.S. 67, 77 (1976); Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51 (1950); Wong Wing v. United States, 163 U.S. 228, 238 (1896). Early suggestions that illegal aliens were entitled to due process of the law arose primarily in deportation cases. *See* Leng May Ma v. Barber, 357 U.S. 185, 187 (1958); Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953); United States v. Murff, 260 F.2d 610, 614 (2d Cir. 1958).

31. *See* Doe v. Plyler, 458 F. Supp. 569, 579-80 & n.12 (E.D. Tex. 1978), *aff'd*, 628 F.2d

effort to justify a distinction between the extension of due process and equal protection principles, there has been some suggestion that the absence of the words "within its jurisdiction" from the due process clause and their appearance in the equal protection clause indicates a restriction of the latter's application.[32] The common usage of the words, however, justifies a reading that this "limitation" is necessary only to emphasize that the equal protection clause does not require the laws of one state to be equivalent to those of another state. While the application of due process principles transcends state lines, a state's obligation under the equal protection clause extends only to those present within its borders and subject to its laws.[33] The undocumented children in Texas are both present within the state's borders and subject to its laws.

Challenging the notion that a state should accord equal protection of the law to all persons within its jurisdiction is the sentiment that those who have entered a country unlawfully should not be granted privileges.[34] Such reasoning begins with the confusion of congressional immigration policies with unrelated state legislative purposes and ends with the infliction of civil disabilities in areas outside the scope of immigration regulations. In *Williams v. Williams*[35] a federal district court ruled that the denial of access to divorce proceedings to those in violation of immigration regulations would not comport with due process or equal protection.[36] The court recognized that there was no justification for confusing divorce

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448 (5th Cir. 1980). An illegal alien, however, does have standing to assert violations of constitutional rights. *See* United States v. Barbera, 514 F.2d 294, 296 & n.3 (2d Cir. 1975). Such standing is conferred by 42 U.S.C. § 1983 (1976):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 has been held to apply to illegal aliens. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948). For a discussion of access to the courts, see Comment, *The Right of an Illegal Alien to Maintain a Civil Action*, 63 CALIF. L. REV. 762 (1975).

32. *In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 35-36 (S.D. Tex. July 21, 1980). For the text of the equal protection clause, see note 10 *supra*.

33. *In re* Alien Children Educ. Litigation, slip op. at 35-36 (citing Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 350 (1938)); *see* Doe v. Plyler, 628 F.2d 448, 454 (5th Cir. 1980).

34. In Burrafato v. United States Dep't of State, 523 F.2d 554 (2d Cir. 1975), the court stated: "To give him rights due to his unlawful presence greater than those he would have had if he had not come to this country, would be the worst sort of bootstrapping and would encourage aliens to enter this country surreptitiously." *Id.* at 557. *See also* Hernandez v. Houston Independent School Dist., 558 S.W.2d 121 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.), in which the court stated:

> The fact that a child leaves his country and covertly enters the state without complying with the immigration laws, should not somehow create a state responsibility to provide him with a free education. The child should have no greater rights to a free education, due to his unlawful presence, than those rights he would have had if he had not come to this country.

Id. at 124.

35. 328 F. Supp. 1380 (D.V.I. 1971).

36. *Id.* at 1383.

proceedings with immigration regulations and stated that such action would discriminate unduly "against persons who violate this particular immigration law, as distinguished from persons who violate any other law."[37] Moreover, as noted by the court in *Doe v. Plyler*,[38] "no legal precedent [exists] for determining that the commission of a federal misdemeanor may *in and of itself* serve as the legitimate basis for state-imposed disabilities."[39] Because of the absence of a clear understanding of the legal status of illegal aliens, some confusion is inevitable,[40] but in light of the clear intent of Congress to control immigration enforcement,[41] the ability of a state to borrow federally created classifications for nonimmigration purposes should be reviewed with care.[42]

The rights of a person within this country are not purely a function of immigration status.[43] As early as 1903 the Supreme Court recognized that a person does not lose all rights by doing an illegal act.[44] The weight of authority supporting the inclusion of illegal aliens under the equal protection clause persuaded at least one Texas state court ruling ultimately against the undocumented children's claim to preface its holding with the assumption that equal protection principles apply.[45] This assumption, if reviewed by the Supreme Court in light of the foregoing discussion,[46] should result in an established policy allowing undocumented children to assert the equal protection clause, thus circumventing the first obstacle to seeking judicial relief.

III. EDUCATION AS A FUNDAMENTAL INTEREST

Infringement upon a fundamental interest automatically requires a showing under the strict scrutiny test that the state's action is necessary to

37. *Id.*

38. 628 F.2d 448 (5th Cir. 1980).

39. *Id.* at 458 (footnote omitted; emphasis in original).

40. *See generally* Comment, *The Legal Status of Undocumented Aliens: In Search of a Consistent Theory*, 16 HOUS. L. REV. 667 (1979).

41. *See* Kleindienst v. Mandel, 408 U.S. 753, 766 (1972); Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895); Burrafato v. United States Dep't of State, 523 F.2d 554, 556 (2d Cir. 1975).

42. *See In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 20-21 (S.D. Tex. July 21, 1980).

43. *See id.* at 20. *See also* Commercial Standard Fire & Marine Co. v Galindo, 484 S.W.2d 635 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.) (illegal status did not make employment contract invalid or affect workmen's compensation claim).

44. National Bank & Loan Co. v. Petrie, 189 U.S. 423, 425 (1903); *see* Janusis v. Long, 284 Mass. 403, 188 N.E. 228, 230 (1933), in which the court noted that the ancient outlawry doctrine did not apply to illegal aliens and that "[e]ven an unlicensed dog is not an outlaw and is entitled to some rights."

45. *See* Hernandez v. Houston Independent School Dist., 558 S.W.2d 121, 123 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).

46. In ruling that the children should be admitted to Texas schools pending further action, Justice Powell noted the probability that the controversy would eventually reach the Supreme Court. Certain Named & Unnamed Non-Citizen Children v. Texas, 49 U.S.L.W. 3133, 3133-34 (Powell, Circuit Justice, 1980).

accomplish a compelling governmental objective.[47] Without a conclusive demonstration of necessity the legislative classification must fail. Defining a fundamental interest for equal protection purposes, however, is a difficult task. The Court's rejection in 1937 of reliance on natural law principles and subjective analysis for the purpose of defining fundamental rights under the due process and equal protection clauses resulted in confusion.[48] Although the Court rejected the use of substantive due process analysis in cases concerning social and economic regulation,[49] subsequent decisions protected certain individual rights lacking specific textual basis in the Constitution.[50]

In *Shapiro v. Thompson*[51] the Court held that the right to interstate travel,[52] although not provided for explicitly in the Constitution, nevertheless constitutes a fundamental right.[53] Similar findings have been made in the areas of voting,[54] procreation,[55] and freedom of association.[56] A continued recognition of substantive due process analysis for the purpose of defining fundamental rights is suggested, however, by the Court's decision in *Griswold v. Connecticut*.[57] In *Griswold* Justice Douglas recognized a fundamental right to privacy based on the "penumbras" of guarantees contained in the Bill of Rights. Without relying explicitly on any specific substantive guarantee, Justice Douglas proposed that the ninth amendment acknowledged the existence of other values equal in importance to those enumerated in the first eight amendments.[58]

Since the end of the Warren Court era in which the recognition of fundamental interests was celebrated, the Court has shown a growing reluctance to expand upon these preferred rights.[59] Commentators have criticized the broadening of the class of fundamental interests as inviting a dilution of egalitarian justice by demanding excessive judicial intervention.[60] Courts do not have the power to act as super-legislatures creating

47. *See* Dunn v. Blumstein, 405 U.S. 330, 336-42 (1972); Shapiro v. Thompson, 394 U.S. 618, 638 (1969); notes 11-19 *supra* and accompanying text.

48. While the Court renounced the use of natural law analysis in the fields of social and economic welfare, reliance on subjective analysis for the protection of individual liberties continued. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 416-19 (1978) [hereinafter cited as J. NOWAK].

49. *See* NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1 (1937) (upholding National Labor Relations Act); West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding minimum wage legislation).

50. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation as a fundamental right).

51. 394 U.S. 618 (1969).

52. For a discussion of the historical treatment of the right to interstate travel, see J. NOWAK, *supra* note 48, at 668-74.

53. 394 U.S. at 620.

54. *See* Reynolds v. Sims, 377 U.S. 533 (1964); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

55. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

56. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

57. 381 U.S. 479 (1965) (Court invalidated state law prohibiting sale of contraceptives to married persons).

58. *Id.* at 484, 493.

