Undocumented Aliens and the Constitution: Limitations on State Action Denying Undocumented Children Access to Public Education

By ROBERT F. KANE* and FELIX VELARDE-MUÑOZ**

Introduction

Federal officials estimate that there are between six and ten million undocumented aliens[1] in the United States.[2] Many of these aliens have resided here for a number of years and have established strong ties with the American community.[3] Although it is generally believed that undocumented

* A.B., B.S., 1973, University of California, Berkeley; J.D., 1976, University of California, Davis. Member, California Bar.

** A.B., 1973, University of California, Berkeley; J.D., 1977, Harvard University. Member, California Bar. Mr. Velarde-Muñoz is primarily responsible for section IV.

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1. An undocumented alien or undocumented person is an alien who is in the United States without proper documentation, either as a result of having entered this country illegally or, having entered legally, subsequently violating the conditions of entry. *See* HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 1ST SESS., ILLEGAL ALIENS: ANALYSIS AND BACKGROUND 1 (Comm. Print 1977) [hereinafter cited as JUDICIARY REPORT ON ILLEGAL ALIENS]. Undocumented aliens commonly are referred to as illegal aliens, or as "wetbacks" if from Mexico. *See* Ortega, *The Plight of the Mexican Wetback*, 58 A.B.A.J. 231 (1972) [hereinafter cited as Ortega]. Because of the derogatory use of the term "wetback" in reference to persons of Mexican descent and the stigma of the label "illegal," the authors have avoided these references where possible.

2. *Getting Their Slice of the Pie*, TIME, May 2, 1977, at 26. Estimates are at best only educated guesses. *See* JUDICIARY REPORT ON ILLEGAL ALIENS, *supra* note 1, at 3-4. Statistics published by the Immigration & Naturalization Service (INS) report the number of undocumented aliens taken into custody, from which the number that remain undiscovered may be extrapolated. Nearly 700,000 aliens were apprehended in fiscal year 1974. *See* Comment, *The Undocumented Alien and De Canas v. Bica: The Supreme Court Capitulates to Public Pressure*, 3 CHICANO L. REV. 164 (1976).

3. Leonel J. Castillo, the head of the INS, estimates that there are about 500,000 illegal

aliens have an adverse impact on American labor,[4] recent studies indicate that undocumented aliens contribute substantially to the American economy[5] and pay their share of taxes.[6] With the continuing deterioration of the American economy and increasing demands on governmental services, however, there is growing public pressure to control illegal immigration and penalize those undocumented aliens residing in this country.[7]

Various proposals regarding illegal immigration and undocumented aliens have been and are now before Congress.[8] Notwithstanding the federal government's potential involvement in the field, state governments have enacted legislation designed to minimize the adverse impact of undocumented aliens residing in their jurisdictions.[9] For example, the Texas legislature

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aliens now residing in the United States who have been here since 1960, and between 2.5 and 5 million who arrived between 1970 and January 1, 1977. Reston, *Illegal Aliens Dilemma*, S.F. Chronicle, Aug. 6, 1977, at 36, col. 3.

4. A Department of Labor spokesman testified before a committee of the House of Representatives that illegally employed aliens:

1. Take jobs which would normally be filled by American workers;
2. Depress the wages and impair the working conditions of American citizens;
3. Compete with unskilled and uneducated American citizens . . . ;
4. Increase the burden on American taxpayers through added welfare costs . . . ;
5. Reduce the effectiveness of employee organizations;
6. Constitute for employers a group highly susceptible for exploitation.

H.R. REP. No. 108, 93d Cong., 1st Sess. 7 (1973). *See also* Rodino, *The Impact of Immigration on the American Labor Market*, 27 RUTGERS L. REV. 245 (1974); JUDICIARY REPORT ON ILLEGAL ALIENS, *supra* note 1, at 24.

5. Abrams & Abrams, *Immigration Policy—Who Gets in and Why?*, THE PUBLIC INTEREST, Winter 1975, at 26-27; Cook, *An Economic Analysis: How Illegal Aliens Pay as They Go*, NEW WEST, May 23, 1977, at 34; Steinman, *Scapegoats of Unemployment*, NATION, April 17, 1972, at 497-500; Wood, *Illegal Aliens' Economic Role*, S.F. Chronicle, Sept. 11, 1977, at 12, col. 1. In a recent article, one commentator concluded after reviewing the evidence that "though the problem [of undocumented aliens] generates much anxiety, it appears to be a good deal less critical than commonly articulated." Nafziger, *A Policy Framework for Regulating the Flow of Undocumented Mexican Aliens into the United States*, 56 ORE. L. REV. 63, 97 (1977) [hereinafter cited as Nafziger]. *But see* Salinas & Torres, *The Undocumented Mexican Alien: A Legal, Social and Economic Analysis*, 13 HOUS. L. REV. 863, 876-81 (1976) [hereinafter cited as Salinas & Torres].

6. *See* JUDICIARY REPORT ON ILLEGAL ALIENS, *supra* note 1, at 23; DOMESTIC COUNCIL COMMITTEE ON ILLEGAL ALIENS, PRELIMINARY REPORT, December 1976, at 151 [hereinafter cited as DOMESTIC COUNCIL REPORT]. *See also* Cornelius, Mexican Migration to the United States: The Views from Rural Sending Communities 29 (June 1976); Deedy, *News & Views: Illegal Aliens*, 102 COMMONWEALTH 194 (1975).

7. *The Gallup Poll Reports Hard Line on Aliens*, S.F. Chronicle, Oct. 31, 1977, at 7, col. 1. *See also* Bustamante, *Structural and Ideological Conditions of the Mexican Undocumented Immigration to the United States*, 19 AM. BEHAVIORAL SCIENTIST 364, 374-75 (1976); Nafziger, *supra* note 5, at 64.

8. JUDICIARY REPORT ON ILLEGAL ALIENS, *supra* note 1, at 1-2; Salinas & Torres, *supra* note 5, at 900-910. For a summary of President Carter's proposal, see 123 CONG. REC. H8680 (daily ed. Aug. 4, 1977); 123 CONG. REC. S13826 (daily ed. Aug. 4, 1977).

9. For example, California, Connecticut and Kansas have recently enacted laws prohibit-

enacted a statute in 1975 that limits free public education to citizens and legally admitted alien children.[10] Prior to 1975, each child residing in that state was guaranteed a free public education at his local school.[11] Although a literal reading of the present statute does not prohibit undocumented children[12] from attending public schools, the law was designed to effectively deny these children that opportunity by requiring them to pay tuition.[13] As a result, undocumented children cannot enroll in the Houston public schools unless they pay $90.00 monthly tuition.[14] Similarly, in the Austin Indepen-

ing employers from knowingly hiring an alien who is not entitled to lawful residence in the United States. CAL. LAB. CODE § 2805 (West Supp. 1977); CONN. GEN. STAT. ANN. § 31-51k (West Supp. 1978); KAN. STAT. ANN. § 21-4409 (1974). *See also* Salinas & Torres, *supra* note 5, at 895-96.

10. TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1978). *See also* Shafer, *Foreign-Born Children of Illegal Immigrants: A Growing Problem*, INTEGRATEDUCATION, Nov.-Dec. 1976, at 18 [hereinafter cited as Shafer].

11. TEX. EDUC. CODE § 21.031 (Vernon 1972) (amended 1975) provided a free public education to any child who was a resident of the local school district. This statute was interpreted to specifically include undocumented children. *See* Texas Attorney General's Opinion No. H-586 (opinion letter, April 18, 1975).

12. Undocumented children are children who are aliens in the United States without proper documentation. *See* note 1 *supra*. Children born in the United States to parents who are in the country illegally are not undocumented aliens. All persons born in the United States are citizens regardless of the parents' immigration status. U.S. CONST. amend. XIV, § 1. *See also* Acosta v. Gaffney, 413 F. Supp. 827, 830-33 (D.N.J. 1976), *rev'd on other grounds*, 558 F.2d 1153 (3d Cir. 1977).

13. Section 21.013 of the Texas Education Code as amended in 1975 reads:

> (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.
>
> (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.
>
> (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.

TEX. EDUC. CODE § 21.03(a)-21.031(c) (Vernon Supp. 1978).*See also* Letter of M.L. Brockette, Texas Commissioner of Education, to the Honorable John A. Traeger, Texas State Senator (Nov. 28, 1975). Brockette states that under the new law undocumented children "who are admitted to school are not eligible to receive benefits of such state funds and must be provided for by local or other resources." The sponsor of the Texas law, Texas State Representative Ruben M. Torres, in a letter dated March 14, 1975, to the Honorable Tom C. Massey, Texas State Representative and Chairman of the Committee on Public Education, stated that the main purpose of the new law is to "eliminate the admission of illegal aliens to public school districts in Texas."

14. The Daily Texan (student newspaper of the University of Texas), Oct. 28, 1976, at 12, col. 4. *See also* Houston Chronicle, Sept. 12, 1976, at 1.

dent School District, an undocumented child must pay tuition ranging from $1300 a year for elementary students to $1728 a year for senior high school students.[15] Since most undocumented children in Texas are from poor Mexican families,[16] the burden of tuition effectively prevents these children from attending school.[17]

Supporters of the Texas law argue that undocumented children are inundating the public schools and thus adversely affecting the education of other students as well as burdening the Texas taxpayer.[18] This proposition is, however, highly speculative. It is virtually impossible to ascertain the exact number of undocumented children involved, or their impact on educational services.[19] More importantly, the parents of undocumented children, like those of citizen and lawful resident children, pay their fair share for education through state and federal taxes.[20] The denial of education to

15. The Daily Texan, Oct. 28, 1976, at 12, col. 4.

16. Ortega, *supra* note 1, at 251. *See also* HUMAN RESOURCES AGENCY, SAN DIEGO COUNTY, A STUDY OF THE SOCIOECONOMIC IMPACT OF ILLEGAL ALIENS ON THE COUNTY OF SAN DIEGO (1977) [hereinafter cited as SAN DIEGO STUDY]. This study was commissioned by the County of San Diego to determine the socio-economic impact of illegal aliens on the County of San Diego, the area in the nation most affected by the influx of illegal immigrants. The study estimated that an undocumented worker earns an average of $4,368 a year, well below that which is required to support a family. *Id.* at xi.

17. *See* The Daily Texan, Oct. 28, 1976, at 12, col. 5.

18. *See* TEX. EDUC. CODE ANN. tit. 2, § 21.031 (Vernon Supp. 1978), denying free public education to undocumented children. In Doe v. Plyler, No. TY-77-261-CA (E.D. Tex., Sept. 12, 1977) (order granting preliminary injunction), the district court preliminarily enjoined the Tyler Independent School District (Texas) from enforcing their restrictive admissions policy based on section 21.031, and from attempting to charge undocumented children tuition as a precondition to enrollment in furtherance of that policy. The court found that the primary purpose of the Texas statute and the Tyler policy denying free public education to undocumented children is "to employ public educational funds for providing education to U.S. citizens and legally admitted aliens, and to prevent the potential drain on such funds should Tyler or Texas in general, become a haven for illegal aliens." *Id.*, Findings of Fact and Conclusions of Law at 4. The defendant school district argued: " 'There is a limited amount of revenue available within the State which can be used to achieve the social goal of educating the State's children. The legislature has determined that those funds are to be used to educate the United States' citizens and the legally admitted aliens who reside in Texas.' " *Id.* at 11 (quoting Brief for Defendant at 16). *See also* S.F. Chronicle, Oct. 26, 1977, at B-6, col. 1; Shafer, *supra* note 10, at 18-19.

19. Attempts to determine the number of undocumented persons in the United States and their impact are highly speculative, and figures purporting to show pressure-mounting impact should be examined with caution. *See* Comment, *The Undocumented Worker: The Controversy Takes a New Turn*, 3 CHICANO L. REV. 164, 164-65 n.3 (1976) [hereinafter cited as *The Undocumented Worker*]; Diamond, *The Alien Hordes: Problem or Propaganda?*, NEW WEST, Dec. 6, 1976, at 103 [hereinafter cited as Diamond]. A recent report to the Domestic Council Committee on Illegal Aliens indicates that the illegal alien population from Mexico is overwhelmingly young, predominantly male and, more often than not, single. DOMESTIC COUNCIL REPORT, supra note 6, at 132. *See also* J. SAMORA, LOS MOJADOS: THE WETBACK STORY 89-94 (1971) [hereinafter cited as SAMORA]. Nevertheless, in the San Diego study the cost impact of undocumented children for 1976-1977 was estimated at $100,000. SAN DIEGO STUDY, *supra* note 16, at xxiii.

20. *See* text accompanying notes 171-76 *infra*.

undocumented children in Texas is of considerable importance not only to the residents of Texas but also to the rest of the nation. As the economic situation worsens, other states, which now provide free public education to undocumented children,[21] will come under increasing pressure to follow the model set by Texas and deny state benefits to these individuals.[22]

This article will explore the plight of the undocumented child and the constitutional arguments available to challenge such statutes, using the Texas statute as a focal point.[23] The historical and sociological background of undocumented aliens, including the problems of illegal immigration from Mexico, will be described initially. The status of undocumented aliens under the United States Constitution will then be explored. The commentary will finally discuss three constitutional limitations on state action that may secure for undocumented children those rights denied by the Texas statute. The sources of these limitations are the due process and equal protection clauses of the Fourteenth Amendment and the doctrine of federal preemption developed under the supremacy clause.

I. The Undocumented Alien in Perspective

The border between Texas and Mexico was established in 1848 with the signing of the Treaty of Guadalupe Hidalgo.[24] This 889 mile border is, however, something of a fiction. It becomes real only when some national policy prompts either the United States or Mexico to assert the fact of its existence. More realistically, this border represents a permeable membrane that joins rather than separates the two nations.[25]

To understand the problem of the undocumented child in Texas, one must examine the historical background of illegal immigration from Mexico. Migration patterns indicate that immigrants generally flow from a place

21. *See, e.g.*, CAL. EDUC. CODE § 42900 (West Spec. Pamph. 1976).

22. *See The Undocumented Worker*, *supra* note 19, at 164-65. Moreover, in Texas there is now increasing pressure to deny free public education to lawful resident alien children. *See* Houston Chronicle, Dec. 7, 1975, at 26, col. 1; Letter from M. L. Brockette, Texas Commissioner of Education, to the Governor of Texas and Members of the 64th Legislature (July 24, 1975).

23. This issue is currently pending in the federal courts. *See* Doe v. Plyler, No. TY-77-261-CA (E.D. Tex., Sept. 12, 1977) (order granting preliminary injunction). This article does not explore possible state statutory or constitutional arguments that might be made. *See, e.g.*, Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied sub nom.* Clowes v. Serrano, 432 U.S. 907 (1977) (declaring California's public school financing system violative of state constitutional provisions guaranteeing equal protection of the law). *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

24. SAMORA, *supra* note 19, at 16.

25. F. SCHMIDT, SPANISH SURNAMED AMERICANS EMPLOYED IN THE SOUTHWEST 7 (1970).

of origin where economic opportunities are restricted to destinations where economic opportunities are comparatively greater.[26] Migration from Mexico to the United States is thus caused by the relatively poor economic conditions in Mexico.[27] Illegal immigration occurs because the restrictive immigration laws of the United States conflict with these economic realities. United States industry has historically exploited this situation by fostering an immigration policy that favors Mexicans as laborers rather than settlers.[28]

The first restrictions on immigration to the United States were enacted in 1882 to prevent the importation of "cheap" labor.[29] At that time, the target was not migration from Mexico; the first immigration restrictions were aimed at the Chinese.[30] Consequently, the immigration restrictions that were enacted[31] were soon waived for Mexican laborers by the Departmental Order of 1913.[32] This order represented the first successful attempt by growers and other industrialists to import Mexican labor with government approval.[33] Thereafter, American employers actively recruited Mexican labor.[34]

Although the Departmental Order was initiated as a wartime measure,[35] southwestern growers and industrialists continued after World War I to encourage the movement of Mexicans across the border as a source of cheap labor.[36] The Great Depression brought an abrupt end to this relatively open

26. Frisbie, *Illegal Migration from Mexico to the United States: A Longitudinal Analysis*, 9 INT'L MIGRATION REV. 3, 3 (1975). *See also* JUDICIARY REPORT ON ILLEGAL ALIENS, *supra* note 1, at 10-11.

27. United States v. Baca, 368 F. Supp. 398, 402-08 (S.D. Cal. 1973), *quoted in* United States v. Ortiz, 422 U.S. 891, 901-02 (1975) (appendix to concurring opinion of Burger, C. J.); SPECIAL STUDY GROUP ON ILLEGAL IMMIGRANTS FROM MEXICO, A PROGRAM FOR EFFECTIVE AND HUMANE ACTION ON ILLEGAL MEXICAN IMMIGRANTS 7 (1973) [hereinafter cited as CRAMTON REPORT]. Cramton was chairman of the Special Study Group.

28. SAMORA, *supra* note 19, at 57.

29. *See* Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. REV. 66, 67 (1975) [hereinafter cited as Cardenas].

30. *See* SAMORA, *supra* note 19, at 35.

31. The Immigration Law of 1882, ch. 376, 22 Stat. 214 (repealed 1966), established a head tax and provided for the exclusion of certain classes of people and other persons likely to become public charges. In 1885 Congress passed the Alien Contract Labor Law, ch. 164, 23 Stat. 332 (repealed 1952), making it illegal to assist the immigration of foreigners to the United States in contemplation of work to be done in the United States for the assisting person. In 1917 a literacy test was made a requirement for admission to the United States. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874 (repealed 1952).

32. The Departmental Order of 1913 by the Commissioner General of Immigration waived the head tax, contract labor and literacy requirements for Mexican laborers. *See* Cardenas, *supra* note 29, at 67-68.

33. *See* Cardenas, *supra* note 29, at 67.

34. SAMORA, *supra* note 19, at 39.

35. Cardenas, *supra* note 29, at 68.

36. SAMORA, *supra* note 19, at 39.

border policy.[37] During the depression, Mexican nationals were displaced, deported and prevented from entering the United States.[38] This reversal in policy created grave hardships for the Mexican nationals who had grown economically dependent on the United States.[39]

With the advent of war and burgeoning economic activity, the United States again sought to utilize Mexican labor. In 1942, the Bracero Program was initiated through a bilateral agreement between the United States and Mexico; it allowed the temporary migration of Mexican farmworkers to the United States.[40] The creation and maintenance of this program was the result of the growers' influence on public policy.[41] During this period, Mexican migration was governed by the ability of the United States to absorb workers rather than by a limitation on the supply of Mexican workers.[42] The northward movement of undocumented Mexican nationals was stimulated by this program and the expectation of work it created.[43] Consequently, while the Bracero Program provided the means by which the Mexican national could legally work in the United States, it also fostered illegal immigration.[44]

37. *Id.* at 40-41.

38. *Id.* at 41-42.

39. *See* McClean, *Tightening the Mexican Border*, 64 SURVEY 28 (1930) wherein the author states:

> [T]here are certain elements of injustice in the new border policy. For ten years, the Mexican peon had surely been the Atlas holding upon his broad shoulders the economic life of the Southwest. He has bent his back over every field, toiled on every mile of railroad, and poured his sweat into every cubic yard of concrete. We have needed him; we have felt that we could not get along without him. And when our need was most acute in the industrial epoch which followed the war, we forgot our own immigration laws. Now that the acute need has passed away, by a stricter interpretation we are uprooting these people and sending them home. By actual deportations, or by "putting the fear of God" into their hearts, we are thrusting them into an economic order with which they have grown unfamiliar. Most of them have been conscious of doing no wrong. And when they steal back across the line to reestablish themselves in the social and economic order to which we have accustomed them, they are thrown in jail as common felons. The injustice comes not from any particular border policy, but rather because we have had no consistent policy.

Id. at 55, *quoted in* SAMORA, *supra* note 19, at 43.

40. *See* Cardenas, *supra* note 29, at 75.

41. SAMORA, *supra* note 19, at 44.

42. *Id.*

43. Salinas & Torres, *supra* note 5, at 871. *See also* note 44 *infra*.

44. *See* Hadley, *A Critical Analysis of the Wetback Problem*, 21 LAW & CONTEMP. PROB. 334 (1956) in which the author states:

> Apparently, the relation between this Mexican contract labor program and the spiraling illegal immigration was this: Contract workers returned with exciting tales of the money that could be earned in the United States. The next year these same workers wanted to repeat their performance and their neighbors wanted to join. The result was that there were many more Mexicans who wanted to come to the United States than there were certifications of need issued by the Secretary of Labor. Further, managing to be among the workers selected by the Mexican officials for the

Although the program was terminated in 1964, the importation of Mexicans as temporary agricultural workers continues under the Immigration and Nationality Act.[45]

Ensuing efforts to control illegal immigration have corresponded to the United States' ability to absorb and profit from the efficient utilization and exploitation of undocumented Mexican aliens.[46] The transition from a relatively open to a closed border policy occurs in cycles depending on the demands of the United States economy.[47] As one commentator has noted:

> The "illegal alien" problem is therefore one whose seed has been planted time and again by the United States when it has been in need of Mexican labor. When expediency better serves, however, immigration laws have been administered and changed in response to a problem perceived as having been created by illegal aliens, when in fact it is largely of the United States' own making.[48]

Even with an ailing economy, the economic and employment opportunities in the United States surpass those in Mexico.[49] This economic disparity, coupled with historic and cultural factors, continues to exert tremendous pressure on Mexican nationals to migrate to the United States.[50]

The life of those who have immigrated illegally to the United States is not ideal. Although many undocumented aliens have developed strong ties with the American community, they nevertheless live in a state of fear.[51] Undocumented aliens are subjected to abuse and exploitation in a variety of ways.[52] Employers, landlords and merchants are all able to exploit them, knowing that the undocumented alien can be turned over to federal officials for deportation if he challenges their authority.[53] Undocumented Mexican workers are generally employed in the lowest paying jobs, often at a wage below the legally required minimum wage.[54] They come here illegally, nevertheless, because it is the only alternative to the extreme poverty in which they live in Mexico.[55]

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program characteristically required the persuasion of a bribe. Thus, it seemed to many much simpler to seek American employment on their own.

Id. at 344, *quoted in* SAMORA, *supra* note 19, at 44-45.

45. 8 U.S.C. §§ 1101-1503 (1970 & Supp. V 1975). *See* Cardenas, *supra* note 29, at 79. *See also* Comment, *The Alien Commuter After Saxbe v. Bustos*, 8 U.C.D. L. REV. 33 (1975).

46. SAMORA, *supra* note 19, at 57.

47. *Id.* at 49.

48. Cardenas, *supra* note 29, at 89.

49. CRAMTON REPORT, *supra* note 27, at 7-8.

50. *Id.* at 8.

51. Ortega, *supra* note 1, at 251.

52. CRAMTON REPORT, *supra* note 27, at 11; JUDICIARY REPORT ON ILLEGAL ALIENS, *supra* note 1, at 18.

53. Ortega, *supra* note 1, at 252; United States v. Ortiz, 422 U.S. 891, 904 (1975) (appendix to concurring opinion of Burger, C.J.).

54. *See* SAMORA, *supra* note 19, at 99.

55. Ortega, *supra* note 1, at 251. *See also* SAMORA, *supra* note 19, at 97.

After years of neglecting the complex problems of illegal immigration and the undocumented alien, the federal government has now begun to act.[56] President Carter has proposed legislation to reduce illegal immigration and to legitimize the status of those undocumented persons already residing in this country.[57] Yet some states such as Texas, acting through their legislatures, are initiating measures to immunize themselves from the impact of the undocumented alien. Undocumented children are caught in the middle of this situation. They are the product of historic and economic factors beyond their control, and education offers one of the few opportunities to break the cycle of poverty and ignorance in which they live.[58]

II. Constitutional Rights of Undocumented Aliens

In *Mathews v. Diaz*,[59] the United States Supreme Court expressly recognized that undocumented aliens are protected by the due process clause of the Fifth and Fourteenth Amendments.[60] Whether other explicit or implicit constitutional rights of citizens extend to undocumented aliens remains unclear.[61] Few courts have faced these issues, largely because undocument-

56. Reston, *Illegal Aliens Dilemma*, S.F. Chronicle, Aug. 6, 1977, at 36, col. 4.

57. *See* Wall St. J., Sept. 19, 1977, at 1. Now before Congress, President Carter's proposal includes provisions that make it unlawful to hire undocumented aliens, that adjust the status of undocumented aliens residing in this country, that increase cooperation between the United States and the countries that are the source of illegal immigration, and that increase the budget of border enforcement. *See* 123 CONG. REC. H8680 (daily ed. Aug. 4, 1977); 123 CONG. REC. S13826 (daily ed. Aug. 4, 1977).

58. *See* S. REP. NO. 146, 89th Cong., 1st Sess. 1, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 1448. *See also* Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

59. 426 U.S. 67 (1976).

60. *Id.* at 77.

61. In *Mathews*, the Court stated: "The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivations of life, liberty, or property without due process of law. . . . Even one whose presence in this country is unlawful . . . is entitled to that protection." *Id.* Thus, the Court implied that undocumented persons might not be entitled to other constitutional protections. *See also* Holley v. Lavine, 529 F.2d 1294 (2d Cir. 1976) in which an illegal Canadian alien sought to invalidate a state statute insofar as it deprived undocumented persons and their children of welfare benefits. The district court had dismissed the complaint for failure to state a claim upon which relief could be granted. The court of appeal reversed, stating:

> [W]e cannot say that the claims are wholly insubstantial or obviously frivolous or that decisions of the Supreme Court foreclose the subject. The Supreme Court has apparently never dealt with the equal protection rights of illegal aliens in this context. Cf. *Graham v. Richardson*, 403 U.S. 365, 371, 91 S. Ct. 1848, 29 L.Ed. 2d. 534 (1971); See also *Bolanos v. Kiley*, 509 F.2d 1023, 1025 (2d Cir. 1975). Nor is the claim that children whose parents are illegal aliens have their own rights to benefits an insubstantial one. Cf. *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 92 S. Ct. 1400, 31 L.Ed. 2d 768 (1972). We do not characterize plaintiff's constitutional arguments as persuasive; we hold merely that the district judge could not dismiss them out of hand.

529 F.2d at 1295-96.

ed aliens are hesitant to pursue legal actions in the United States.[62]

Because undocumented aliens reside in the United States in violation of federal immigration laws, they have some of the same status characteristics as lawfully admitted resident aliens and nonresident aliens. Undocumented aliens are like lawfully admitted aliens in that they reside within the territory of the United States. On the other hand, they are like nonresident aliens in that the federal government has not granted them permission to enter the United States. Thus, the legal rights of undocumented aliens can be analyzed in relation to the legal status of these other two groups.

A nonresident alien has no constitutional right to enter the United States.[63] The conditions and terms of entry into the United States are solely within the discretion of Congress.[64] Nonresident aliens are thus entitled only to the proper functioning of the immigration process as established by Congress.[65] The Supreme Court has consistently held that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[66] In *Kleindienst v. Mandel*,[67] a nonresident alien sought admission to the United States for the purpose of lecturing on Marxism. The Supreme Court upheld the federal government's denial of entry notwithstanding the claims of United States citizens that their First Amendment right to receive information was unconstitutionally abridged.[68] In so holding, the Court reaffirmed that the unadmitted nonresident alien has no constitutional right of entry.[69]

In contrast, state action adversely affecting nonresident aliens has been invalidated. In *Zschernig v. Miller*,[70] the Supreme Court struck down an

62. Aside from deportation cases initiated by the federal government, undocumented persons are not involved in many legal actions. Undocumented persons have been reluctant to take part in or initiate legal actions because they fear that their illegal status may be discovered. *See* Ortega, *supra* note 1, at 252-53. Moreover, an undocumented person's right to maintain a civil action to protect his or her rights has not been clearly established. *See* Comment, *The Right of an Illegal Alien to Maintain a Civil Action*, 63 CALIF. L. REV. 762 (1975).

63. Kleindienst v. Mandel, 408 U.S. 753, 762 (1972).

64. Fiallo v. Bell, 430 U.S. 787, 794 (1977).

65. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953). *See also* Gordon, *The Alien and the Constitution*, 9 CAL. W. L. REV. 1, 21-22 (1972); Note, *Ideological Restrictions on Immigration*, 8 U.C.D. L. REV. 217, 222 (1975).

66. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

67. 408 U.S. 753 (1972).

68. *Id.* at 765-70.

69. *Id.* at 762. *See also* Pilapil v. INS, 424 F.2d 6 (10th Cir. 1970) in which the court stated:

> Petitioner admits he is a nonimmigrant with alien status for the sole purpose of being a student in the United States admitted subject to specific conditions.
>
> Before this limited status was granted to respondent [*sic*], he had no rights under the Constitution, laws or government of the United States. As a citizen and national of another country his rights were established by the alien law peculiar to his native domicile.

Id. at 11.

70. 389 U.S. 429 (1968).

Oregon statute that allowed a nonresident alien heir to inherit property only upon proof that the alien would receive the benefits of the property without confiscation by his country's government. This statute was held to be an unconstitutional state intrusion into foreign affairs and international relations.[71] Although not decided on the basis of the protection to be accorded an alien, the case reaffirmed the proposition that states have considerably less power over nonresident aliens than the federal government has.[72]

The rights of lawfully admitted resident aliens, on the other hand, are afforded greater constitutional protection. Mere presence within the United States endows an individual with certain constitutional rights.[73] The rights of lawfully admitted resident aliens, however, are not co-extensive with the rights of citizens.[74] Congress has broad power over resident aliens as a concomitant of the plenary federal power over immigration and naturalization.[75] An act of Congress that treats aliens differently from citizens does not in itself constitute "invidious discrimination."[76] Nevertheless, the federal government lacks the power arbitrarily to subject all resident aliens to different substantive rules from those applied to citizens.[77]

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71. *Id.* at 441.