59. *See* Gunther, *supra* note 14, at 12-15.

60. *Id.* at 10.

substantive constitutional rights in the name of due process and equal protection of the laws.[61]

Proponents of a broader view of the source of protected interests suggest that the Court should determine the treatment of a right as fundamental by measuring the extent to which constitutionally guaranteed rights are dependent upon those interests that are not enumerated specifically.[62] Under this analysis, the Court would measure support for conferring preferential status on certain rights by the nexus between express guarantees and underlying interests.[63] Using this approach in *In re Alien Children Education Litigation*,[64] Judge Seals concluded that a right should be characterized as fundamental if "it is preservative of or substantially related to other basic civil and political rights which are guaranteed by the constitution."[65] Applying this test to the possible impingement upon a fundamental interest through the denial of education requires a showing that education promotes express constitutional guarantees.

Upon entry into the Union in 1845, the first Texas State Constitution made the following provision for the institution of a public school system: "A general diffusion of knowledge being essential to the preservation of the rights and liberties of the people, it shall be the duty of the Legislature of this State, to make suitable provision for the support and maintenance of public schools."[66] This language is difficult to reconcile with the absolute denial of education to an entire segment of school-aged children. While a state constitution cannot create substantive federal constitutional rights, the Texas Legislature determined at its inception that it had an obligation to provide an educational system that would foster and protect civil liberties.

Although cited primarily as a racial discrimination case, *Brown v. Board of Education*[67] contains a dictum clearly reflecting the revered position of education in society:

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61. *See* Mobile v. Bolden, 100 S. Ct. 1490, 1505, 64 L. Ed. 2d 47, 64 (1980); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973); Lindsey v. Normet, 405 U.S. 56, 74 (1972); *In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 16 (S.D. Tex. July 21, 1980).

62. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 115 & n.74 (1973); *see* Reynolds v. Simms, 377 U.S. 533, 561-62 (1964) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

63. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 115 & n.74 (1973); Reynolds v. Simms, 377 U.S. 533, 561-62 (1964) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

64. MDL No. 398 (S.D. Tex. July 21, 1980). After seven complaints against the State of Texas and the Texas Education Agency were filed in four different school districts, the state petitioned the Judicial Panel of Multidistrict Litigation for a consolidation of the several actions. The panel decided that those claims against the state involved similar questions and should be consolidated for pretrial proceedings. *In re* Alien Children Educ. Litigation, 482 F. Supp. 326 (J.P.M.D.L. 1979) (per curiam). The action was then transferred to the southern district where the parties agreed to have that court rule on the merits. *In re* Alien Children Educ. Litigation, MDL No. 398 (S.D. Tex. July 21, 1980).

65. *In re* Alien Children Educ. Litigation, slip op. at 17.

66. TEX. CONST. art. X, § 1 (1845).

67. 347 U.S. 483 (1954).

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . Today it is a principal institution in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[68]

If this vision of society was accurate in 1954, it can be no less profound in the present day in which the challenges of adjusting and contributing to society rest heavily on educational skills.

The Supreme Court has noted, however, that the significance of a service performed by the state is not determinative of its status as a fundamental interest for equal protection purposes.[69] *San Antonio Independent School District v. Rodriguez*,[70] decided by the Court in 1973, is quoted often for the principle that education is not a fundamental right.[71] In *Rodriguez* Mexican-American parents brought a class action on behalf of all school children residing in Texas school districts having low property tax bases. The plaintiffs contended that the Texas system of financing public education based on property taxes discriminated against children residing in school districts that could not generate sufficient revenue to provide an education equal in quality to that available in other districts. Justice Powell, writing for the majority, stated that education was not among the explicit constitutionally guaranteed rights.[72] Justice Powell found further that no justification existed for recognizing education as a right implicit in the Constitution.[73]

While the Court appears to have made a definitive statement foreclosing further discussion of education as a fundamental interest, the holding in *Rodriguez* did not address the situation presented under section 21.031 of the Texas Education Code.[74] No contention was made in *Rodriguez* that the Texas school financing system denied the children an access to education. Instead, the question confronting the *Rodriguez* Court was whether the relative deprivation of educational benefits should trigger strict scrutiny. The Court stated that there was no justification for finding that only relative differences in spending levels infringed on a fundamental right.[75] The Court noted specifically that no allegation had been made that the

68. *Id.* at 493.
69. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 30, 33 (1973).
70. 411 U.S. 1 (1973).
71. *See* Ambach v. Norwich, 441 U.S. 68, 77 & n.7 (1979); Hernandez v. Houston Independent School Dist., 558 S.W.2d 121, 124 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).
72. 411 U.S. at 35.
73. *Id.*
74. For the text of § 21.031, see note 4 *supra*; *see* Doe v. Plyler, 628 F.2d 448, 456-57 (5th Cir. 1980).
75. 411 U.S. at 37.

opportunity was lacking for every child "to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[76] If the Court had found such an absolute deprivation, the case might have been decided differently. The Court's connection of minimal skills with the exercise of civil liberties suggests the occasion for a higher level of scrutiny when the state's classification frustrates the acquisition of such minimal skills.[77]

Relating an undocumented child's right to education to the exercise of civil liberties presents a difficult question if restricted to the exercise of the right to vote, which is clearly denied to noncitizens. In *Doe v. Plyler*,[78] however, Federal District Judge Justice refuted the suggestion that an undocumented alien's ability to participate in society outside the voting booth should not be a concern of the state.[79] The entitlement of all persons to free speech[80] and due process[81] suggests the necessary nexus between education and constitutional guarantees beyond the right of citizens to vote. The question is not whether the state must take affirmative action to promote the ability of persons to exercise their rights, but whether education is connected so intimately with these guaranteed rights that a total deprivation of education should merit a stricter examination by the court.[82] In *In re Alien Children Education Litigation*[83] Judge Seals concluded that the present controversy "squarely presents the issue reserved by the [United States] Supreme Court in *Rodriguez*: [W]hat level of scrutiny should be applied when a statute absolutely deprives educational opportunities to some children within the state's jurisdiction?"[84] The present controversy involves access to schools, not equality of education. This distinction should serve to extinguish the Court's fear in *Rodriguez* that it would have to act as guardian for a uniform quality of education.[85]

The district court in *In re Alien Children Education Litigation* concluded that it should apply strict judicial scrutiny when faced with an absolute deprivation of education.[86] In making this decision, it relied on both the substantive connection between education and the free exchange of ideas

76. *Id.*

77. The federal court of appeals in Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980), declined to hold that the absolute denial of free education to some children is not a denial of a fundamental right. *Id.* at 457.

78. 458 F. Supp. 569 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980).

79. 458 F. Supp. at 581 & n.14. Resident aliens are also denied the right to vote and yet this reasoning has not been applied to suggest that the state has no obligation to provide them with an education.

80. The constitutional right of free speech under the first amendment applies to undocumented aliens. Bridges v. Wixon, 326 U.S. 135, 148 (1945).

81. Due process under both the fifth and the fourteenth amendments applies to undocumented aliens. Mathews v. Diaz, 426 U.S. 67, 77 (1976).

82. *In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 17 (S.D. Tex. July 21, 1980).

83. MDL No. 398 (S.D. Tex. July 21, 1980).

84. *Id.*, slip op. at 16.

85. *Id.* at 27-29.

86. *Id.* at 29.

and on the premise that education is a state function.[87] This latter finding of education as a state responsibility is necessary to overcome the historical deference accorded states in administering social and economic programs that merely supplement private sector resources. In *Dandridge v. Williams*[88] the Court deferred to the State of Maryland's determination of how to allocate limited public welfare funds. The *Dandridge* Court noted that a state does not necessarily violate equal protection principles if its classifications in economic and social welfare areas are imperfect.[89] Ruling that it could not impose upon the states its view of what constitutes wise economic and social policy[90] the Court emphasized that the disparity resulting from the Maryland public welfare system did not infringe upon any guaranteed rights.[91] The Court's reasoning arguably does not apply in the present context for several reasons. First, the state's classifications in *Dandridge* resulted in relative rather than total deprivation.[92] Secondly, although basic economic needs were involved, there was no indication that the classification threatened guaranteed rights,[93] as arguably would be the case in the denial of education. Thirdly, *Dandridge* did not involve a classification based on immigration status. Finally, the state's role as a provider of education is distinguishable from "the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests."[94] The decisions exhibiting deference to states in formulating social and economic policy primarily concern state programs, such as welfare, that offer assistance when the traditional mechanisms of support are inadequate.[95] Education is a function of the state itself,[96] rather than a supplement to services provided primarily by the private sector.[97]