72. *See* Clark v. Allen, 331 U.S. 503 (1947); Note, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 95, 238-45 (1968).

73. In Johnson v. Eisentrager, 339 U.S. 763 (1950), German functionaries convicted by an American military court in China of aiding the Japanese war effort in that country sought a writ of habeas corpus. They were imprisoned in Germany and had spent no part of their captivity within the United States or its territories. The Court denied relief, stating that "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction which gave the judiciary power to act." *Id.* at 771. Moreover, the Court stated, "the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection." *Id.* at 777-78. *See also* Russian Volunteer Fleet v. United States, 282 U.S. 481, 491-92 (1931); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). *See generally* Travers, *The Constitutional Status of State and Federal Government Discrimination Against Resident Aliens*, 16 HARV. INT'L L.J. 113 (1975), in which the author states:

> The territorial basis for the application of constitutional guarantees to aliens thus appears to be an important standard by which the Court has attempted to reconcile the interest of the United States and the individual states in freedom from foreign domination and the interest of noncitizens in avoiding arbitrary treatment at the hands of a society to which they have manifold and substantial attachments.

Id. at 127.

74. Mathews v. Diaz, 426 U.S. 67, 78 (1976); Harisiades v. Shaughnessy, 342 U.S. 580, 586 (1952). *See also* Note, *Immigrants, Aliens, and the Constitution*, 49 NOTRE DAME LAW. 1075, 1087 (1974); Comment, *The Alien and the Constitution*, 20 U. CHI. L. REV. 547, 564 (1953).

75. Mathews v. Diaz, 426 U.S. 67, 79-80 (1976).

76. *Id.* at 80.

77. Hampton v. Mow Sun Wong, 426 U.S. 88, 101-02 (1976).

The constitutional protection from discriminatory state regulation accorded to lawfully admitted resident aliens is far greater.[78] State discrimination against lawfully admitted resident aliens is "invidious" for two reasons. First, aliens as a class are often a prime example of a discrete and insular minority for whom heightened judicial solicitude is appropriate.[79] Second, the federal, rather than the state, government has primary authority in the field of immigration and naturalization.[80] Thus, while state discrimination against lawfully admitted resident aliens is subject to strict judicial scrutiny,[81] discrimination by the federal government is judged by a less stringent standard.[82]

Certain limited types of state discrimination against lawfully admitted resident aliens are, however, permissible. Lawfully admitted aliens can be denied the right to vote,[83] the right to hold high public office[84] and the right to serve on juries.[85] These types of discrimination are justified on the basis of the state's interest in establishing a government and in limiting participation therein to those within the basic concept of a political community.[86] Citizenship bears some rational relationship to defining that community.[87] A state cannot, however, favor citizens over lawfully admitted resident aliens when allocating state benefits,[88] since there is no reason to deny aliens as a class state benefits when aliens, like citizens, support state government through their taxes.[89] Denial of state benefits to aliens in order to conserve

78. Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976); Graham v. Richardson, 403 U.S. 365 (1971).

79. Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 602 (1976); *see* text accompanying notes 185-220 *infra*.

80. *Id.* at 602.

81. *Id.*; Graham v. Richardson, 403 U.S. 365, 376 (1971). *But see* Foley v. Connelie, 46 U.S.L.W. 4237 (U.S. Mar. 22, 1978).

82. Hampton v. Mow Sun Wong, 426 U.S. 88, 101-02 (1976); Mathews v. Diaz, 426 U.S. 67, 82 (1976).

83. Skafte v. Rorex, 553 P.2d 830 (Colo. 1976), *appeal dismissed*, 430 U.S. 961 (1977). *See also* Sugarman v. Dougall, 413 U.S. 634 (1973).

84. Sugarman v. Dougall, 413 U.S. 634, 648 (1973).

85. Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974) (three judge court), *aff'd*, 426 U.S. 913 (1976). *See also* Carter v. Jury Comm'n, 396 U.S. 320, 332 (1972).

86. Sugarman v. Dougall, 413 U.S. 634, 642, 647-48 (1973).

87. *Id.* at 647. *See also* Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974), in which the court upheld the exclusion of resident aliens from jury panels by stating:

> [I]t is the process of filing for citizenship that establishes . . . loyalty; any attempt at prior screening would undercut the efficiency and significance of existing procedures. Therefore, although the presumption that all aliens owe no allegiance to the United States is not valid in every case, no alternative to taking citizenship for testing allegiance can be devised, so that we conclude that the classification is compelled by circumstances, and that it is justifiable.

Id. at 138.

88. Graham v. Richardson, 403 U.S. 365, 374-76 (1971).

89. Nyquist v. Mauclet, 432 U.S. 1, 12 (1977); Graham v. Richardson, 403 U.S. 365, 376 (1971).

the state's resources for citizens constitutes an invidious and unconstitutional form of discrimination.[90] This principle has been applied to prohibit the denial of free public education to resident alien children when it is available to children of citizens.[91] Arguably, a similar result is required when undocumented children are denied free public education.

The difference in these standards becomes apparent when the Supreme Court's opinion in *Graham v. Richardson*[92] is contrasted with its later opinion in *Mathews v. Diaz*.[93] In *Graham*, the Court invalidated a state statute that denied resident aliens welfare benefits unless they met a durational residency requirement.[94] Five years later, in *Mathews*, the Court upheld a federal statute that denied resident aliens federal medical insurance unless they met a durational residency requirement.[95] In upholding the federal statute in *Mathews*, the Court distinguished *Graham*, stating that:

> 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. Furthermore, whereas the Constitution inhibits every State's power to restrict travel across its own borders, Congress is explicitly empowered to exercise that type of control over travel across the borders of the United States.[96]

Thus, state statutes denying aliens state government jobs[97] or the right to engage in other occupations[98] have been held unconstitutional, while the validity of similar prohibitions by the federal government is unclear.[99]

90. Nyquist v. Mauclet, 432 U.S. 1, 12 (1977); Graham v. Richardson, 403 U.S. 365, 374 (1971).

91. *See* Hosier v. Evans, 314 F. Supp. 316, 319 (D.V.I. 1970). *See also* Nyquist v. Mauclet, 432 U.S. 1 (1977) (invalidating state statute barring certain resident aliens from state financial assistance for higher education).

92. 403 U.S. 365 (1971).

93. 426 U.S. 67 (1976).

94. 403 U.S. at 376.

95. 426 U.S. at 83-84.

96. *Id.* at 85.

97. Sugarman v. Dougall, 413 U.S. 634 (1973).

98. Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976) (denial of engineering license); *In re* Griffiths, 413 U.S. 717 (1973) (exclusion from law practice); Norwick v. Nyquist, 417 F. Supp. 913 (S.D.N.Y. 1976) (three judge court) (exclusion from employment as a teacher in a public school). *But see* Foley v. Connelie, 46 U.S.L.W. 4237 (U.S. Mar. 22, 1978). Over fifty years ago, the Supreme Court held that lawfully admitted aliens could not be excluded from all gainful employment by state statute. Truax v. Raich, 239 U.S. 33 (1915). *But see* De Canas v. Bica, 424 U.S. 351 (1976).

99. Hampton v. Mow Sun Wong, 426 U.S. 88, 100-101 (1976).

The rights of undocumented aliens domiciled in the United States have not been clearly defined by the courts. Although undocumented aliens are afforded the protection of the due process clause,[100] this does not necessarily mean that they are afforded other constitutional guarantees available to citizens. Due process protection is qualitatively different from other constitutional rights;[101] for example, the right to be free from arbitrary state deprivations, which is prohibited by the due process clause, differs fundamentally from the right to enjoy the benefits of the state's largess.[102] Recent decisions by lower courts have reached different results on the rights of undocumented aliens.[103] The remainder of the article will explore the

100. Mathews v. Diaz, 426 U.S. 67, 77 (1976).

101. *See* Dandridge v. Williams, 397 U.S. 471 (1970), in which the Supreme Court upheld a state welfare regulation that placed a maximum limit on the amount of money a family could receive. In upholding the regulation, the Court distinguished the procedural protections afforded at the termination of benefits from the right of an individual to demand such benefits from the state. The Court noted: "The Constitution may impose certain procedural safeguards upon systems of welfare administration, Goldberg v. Kelly . . . . But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Id.* at 487. Similarly, in Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886 (1961), an employee was summarily denied access to the site of her former employment. It was argued that since she had no constitutional right to be there, she could not question the means used to deny her access. The Court rejected this argument, stating, "[o]ne may not have a constitutional right to go to Baghdad, but the government may not prohibit one from going there unless by means consonant with due process of law." *Id.* at 894. *See also* Arnett v. Kennedy, 416 U.S. 134, 166-67 (1974).

102. *See* Mathews v. Diaz, 426 U.S. 67 (1976), in which the Supreme Court, after stating that undocumented persons are protected by the due process clause, id. at 77, stated that in terms of the federal government, "[n]either the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests." *Id.* at 80. *See also* Maher v. Roe, 432 U.S. 464 (1977), in which the Court held that a state need not provide an indigent with nontherapeutic abortions notwithstanding the Court's earlier holding in Roe v. Wade, 410 U.S. 113 (1973), that a state could not totally prohibit a woman from having a nontherapeutic abortion.

103. For example, in Alonso v. State, 50 Cal. App. 3d 242, 123 Cal. Rptr. 536 (1975), an undocumented worker was denied unemployment benefits. In upholding this administrative decision, the court stated:

> [E]ven if appellant put money into the fund, he is not entitled to the benefits. An illegal alien who enters the United States without inspection in violation of 8 United States Code section 1251 is subject to deportation. His entry is illegal and any subsequent acts done by him in this country would be in furtherance of that illegal entry. To allow an illegal alien to collect unemployment benefits would reward him for his illegal entry into this country. In essence, his entry into this country is fraudulent, and as such he should not be allowed to profit from the illegal act.

Id. at 253-54, 123 Cal. Rptr. at 544. In reaching this conclusion, the court pointed out the "obvious catastrophic effect upon the economic well-being of California citizens by the tremendous influx of illegal aliens." *Id.* at 257, 123 Cal. Rptr. at 546. In contrast, another division of the California Court of Appeal held in Ayala v. Unemployment Ins. Appeals Bd., 54 Cal. App. 3d 676, 126 Cal. Rptr. 210 (1976) that an undocumented worker who had complied

constitutional arguments that undocumented children could employ to challenge state statutes. The Texas statute will be used as a focal point for analysis of the rights of such children to equal access to free public education.

III. Due Process Challenges

The due process clause of the Fourteenth Amendment protects all persons within the United States from state action that deprives them of life, liberty or property without due process of law.[104] It places two analytically distinct limitations on state action. First, procedural due process prevents a state from depriving a person of life, liberty or property without a prior hearing.[105] Second, substantive due process prevents a state from enacting arbitrary and unreasonable legislation, regardless of the statute's procedural fairness.[106] The Supreme Court has unequivocally stated that the right to due process is guaranteed to aliens who are unlawfully in the country.[107] Undocumented children can employ both prongs of the due process clause to challenge state legislation that denies equal access to public education.

A. Procedural Due Process

Procedural due process differs fundamentally from equal protection and substantive due process. The issue is not whether a state can deny undocumented children equal access to education; rather, it is whether a state can deprive a child of the benefit of free public education without a prior hearing.[108] Under Texas law, a child who is either a citizen or a lawful

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with all state statutes could not be denied disability benefits solely because he was in the country illegally. As the court stated:

> To conclusively presume that an illegal alien who has been attached to the labor force and who has in all respects complied with the sections of the Unemployment Insurance Code cannot, simply because he is an illegal alien, collect disability benefits is contrary to the statutes. . . . In addition, the Supreme Court of the United States has consistently invalidated statutory or administrative classifications bottomed on such conclusive presumptions.

Id. at 680, 126 Cal. Rptr. at 213 (citations omitted).

104. U.S. CONST. amend. XIV, § 1, cl. 1; Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Mathews v. Diaz, 426 U.S. 67, 77 (1976).

105. Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972); Goss v. Lopez, 419 U.S. 565, 572-74 (1975).

106. Palko v. Connecticut, 302 U.S. 319 (1937).

107. *See* Mathews v. Diaz, 426 U.S. 67 (1976), in which the Court stated:

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. . . . Even one whose presence in this country is unlawful, involuntary, or transitory, is entitled to that constitutional protection.

Id. at 77 (citations omitted).

108. *See* note 112 *infra*.

resident alien can attend free public schools.[109] The state statute thus appears to establish the right to public education as a property interest; the Supreme Court has held that such an interest is protected by the due process clause and may not be taken away without adherence to the minimum procedural safeguards required by that clause.[110] If a child was not lawfully admitted into this country, that child is not entitled to a free public education in Texas.[111] Since the determination of one's status as an unlawful immigrant will result in the loss of a protected property interest, that determination must be made in accordance with procedural safeguards.[112] Thus, prior to denying a child access to free public education, a state must afford that child procedural due process.

Once it is determined that due process applies, the question remains what process is due.[113] Arguably, all the procedural rights afforded a person subject to deportation[114] should be provided in determining whether a child is in this country illegally.[115] At a minimum, due process requires that a person be given notice and an opportunity to be heard before the disability is imposed.[116] The purpose of this requirement is to protect individuals from unfair or mistaken deprivation of a protected property interest.[117] Such deprivations can be prevented only when a person has the opportunity to speak in his or her defense prior to the deprivation.[118] An argument grounded on procedural due process may in fact invalidate the entire statutory scheme. The Court has held that in some situations, the due process clause

109. TEX. EDUC. CODE ANN. tit. 2, § 21.031 (Vernon Supp. 1978).

110. Goss v. Lopez, 419 U.S. 565, 574 (1975).

111. TEX. EDUC. CODE ANN. tit. 2, § 21.031 (Vernon Supp. 1978).

112. *See* Goss v. Lopez, 419 U.S. 565, 579 (1975) (student cannot be suspended for ten days without hearing to determine alleged misconduct); Fuentes v. Shevin, 407 U.S. 67 (1972) (chattels cannot be repossessed by secured creditor without prior hearing to determine one's right to the chattels). Bell v. Burson, 402 U.S. 535 (1971) (driver's license cannot be revoked prior to hearing to determine whether there was a reasonable possibility of a judgment against the driver as a result of accident); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits cannot be terminated without a hearing to determine recipient's ineligibility); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (state cannot post notice denying individual right to purchase alcoholic beverages without hearing to determine whether individual fits proscribed status). *But see* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (pre-hearing attachment valid when pursuant to writ of sequestration issued by a judge on basis of a factual affidavit alleging fear of loss of collateral).

113. Goss v. Lopez, 419 U.S. 565, 577 (1975).

114. *See* 8 U.S.C. §§ 1251-1260 (1970); 8 C.F.R. §§ 241.1-244.2 (1977). *See also* Comment, *Alternatives to Deportation: Relief Provisions of the Immigration and Nationality Act*, 8 U.C.D. L. REV. 323, 327 (1975) [hereinafter cited as *Alternatives to Deportation*] for a survey of deportation procedures and protections.

115. *See* Williams v. Williams, 328 F. Supp. 1380, 1383 (D.V.I. 1971).

116. Goss v. Lopez, 419 U.S. 565, 578-80 (1975); Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).

117. Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

118. *Id.*; Goss v. Lopez, 419 U.S. 565, 580 (1975).

requires that an individual be granted a fair opportunity to rebut a statutory presumption that is not necessarily true in fact, particularly when the state has reasonable alternative means of making the crucial determination.[119] As a result, a statute that employs a permanent irrebuttable presumption as the basis for depriving an individual of a protected interest is constitutionally disfavored.[120]

The Texas statute denies all undocumented children free public education. Implicit in the statute is the presumption that undocumented children represent a financial drain on the school system's limited resources because undocumented children and their parents do not contribute to the funding of public schools.[121] This presumption, however, is not necessarily true. The extent of an undocumented alien's financial impact through sales, property and income taxes is indeterminable.[122] It is clear, however, that undocumented children as a group are not necessarily different than other children in terms of the financial support to the public school system provided by their parents.[123] To conclusively presume that all undocumented children and their parents do not contribute to the support of public schools is a constitutionally intolerable denial of due process.

A more serious problem arises, however, as to the substantive standards employed in deciding whether a child has been lawfully admitted into the country.[124] In determining whether a child is a lawful resident for educational purposes, the state will necessarily encroach upon the exclusive authority of the federal government to regulate immigration, which is discussed later in this article.[125]

119. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (school board regulation, which presumed that teachers in the fifth month of pregnancy were unfit to teach, held unconstitutional); Vlandis v. Kline, 412 U.S. 441 (1973) (Connecticut statute, which presumed certain university students were non-residents for out-of-state tuition purposes, held unconstitutional); Moreno v. University of Md., 420 F. Supp. 541 (D. Md. 1976), *cert. granted sub nom.* Elkins v. Moreno, 98 S. Ct. 260 (1977) (university's in-state policy, as applied to non-immigrant aliens, created a constitutionally impermissible irrebuttable presumption).

120. *See generally* Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974). *Compare* Tribe, *From Environmental Foundations to Constitutional Structures: Learning from Nature's Future*, 84 YALE L.J. 545 (1975) *with* Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975).

121. *See* text accompanying note 18 *supra*.

122. *See* notes 18-19 and accompanying text *supra*, notes 171-176 and accompanying text *infra*.

123. *See* text accompanying note 20 *supra* and 171-176 *infra*.

124. The Texas statute allows "lawfully admitted aliens" to attend free public school. TEX. EDUC. CODE ANN. tit. 2, § 21.031 (Vernon Supp. 1978). A problem of interpretation arises as to whether lawfully admitted aliens who subsequently violate the condition of their entry and are subject to deportation under 8 U.S.C. § 1251 (1970) come within the statute and are entitled to free public education. *See* CAL. WELF. & INST. CODE § 11104 (West 1972).

125. *See* text accompanying notes 314-67 *infra*.

B. Substantive Due Process

Even with the institution of constitutionally adequate procedures, the Texas scheme could be challenged as a violation of substantive due process rights. Unlike procedural due process, substantive due process limitations focus on what a state can do rather than how it must do it.[126] Until 1937, the Supreme Court utilized substantive due process as a tool to invalidate a substantial number of laws dealing with social and economic matters.[127] Discredited by overuse and lack of judicial restraint,[128] substantive due process has for many years taken a back seat to equal protection in the preservation of personal liberties and rights.[129] Unlike equal protection, which looks at comparative classifications, substantive due process looks at the relative importance of the right at issue and the extent to which it is burdened by state law.[130] In recent years, there has been renewed interest in this form of analysis.[131]

Substantive due process rights are not limited to those specifically enumerated in the Bill of Rights.[132] Rather, due process prevents a state from violating fundamental concepts of justice that are basic to our civil and political institutions.[133] One such fundamental concept protected by the due process clause is the idea that punishment must be predicated upon personal guilt.[134] In *Weber v. Aetna Casualty & Surety Co.*,[135] the Supreme Court

126. *See* Stone, *Introduction: Due Progress of "Due Process,"* 25 HASTINGS L.J. 785, 794-96 (1974).

127. *See* E. BARRETT, JR. & P. BRUTON, CONSTITUTIONAL LAW: CASES AND MATERIALS 713 n.1 (4th ed. 1973). The case commonly viewed as marking the Court's abandonment of the substantive due process doctrine is West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

128. *See generally* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

129. *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, 42 (1972) [hereinafter cited as *Foreword*].

130. Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532, 1541 (1974) [hereinafter cited as Bartlett].

131. *See* Tribe, *The Supreme Court, 1972—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 2 (1973).

132. *See* Roe v. Wade, 410 U.S. 113, 152 (1973); Karr v. Schmidt, 460 F.2d 609, 614 (5th Cir. 1972) (en banc).

133. Powell v. Alabama, 287 U.S. 45, 67 (1932) (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)); St. Ann v. Palisi, 495 F.2d 423, 425 (5th Cir. 1974).

134. *See* Scales v. United States, 367 U.S. 203 (1961) in which the Court stated:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow [of the government of the United States]), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

Id. at 224-25.

135. 406 U.S. 164 (1972).

invalidated a state workers' compensation law that discriminated against illegitimate children.

> [I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent.[136]

State laws that deprive undocumented children of equal access to education punish the children for a status that they, like illegitimate children, cannot control. The primary role of the parents in the upbringing and control of minor children and the destiny of the family is beyond question.[137] The status of undocumented children is attributable to parents who illegally immigrate to the United States in response to economic conditions beyond their control.[138] Moreover, the undocumented child commits no crime by being in this country illegally; he is subject to deportation only at the behest of federal authorities.[139] Consequently, by denying undocumented children equal access to public education, state authorities create a disability not contemplated by federal law[140] and based on a status that has been foisted upon the undocumented child.

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136. *Id.* at 175. *See also* Trimble v. Gordon, 430 U.S. 762, 769-70; New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619, 620 (1973).

137. The Supreme Court on numerous occasions has recognized the parent's primary role in the upbringing of children and the affairs of the family. *See* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). In particular, *see* Miller v. Superior Court, 69 Cal. App. 3d 191, 138 Cal. Rptr. 123 (1977) (hearing granted July 21, 1977):

> In spite of recent developments in the law giving recognition to the rights of children, vis-a-vis the government and the judicial system, there still exists a recognized need for parental control and parental decisionmaking before which the child's rights and desires must yield. One such area of decisionmaking is with certain limited exceptions, the location of residence.

Id. at 200, 138 Cal. Rptr. at 127. *See also In re* Roger S., 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977); *In re* John S., 66 Cal. App. 3d 343, 135 Cal. Rptr. 893 (1977); J. L. v. Parham, 412 F. Supp. 112 (M.D. Ga. 1976) (three judge court), *prob. juris. noted*, 431 U.S. 936 (1977), which deal with the right of a parent to commit an unconsenting child to a mental hospital.

138. *See* United States v. Ortiz, 422 U.S. 891, 901-02 (1975) (appendix to concurring opinion of Burger, C.J.); SAMORA, *supra* note 19, at 94-96; Comment, *Illegal Aliens and Enforcement: Present Practices & Proposed Legislation*, 8 U.C.D. L. REV. 127, 128 (1975) [hereinafter cited as *Illegal Aliens and Enforcement*].

139. *Illegal Aliens and Enforcement*, *supra* note 138, at 138 n.84. *See also* Metalworking Mach., Inc. v. Superior Court, 69 Cal. App. 3d 791, 796, 138 Cal. Rptr. 369, 371 (1977).

140. *See* Williams v. Williams, 328 F. Supp. 1380 (D.V.I. 1971), holding that an illegal alien may not be denied access to state divorce courts. The court stated: "The enforcement of immigration laws properly remains with those to whom it is entrusted by law and does not need in aid of enforcement the judicially created civil disability of exclusion from our divorce courts." *Id.* at 1383.

The requirements of due process, however, do not apply to all state-created disabilities. To fall within the ambit of the due process clause, undocumented children must demonstrate that the Texas statute deprives them of a protected interest in either liberty or property.[141] Although liberty and property are broadly defined for purposes of the due process clause, they are not unlimited.[142] The property interests protected by the United States Constitution[143] are defined by reference to state statutes or rules that grant certain benefits.[144] Undocumented children cannot claim that they have been denied a property right because the Texas education code specifically excludes undocumented children from the benefit of free public education.[145] Consequently, the Texas statute precludes the excluded benefit from being a protected property interest.[146]

Public education, however, can be considered an interest in liberty meriting protection. Unlike property interests, liberty interests are inherently less susceptible to precise definition. Yet, the meaning of liberty is broad.[147] It encompasses those privileges long recognized as essential to the orderly pursuit of happiness by a free people.[148] In describing the scope of protected liberty interests, the Supreme Court has made it clear that more than freedom from bodily restraint is involved.[149]

Education is basic to a free society.[150] The Supreme Court has held that a restraint on the teaching of foreign language in any public or private school to any child who had not passed the eighth grade interferes with a protected

141. *See* St. Ann v. Palisi, 495 F.2d 423, 426-27 (5th Cir. 1974).

142. Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972).

143. *Id.* at 577; Goss v. Lopez, 419 U.S. 565, 572-73 (1975).

144. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Goss v. Lopez, 419 U.S. 565, 572-73 (1975).

145. TEX. EDUC. CODE ANN. tit. 2, § 21.031 (Vernon Supp. 1978).

146. In contrast, *see* Goss v. Lopez, 419 U.S. 565 (1975): "Having chosen to extend the [property] right to people of appellee's class generally, Ohio may not withdraw that right . . . absent fundamentally fair procedures . . . . " *Id.* at 574.

147. Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

148. *Id.*; Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

149. As the Supreme Court stated in *Meyer*:

> While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denoted not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

262 U.S. at 399.

150. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29-30 (1973); Brown v. Board of Educ., 347 U.S. 483, 493 (1954). *See also* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

liberty.[151] Similarly, it has held that a state statute mandating attendance at public schools interferes with a protected liberty.[152] If a student's right to attend private school or to learn a foreign language is a protected liberty interest, it would appear that a student's right to attend public school—indeed, to attend school at all—must also be protected.

Although the United States Supreme Court declined to deem education a fundamental interest for purposes of equal protection analysis,[153] this does not affect the determination of whether it is a liberty interest protected by the due process clause.[154] By denying undocumented children free public education, Texas deprives them of a valuable liberty interest without due process.[155] When such a violation of due process has been found, the state must satisfy a substantial burden to justify its action.[156] Texas' interest in denying undocumented children equal access to public education is ostensibly fiscal: the state wants to save money.[157] Concern for fiscal integrity is not, however, sufficient justification for such a significant deprivation.[158]

IV. Equal Protection Challenge

The equal protection clause of the Fourteenth Amendment embodies three analytically separate limitations on the legislative power of a state[159] to

151. Meyer v. Nebraska, 262 U.S. 390 (1923).

152. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

153. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

154. St. Ann v. Palisi, 495 F.2d 423, 429 (5th Cir. 1974); *see* Goss v. Lopez, 419 U.S. 565 (1975); Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886 (1961).

155. *See* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), in which the Supreme Court overturned a federal civil service regulation denying aliens employment in federal civil service jobs. There the Court stated:

> [I]neligibility for employment in a major sector of the economy . . . is of sufficient significance to be characterized as a deprivation of an interest in liberty. Indeed we deal with a rule which deprives a discrete class of persons of an interest in liberty on a wholesale basis. By reason of the Fifth Amendment, such a deprivation must be accompanied by due process.

Id. at 102-03. *But see* De Canas v. Bica, 424 U.S. 351 (1976), in which the Court refused to sustain a lower court's determination that a state statute which effectively denied undocumented workers employment within California by making it a crime for employers to hire them was unconstitutional. This case, however, was decided on the narrow ground that not all state legislation affecting undocumented persons is necessarily preempted, and did not discuss the due process or equal protection ramifications of such a statute.

156. St. Ann v. Palisi, 495 F.2d 423, 427 (5th Cir. 1974).

157. *See* text accompanying notes 13-20 *supra*.

158. Graham v. Richardson, 403 U.S. 365, 375 (1971). *See also* Hosier v. Evans, 314 F. Supp. 316, 320-21 (D.V.I. 1970) (federal district court stated that non-citizens could not be denied access to public schools to save the school district money); Stanley v. Illinois, 405 U.S. 645 (1972) ("The Constitution recognizes higher values than speed & efficiency." *Id.* at 652.)

159. Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 B.Y.U. L. REV. 89, 90 [hereinafter cited as Barrett].

treat similarly situated persons differently.[160] First, a legislative classification is invalid if it is not rationally related to a legitimate state purpose.[161] Second, certain bases of classification that are "suspect" may be used, if at all, only in unusual circumstances.[162] Finally, the classification may not interfere to an impermissible extent with the exercise of a "fundamental" right.[163]

Statutes such as the one enacted in Texas treat children who reside within that state differently from one another. The statute differentiates between children who are citizens or who are legally in the United States and children who are in the country illegally, *i.e.*, without documents.[164] This classification is the basis for providing tuition-free public education to some children, while denying it to others.[165] Apart from their immigration status, however, which is a distinction created by the federal government to serve federal purposes, the children are similarly situated, particularly with regard to financial contributions.

Various state and local funds, supplemented by federal aid,[166] support Texas public schools. The state's contribution comes from a variety of sources, including a state ad valorem property tax and the state's general revenues.[167] These contributions support the Texas Minimum Foundation School Program;[168] its funds are in turn earmarked for operating expenses, transportation costs, and teachers' salaries.[169] The contributions of local

160. F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

161. Mathews v. Lucas, 427 U.S. 495, 510 (1976); USDA v. Moreno, 413 U.S. 528, 538 (1973).

162. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976); Graham v. Richardson, 403 U.S. 365, 371-72 (1971).

163. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973); Shapiro v. Thompson, 394 U.S. 618 (1969). For a more detailed explanation of equal protection analysis and standards, *see* text accompanying notes 177-84 *infra*.

164. TEX. EDUC. CODE ANN. tit. 2, § 21.031 (Vernon Supp. 1978).

165. *Id.* The code provides that those children who are citizens or legally admitted aliens can attend the public free schools and are entitled to the benefits of the Available School Fund. By negative implication, those children who do not have such status are not entitled to the rights mentioned in the statute. Some school districts have begun to require tuition fees of some children. *See* text accompanying notes 14-17 *supra*.

166. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 9 n.21 (1973). In 1970-71, state aid accounted for 48% of funds for Texas schools, local funds for 41.1%, and federal sources contributed 10.9%. *Id.* at 12.

167. The Texas Constitution and the Texas Education Code delineate how state education funds are raised and allocated. *See* TEX. CONST. art. 7, §§ 1-5; TEX. EDUC. CODE ANN, tit. 2, § 16.251 (Vernon Supp. 1978).

168. The Texas Minimum Foundation School Program was enacted by the Texas Legislature to offset disparities in local spending and to meet changing educational requirements in Texas. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 9 (1973).

169. TEX. EDUC. CODE ANN. tit. 2, § 16.251(a) (Vernon Supp. 1978).

school districts are derived from the issuance of bonds and the collection of ad valorem property taxes.[170] Undocumented aliens who own property are not immune from payment of property taxes,[171] and the majority of undocumented aliens, who live in rented accommodations, contribute to the property tax through their rental payments.[172] Undocumented aliens also pay state and federal income taxes.[173] In fact, some pay more taxes than are required.[174] On balance, a recent study concludes, they pay more in taxes than they collect in services.[175] Thus, undocumented children are similarly situated with children who are entitled to tuition-free public education because parents of both groups finance the public school system.[176]

170. TEX. CONST. art. 7, § 3 (ad valorem property taxes); TEX. EDUC. CODE ANN. §§ 20.01-20.08, 20.21-20.27 (Vernon 1972 & Supp. 1978) (bonds).

171. See Kirsh, *California Illegal Aliens: They Give More Than They Take*, NEW WEST, May 23, 1977, at 26.

172. *See* SAN DIEGO STUDY, *supra* note 16, in which of the undocumented aliens interviewed, 61% lived in rented accommodations, 23% lived in rent-free housing provided by their employer, 10% lived under a tree or in a hole in an open field, 4% lived in tents or garages, 1% lived in cars and 1% did not respond. *Id.* at xxiii.

173. SAN DIEGO STUDY, *supra* note 16, at xi.

174. *Id.*

175. *The Wall Street Journal*, after discussing a recent study by the United States Department of Labor, stated that that study "refutes the widespread belief that the aliens are freeloading . . . . The government is obviously getting more than it gives." Diamond, *supra* note 19, at 108. *See* Cook, *An Economic Analysis: How Illegal Aliens Pay as They Go*, NEW WEST, May 23, 1977, at 34. Similarly, in the San Diego study it was noted that:

> Some of the preceding conclusions indicate an impact by illegal aliens on such social service areas as health care, welfare, and education. However, considering that the estimated number of illegal aliens residing in San Diego is 92,138, and that their participation in social service programs may be considered quantitatively minimal, therefore the study concludes that the impact may be less than originally perceived by the general public when the impact is viewed. This impact may be mitigated when considering that illegal aliens are presumed to pay federal and state taxes, social security, and disability insurance through payroll deductions for services they mostly never benefit from.
>
> This conclusion is consistent with research studies on illegal aliens . . . [which] indicate the United States government is receiving much more from the illegal aliens in the form of tax and social security deductions than what the illegal aliens receive in social services.

SAN DIEGO STUDY, *supra* note 16, at 178-79.

176. *See* Ortega, *supra* note 1, at 253.

> The curious argument for keeping these children out of school is that there are so many of them. The argument is curious because it is made by "educators" and because they are, in essence, saying "We would admit you if there were only a few of you, but since there are 50,000 of you, we can't. It is less unconscionable to us to see 50,000 children without any education walking the streets of Los Angeles that if there were only a few." Their stated reason for not admitting them is that these children are a financial burden on the district. But all children are a burden on a district. The fact is that these children and their parents pay taxes and contribute to the economic well-being of the community the same as residents.

Id.

Legislation distinguishing undocumented children may, therefore, be tested under traditional equal protection analysis. Under the "two-tiered" model,[177] most classifications are tested by a rational basis standard, which, it has been argued, involves minimal scrutiny in theory and practically none in fact.[178] On the other hand, if a legislative classification is based on "suspect" criteria or impinges on a "fundamental" interest, a more rigorous or "strict" scrutiny of the legislative action is invoked, which most often results in the invalidation of the legislative action.[179] Characterizing a class as suspect or a right as fundamental is thus a critical element in assessing the constitutionality of a legislative action under the equal protection clause.[180] The inflexibility of this approach has led to dissatisfaction with the model,[181] inconsistent results,[182] and decisions that fail to identify the standard employed.[183] The resulting confusion has prompted at least two Supreme Court justices and various commentators to call for an alternative approach to equal protection adjudication.[184] This section will examine the Texas statute under the traditional two-tiered model as well as under the balancing approach advocated by Justice Marshall.

A. Undocumented Children as a Suspect Class

Although a state is not barred by the equal protection clause from creating statutory classifications, some classifications are so disfavored that strict judicial scrutiny is mandated.[185] In the now-famous "footnote four" of *United States v. Carolene Products, Co.*[186] the Court began to carve out a principled basis for departure from general principles of judicial restraint in the area of equal protection analysis. Justice Stone, writing for the Court, recognized the possibility that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the

177. *See Foreword*, *supra* note 129, at 8.

178. *Id.*

179. *Id.*

180. Bartlett, *supra* note 130, at 1538.

181. *See Foreword*, *supra* note 129, at 17.

182. *See* Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071, 1074 (1974) [hereinafter cited as Nowak]; Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 952 (1974) [hereinafter cited as Wilkinson].

183. *See* Nowak, *supra* note 182, at 1073; Wilkinson, *supra* note 182, at 952.

184. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-27 (1976) (Marshall, J., dissenting); Mathews v. Lucas, 427 U.S. 495, 518-23 (1976) (Stevens, J., dissenting); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 517-30 (1970) (Marshall, J., dissenting). *See generally Foreword*, *supra* note 129; Nowak, *supra* note 182; Wilkinson, *supra* note 182.

185. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976).

186. 304 U.S. 144 (1938).

operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[187] This classic, yet enigmatic description does not provide an adequate analytic framework for determining whether a classification should be designated as suspect.[188] Subsequent decisions have nevertheless applied the principle, identifying as suspect classifications based on race,[189] alienage[190] and national origin.[191]

Recent decisions have articulated additional indicia that point to a suspect classification. The Court's opinion in *San Antonio Independent School District v. Rodriguez*[192] admonished courts to consider whether the class "is not 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."[193] These additional indicia are also broad and imprecise.[194] They do not define what quantum or quality of discrimination is required,[195] nor how long or how recently the group as a class must have suffered discriminatory treatment.[196] It is not clear what is meant by political powerlessness, or how it is to be judged.[197]

The vagueness of the *Rodriguez* formulation has prompted some commentators to accuse the Court of determining suspectness on the basis of what the Court "feels."[198] The Court has clearly limited the number of

187. *Id.* at 152-53 n.4.

188. *See* Wilkinson, *supra* note 182, at 980. Justice Rehnquist has pointed out with regard to this definition that "[our] society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road." Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting).

189. Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

190. *In re* Griffiths, 413 U.S. 717 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

191. Hernandez v. Texas, 347 U.S. 475 (1954); Oyama v. California, 332 U.S. 633 (1948). Each of the classifications in the above cases involved the imposition of burdens upon groups that are prime examples of discrete and insular minorities.

192. 411 U.S. 1 (1973).

193. *Id.* at 28. *See* Frontiero v. Richardson, 411 U.S. 677, 685-86 (1973).

194. *See generally* Wilkinson, *supra* note 182, at 980-83. Professor Wilkinson critiques the factors that Justice Brennan found relevant in Frontiero v. Richardson, 411 U.S. 677, 685-86 (1973) for determining whether or not a classification is suspect. The criticism that Wilkinson makes of Justice Brennan's factors is equally applicable to the indicia noted in *San Antonio*. Justice Powell's language in *San Antonio* is as broad, general, and abstract as Justice Brennan's in *Frontiero*. Similarly, Justice Powell's indicia are as undefined as are the terms used in Justice Brennan's factors.

195. *See* Wilkinson, *supra* note 182, at 981.

196. *Id.*

197. *Id.*

198. *Id.* In Graham v. Richardson, 403 U.S. 365 (1971), the Court simply labelled alienage, without explanation, as "a prime example" of a discrete and insular minority "for whom such heightened judicial solicitude is appropriate," *id.* at 371-72, as contemplated in *Carolene Products*. *Id.*

classes that are accorded heightened protection. In *Mathews v. Lucas*,[199] it found illegitimacy not to be a suspect criterion. The stated rationale for the holding was that "illegitimacy does not carry an obvious badge, as race or sex do, [and] this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes."[200] It should be pointed out that the Court in *Mathews* failed to explain why alienage is "a prime example" of a discrete and insular minority notwithstanding its lack of an inherently "obvious badge."[201]

The Court reached a similar result with regard to old age in *Massachusetts Board of Retirement v. Murgia*.[202] In that case, the Court stated that it found no unique disabilities connected with old age, noting that old age simply marks a stage in life to which most people are subject.[203] The Court also found that there had been no history of purposeful, unequal treatment of the aged that was based on stereotyped characteristics that were not truly indicative of ability.[204]

In *Frontiero v. Richardson*,[205] which involved sex-based discrimination against women, the plurality opinion sought to add sex to the list of suspect classifications, focusing on factors other than those articulated in *San Antonio*. In *Frontiero*, Justice Brennan noted three factors that were considered relevant to the determination. One commentator has described them as follows:

> (1) that the suspect classes suffer from "an immutable characteristic determined solely by the accident of birth," which "bears no relation to ability to perform or contribute to society";
> (2) that suspect classes have suffered historical vilification, as illustrated by Justice Brennan's assertion that the 19th century "position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes"; and
> (3) that the suspect class, largely because of past discrimination, lacks effective political power and redress.[206]

Justice Brennan's relevant factors are not without their own limitations. The use of these factors excludes alienage as a suspect class because the status is not immutable.[207] The factors articulated also suffer from a lack of precision and concreteness. Justice Brennan's arguments carried little weight, how-

199. 427 U.S. 495 (1976).
200. *Id.* at 506.
201. *See* note 198 *supra*.
202. 427 U.S. 307 (1976).
203. *Id.* at 313.
204. *Id.*
205. 411 U.S. 677 (1973).
206. *See* Wilkinson, *supra* note 182, at 980.
207. *Id.*

ever; sex has not been recognized as a suspect classification by a majority of the Court.[208] Nor has Justice Brennan carried forward his own argument. In a more recent case involving sex discrimination, his majority opinion does not even discuss sex as a suspect classification.[209]

The Court's inability thoroughly to define or consistently to apply a set of criteria for determining suspectness has created latent confusion in the area of equal protection.[210] Under the traditional two-tiered model of review,[211] undocumented aliens generally, and undocumented children specifically, could constitute a suspect class. Undocumented aliens individually and as a group are politically powerless. Like lawful resident aliens, undocumented aliens are not guaranteed the right to vote.[212] Consequently, they are dependent on others to protect their interests. The political powerlessness of undocumented children is more severe because they cannot rely on their parents to protect their interests. Additionally, undocumented aliens have historically been the target of purposeful legal, economic and social discrimination and exploitation.[213] Moreover, most of the undocumented children in Texas are of Mexican ancestry.[214] They share with other ethnic and racial minorities physical, cultural and language characteristics that set them apart from the Anglo majority and make them identifiable as part of a distinct and insular minority.[215] In addition, the classification is based, like race and national origin, on a characteristic, their migration status, over which the children have no control.[216] Since undocumented children suffer the full range of disabilities and are discriminated against for reasons

208. Justices Douglas, White and Marshall joined Justice Brennan in finding sex-based classifications to be suspect. 411 U.S. at 678, 688. Justice Stewart concurred in the judgment, *id.* at 691 (Stewart, J., concurring in the judgment), based on the Court's opinion in Reed v. Reed, 404 U.S. 71 (1971). In *Reed*, it was held that the means (statutory preference for selection of males over females in the administration of decedents' estates) were so unrelated to the objective (to decrease litigation by statutorily narrowing the class of possible administrators) as to be unconstitutionally arbitrary under the equal protection clause of the Fourteenth Amendment. Justice Powell, concurring in the judgment and joined by Justice Blackmun and by Chief Justice Burger, felt that *Reed* was sufficient authority and that it would be improper to expand the *Reed* rationale at that time. 411 U.S. at 691-92 (Powell, J., concurring in the judgment). The Court since then has consistently cited *Reed* and has not characterized sex as "suspect." *See, e.g.*, Stanton v. Stanton, 421 U.S. 7 (1971); Craig v. Boren, 429 U.S. 190 (1976).

209. Craig v. Boren, 429 U.S. 190 (1976).

210. *See* Wilkinson, *supra* note 182, at 978.

211. *See* notes 177-80 and accompanying text *supra*; *see generally* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-21 (1976) (Marshall, J., dissenting).

212. Sugarman v. Dougall, 413 U.S. 634, 646-48 (1973).

213. *See* text accompanying notes 50-55 *supra*.

214. *See* note 16 *supra*.

215. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 197-98 (1973).

216. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972) (illegitimate children have no control over their status and ought not be made to suffer on account of it).

unrelated to their worth as individuals, they deserve extraordinary judicial protection.[217]

The designation of undocumented children as a suspect class would be tantamount to invalidation of the Texas statutory classification.[218] Mere fiscal interest would not be sufficient to justify the unequal treatment of undocumented children.[219] It is equally clear, however, that the Court has been hesitant to expand the number of classifications designated as suspect.[220]

B. Education as a Fundamental Right

The equal protection clause prohibits a state from burdening fundamental interests. In this analysis, the focus shifts from an examination of the classification to the type of interest burdened.[221] If an individual can show that a classification serves to penalize the exercise of a constitutionally protected or fundamental right, the state must prove that the classification is necessary to promote a compelling governmental interest.[222] Absent such a showing, the classification will be invalidated.

The initial determination is whether the right in question is fundamental for purposes of equal protection analysis. The key is "assessing whether the right is explicitly or implicitly guaranteed by the Constitution."[223] In *San Antonio Independent School District v. Rodriguez*,[224] the Court examined

217. In recent decisions, however, the Supreme Court has refused to enlarge the number of suspect classifications. In each of these cases, the classifications in question did not meet the Court's criteria. *See* Mathews v. Lucas, 427 U.S. 495, 506 (1976) (illegitimacy not an "obvious badge" and no history of purposeful discrimination); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976) (old age marks a stage in life, no history of purposeful unequal treatment, no unique disabilities); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (no history of purposeful unique treatment of residents of low-wealth districts, nor are they relegated to a position of political powerlessness).