In ruling that the denial of education to undocumented children was unconstitutional, Judge Seals gave significant attention to the harm suf-

87. *Id.*
88. 397 U.S. 471 (1970).
89. *Id.* at 485.
90. *Id.* at 486.
91. *Id.* at 484.
92. *Id.* The state set a maximum grant limitation for welfare funds that did not fully account for the size of a household. For a discussion of absolute versus relative deprivation, see L. TRIBE, *supra* note 22, at 1006.
93. 397 U.S. at 484.
94. Mathews v. Diaz, 426 U.S. 67, 80 (1976) (emphasis in original). This language is quoted in Hernandez v. Houston Independent School Dist., 558 S.W.2d 121, 125 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.), to support the state's ability to deny tuition-free education to undocumented children. It should be noted, however, that *Diaz* involved a federal classification and expressly recognized that more discretion is given to the federal government in using classifications based on a person's relation to this country. 426 U.S. at 85.
95. Doe v. Plyler, 458 F. Supp. 569 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980).
96. *See* Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).
97. *In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 40-41 (S.D. Tex. July 21, 1980). Although the public school system is supplemented by private and parochial schools, Judge Seals argued that these schools could not absorb all of the undocumented children, even if the children could afford the tuition. *Id.* at 22. The court in Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980), stated that even if education is a state-provided bounty, legislation cannot avoid a constitutional challenge "merely because a state clothes its actions in economic phraseology." *Id.* at 459.

fered by children who are deprived of an education. Discussing the testimony of child psychologists, Seals emphasized the behavioral and emotional problems associated with a lack of educational opportunities at an early age.[98] In addition to the lack of opportunity to acquire basic skills, the already existing language barrier severely threatens the possibility of adjustment in society.[99] Supreme Court Justice Powell confirmed these observations in his ruling that the undocumented children should be admitted to Texas schools pending appeal of the district court's decision to the Fifth Circuit Court of Appeals.[100] Justice Powell, acting in his capacity as circuit justice, noted that the harm occasioned by the exclusion of these children from the classroom "needs little elucidation."[101] Focusing on the relegation of these children to a life of ignorance and illiteracy, Justice Powell also noted that the Texas statute denied these children the benefits of associating with students and teachers of diverse backgrounds.[102]

In his testimony to the federal district court in *In re Alien Children Education Litigation*, a sociologist specializing in education drew a connection between illiteracy and the ability to become aware of the opportunities and protections of the political process.[103] Associating education with rights that are essential to a democratic society provides the requisite nexus between education and constitutional guarantees. Both the exercise of free speech and the awareness of constitutional protections such as due process are threatened by the denial of education to undocumented children.[104] Recognizing education as a fundamental interest in the context of access to the Texas schools is not a demand for equality of results. Rather, it is an acknowledgment that denying children an education impinges upon a right "so fundamental as to be fittingly considered the cornerstone of a vibrant and viable republican form of democracy."[105]

IV. THE SEARCH FOR A SUSPECT CLASSIFICATION

A. *Alienage*

State legislation is presumed to be constitutionally permissible despite

98. *In re* Alien Children Educ. Litigation, slip op. at 23.

99. *Id.*

100. Certain Named & Unnamed Non-Citizen Children v. Texas, 49 U.S.L.W. 3133 (Powell, Circuit Justice, 1980).

101. *Id.* at 3134. In order for a circuit justice to dissolve a stay, some reasonable probability that the Court will grant certiorari or note probable jurisdiction must exist. In addition, a significant likelihood that the district court opinion will be upheld and that irreparable harm will result if the stay granted by the court of appeals is not vacated must be shown. Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301, 1305 (1974) (Powell, Circuit Justice, 1974).

102. 49 U.S.L.W. at 3134.

103. *In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 25 (S.D. Tex. July 21, 1980).

104. *See* notes 80-81 *supra* and accompanying text.

105. Hosier v. Evans, 314 F. Supp. 316, 319 (D.V.I. 1970) (resident aliens could not be denied state-provided education).

the fact that it may result in some inequality.[106] This presumption fails, however, if the state adopts legislation using a "suspect" classification.[107] Although adoption of the equal protection clause in the fourteenth amendment was a direct reaction to invidious racial discrimination,[108] the Court has since recognized that legislation discriminating against other "discrete and insular" minorities demands strict judicial scrutiny.[109] In *Graham v. Richardson*[110] the Court determined that a legislative distinction between resident aliens and United States citizens constitutes a suspect classification.[111] Prior to that decision, the Court had accorded the states significant freedom to establish classifications on the basis of alienage under a "special public interest" theory.[112] Particularly in the areas of use of natural resources,[113] ownership of land,[114] and employment,[115] the courts had denied resident aliens more than minimal judicial protection against discriminatory state legislation. As a consequence of *Graham*, the use of alienage classifications may now only be justified by an overriding interest of the state.[116] Without proof of a compelling state interest and without a show-

106. *See* Lindsey v. Normet, 405 U.S. 56, 71 (1972); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

107. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964). The traditional indicia of suspectness are present when a class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); *see* Frontiero v. Richardson, 411 U.S. 677, 686-88 (1973); United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

108. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872). Justice Rehnquist has suggested that no historical evidence justifies the extension of suspect classification to any group of persons other than racial minorities. Sugarman v. Dougall, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting).

109. *See* Frontiero v. Richardson, 411 U.S. 677, 686-88 (1973); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 & n.4 (1938). *But see* Sugarman v. Dougall, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting).

110. 403 U.S. 365 (1971) (Arizona statute imposing durational residency requirement on resident aliens for receipt of welfare benefits held invalid).

111. *Id.* at 371-72; *see In re* Griffiths, 413 U.S. 717, 721-22 (1973) (Connecticut statute excluding aliens from practice of law invalid); Sugarman v. Dougall, 413 U.S. 634, 641 (1973) (New York Civil Service law excluding aliens from competitive civil service positions held invalid). *But see* Foley v. Connelie, 435 U.S. 291, 294 (1978) (upholding state practice of excluding aliens from police force, in which the Court stated: "But we have never suggested that such legislation is inherently invalid, nor have we held that all limitations on aliens are suspect.").

112. *See* Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392 (1927); J. NOWAK, *supra* note 48, at 594. The special public interest theory has been rejected as dependent upon a distinction between rights and privileges that is no longer accepted. Sugarman v. Dougall, 413 U.S. 634, 644 (1973). The major breakthrough in rejecting the special interest theory came in Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948), and Oyama v. California, 332 U.S. 633 (1948). Some vestiges of the theory remain, however, in allowing states to take action to preserve the basic conception of a political community. *See* Sugarman v. Dougall, 413 U.S. 634, 642-43, 647-49 (1973); Dunn v. Blumstein, 405 U.S. 330, 343-44 (1972).

113. *See* Patsone v. Pennsylvania, 232 U.S. 138 (1914).

114. *See* Terrace v. Thompson, 263 U.S. 197 (1923).

115. *See* Truax v. Raich, 239 U.S. 33 (1915).

116. *See* J. NOWAK, *supra* note 48, at 598. For instance, while the Court found that denying positions in the state competitive civil service program to aliens was improper,

ing that a less inclusive classification would be ineffective to serve these interests, classifications based on alienage must fail.[117]

The legislative classification excluding undocumented children from the Texas public school system, however, is not based on a distinction between resident aliens and United States citizens.[118] The statute specifically provides that resident aliens shall be admitted without the payment of tuition.[119] Nor can it be contended that the classification in section 21.031 of the Texas Education Code should be characterized as suspect because undocumented aliens constitute a subgroup of resident aliens.[120] Evidence of invidious discrimination and political helplessness persuaded the Court in *Graham* to recognize resident aliens as "a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate."[121] While undocumented aliens have a similar history of discriminatory treatment,[122] the Supreme Court is not likely to add this group to the list of suspect classes. Perhaps the most significant basis for this doubt is the perception that the status of an undocumented alien ordinarily is not beyond the individual's control.[123] Channels may not be available for such persons to change their status, but adult aliens have made a choice to enter and remain in the United States outside the permission of the law. This control over their status distinguishes undocumented aliens from groups that have suffered discrimination on the basis of immutable characteristics such as race and nationality.[124]

Those defending the present Texas statute claim that the Court answered the question of whether undocumented aliens constitute a suspect class in *De Canas v. Bica*.[125] In *De Canas* the Supreme Court upheld a

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Sugarman v. Dougall, 413 U.S. 634 (1973), it found that exclusion of aliens from the police force was permissible, Foley v. Connelie, 435 U.S. 291 (1978).

117. *See* Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976); *In re* Griffiths, 413 U.S. 717 (1973); J. NOWAK, *supra* note 48, at 598.

118. Hernandez v. Houston Independent School Dist., 558 S.W.2d 121, 124 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).

119. TEX. EDUC. CODE ANN. § 21.031(c) (Vernon Supp. 1980-1981).

120. *See* Mathews v. Diaz, 426 U.S. 67, 78-80 & n.13 (1976) (discussing different classifications of aliens, the Court stated: "[i]n addition to lawfully admitted aliens, there are, of course, aliens who have entered illegally").

121. Graham v. Richardson, 403 U.S. 365, 372 (1971) (citations omitted); *see In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 31 (S.D. Tex. July 21, 1980); Comment, *supra* note 40, at 689.

122. *See generally* Kane & Velarde-Muñoz, *Undocumented Aliens and the Constitution: Limitations on State Action Denying Undocumented Children Access to Public Education*, 5 HASTINGS L.Q. 461, 465-69 (1978); Ortega, *Plight of the Mexican Wetback*, 58 A.B.A.J. 251 (1972).

123. *See In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 31 n.40 (S.D. Tex. July 21, 1980).

124. This group may also be distinguished from resident aliens because of the durational residency requirement that Congress imposes on resident aliens before they may become citizens. The status of resident aliens for this period of time is beyond their control. During this waiting period, resident aliens are excluded from the political process and any further discrimination on the part of the state in most instances would be contrary to federal policy. *See* Sugarman v. Dougall, 413 U.S. 634 (1973). *But see* Foley v. Connelie, 435 U.S. 291 (1978) (excluding aliens from state police force upheld).

125. 424 U.S. 351 (1976).

California statute restricting employment of illegal aliens because of the state's overriding interest in protecting its domestic labor force.[126] Although the issue of equal protection was not discussed,[127] the Court arguably would not have permitted this discrimination against illegal aliens if it had recognized the existence of a suspect classification.[128] In *In re Alien Children Education Litigation* Judge Seals relied on *De Canas* to reach his conclusion that undocumented aliens are not a suspect class.[129] The district court in *Doe v. Plyler*[130] suggested, however, that while classifications discriminating against illegal aliens might not be suspect when state objectives are coextensive with congressional policy, they should be considered suspect when "the state acts independently of the federal exclusionary purposes, accepts the presence of illegal aliens, and then subjects them to discriminatory laws."[131]

B. *Children*

While illegal aliens may not be able to claim suspect status as a subgroup of resident aliens, the children themselves constitute a readily definable class. As the Court noted in *Doe v. Plyler*,[132] undocumented children have no control over their status or their residence.[133] While the children are legally culpable under immigration laws,[134] they are not morally responsible for their unlawful status.[135] Moreover, the law recognizes the injustice of penalizing those who are without personal fault.[136] Perhaps the most compelling language on this issue appeared in *Weber v. Aetna*

126. *Id.* at 356-57.

127. The undocumented workers were not a party to the action brought by migrant farmworkers against farm labor contractors, and therefore no party was present before the Court for the purpose of raising an equal protection argument.

128. *See In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 33 n.45 (S.D. Tex. July 21, 1980).

129. *Id.*

130. 458 F. Supp. 569 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980).

131. 458 F. Supp. at 583. On appeal the court noted that this approach would demand difficult factual determinations and could result in inconsistent decisions. 628 F.2d 448, 458 n.27 (5th Cir. 1980). The Supreme Court has already suggested, however, that resident aliens may be a suspect class for certain purposes and not for others. *See* Foley v. Connelie, 435 U.S. 291, 294 (1977).

132. 628 F.2d 448 (5th Cir. 1980).

133. *Id.* at 457; *see In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 44 (S.D. Tex. July 21, 1980).

134. 628 F.2d at 455 n.16. The immigration laws making illegal entry a misdemeanor for the first commission and a felony for subsequent commissions and making reentry after deportation a felony do not distinguish between adults and children. *See* 8 U.S.C. §§ 1325-1326 (1976).

135. 628 F.2d at 457.

136. *See, e.g.*, St. Ann v. Palisi, 495 F.2d 423, 425 (5th Cir. 1974) ("[f]reedom from punishment in the absence of *personal* guilt is a fundamental concept in the American scheme of justice" (emphasis in original)). The injustice of depriving these particular children of an education is emphasized by the fact that their American-born siblings are entitled to all the benefits of citizenship. U.S. CONST. amend. XIV, § 1. When such children reach majority, they may apply for citizenship on behalf of their noncitizen family members.

Casualty & Surety Co.,[137] a decision considering the penalties associated with the status of illegitimacy. The Court stated that punishing such children was "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[138] While distinctions on the basis of illegitimacy share some similarities to suspect classifications, the Court has declined to recognize illegitimacy as a suspect classification.[139] The Court has explained its resistance to extending suspect status in this area in part by the fact that illegitimacy does not carry a discernible badge such as is found in race or sex characterizations.[140] The Court also has noted that the historical treatment of illegitimate children is perhaps less severe than that associated with other minorities.[141]

The logic of these arguments may be questionable, but the end result is an obvious hesitance to expand the list of suspect classifications to include classes based on distinctions that merely are analogous to classifications that already require strict scrutiny. Still, some consolation can be found in the fact that while declining to apply a "most exacting scrutiny" to classifications based on illegitimacy,[142] the Court has settled on a requirement that such classifications must bear a substantial relation to important state interests,[143] a heightened standard demanding more than toothless scrutiny.[144]

C. *Wealth*

Statistics show that the mean hourly wage for families of undocumented children is $2.75.[145] Judge Seals suggested that the imposition of tuition requirements under section 21.031 of the Texas Education Code constitutes a suspect classification because the children are being denied an education based on their inability to pay tuition.[146] Judge Seals stated that two conditions are necessary for a finding of invidious discrimination on

137. 406 U.S. 164 (1972) (state law prohibiting illegitimates from recovering workmen's compensation benefits after death of father).

138. *Id.* at 175.

139. *See* Trimble v. Gordon, 430 U.S. 762, 767 (1977); Mathews v. Lucas, 427 U.S. 495 (1976); Jimenez v. Weinberger, 417 U.S. 628 (1974); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Labine v. Vincent, 401 U.S. 532 (1971); Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968); Beaty v. Weinberger, 478 F.2d 300 (5th Cir. 1973), *aff'd mem.*, 418 U.S. 901 (1974); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), *aff'd mem.*, 409 U.S. 1069 (1972).

140. *See* Mathews v. Lucas, 427 U.S. 495, 506 (1976) (Social Security Act providing procedural benefits for legitimate children in insurance benefits claims upheld because recovery was not wholly prevented).

141. *Id.*

142. *See id.*

143. *See* Lalli v. Lalli, 439 U.S. 259, 265 (1978).

144. *See* Mathews v. Lucas, 427 U.S. 495, 510 (1976).

145. *See In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 39 (S.D. Tex. July 21, 1980). The court cited the U.S. Civil Rights Commission's finding that "[t]he situation in South Texas for the undocumented person . . . resembles the early slavery in the United States." *Id.*

146. *Id.* at 42.

the basis of wealth:[147] (1) a recognized discrete class of poor persons who are being denied access to state services; (2) the services being denied are not in the areas of social or economic benefits.[148] According to Judge Seals, both conditions are present in the denial of education to undocumented children because no practicable alternative to the free, state-provided education is available.[149]

The effectiveness of such an argument, however, must be measured against the United States Supreme Court's reluctance to view wealth distinctions as suspect classifications. Without a finding that such discrimination impinges upon a fundamental right, the Court has viewed distinctions based on wealth as economic regulations of state benefits reviewable under the rationality test.[150] In *San Antonio Independent School District v. Rodriguez*[151] the Court noted that none of its decisions supported application of strict scrutiny on the basis of poor people being denied nonfundamental rights.[152] In the areas of state welfare benefits[153] and public housing,[154] for example, the Court has resisted the opportunity to apply strict scrutiny. While the language in cases such as *Harper v. Virginia Board of Elections*[155] suggests that the Court has "traditionally disfavored" distinctions based on wealth, a searching study of the Court's reasoning reveals other grounds for applying strict scrutiny.[156] When wealth classifications have interfered with the exercise of fundamental rights, such as voting,[157] access to the courts,[158] interstate travel,[159] or procedural due process,[160] the Court has resorted to strict scrutiny.[161] At least one case reveals, however, that the refusal to apply strict scrutiny to wealth distinctions may not necessarily mean that the legislation will survive judicial review. In *United States Department of Agriculture v. Moreno*[162] the Court invalidated a statutory provision disqualifying households with unrelated members from the food stamp program. While recognizing that such a provision might discourage fraud, the Court held that it failed the rational relation test.[163]

147. *Id.* at 40 (citing United States v. Kras, 409 U.S. 434, 446 (1973)).
148. *Id.*; *see* notes 87-97 *supra* and accompanying text.
149. *In re* Alien Children Educ. Litigation, slip op. at 22.
150. *See* Dandridge v. Williams, 397 U.S. 471, 484-86 (1970).
151. 411 U.S. 1 (1973).
152. *Id.* at 29.
153. *See* Jefferson v. Hackney, 406 U.S. 535 (1972).
154. *See* James v. Valtierra, 402 U.S. 137 (1971).
155. 383 U.S. 663, 668 (1966). *See also* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969) (comparing wealth discrimination to race discrimination).
156. The Court found in Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966), that a poll tax was an unconstitutional infringement upon the fundamental right to vote.
157. *See id.*
158. *See* Boddie v. Connecticut, 401 U.S. 371 (1971).
159. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969).
160. *See* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 21 (1956).
161. In other cases, including wealth discrimination, the Court has found a violation of due process. *See, e.g.*, Griffin v. Illinois, 351 U.S. 21 (1956).
162. 413 U.S. 528 (1973).
163. *Id.* at 538.