218. *See* Barrett, *supra* note 159, at 94. Only once has the Supreme Court upheld discrimination against a suspect class. *See* Korematsu v. United States, 323 U.S. 214 (1944).

219. Graham v. Richardson, 403 U.S. 365, 375 (1971); Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

220. *See* text accompanying notes 199-209 *supra*.

221. Legislative discrimination against constitutionally protected interests will normally be held invalid, either by applying the underlying constitutional provision or by the employment of equal protection analysis. *See* Barrett, *supra* note 159, at 108-09. Where a classification burdens a constitutional right to such a degree as to be inconsistent with the constitutional protection afforded the interest, it will also be held invalid. This normally requires a balancing process to determine if the state interest is sufficiently important to justify the burden on the protected right. *Id.* at 110. In this case, the Texas statute is burdening the undocumented child's right to an education by authorizing local districts to require such a child to pay tuition.

222. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

223. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). *But see* Wilkinson, *supra* note 182, at 952.

224. 411 U.S. 1 (1973).

whether education is a fundamental right in the context of a challenge to a state financing scheme that created financial disparities among school districts.[225] Writing for the majority, Justice Powell noted that free public education is not "afforded explicit protection under our Federal Constitution."[226] He went on to hold that there was no basis for finding it implicitly protected in the context of this challenge.[227] Justice Powell's opinion in *San Antonio* offers no guidance for determining whether a right is implicitly guaranteed by the Constitution.[228]

The situation of undocumented children in the Texas schools differs radically from the circumstances of the children in *San Antonio*. In contrast to the differential spending levels involved in *San Antonio*,[229] the Texas statute effectively denies education to all undocumented children.[230] In upholding the Texas scheme of financing in *San Antonio*, the Court noted that its underlying purpose was to extend and improve education.[231] In contrast, the purpose and effect of the amendment to the Texas statute is to selectively deny education to a class of politically unpopular individuals.[232]

In *San Antonio*, the Court expressly left open the question of whether the absolute denial of education might impinge on a constitutionally protected right.[233] It was argued by respondents in *San Antonio* that education is a fundamental right because of its "peculiarly close relationship to other rights and liberties accorded protection under the Constitution."[234] Specifically, it was argued that education is necessary for the effective exercise of First Amendment and voting rights.[235] The Court's opinion in *San Antonio*

225. *Id.* at 35, 37.

226. *Id.* at 35.

227. *Id.* at 37. The Court found unpersuasive the argument that education is a fundamental right because it is essential to the effective exercise of First Amendment freedoms and to an intelligent exercise of the right to vote. *Id.* It observed that it did not possess "either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice." *Id.* at 36. The Court went on to point out that no argument could be made that the Texas system failed to provide the basic minimal skills necessary for the enjoyment of the rights of free speech and voting. *Id.* at 37. It also noted that the Texas scheme was remedial in nature and was an effort to extend public education and to improve its quality. *Id.* at 39.

228. In discussing interstate travel as a fundamental right, however, Justice Powell noted that it has "long been recognized as a right of constitutional significance." *Id.* at 32. Although it has no source in a particular constitutional provision, Shapiro v. Thompson, 394 U.S. 618, 630 (1968), the right to interstate travel is fundamental to the concept of the federal union. United States v. Guest, 383 U.S. 745, 757-58 (1966).

229. 411 U.S. at 37.

230. *See* text accompanying notes 10-17 *supra*.

231. 411 U.S. at 39.

232. *See* notes 10-17 and accompanying text *supra*.

233. 411 U.S. at 36-37.

234. *Id.* at 35.

235. *Id.*

admitted that this argument would have had more immediacy had education been absolutely denied.[236] A total denial would seriously limit an individual's ability to participate in the governmental process.[237] The Court itself has recognized elsewhere that the individual can be severely injured as a result of the denial of education for more than a "trivial" period.[238] The cost to society in general must also be considered.[239] One court noted that denying education to a group of lawfully admitted, non-immigrant children could "develop and foster a ghetto of ignorance, with countless numbers of untrained, untutored and perhaps untended children . . . roaming the streets, this with the concommitant [*sic*] evils of crime, immorality and general social degeneracy."[240]

Assuming then that there is a protected right to some minimum amount of education,[241] Texas must demonstrate that a classification that effectively denies education to undocumented children serves a compelling state interest.[242] This is a heavy burden: when the Court has applied this standard, the challenged legislation has frequently been invalidated.[243] Again, the state's fiscal concerns would not be sufficient justification.[244] Nevertheless, even if it can be established that there is a fundamental right to some quantum of education, additional problems arise. First, the "nexus" arguments, that education is necessary to properly exercise the protected rights of free speech and voting,[245] may not be as strong when aliens are involved. Although aliens residing in this country are accorded freedom of speech,[246] states are not required to extend to them the right to vote.[247] Second, it has

236. *Id.* at 37.

237. *Id.* at 112. Admittedly, this argument has less merit with regard to nonvoting aliens.

238. Goss v. Lopez, 419 U.S. 565, 576 (1975) (ten-day suspension).

239. Hosier v. Evans, 314 F. Supp. 316 (D.V.I. 1970).

240. *Id.* at 321.

241. In a recent article, Professor Tribe discussed the possible constitutional framework for an argument in favor of some minimum level of governmental service. *See* Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977) [hereinafter cited as *New Federalism*]. Professor Tribe argues that a tension exists among the rhetoric, reasoning and results in the leading cases involving basic governmental benefits. *Id.* at 1079. He concludes: "That tension may well reflect an unarticulated perception that there exist constitutional norms establishing minimal entitlements to certain services—an intuitive sense that some expectations are protected." *Id.* at 1079. Education certainly fits Tribe's definition of "certain services." The Supreme Court has long recognized the importance of education in this society and the central role of the government in providing for it. *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972); Brown v. Board of Educ., 347 U.S. 483 (1954); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

242. Barrett, *supra* note 159, at 110-11.

243. *Id.* at 111.

244. *See* text accompanying note 158 *supra*.

245. *See* text accompanying notes 233-37 *supra*.

246. Bridges v. Wixon, 326 U.S. 135, 148 (1945).

247. Sugarman v. Dougall, 413 U.S. 634, 647-49 (1973).

not been established that undocumented aliens generally, and undocumented children specifically, are entitled to substantive constitutional rights.[248]

C. Undocumented Children as an Irrational Classification

Although a legislatively created classification may not be suspect and may not infringe upon a fundamental right, it must nonetheless be rationally related to a legitimate state purpose.[249] Legislative action will normally be presumed valid;[250] the challenging party must prove the insubstantiality of the relation between the classification and the legislative purpose.[251] This involves a two-step process. First, the legislative objective of the statute in question must be ascertained.[252] Once this has been accomplished, it must be determined whether the classification serves that objective.[253] An additional variable is the balance between the importance of the legislative interest and the level of tolerable irrationality.[254] Justice Marshall has

248. *See* text accompanying notes 59-103 *supra*.

249. Trimble v. Gordon, 430 U.S. 762, 767 (1977) (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 162 (1972)); USDA v. Moreno, 413 U.S. 528, 538 (1973); Reed v. Reed, 404 U.S. 71, 76-77 (1971).

250. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

251. Mathews v. Lucas, 427 U.S. 495, 510 (1976).

252. Such a search is not without difficulty. The Supreme Court has not limited itself in the past to accepting the purpose suggested by the plain terms of a statute. It has used various methods to reach an independent determination. One author suggested dividing the methods used into three groupings: "(A) ignoring any purpose, (B) stating the purpose as a unit rather than as a mix of policies, and (C) manipulating the level of abstraction at which the purpose is defined." Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 132 (1972). In the past, the Court has utilized an independent assessment to define a statute's purpose so as to render the challenged classification inappropriate. *Id.* Nevertheless, it is possible that the Court might use the same liberality to construe the purpose of a statute in such a way as to validate the classification. *Id.* at 128.

> It is always possible to define the legislative purpose of a statute in such a way that the statutory classification is rationally related to it. When a statute names a class, that class must share some common characteristic for that is the definitional attribute of a "class". The nature of the burdens or benefits created by a statute and the nature of the chosen class's commonality will always suggest a statutory purpose—to so burden or benefit the common trait shared by members of the identified class. A statute's classifications will be rationally related to such a purpose because the reach of the purpose has been derived from the classifications themselves.

Id. *See* Mathews v. Lucas, 427 U.S. 495 (1976), in which the Court accepted HEW's argument that the design of the statute in question was "to provide for all children of deceased insureds who can demonstrate their 'need' in terms of dependency at the times of the insureds' deaths." *Id.* at 507. The Court held that the regulation requiring illegitimate children to show proof of dependency, while not requiring such a showing by other children, was reasonably related to this purpose. *Id.* at 510. *Cf.* Jimenez v. Weinberger, 417 U.S. 628 (1974); Gomez v. Perez, 409 U.S. 535 (1973); Trimble v. Gordon, 430 U.S. 762 (1977).

253. *See* Barrett, *supra* note 159, at 122. *See generally* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-79 (1969).

254. Barrett, *supra* note 159, at 122-29.

There are at least five possibilities. The Court could balance (1) the level of irrationali-

observed that the standard of review used by the Court varies in degree depending upon the particular classification at issue.[255]

Under the two-tiered model of equal protection analysis, the Court has traditionally exhibited great deference to legislative decisions in applying the rational basis standard.[256] This is exemplified by Chief Justice Warren's formulation of the standard in *McGowan v. Maryland*[257] and *McDonald v. Board of Election Commissioners*.[258] In *McGowan*, he stated:

> [T]he Fourteenth Amendment 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.[259]

When applied as articulated, this standard normally results in the challenged legislation being upheld.[260] In recent years, however, the inevitability of the result under this test in areas other than economic regulation has been less predictable.[261] In a number of cases the Court, while ostensibly applying the rational basis test, has reached results that exhibit a more detailed analysis

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ty of the legislation—the extent to which the classification departs from perfect correlation with the legislative purpose—against the state interest in maintaining the normal political processes in our democratic society (which necessarily produce less-than-perfect classifications); (2) the level of irrationality against the state interest in economy and efficiency achieved by making the particular classifications; (3) the level of irrationality against the nature and extent of the burden on the individual affected by the classification (e.g., if the individual is imprisoned or denied welfare or education, the classifications would have to be more rational than if his business were made less profitable or his property less valuable); (4) the level of irrationality against the invidiousness of the basis upon which the classification is drawn (e.g., a classification based on lack of wealth would have to be more rational than one based on ability to pass a driving test); and (5) the importance of the state interest being served by the legislation against the nature and extent of the burden on the individual, or the relative "invidiousness" of the classification.

Id. at 123.

255. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting).

256. *See Foreword*, *supra* note 129, at 8.

257. 366 U.S. 420 (1961).

258. 394 U.S. 802 (1969).

259. 366 U.S. at 425-26. In *McDonald*, Warren expressed even greater deference: "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classification will be set aside only if no grounds can be conceived to justify them." 394 U.S. at 809.

260. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting).

261. *See* Nowak, *supra* note 182, at 1073.

and higher level of scrutiny than that articulated in the Warren formulation.[262]

In *Trimble v. Gordon*,[263] for example, the Court employed the rational basis standard but noted that the scrutiny under it "is not a toothless one."[264] The Court struck down an Illinois statute that totally barred illegitimate children from inheriting from fathers who died intestate. In answer to the state's argument that the scheme provided an accurate and efficient method of property disposition at death, the Court noted that the statute was inadequately attuned to alternative means of proving paternity.[265] While proof of paternity, as opposed to maternity, can present serious problems in the case of an illegitimate child, the Court nevertheless held that such problems did not justify the total disinheritance of illegitimate children whose fathers die intestate.[266] The Court's approach in *Trimble* is certainly not the deferential treatment envisioned by Chief Justice Warren's formulation of the rational basis standard. While not meticulously tailored, the Illinois scheme arguably provided a means of efficiently determining property disposition at death.

Utilizing the rational basis standard in *Stanton v. Stanton*,[267] the Court invalidated the provisions of a Utah statute that required support payments pursuant to a divorce decree for a male child until he reached the age of twenty-one, but only to the age of eighteen for a female child.[268] The Court stated that the statutory distinction, which was based on sex alone, was "wholly unrelated to the objective of the statute."[269] The Court reached similar results in other cases in which differences based on sex led to disparate treatment in the context of Social Security benefits[270] and the administration of decedents' estates.[271]

The Court similarly departed from a mood of judicial deference in *United States Department of Agriculture v. Moreno*,[272] invalidating a section of the Food Stamp Act.[273] The Court held that the provisions of the Act, which denied food stamps to any household containing an individual unrelated to the other members of the household, were without any rational

262. *See* Wilkinson, *supra* note 182, at 951-54.
263. 430 U.S. 762 (1977).
264. *Id.* at 767 (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)).
265. *Id.* at 770-71.
266. *Id.*
267. 421 U.S. 7 (1975).
268. *Id.* at 9.
269. *Id.* at 14.
270. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).
271. Reed v. Reed, 404 U.S. 71 (1971).
272. 413 U.S. 528 (1973).
273. 7 U.S.C. § 2011 (1976).

basis.[274] The Court dismissed a "reasonable, if less than powerful," argument that unrelated households are more likely to contain abusers.[275]

The Court's most recent formulation of the rational basis standard is found in *Craig v. Boren*.[276] At issue was an Oklahoma statute that prohibited the sale of "non-intoxicating" 3.2% beer to males under the age of twenty-one and to females under the age of eighteen. Writing for the majority, Justice Brennan stated that to withstand constitutional challenge such a distinction "must serve important governmental objectives and must be substantially related to achievement of those objectives."[277]

Despite the confusion in this area of equal protection,[278] a strong argument for the invalidation of the Texas education statute can be constructed. The avowed purpose of the statute is to relieve Texas taxpayers of the fiscal burden of educating undocumented children.[279] The structure of the Texas school financing scheme relies on contributions from local, state and federal sources.[280] These funds are to be used by local school districts for the education of local residents.[281] The goal of equalizing contributions may very well be a legitimate state interest.[282] Nevertheless the manner in

274. 413 U.S. at 538.

275. *See* Wilkinson, *supra* note 182, at 953 n.58 (citing *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 130 (1973)).

276. 429 U.S. 190 (1976).

277. *Id.* at 197.

278. In addition to the cases cited in the text, other Supreme Court decisions have employed different formulations of the rational basis standard. *See, e.g.*, Fuller v. Oregon, 417 U.S. 40 (1974); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (challenged statutory distinction must further some "legitimate, articulated state purpose"); James v. Strange, 407 U.S. 128, 140 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173-76 (1972); Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966).

279. *See* note 12 and accompanying text *supra*. The history and the construction of the amended statute reveals that its overriding purpose is to discriminate against undocumented children, depriving them of equal access to education. *See* note 6 *supra*. Although states have wide latitude in drawing their statutes, they are constitutionally constrained when the purpose is to harm a politically unpopular group. USDA v. Moreno, 413 U.S. 528, 534 (1973). Consequently, Texas' purposeful discrimination against undocumented children cannot stand as the express governmental goal against which to test the classification.

280. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 6 (1973); Wright v. Houston Independent School Dist., 393 F. Supp. 1149, 1154 (S.D. Tex. 1975). *See also* notes 166-70 and accompanying text *supra*.

281. Love v. City of Dallas, 120 Tex. 351, 40 S.W.2d 20 (1931), involved a suit brought by Texas high school students, all of whom lived outside the city of Dallas and some of whom lived outside the county of Dallas, who sought admission to Dallas city high schools. The Texas Supreme Court held that since the state constitution "contemplates that [school] districts shall be organized and taxes levied for the education of scholastics within the districts, it is obvious that the education of nonresident scholastics is not within their ordinary functions as quasi-municipal corporations . . . . [T]he Legislature . . . cannot compel [a] district to construct buildings and levy taxes for the education of nonresident pupils." *Id.* at 367, 40 S.W.2d at 27.

282. *See* Vlandis v. Kline, 412 U.S. 441, 448 (1973).

which Texas seeks to achieve its aim is insufficiently related to its purpose, particularly in light of the degree of individial deprivation. Moreover, a classification that singles out the undocumented child to pay tuition is both underinclusive and overinclusive.[283] It does not require tuition of children whose parents reside in the community but pay no taxes. At the same time, it includes all undocumented children, large numbers of whose parents do contribute to available education funds through property taxes, income taxes and other means.[284] Because the Texas classification is not rationally related to the accomplishment of its purpose, it should be invalidated.

D. Balancing: An Alternative

The situation of undocumented children exemplifies the difficulty inherent in attempting to fit all legislative classifications neatly into "the conventional mosaic of constitutional analysis under the Equal Protection Clause."[285] Some classifications defy easy characterization in terms of one test or the other.[286] As Justice Marshall has recently pointed out:

> It cannot be gainsaid that there remain rights, not now classified as "fundamental," that remain vital to the flourishing of a free society, and classes, not now classified as "suspect," that are unfairly burdened by invidious discrimination unrelated to the individual worth of their members.[287]

The Texas statute offers the Supreme Court an opportunity to abandon its stated commitment to the two-tiered model and to embrace a more flexible balancing approach for equal protection analysis. As Justice Marshall has correctly pointed out: "[a]ll interests not 'fundamental' and all classes not 'suspect' are not the same; and it is time for the Court to drop the pretense that, for purposes of the Equal Protection Clause, they are."[288] A number of alternative models have been proposed.[289] Reflecting the authors' perception of the Court's current analysis, most alternative formulations suggest a balancing of relevant factors to determine the validity of legislative classifications.[290]

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283. *See* Barrett, *supra* note 159, at 122.

284. *See* text accompanying notes 171-76 *supra*.

285. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 18 (1973).

286. Dandridge v. Williams, 397 U.S. 471, 520 (1970) (Marshall, J., dissenting).

287. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 320 (1976) (Marshall, J., dissenting).

288. *Id.* at 321.

289. *See generally Foreword*, *supra* note 129; Wilkinson, *supra* note 182; Nowak, *supra* note 182; Barrett, *supra* note 159.

290. *See Foreword*, *supra* note 129, at 20-24; Wilkinson, *supra* note 182, at 990-98. Professor Wilkinson limits his balancing approach to rights involving equality of opportunity. He asserts it is inappropriate to use such balancing in areas of political equality, where the Court should actively safeguard individual political rights, and economic equality, where the Court should defer to legislative action. *Id.* at 990-1017.

Justice Marshall has been the most persistent member of the Court to urge recognition of an alternate approach. As long ago as 1970,[291] he proposed a balancing approach based on three factors: "1) the character of the classification in question, 2) the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive and 3) the asserted state interests in support of the classification."[292] The chief advantage of Marshall's approach is its flexibility: it can accommodate differences in strength and importance of governmental and individual interests in various factual settings.[293] The Texas statute is well-suited to such a flexible balancing analysis.

1. Education as an Important Governmental Benefit

The importance of education to our political and social fabric cannot be doubted. The Supreme Court has repeatedly recognized the central role that education plays in fostering an individual's personal development, as well as its contribution to society as a whole.[294] Even in *San Antonio Independent School District v. Rodriguez*,[295] in which the Court held that education is not a fundamental right for purposes of equal protection analysis, the majority opinion reaffirmed the importance of education and the vital role it plays in any free society.[296]

291. Dandridge v. Williams, 397 U.S. 471, 520 (1970) (Marshall, J., dissenting).

292. *Id.* at 521. A recent application of Justice Marshall's model involving age discrimination can be found in his dissent in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317-27 (1976) (Marshall, J., dissenting).

293. Wilkinson, *supra* note 182, at 989.

294. Wisconsin v. Yoder, 406 U.S. 205 (1972) (Burger, C.J.) ("Providing public schools ranks at the very apex of the function of a State." *Id.* at 213); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (Brennan, J., concurring) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government." *Id.* at 230.); Brown v. Board of Educ. 347 U.S. 483 (1954) (Warren, C.J.) (As Chief Justice Warren stated, "[t]oday, 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. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument 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." *Id.* at 493.); Meyer v. Nebraska, 262 U.S. 390 (1923) (McReynolds, J.) ("The American people have always regarded education and acquisition of knowledge as matters of supreme importance . . . ." *Id.* at 400); Interstate Ry. Co. v. Massachusetts, 207 U.S. 79 (1907) (Holmes, J.) ("Education is one of the purposes for which what is called the police power may be exercised. . . . Massachusetts always has recognized it as one of the first objects of public care." *Id.* at 87 (citation omitted)).

295. 411 U.S. 1 (1973).

296. *Id.* at 30.

The importance of education is underscored by its historical link in this country to the concept of equality of opportunity.[297] During the last decade of the Warren Court, equality emerged as a major focal point of constitutional dimensions.[298] Recent decisions by the Supreme Court demonstrate great judicial concern for and commitment to the goal of equal opportunity.[299] Because of its link with personal opportunity, education is the key to attainment of this goal. Moreover, the importance of education in enabling or preparing individuals to exercise recognized liberties, such as liberty of thought, redress of grievances, and physical, social and economic mobility cannot be underestimated.[300] These liberties are mere formalisms without the ability to realize and make use of their underlying value.[301] Even if the liberties of undocumented aliens are not coextensive with those of other individuals in this country, undocumented aliens should not be denied the opportunity to prepare for the effective exercise of the liberties they do enjoy. To deny undocumented children as a class the opportunity of public education is to deprive them of their only opportunity to break the cycle of poverty and ignorance in which they live.[302]

2. *The Character of the Classification*

The Texas statute denying free public education to undocumented children singles out children in the United States who are not citizens or lawful resident aliens and subjects them to unequal treatment. They are discriminated against as a class on the basis of a status determined by federal law, for reasons unrelated to the purpose of the education statute. The classification is the reflection of historic prejudices, which are aimed at a politically unpopular group, rather than a reflection of legislative rationality.[303] Moreover, the reality of the situation compels acknowledgment of the racial overtones of the classification.[304]

297. *See* Wilkinson, *supra* note 182, at 977. *See also* Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32, 52-53 (1973) [hereinafter cited as Richards].

298. Wilkinson, *supra* note 182, at 949, 984.

299. *Id.* at 987.

300. See Richards, *supra* note 297, at 46.

301. *Id.* at 46-47 n.68.

302. *See* note 58 and accompanying text *supra*. *See also* Trimble v. Gordon, 430 U.S. 762 (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); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

303. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 105 (1973) (Marshall, J., dissenting).

304. *See* text accompanying notes 16-17 *supra*.

Such statutes are impermissibly underinclusive and overinclusive.[305] The colorable purpose of the Texas statute is to guarantee that the limited funds available for education are spent on citizens or legal resident aliens, on the theory that they are entitled to benefits because they, through their parents, contribute to the funding sources through the payment of various taxes.[306] In this regard, however, there is no logical basis for distinguishing undocumented children from out-of-state children who have recently entered the school system.[307] To the contrary, recently arrived citizen or resident alien children are arguably less entitled to education benefits than undocumented children who have resided in a state for a period of time. The parents of recently arrived children would not have contributed to local sources of education funding at all, whereas the parents of the undocumented child may well have contributed through the payment of rent, state and local sales taxes, and other taxes.[308]

3. *Preserving the Fiscal Integrity of Public Education*

The asserted interest of the state of Texas in denying undocumented children equal access to free public education is to preserve the fiscal integrity of its school system.[309] Maintaining the fiscal integrity of public schools is an important and legitimate state interest, on a par with a state's interest in local control of its schools.[310] Local control serves to promote local responsibility; fiscal integrity ensures that schools will continue to operate.

A state's interest in preserving limited resources is not, however, a compelling state interest that justifies invidious discrimination.[311] Moreov-

305. *See* text accompanying notes 10-22 and 279-284 *supra*.

306. *See* text accompanying notes 171-75 *supra*.

307. *See* Mathews v. Diaz, 426 U.S. 67 (1976), for an analogous situation in which a distinction was made between citizens and lawfully admitted aliens in the payment of welfare benefits. 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 sub-categories of United States citizens and aliens has no apparent justification . . . .

Id. at 85.

308. *See* Doe v. Plyler, No. TY-77-261-CA, (E.D. Tex., Sept. 12, 1977) (order granting preliminary injunction), Findings of Fact and Conclusions of Law at 12.

309. *Id.* at 11. *See* text accompanying notes 10-18 *supra*.

310. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 126 (1973) (Marshall, J., dissenting). *See also* Wright v. Council of Emporia, 407 U.S. 451, 469 (1972).

311. Shapiro v. Thompson, 394 U.S. 618 (1969): "We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. . . . But a State may not accomplish such a purpose by invidious distinction between classes of its citizens. *It could not, for example, reduce expenditures for education by barring indigent children from its schools.*" *Id.* at 633 (emphasis added). *See also* Nyquist v. Mauclet, 432 U.S. 1, 12 (1977).

er, the state cannot have a "special interest" in tax revenue to which undocumented persons have contributed along with citizens or legal residents.[312] Further, the state interest to be served by the statute must be weighed against countervailing considerations. The use of an essentially racial classification, the importance of education to the persons affected, and the marginal state interest arguably served, would, on balance, appear to favor equal access to free public education for undocumented children. As a consequence, under Justice Marshall's alternate approach,[313] the Texas statute denying such children equal access to that state's public schools should be invalidated as violative of the equal protection clause of the Fourteenth Amendment.

V. Federal Preemption Challenge

The supremacy of federal power to regulate immigration is unquestioned.[314] Until recently, Congress' power "to establish an uniform rule of naturalization"[315] and the Immigration and Nationality Act[316] were thought to preempt state legislation affecting immigration.[317] In *De Canas v. Bica*,[318] however, the Supreme Court held that a state enactment dealing with aliens might not constitute a "regulation" of immigration such that it was necessarily preempted by federal legislation.[319] Under *De Canas*, the test for determining federal preemption is two-pronged. Federal regulation is deemed preemptive of state regulatory power if either "the Congress has unmistakably so ordained" or if "the nature of the regulated subject matter permits no other conclusion."[320]

312. *See* Nyquist v. Mauclet, 432 U.S. 1, 12 (1977); Graham v. Richardson, 403 U.S. 365, 376 (1971).

313. *See* text accompanying notes 291-93 *supra*.

314. De Canas v. Bica, 424 U.S. 351, 354 (1976); Hines v. Davidowitz, 312 U.S. 52, 62 (1941); Passenger Cases, 48 U.S. (7 How.) 283 (1849).

315. U.S. CONST. art. I, § 8, cl. 4.

316. 8 U.S.C. § 1101 (1970 & Supp. V 1975).

317. *See The Undocumented Worker*, *supra* note 19, at 165-66. On the subject of preemption generally and the Burger Court's unwillingness to preempt state action, see Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

318. 424 U.S. 351 (1976).

319. *Id.* at 354. For a critique of the Court's treatment of this issue, see Comment, *The Undocumented Alien Laborer and De Canas v. Bica: The Supreme Court Capitulates to Public Pressure*, 3 CHICANO L. REV. 148, 150-55 (1976) [hereinafter cited as *Undocumented Alien and De Canas*].

320. *Id.* at 356. This test was derived from Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) which dealt with federal preemption in the context of a state's regulation of commerce.

A. Congressional Intent to Preempt

Any discussion of congressional intent to preempt state regulation dealing with immigration must begin with *De Canas*. In that case, the Court held that Congress did not intend to preempt states from regulating the employment of illegal aliens.[321] In so holding, the Court considered the following four factors. First, states have broad authority to regulate the employment relationship to protect their citizens.[322] Second, the wording and legislative history of the Immigration and Nationality Act do not indicate that Congress intended to preclude harmonious state regulation dealing with the employment of illegal aliens.[323] Third, employment of illegal aliens is at best a "peripheral concern" of the Immigration and Nationality Act.[324] And, finally, the Federal Farm Labor Contractor Registration Act,[325] dealing expressly with the employment of illegal aliens, specifically allowed supplemental state regulations.[326]

When these four factors are analyzed in the context of the denial of equal access to education to undocumented children, however, a different result is reached. Although the regulation of education, like the regulation of employment, is primarily a matter of local or state concern,[327] "even state regulation designed to protect vital state interests must give way to paramount federal legislation."[328] In *De Canas*, the Court acknowledged that the words and legislative history of the Immigration and Nationality Act leave room for some state regulation affecting aliens.[329] The issue remains whether a state statute denying undocumented children equal access to education is the type of regulation contemplated by the Act.

The central concern of the Immigration and Nationality Act is with the terms and conditions of admission to the country.[330] It is presumed, therefore, that Congress intended to preempt state action in this area.[331] States can neither "add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states."[332] The conditions upon which an alien

321. 424 U.S. at 356, 362.
322. *Id.* at 356.
323. *Id.* at 358-59.
324. *Id.* at 360.
325. 7 U.S.C. §§ 2041-2055 (1976).
326. 424 U.S. at 361-62.
327. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 42 (1973).
328. 424 U.S. at 357.
329. *Id.* at 358.
330. *Id.* at 359.
331. *Id.*
332. *Id.* at 358 n.6 (quoting Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (emphasis omitted)).

may be excluded[333] or deported[334] have been set out by Congress and interpreted by the courts and administrative agencies.[335] Moreover, Congress has established provisions that may allow an otherwise deportable alien to remain lawfully in the country.[336] As a consequence, until an order of deportation is obtained by the Attorney General,[337] the federal government cannot force an alien to leave the country.[338]

A statute such as the Texas statute requires a state or local agency to inquire into and determine each child's immigration status.[339] Such a determination is the central and exclusive concern of the federal government.[340] The California Labor Code provision[341] examined in *De Canas* does not pose this problem because it operates "only with respect to individuals whom the Federal Government has already declared cannot work in this country."[342] The employer is not called upon to inquire into the prospective

333. 8 U.S.C. §§ 1181-1226 (1970).