In *San Antonio Independent School District v. Rodriguez*[164] the Court noted that the threshold consideration for finding discrimination on the basis of wealth had not been satisfied because school district divisions did not identify adequately a class of poor people and because the effect of a relative rather than an absolute deprivation had not been analyzed effectively.[165] The Court did state, however, that a clearly defined class of poor persons would "present a far more compelling set of circumstances for judicial assistance."[166] In *Rodriguez* the Court also distinguished unequal financing in school districts from the imposition of tuition.[167] The Court stated that a tuition requirement would result in a discrete class of poor people "definable in terms of their inability to pay the prescribed sum."[168] Although the Court did not state that strict scrutiny would be justified under such circumstances, a dictum in *Shapiro v. Thompson*[169] suggests that the exclusion of indigent children from a public school system would be constitutionally impermissible.[170]

V. Determining the Applicable Level of Judicial Scrutiny

Fears that the Burger Court would undermine advances made by the Warren Court in the area of equal protection were largely overstated.[171] Still, the present Court has exhibited a more modest approach to judicial intervention and a growing discontent with the traditional two-tiered approach.[172] While the constitutional language of the equal protection clause gives no suggestion of a mere rationality versus strict scrutiny dichotomy, it has become firmly embedded in judicial precedent.[173] It worked well to serve the purposes of the Warren Court through what has often been described as a result-oriented, mechanical approach.[174] The Burger Court, however, has resisted both value-laden judgments and the "all or nothing" tactics of the two-tier model.[175] The model is perhaps too

164. 411 U.S. 1 (1973).

165. *Id.* at 19. Powell described the court below as having taken a simplistic view of wealth discrimination. *Id.*

166. *Id.* at 25 n.60.

167. *Id.*

168. *Id.*

169. 394 U.S. 618 (1969).

170. *Id.* at 633. The Court stated: "It [the state] could not, for example, reduce expenditures for education by barring indigent children from its schools." *Id.*

171. *See* Gunther, *supra* note 14, at 10-11; Wilkinson, *supra* note 20, at 954.

172. *See* Gunther, *supra* note 14, at 12.

173. *See* Craig v. Boren, 429 U.S. 190, 210-11 n.* (Powell, J., concurring).

174. *Id.*

175. *See, e.g.*, USDA v. Moreno, 413 U.S. 528 (1973), in which the Court invalidated a restriction in the Food Stamp Act that prohibited households consisting of unrelated members from receiving assistance. While concluding through the rational basis test that the methods were "clearly irrelevant" to the stated purposes, the Court did recognize that the restriction might serve to discourage fraud. *Id.* at 534-35. Under the traditional lower tier approach, such a purpose arguably would not have been questioned. In Eisenstadt v. Baird, 405 U.S. 438, 447 & n.7 (1972), the Court held that a state law prohibiting the sale of contraceptives to single persons violated equal protection. Although the state had claimed the statute served to deter fornication and to improve health standards, the Court found that these purposes would not suffice under the rational basis test. *Id.* at 447-52. In Reed v.

rigid to accommodate the compromises that the present composition of the Court demands.[176] The Court's hesitance to recognize new "signals" triggering strict scrutiny and its efforts to add "new bite" to the mere rationality test have resulted in a loss of predictability.

For a brief period the Court appeared to acknowledge a sliding-scale approach. In *Weber v. Aetna Casualty & Surety Co.*[177] the Court described its inquiry in equal protection cases as twofold: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[178] The Court discounted the continued practicality of this approach, however, in *San Antonio Independent School District v. Rodriguez*,[179] which the Court decided strictly in the traditional two-tiered mode. Justice Marshall has been conspicuous for his criticism of these mutually exclusive tests. In *Rodriguez* Justice Marshall disagreed with the majority's presumption that equal protection cases can be grouped into two distinct categories.[180] Suggesting that the Court should limit use of the mere rationality test to actions dealing with business interests that do not require judicial protection, Justice Marshall has criticized the utility of the lower tier when state classifications violate vital interests.[181] Instead of focusing on which rights are fundamental or on which classifications are suspect, Justice Marshall has called for attention to the character of the legislative classification, the relative importance to a class of the benefits denied, and the purported state interests in support of the classification.[182]

The Court's struggle with the confines of the two-tier method is apparent in its review of discrimination based on illegitimacy. Here, the Court has stated that while it will not apply strict scrutiny, it will elevate the rational

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Reed, 404 U.S. 71 (1971), the Court again appeared to elevate the rational basis test. While ruling that Illinois could not decide arbitrarily that male administrators would receive preference over female administrators, all things being equal, the Court recognized that the objective of reducing the workload in probate courts was not without some legitimacy. The Court nevertheless ruled that the distinction was unconstitutional, finding it unnecessary to resort to strict scrutiny. *Id.* at 75-77.

176. *See* Wilkinson, *supra* note 20, at 964.

177. 406 U.S. 164 (1972).

178. *Id.* at 173.

179. 411 U.S. 1 (1973).

180. *Id.* at 98 (Marshall, J., dissenting). Justice Marshall stated: "The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization." *Id. See also* Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring) (irrebutable presumption of nonresidency for purposes of determining in-state college tuition invalidated).

181. Dandridge v. Williams, 397 U.S. 471, 520 (1970) (Marshall, J., dissenting). Justice Marshall explained:

> The extremes to which the Court has gone in dreaming up rational bases for state regulation in that area [business] may in many instances be ascribed to a healthy revulsion from the Court's earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls.

Id.

182. *Id.* at 520-21.

basis test so that it demands more than a cursory review.[183] Earlier cases employing the mere rationality test required only a showing of means not "wholly irrelevant" to state objectives.[184] This wide range of discretion resulted in the sustaining of classifications that could be justified only by incidental or hypothetical legislative purposes.[185] Critics have questioned the soundness of such an approach when the characteristics of the group affected are analogous to those of other classes protected against suspect classifications or when important interests with no explicit textual basis in the Constitution are at stake.[186] The Court's approach to classifications based on illegitimacy demonstrates that adding "new bite" to the rationality test may accommodate protection of important individual interests against infringement by the state without resorting to strict scrutiny.[187]

Ruling in favor of the undocumented children's right to an education, the district court in *Doe v. Plyler*[188] suggested that an intermediate review might be appropriate, but declined to take this approach because of the lack of explicit judicial precedence.[189] The Supreme Court, however, has suggested a recognition of an actual middle tier in cases dealing with gender discrimination.[190] While a plurality of the Court recognized gender classifications as "suspect" in *Frontiero v. Richardson*,[191] a majority of the Court has declined to apply strict scrutiny to such classifications. Acknowledgement of the often tenuous relation between the ability to per-

183. *See* notes 142-44 *supra* and accompanying text.

184. *See* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Allied Stores v. Bowers, 358 U.S. 522, 530 (1959).

185. *See, e.g.*, Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 563 (1947), in which the Court upheld a state practice of allowing nepotism in selection of pilot apprentices. Searching for a set of facts to uphold the legislation, the Court stated that the possible promotion of morale through family tradition "might have prompted" the state legislation to allow pilots to choose relatives for their apprentices. *Id.*

186. One commentator has suggested that the presence of sensitive classes and important issues should justify application of an intermediate tier. L. TRIBE, *supra* note 22, at 1089-90 & n.10. The following cases were cited as examples: Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (aliens deprived of civil service benefits); USDA v. Moreno, 413 U.S. 528 (1973) (households with unrelated members disqualified under Food Stamp Act); Stanley v. Illinois, 405 U.S. 45 (1972) (unwed fathers denied child custody).

187. In *In re* Alien Children Educ. Litigation, MDL No. 398 (S.D. Tex. July 21, 1980), the court appeared to rule on alternate grounds in favor of educating undocumented children. While the conclusion of the court called for strict scrutiny based on the recognition of education as a fundamental interest, *id.*, slip op. at 63, an earlier footnote in the opinion suggested a means-scrutiny test under an elevated lower tier. The court stated:

> The court has concluded that an intensified rationality test is appropriate because the statute penalizes children in the absence of individual responsibility or wrongdoing. . . . Under that approach, the means used by the State must be substantially related to the achievement of the governmental objective. Here there is no relationship between the classification and the objective. It is wholly capricious and irrelevant. The statute cannot be upheld if intensified rationality is applied.

Id. at 62 n.105 (citation omitted).

188. 458 F. Supp. 569 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980).

189. 458 F. Supp. at 580 n.13 ("[a] majority of the Supreme Court, however, has never explicitly sanctioned such an approach").

190. *See* Craig v. Boren, 429 U.S. 190 (1977).

191. 411 U.S. 677, 686 (1973).

form and gender, however, has moved the Court closer to an intermediate tier of review in this area.[192] In *Reed v. Reed*[193] the Court held that the state's objective of "administrative convenience" in probate proceedings did not justify a statute preferring male administrators to female administrators.[194] Thus, a mere rational basis for a gender-based legislative classification was inadequate to withstand review.[195] Later, in *Craig v. Boren*[196] the majority relied on *Reed* to hold that gender-based classifications must serve important governmental objectives and must be substantially related to achievement of those objectives.[197]

Justice Powell discussed the Court's recognition of an intermediate tier of review in his concurring opinion in *Craig v. Boren*.[198] Justice Powell recognized an evolving critical examination of gender-based discrimination beyond that which the Court ordinarily affords to cases lacking the fundamental interest or the suspect classification required for strict scrutiny.[199] Predicting that some would view the majority's opinion as a "middle-tier approach," Justice Powell declined to endorse such a characterization.[200] He did recognize, however, that the mere rationality test has taken on a "sharper focus" when the Court has reviewed gender-based classifications.[201] Justice Powell appeared to be advocating the use of a "means" analysis when the deferential rational basis standard is inappropriate.[202] Under such an approach, the Court would review the legislative classification to determine if it bears a fair and substantial relation to the governmental objective.[203] This means-oriented approach serves several functions. Focusing on the relation between a classification and its purposes avoids the value-laden judgments resulting from examination of

192. *Id.*
193. 404 U.S. 71 (1971).
194. *Id.* at 76-77.
195. *Id.*
196. 429 U.S. 190 (1976) (state statute prohibiting sale of 3.2% beer to males under 21 and females under 18 held invalid).
197. *Id.* at 197.
198. *Id.* at 210-11.
199. *Id.* at 210.
200. *Id.* at 210-11 n.24.
201. *Id.*
202. *Id.* at 211. "The decision of the case turns on whether the state legislature, by the classification it has chosen, has adopted a means that bears a 'fair and substantial relation' to this objective." *Id.* (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920), *quoted in* Reed v. Reed, 404 U.S. 71, 76 (1971)).
203. For a discussion of the means-scrutiny test, see Gunther, *supra* note 14, at 21-24. Gunther describes this means-oriented model as an expanded reasonable means inquiry which would put "new bite" into the rational basis test. The model, according to Gunther, would allow the Court to rule on narrower grounds without confronting broad value choices. The approach would also discourage the Court from allowing hypothetical rationales to sustain legislation. *Id.* This intensified rationality test is distinguishable from the middle tier used in *Reed* and *Craig* that required a showing of both substantial relationship and important governmental interests. The elevated rationality test focuses on the methods employed and their relationship to the ends, without explicit attention to the importance of governmental interests. In order to distinguish between the two models, Gunther's means scrutiny will be referred to as heightened, elevated, or intensified rationality, while the *Reed* test will be designated as a middle tier or intermediate tier approach.

the wisdom of legislative objectives. Further, by concentrating on the means specified in achieving governmental objectives, the Court is in a better position to detect those classifications that are over-inclusive. As one commentator cited by Justice Powell has noted, the means inquiry raises the level of review under the mere rationality test without abandoning strict scrutiny.[204] While a consideration of rationality is a common denominator to each level of judicial scrutiny, a majority of the Court has never undertaken a means analysis without at least some classification of governmental objectives.

Justice Rehnquist's dissent in *Craig v. Boren*[205] criticized the majority for fashioning a new standard of intermediate review out of "thin air."[206] Justice Rehnquist's objection focused on the existing confusion embodied in the two-tiered approach and the difficulty of applying an amorphous new standard.[207] Justice Rehnquist described the majority's dictate that gender-based discrimination must serve important governmental objectives and must be substantially related to achievement of such objectives as "so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives or, whether the relationship to those objectives is 'substantial' enough."[208] Justice Powell's concurring opinion answered the objection to allowing courts to decide which governmental objectives are "important" by focusing on the means designed to achieve these ends.[209] Justice Rehnquist's fear that courts do not have the expertise to recognize which classifications are substantially related to governmental goals[210] arguably should be confined to those areas in which the courts clearly lack the competence to appraise the relative value of an adopted classification to the designated ends. Little doubt exists, however, that an intermediate approach, whether characterized as heightened rationality or as means analysis, adds a new dimension to judicial discretion.

Apart from the discussion of an elevated lower tier or an intermediate tier, others have questioned the appropriateness of any multiple test. Justice Stevens, in a concurring opinion in *Craig v. Boren*,[211] noted that there is only one equal protection clause.[212] Given the absence of any dictate in the Constitution that a two-tiered approach should apply, Justice Stevens stated that a triple standard is no less offensive than a dual standard.[213] Justice Stevens suggested that the two-tiered method has been used to ex-

204. *See id.* at 24.
205. 429 U.S. 190, 217-28 (1976).
206. *Id.* at 220.
207. *Id.* at 220-21.
208. *Id.* at 221.
209. *Id.* at 211.
210. *Id.* at 221.
211. *Id.* at 211-14.
212. *Id.* at 211.
213. *Id.* at 212.

plain decisions that were based actually on a single inquiry.[214] Instead of trying to define this single standard in "all-encompassing terms," Justice Stevens suggested that a more appropriate analysis of the decisions rendered in the name of traditional approaches could be divined by examining the reasons motivating particular decisions.[215] Beginning with the conclusion that the classification used in *Craig* was "not as obnoxious as some the Court has condemned, nor as inoffensive as some the Court has accepted,"[216] Justice Stevens then questioned whether an otherwise offensive classification could be justified.[217]

Inquiry into the constitutionality of the Texas statute limiting state funds to the education of citizens and resident aliens might begin, under Justice Stevens's approach, with the observation that an offensive classification exists. Such a conclusory reaction, however, cannot excuse an otherwise searching study of the constitutional issues raised. The crucial question is whether the sentiments toward education expressed in *Brown v. Board of Education*[218] and the Texas Constitution[219] will be given constitutional significance.[220] If strict scrutiny is not justified by recognition of education as a fundamental right or by a finding of a suspect classification, what elements of the present controversy would suggest a more meaningful review under a heightened rationality test remain to be seen.[221] The Court has several choices in this area, including the acknowledged importance of education, the historical prejudice against undocumented aliens, and the children's lack of moral culpability. These factors arguably justify scrutiny under the substantial relation test of either the elevated rationality or the middle tier approach.

VI. STATE INTERESTS

School district officials and state representatives have stated that section 21.031 of the Texas Education Code is an attempt to avoid the dilution of quality education.[222] State officials contend that the financial burden of introducing undocumented children into the school system and accommodating their specific needs will result in an overall reduction in the quality of education available to all students.[223] Construction restrictions in cer-

214. *Id.*
215. *Id.*
216. *Id.* (footnote omitted).
217. *Id.* at 213.
218. 347 U.S. 483, 493 (1954); *see* notes 67-68 *supra* and accompanying text.
219. TEX. CONST. art. X, § 1 (1845); *see* note 66 *supra* and accompanying text.
220. *See* Wilkinson, *supra* note 20, at 977. "Opportunity in America has historically meant education, and in this regard, the present Court's sympathies may only be stiffening . . . . Recognition of the constitutional fundamentality of education would be the boldest step toward equality of opportunity the Court might now take." *Id.*
221. Justice Marshall has acknowledged that there are many important interests and questionable classifications that do not fit neatly into the two-tiered model. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 320 (1976) (Marshall, J., dissenting).
222. *See In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 45 (S.D. Tex. July 21, 1980).
223. In Doe v. Plyler, 458 F. Supp. 569, 573 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th

tain districts and an inability to hire bilingual teachers to instruct new students also have been cited as additional factors necessitating the exclusion of undocumented children from the public school system.[224]

While analysis under a strict scrutiny test demands that the state's interests be compelling and that its methods be necessary to achieve these ends, both the strict scrutiny and the intensified rationality tests require, at minimum, a showing of a substantial relation between the means employed and the objective forwarded. Before examining the direct relation between the stated purposes of the legislation and the method being used to advance its goals, the state's choice of classification in the abstract must be examined.