334. 8 U.S.C. §§ 1227, 1251-1260 (1970).

335. Procedure for judicial review of deportation orders after administrative remedies are exhausted is found in 8 U.S.C. § 1105(a) (1970).

336. The discretionary relief available includes suspension of deportation, stay of deportation, adjustment of status, waiver of deportation and private bills. *See Alternatives to Deportation*, *supra* note 114, at 333-39.

337. 8 U.S.C. § 1252(b)(4) (1970). Although deportation is a civil proceeding, the government's burden of proof is higher than in ordinary civil cases. *See* United States v. Ortiz, 422 U.S. 891, 906 (1975) (appendix to concurring opinion of Burger, C.J.).

338. 8 U.S.C. § 1252 (1970). Furthermore, an alien who is present in this country illegally but who broke no law to gain entrance is not guilty of any crime and is subject only to the sanction of deportation under federal law. Abrams & Abrams, *Immigration Policy—Who Gets In and Why?*, THE PUBLIC INTEREST, Winter 1975, at 23. *See* 2 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE 9-1 to 9-92 (1977) (listing civil and criminal penalties but omitting any mention of illegal alien status as a crime in itself).

339. The Texas statute allows only "legally admitted aliens" to attend free public schools, but the term "legally admitted aliens" is not defined in the statute. TEX. EDUC. CODE ANN. tit. 2, § 21.031 (Vernon Supp. 1978). As a result individual school districts promulgated policies concerning the financing and control of the education of illegally admitted aliens. For example, the policy of the Board of Education for the Tyler Independent School District states:

> The Tyler Independent School District shall enroll all qualified students who are citizens of the United States or legally admitted aliens, and who are residents of this school district, free of tuition charge. Illegal aliens [*sic*] children may enroll and attend schools in the Tyler Independent School District by payment of the full tuition fee.

A legally admitted alien is one who has documentation that he or she is legally in the United States, or a person who is in the process of securing documentation from the United States Immigration Service, and the Service will state that the person is being processed and will be admitted with proper documentation. Doe v. Plyler, No. TY-77-261-CA (E.D. Tex., Sept. 12, 1977), Findings of Fact and Conclusions of Law at 2. *Compare* this language *with* CAL. WELF. & INST. CODE § 11104 (West 1972), which deprives aliens under federal order of deportation of state welfare benefits.

340. De Canas v. Bica, 424 U.S. 351, 359 (1976).

341. CAL. LAB. CODE § 2805(a) (West Supp. 1977).

342. 424 U.S. at 363. *See* Comment, *State Regulation of the Employment of Illegal Aliens: A Constitutional Approach*, 46 S. CAL. L. REV. 565, 565-66 (1973).

employee's immigration status or to make any determination as to that status. Moreover, the only determination that the state is required to make is whether the employer knowingly hired an undocumented person. Such a determination can be made solely by reference to state law.[343]

Furthermore, unlike *De Canas*,[344] there is no federal statute that contemplates state regulation of the education of undocumented children. The primary federal statute dealing with financial assistence to local education is Title 1 of the Elementary and Secondary Education Act of 1965.[345] This Act provides for the distribution of federal funds to local schools to aid low income children.[346] The purpose of the Act is "to give young people a chance to break the cycle of poverty and poor education that so many of them and their parents have known."[347] Under the Act, children are defined as "all children aged five through seventeen, inclusive."[348] No distinction is made among children of citizens, resident aliens or undocumented aliens. Therefore, by implication, local schools teaching undocumented, low income children should be the recipients of these federal funds. Because the Texas statute thwarts the objective of the Act by operating to deny undocumented, low income children access to local public schools, it is inconsistent with congressional intent to regulate this area.

B. Preemption by Burdening Federal Objectives

Although the above analysis is sufficient to void the Texas statute, the statute suffers even more seriously under the second prong of the preemption test, which requires invalidation if the state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the Immigration and Nationality Act.[349] This requires a determination of whether the state statute can be enforced "without impairing the Federal superintendence of the field."[350] The Supreme Court in *De Canas* could not reach this issue on the record before it, and ordered the case remanded to the California court.[351] The Court indicated that the state

343. Under California law "knowingly" is defined in CAL. PENAL CODE § 7 (West 1970). *See also* People v. Flumerfelt, 35 Cal. App. 2d 495, 96 P.2d 190 (1939).

344. In *De Canas*, the Federal Farm Labor Contractor Registration Act was interpreted to recognize congressional intent to allow states to regulate undocumented workers. 424 U.S. at 361-62.

345. 20 U.S.C. § 241a-244a (1970 & Supp. V 1975).

346. *Id.* at § 241a (1970).

347. H.R. REP. No. 805, 93rd Cong., 2d Sess. 6, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4093, 4096.

348. 20 U.S.C. § 241(c)(2)(A) (Supp. V 1975).

349. De Canas v. Bica, 424 U.S. 351, 363 (1976).

350. *Id.*

351. *Id.*

court should attempt, if possible, to reconcile the state statute with the federal scheme.[352] To determine whether the Texas statute impairs federal goals, two areas must be examined: first, the Texas statute's impairment of the objectives of the Immigration and Nationality Act; and second, the statute's effect on the federal government's exclusive power over international relations.

When a state is allowed to determine a person's immigration status, a potential conflict with the federal standards and policies under the Immigration and Nationality Act emerges. Federal officials are charged with the responsibility of enforcing our immigration laws.[353] Moreover, federal standards govern who is or can become a lawful resident.[354] To allow a state determination of immigration status to impose disabilities on undocumented children conflicts with federal power.[355]

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352. As the Court noted in *De Canas*:

> Of course, even absent such a manifestation of congressional intent to "occupy the field," the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws or treaties. . . . However, "conflicting law, absent repealing or exclusivity provisions, should be pre-empted . . . 'only to the extent necessary to protect the achievement of' " the aims of the federal law, since "the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted."

Id. at 357-58 n.5 (citation omitted). Professor T. Krattinmacher at the Conference on Immigration Law held at Georgetown University Law Center on March 26, 1976, stated:

> *De Canas* is a sterile case in that the California court held § 2805 unconstitutional in the abstract and the Supreme Court reversed that decision as such. . . . Whether the statute can ever be constitutional as applied to any given fact situation is a totally different question. My hunch is that the state court will find § 2805 unconstitutional as well. . . .

Undocumented Alien and De Canas, *supra* note 319, at 163 n.66.

353. The Attorney General is charged with the administration and enforcement of the Immigration and Naturalization of Aliens. 8 U.S.C. § 1103(a) (1970). In exercising this responsibility, Attorney General Bell has indicated that he intends to eliminate massive deportations of undocumented persons because it would be inhumane and impractical. S.F. Chronicle, Feb. 14, 1977, at 5, col. 6.

354. *See* text accompanying notes 332-38 *supra*. Recently, in Silva v. Levi, Civ. No. 76C-4268 (N.D. Ill., Mar. 10, 1977), Judge Grady ordered the federal government to stop deportation procedures against 280,000 Mexican and Latino illegal aliens who were denied visas because of United States immigration quotas. L. A. Daily Journal, Mar. 14, 1977, at 1, col. 3; S.F. Chronicle, June 13, 1977, at 9, col. 1.

355. *See* Williams v. Williams, 328 F. Supp. 1381 (D.V.I. 1971) in which the court stated:

> To deny an alien access to our divorce courts on the sole ground that he may be in violation of an immigration law would be to deny both due process and the equal protection of the laws. Such a denial would attach a civil disability to some aliens without the prior benefit of the procedures designed for the purpose of enforcing the immigration laws. . . . The remedy for a violation [of the immigration laws] is deportation or other administrative sanction, not withdrawal of the right of access to our divorce courts.

Id. at 1383 (citation omitted).

Regulation of immigration is also integrally related to international relations,[356] which is an area of exclusive federal concern.[357] In *Hines v. Davidowitz*,[358] the Supreme Court held that Pennsylvania's Alien Registration Act[359] was preempted by the Federal Alien Registration Act. The Court noted that state enforcement of any laws regarding aliens was a particularly dangerous endeavor because "subjecting [aliens] . . . to indiscriminate and repeated interception and interrogation by public officials . . . bears an inseparable relationship to the welfare and tranquility of all the states . . . ."[360]

Further, the federal government, in exercising its power over international relations, entered into the Protocol of Buenos Aires with other members of the Organization of American States.[361] This agreement, an amendment to the O.A.S. Charter[362] which deals in part with education in the Western Hemisphere, was designed to promote "the economic, social and cultural development of the peoples of the Hemisphere" by "reaffirming the determination of the American States to combine their efforts in a spirit of solidarity in the permanent task of achieving the general conditions of well-being that will ensure a life of dignity and freedom to their peoples."[363] Under this protocol, it was agreed that each signatory nation would endeavor to provide compulsory free public education to all children.[364] The Texas statute is contrary to the spirit of this international agreement.[365] International controversies of great magnitude may arise from real or imagi-

356. Hines v. Davidowitz, 312 U.S. 52, 64 (1941).

357. Zschernig v. Miller, 389 U.S. 429, 440-41 (1968).

358. 312 U.S. 52 (1941).

359. PA. STAT. ANN. tit. 35, §§ 1801-1806 (Purdon 1977). Although the holding in *Hines* has been construed by lower courts as a recognition of total federal preemption in the field of immigration, *see, e.g.*, Dolores Canning Co. v. Howard, 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (1974), the Court's decision in *De Canas* gives *Hines* a narrow construction. De Canas v. Bica, 424 U.S. 351, 362-63 (1976).

360. 312 U.S. at 65-66.

361. Protocol of Amendment to the Charter of the Organization of American States, "Protocol of Buenos Aires", Feb. 27, 1967, [1970] 21 U.S.T. 607, T.I.A.S. No. 6847.

362. Charter of the Organization of American States, April 30, 1948, [1952] 2 U.S.T. 2395, T.I.A.S. No. 2361.

363. *Id., as amended by* [1970] 21 U.S.T. 670, T.I.A.S. No. 6847.

364. Article 47 of the O.A.S. Charter, as amended by the Protocol, reads:

> The member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education, on the following bases:
>
> a) Elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State it shall be without charge. . . .

Id., as amended by [1970] 21 U.S.T. 670, 672, T.I.A.S. No. 6847.

365. *See* United States v. Pink, 315 U.S. 203, 231 (1942); Hauenstein v. Lynham, 100 U.S. 483, 488 (1880).

nary wrongs to another country's subjects inflicted or permitted by the federal government.[366] The Texas statute denying undocumented children equal access to free public education creates the potential for just such a controversy.[367]

Conclusion

Fueled by the hysteria regarding illegal aliens in the United States, states are now seeking to limit the entry of undocumented aliens by denying them state benefits.[368] In the past, the Supreme Court has invalidated attempts by individual states to protect their own resources in the face of a

366. Mexico and members of minority groups in the United States, particularly Mexican-Americans, have become increasingly concerned about abuses generated by federal enforcement of the immigration laws. In fact, Mexican officials have officially protested to the United States regarding the treatment of Mexican nationals by American officials. *See Illegal Aliens and Enforcement*, *supra* note 138, at 148. Similarly, minority groups have complained. *Id.* at 132. Discriminatory enforcement of the immigration laws, especially with respect to persons of Mexican descent, has in fact been wide-spread. In United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 (1975), the Court specifically condemned the INS' practice of detaining people of Mexican ancestry to discover undocumented aliens. *See also* Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976), which affirmed the granting of a prohibitory injunction against the INS' questioning of persons solely on the basis of racial characteristics. Local enforcement efforts will only exacerbate these difficulties. *See Illegal Aliens and Enforcement*, *supra* note 138, at 148.

367. In addition to being violative of this treaty, the Texas statute could have an adverse effect upon the United States' international relations with Mexico. In Hines v. Davidowitz, 312 U.S. 52 (1941), the Court not only warned of what might happen to the interstate relations of the United States if each state were allowed to impose "repeated interceptions and interrogations by public officials" on aliens, *id.* at 66, but it also warned of the international repercussions that would arise from such actions. The Court stated: "Laws imposing such burdens are not mere census requirements, and even though they may be immediately associated with the accomplishment of a local purpose, they provoke questions in the field of international affairs." *Id.* Earlier in its decision, the Court also warned that:

> One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government. This country, like other nations, has entered into numerous treaties of amity and commerce since its inception—treaties entered into under express constitutional authority, and by binding upon the states as well as the nation.

Id. at 64-65 (footnote omitted).

Recently, the United States and Mexico have held negotiations aimed at solving the complex problems presented by the migration of undocumented aliens. State statutes affecting undocumented aliens may interfere with the federal government's ability to act in these negotiations. These negotiations are chronicled in the papers of former Presidents Nixon and Ford. *See* 1972 PUB. PAPERS 695; 1974 PUB. PAPERS 419.

368. *See* comments of Professor Charles Gordon, former Chief Counsel for the INS, in *Undocumented Alien and De Canas*, *supra* note 319, at 155 n.35.

national problem.[369] The attempt by Texas to protect its school funds by barring undocumented children from free public education presents an analogous situation.

Specific federal legislation prohibiting states from denying undocumented children equal access to public education could resolve this problem[370] Increased federal responsibility for education could also eliminate the financial problems that have motivated Texas to act as it has.[371] Nevertheless, because Congress has not acted, undocumented children must rely on the courts for protection against discriminatory state regulation. While various constitutional arguments may be employed to strike down such legislation, it is difficult to predict how a court will treat these delicate issues. The equal protection and substantive due process analyses require judicial extension of these constitutional doctrines. In contrast, the preemption argument avoids the necessity of enlarging the rights of aliens as a class. The doctrine of preemption exists, however, not to protect the interest of the individual, but rather to protect the federal government's interest in a uniform national immigration policy.

State legislative action, such as the Texas statute, can only compound the problem of illegal immigration. Largely the result of international economic conditions, illegal immigration can only be solved by broadly based federal action and international cooperation.[372]

369. *See* Edwards v. California, 314 U.S. 160 (1941), in which the Court held invalid a California law developed to preserve state resources during the Depression by making it a crime to bring into the state any indigent person who was not a resident of the state.

370. Under the supremacy clause, U.S. CONST. art. VI, cl. 2, "any state law, however clearly within a State's acknowledged power, which . . . is contrary to federal law, must yield." Free v. Bland, 369 U.S. 663, 666 (1962).

371. *See* Comment, *Health Care for Indigent Illegal Aliens: Whose Responsibility?*, 8 U.C.D. L. REV. 107, 123 (1976) in which an analogous proposal relating to federal financial responsibility for health care for undocumented persons is discussed.

372. *See Illegal Aliens and Enforcement*, *supra* note 138, at 161.