In an attempt to formulate a response to limited resources, the state has borrowed a federal classification. While the federal government is permitted substantial leverage in distinguishing between those present within the United States on the basis of their relation with this country, states are not accorded the same measure of discretion.[225] As Justice Murphy explained in his opinion in *Oyama v. California*,[226] classifications that may be reasonable and permissible for Congress in implementing one purpose might not be constitutional for a state in furthering a distinct purpose.[227] Without this limitation, the states would be free to borrow from a "plethora of

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Cir. 1980), the assistant attorney general's opening statement described the aim of the state's evidence: "Basically, what we will attempt to show or what we will show is the impact on the educational system, that it impacts to the detriment of the citizens, the legally admitted child, particularly in the border areas, and the areas in which you find large Mexican-American enclaves . . . . Record of Proceedings, Dec. 12, 16, 1977 ('Tr. 12/12'), at 163." *Id. See also In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 55 (S.D. Tex. July 21, 1980).

224. *See In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 58 (S.D. Tex. July 21, 1980). State funds may not be used for construction. TEX. EDUC. CODE ANN. § 16.004 (Vernon Supp. 1980-1981). The state also claimed that the possibility of new laws on standards for bilingual education might make it impossible for them to comply. In a memorandum to the United States Supreme Court the Justice Department described such arguments as hypothetical. Memorandum for the United States in Support of Plaintiffs-Appellees' Application to Vacate Stay Pending Appeal at 5, Certain Named & Unnamed Undocumented Alien Children v. Texas, No. A-179 (filed Aug. 21, 1980). Finally, state officials have argued that undocumented children may contaminate citizen and legal alien children with communicable diseases. The court in Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980), found that the statute in question bears no rational relation to the control of school children's health. *Id.* at 460.

225. *See* Nyquist v. Mauclet, 432 U.S. 1, 7 & n.8 (1977); Mathews v. Diaz, 426 U.S. 67, 85 (1976).

226. 332 U.S. 633 (1948).

227. *Id.* at 664-65 (Murphy, J., concurring). *See also* Mathews v. Diaz, 426 U.S. 67, 85 (1976), in which the Court distinguished between classifications used for federal purposes and those used for state purposes. The Court stated:

> Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interests in administering its welfare programs are concerned. Thus, a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business.

Id. (footnote omitted).

federal classifications."[228] According to Justice Murphy, federal classifications that the state borrows for its own purposes cannot be justified as an extension of congressional policy in the area of immigration control.[229] While classifications employing immigration language are not necessarily unreasonable, they must be sustained on their own merits.[230] That the present statute may discourage a further flow of Mexican immigrants to Texas, therefore, it not enough.[231] Indeed, this justification standing alone would be impermissible because of federal preemption in the area of immigration law.[232] In *De Canas v. Bica*[233] the Supreme Court upheld a California statute placing certain limitations on the employment of illegal aliens. The Court cited the state's concern for the integrity of its domestic work force as a legitimate state purpose, not inconsistent with federal policy and supportable on its own merits.[234] The issue of educating undocumented children arguably may be distinguished due to the Texas Legislature's tolerance of illegal aliens in other areas such as employment, which perhaps serves as a more compelling factor in the migration of undocumented workers into the state. While a state is not obliged to pass legislation restricting employment of illegal aliens, the court in *Doe v. Plyler*[235] suggested that the failure of Texas to enact measures most likely to discourage illegal entry "casts serious doubt on its exclusionary motive" in depriving undocumented children the right to free education.[236]

Under the Constitution, the power to enforce immigration regulations

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228. 332 U.S. at 664-65 (Murphy, J., concurring).

229. *Id.* Justice Murphy stated:

> In other words, if a state wishes to borrow a federal classification, it must seek to rationalize the adopted distinction in the new setting. Is the distinction a reasonable one for the purposes for which the state desires to use it? To that question it is no answer that the distinction was taken from a federal statute or that the distinction may be rationalized for the purpose for which Congress used it. The state's use of the distinction must stand or fall on its own merits.

Id.

230. *See* De Canas v. Bica, 424 U.S. 351, 355 (1976).

231. In Doe v. Plyler, 458 F. Supp. 569 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), the court stated that refusing state funds for the education of undocumented aliens as an attempt to curtail unlawful entry into the state is "ludicrously ineffectual." 458 F. Supp. at 585.

232. *See* De Canas v. Bica, 424 U.S. 351, 364 (1976). *See also In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 53 (S.D. Tex. July 21, 1980). The legislative history of the adoption of TEX. EDUC. CODE ANN. § 21.031(d) (Vernon Supp. 1980-1981), as amended in 1977, shows that the reason behind forbidding Mexican children to live with Texas families in order to qualify for resident status and to attend district schools was to "make it more difficult for kids to be brought in from Mexico to attend schools in the United States." *Hearing on H.B. 247 (S.B. 425) Before the Education Committee*, 65th Tex. Leg., Reg. Sess., Mar. 25, 1977. Judge Seals suggested that this might also have been the purpose of §§ 21.031(a)-(c). Slip. op. at 53. For the text of subsections (a)-(c), see note 4 *supra*.

233. 424 U.S. 351 (1976).

234. *Id.* at 355-56. The district court in Doe v. Plyler, 458 F. Supp. 569 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), distinguished the Texas statute from the California statute involved in *De Canas* on the grounds that the former made no attempt to serve federal purposes and adopted means that were not rationally related to the ends. 458 F. Supp. at 588.

235. 628 F.2d 448 (5th Cir. 1980).

236. *Id.* at 461.

rests exclusively in the federal government.[237] The fact that aliens are subject to state statutes, however, does not necessarily connote an attempt to regulate immigration.[238] The question is not whether Congress has preempted the immigration area in such a way as to invalidate all state distinctions drawn on the basis of immigration status, but whether this discrimination is permissible, given objectives separate from those that the Congress pursues.

With the understanding that states may not borrow federal purposes along with federal classifications, the question remains whether the distinction between undocumented children and other school children in Texas is substantially related to the improvement of education. Those in favor of excluding undocumented children from Texas public schools rely on the preservation of quality education as the paramount concern of the state. As Judge Seals noted, no attempt was made prior to the amendment of section 21.031 to determine the number of undocumented children or the impact of their presence in district schools.[239] Judge Seals's search for subsequent studies also revealed an absence of data on the academic performance in schools since the exclusion of the undocumented children.[240] As to the particular problems posed by the presence of undocumented children, both Judge Seals and Judge Justice determined that the undocumented child is virtually indistinguishable from a resident alien child in terms of needs.[241] Certain children in both categories, for example, require bilingual education. Excluding undocumented children without evidence of their unique impact on the quality of education weakens the relation between the adopted methods of dealing with performance standards and the projected improvement of education.[242] Furthermore, a mere decline in the quality of education for an entire population does not support a claim of constitutional dimension.[243]

The State of Texas has suggested, however, that in addition to its concern for quality education the cost of readmitting undocumented children into Texas schools is prohibitive, both in terms of accommodating their

237. *See* Nyquist v. Mauclet, 432 U.S. 1, 10 (1976); Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893); The Chinese Exclusion Case, 130 U.S. 581, 609 (1889).

238. *See* De Canas v. Bica, 424 U.S. 351, 355 (1976).

239. *See In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 46 (S.D. Tex. July 21, 1980). In addition, the deputy commissioner of the Texas Education Agency, who now serves as commissioner, testified that no attempt was made to contact or consult that agency prior to the 1975 amendment of § 21.031. *Id.*

240. *Id.*

241. *See In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 62 & n.104 (S.D. Tex. July 21, 1980); Doe v. Plyler, 458 F. Supp. 569, 589 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980).

242. *See* Doe v. Plyler, 458 F. Supp. 569, 576 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980). The state claimed at trial that undocumented children were particularly problematic. The suggestion was made, for example, that undocumented children lost books more frequently than other students. The court found that these assertions were not supported by evidence. 458 F. Supp. at 576 n.8.

243. Doe v. Plyler, 628 F.2d 448, 459 (5th Cir. 1980) (citing San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973)).

overall numbers and of responding to their particular educational needs.[244] According to Judge Seals, the state has not argued that the numbers of undocumented students enrolled in 1975 was unmanageable, but that the return of those children would present an unreasonable financial burden.[245] In a critical study of the method used by independent analysts testifying for the state to ascertain the potential number of students involved, Judge Seals concluded that the projected number exceeded any reasonable estimate.[246] Looking at the expense of providing bilingual education for this particular segment of the population, Judge Justice examined federal involvement in this area. The largest single source of funds for bilingual education is the federal government, which contributes forty-five percent of the cost of such programs.[247] The distribution of these funds, as well as appropriations under free breakfast and lunch programs are available without regard to the immigration status of school-age children.[248] Judge Justice also emphasized that the savings involved in excluding undocumented children from the public school system are unpredictable.[249] The costs in certain areas of administration, maintenance, and operation are fixed in such a way that moderate declines in enrollment would not result in substantial reductions.[250] Teachers' salaries represent the largest single variable in educational costs. Judge Justice stated, however, that a decrease of twenty to thirty students in a particular grade in a single school is customarily necessary to justify releasing a teacher.[251] While schools may realize relative savings in the reduction of overall student population, the drastic method chosen in this instance is

244. *See In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 55 & n.89 (S.D. Tex. July 21, 1980). A representative of the Texas Education Agency testifying at trial compared the decision on educating undocumented children to the choice that would have to be made by the captain of a sinking oceanliner who is caught between taking more passengers and allowing the lifeboat to sink or leaving them behind in hopes of remaining afloat. Judge Seals pointed out, however, that the children in this case had already been thrown out of the boat. *Id.* The court also found that there was no evidence that the state and local districts lacked the necessary funds to educate the undocumented children. The state had noted in its closing argument: "There is no place in this pre-trial order that the State has said the State of Texas doesn't have enough money. Not one place. Texas can come up with the money. If we want to get the legislature to fund certain projects, we will go down and get them to fund it. The State never said it didn't have money in its budget." *Id.* at 56.

245. *Id.* at 48. The addition of 120,000 children would decrease the per child expenditure by $70. *Id.* at 57.

246. *Id.* at 49-54. The district court found that the analysis focused on the number of children out of school, rather than the number of undocumented children. "To assume that children not enrolled in school are undocumented is simply unsound." *Id.* at 49. The court suggested that 20,000 would be a more accurate figure than the analysts' estimate of 120,000. *Id.* at 52.

247. *See* Doe v. Plyler, 458 F. Supp. 569, 577 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980).

248. 458 F. Supp. at 577; *see In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 59 (S.D. Tex. July 21, 1980).

249. *See* Doe v. Plyler, 458 F. Supp. 569, 576 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980).

250. 458 F. Supp. at 576.

251. *Id.*

not designed to address the far-reaching problems in school financing.[252] Furthermore, a state's interest in decreasing its costs in and of itself is insufficient to withstand judicial review under either the rational basis test or the strict scrutiny test.[253]

Judge Seals criticized the practice of charging tuition to undocumented children as a means of exacting their share of educational expenses.[254] Texas has no state income tax, but the payment of sales taxes is unavoidable, and it is difficult to work without paying social security.[255] Further, those who rent housing contribute indirectly to the payment of property taxes.[256] The families of undocumented children contribute to government revenue to the same extent as other families of similar incomes, making the solicitation of additional funds an added and unjustified burden.[257] Judge Justice suggested that a more direct means of satisfying state needs would be found by classifying students according to their wealth, English-speaking ability, age relative to assigned grade, degree of educability, and amount of their parents' contribution to property taxes.[258] According to Judge Justice, such a classification system would be unconstitutional, but it does serve to illustrate that the complex factors affecting school financing cannot be correlated directly with the education of undocumented children.[259]

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252. *See In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 58 (S.D. Tex. July 21, 1980). The school financing laws do not provide for additional funds to those areas suffering from lack of classroom space or from failure to meet teachers' salaries due to the high cost of living. Instead, the attack is directed at reducing overall numbers. *Id.* In addition, no evidence shows that the quality of education relates directly to the amount of money expended on each student. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 24 n.56 (1973).

253. Doe v. Plyler, 628 F.2d 448, 459 (5th Cir. 1980) (citing USDA v. Moreno, 413 U.S. 528, 538 (1973) (rational basis test); Graham v. Richardson, 403 U.S. 365, 375-76 (1971) (strict scrutiny test)).

254. *See In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 40 (S.D. Tex. July 21, 1980). Funding under the Texas school financing system is outlined in TEX. CONST. arts. I-V.

255. Aliens, like citizens, must pay federal taxes. Mathews v. Diaz, 426 U.S. 67, 83 n.22 (1976); *see In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 40 (S.D. Tex. July 21, 1980); Doe v. Plyler, 458 F. Supp. 569, 578, 588 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980).

256. *See* Doe v. Plyler, 458 F. Supp. 569, 588 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980).

257. *See In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 40 & n.55 (S.D. Tex. July 21, 1980).

258. *See* Doe v. Plyler, 458 F. Supp. 569, 589 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980).

259. In *In re* Alien Children Educ. Litigation, MDL No. 398, slip op. at 62 (S.D. Tex. July 21, 1980), Judge Seals concluded:

> The exclusion of undocumented children no more relates to the saving of educational resources than does denying access to education to a similar number of documented and citizen children. The State never attempted to examine the impact of undocumented children on the schools before deciding to exclude them. It is thus not surprising that the classification used is in no way carefully tailored or drawn to advance the state interest.

Id. (footnote omitted).

VII. CONCLUSION

The growing number of illegal aliens present in the United States raises complex social and economic issues. These issues are most immediate in states such as Texas that must accommodate high numbers of illegal entrants. The ineffectiveness of federal enforcement of border controls aggravates the growing problem. Texas is the only state, however, that denies public education to undocumented children. While the uniqueness of a state's legislation is not determinative of its validity, in this instance it does demand a searching inquiry into the appropriateness of the state's action. The search for economic opportunity is the primary impetus for the influx of undocumented workers into the United States. While a state may have a strong interest in protecting the integrity of its domestic work force, Texas has passed no legislation penalizing or restricting employment of undocumented aliens. The absence of such an attempt to discourage employment of undocumented workers raises a serious question of consistency when balanced against the state's treatment of undocumented children.

Unlike their parents, undocumented children have not entered the United States by their own volition. While immigration regulations do not discriminate between adults and children when characterizing the unlawfulness of an individual's entry into this country, the children have not purposely violated federal laws. Discriminating against this group of children raises an additional question of consistency because their American-born siblings enjoy all the benefits of citizenship. When these American-born children reach adulthood, they may apply for citizenship on behalf of their family members, creating the possibility that the undocumented children of today may at some future time become citizens. Whether through official channels or unofficial tolerance, many of these children are likely to remain in the United States. Consigning an entire segment of a state's population to ignorance through the denial of education cannot further the interests of society as a whole.

The lack of control evident in the undocumented children's predicament may be sufficient alone to justify a more meaningful level of judicial scrutiny than would otherwise be necessary. The Texas legislation denying education to certain children based on their immigration status arguably would not survive a search for a substantial relationship between the state's methods and its proposed benefits. While reducing the overall number of children in Texas schools undoubtedly will preserve state education funds, the nature of the state's classification of undocumented children for this purpose does not reflect a well-tailored approach to the promotion of quality education. The state has not shown that prior exclusion of undocumented children from schools increased academic performance. Denying education to these particular children, in light of similar educational needs that other students exhibit, results in a questionable relationship between legislative methods and state purposes. If the state cannot demonstrate a substantial relationship between its classification and its

objectives, then the statute must fail under all but the lowest levels of judicial scrutiny.

Implicit in the state's argument that accommodating the needs of these children will threaten the overall quality of education is a recognition of the importance of education. While the Court declined to recognize education as a fundamental interest in *Rodriguez*, at least two compelling reasons suggest that the issue is not closed. First, the legislation in question acts as a complete bar to education for the undocumented children. Secondly, the Court would not have to monitor relative levels of educational benefits when the issue is confined to access to education. While recognition of education as a fundamental right eliciting strict judicial scrutiny may have far-reaching implications, acknowledging a basic right to acquire minimal skills through access to education limits the extent to which such a decision would operate. Requiring Texas to bear a disproportionate burden of the expense of educating undocumented children may justify an argument for increased federal assistance. As long as these children are present within its borders, however, Texas cannot ignore their presence by closing the classroom door.