

# HEALTH CARE FOR UNDOCUMENTED IMMIGRANT CHILDREN: SPECIAL MEMBERS OF AN UNDERCLASS

## I. INTRODUCTION

In 2000, an estimated seven million undocumented immigrants lived in the United States.<sup>1</sup> According to the Immigration and Naturalization Service (INS),<sup>2</sup> undocumented immigrants are “foreign-born persons who entered without inspection or who violated the terms of a temporary admission and who have not acquired [lawful permanent residence] status or gained temporary protection against removal by applying for an immigration benefit.”<sup>3</sup> Many view this population as a parasite on public funds, draining resources and unjustly benefiting from their unlawful presence.<sup>4</sup> Some government officials estimate that the annual cost for

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1. U.S. IMMIGRATION AND NATURALIZATION SERVICE, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 to 2000 1 (2003), [http://uscis.gov/graphics/shared/aboutus/statistics/III\\_Report\\_1211.pdf](http://uscis.gov/graphics/shared/aboutus/statistics/III_Report_1211.pdf). The INS produced this estimate by subtracting the estimated number of the legally resident foreign-born population from the total foreign-born population. *Id.* at 5. In calculating the total foreign-born population, the INS adjusted 2000 Census data for the foreign-born population by estimating an undercount of undocumented immigrants excluded from the Census. *Id.* The legally resident foreign-born population also required estimates for several “difficult-to-estimate populations,” including “nonimmigrant residents (temporary workers, students, etc.); unauthorized residents who have pending, and likely to be approved, applications for (LPR) [lawful permanent residence] status in the INS processing backlog; asylees and parolees who have work authorization but have not adjusted to LPR status;” and unauthorized residents allowed to work in the U.S. under legislative provisions or rulings. *Id.* Thus, the approximation for total undocumented immigrants is subject to statistical limitations stemming from the fact that the INS had to make several difficult population estimates to calculate the undocumented immigrant population. *See id.* at 5–6. *See* U.S. Citizenship and Immigration Services, About USCIS, <http://uscis.gov/graphics/aboutus/index.htm> (last visited Mar. 15, 2006).

2. On March 1, 2004, the INS became the U.S. Citizenship and Immigration Services (USCIS) under the Department of Homeland Security. Because all INS documents referenced in this Note were published prior to March 2004, this Note references the INS rather than the USCIS.

3. U.S. IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 1, at 3.

4. *See* Emilie Cooper, Note, *Embedded Immigrant Exceptionalism: An Examination of California’s Proposition 187, the 1996 Welfare Reforms and the Anti-Immigrant Sentiment Expressed Therein*, 18 GEO. IMMIGR. L.J. 345, 348–51 n.2 (2004) (discussing the motivations for California’s Proposition 187, which excluded undocumented immigrants from public services and public education); Robert Redding, Jr., *Illegals’ Health Care Costs Increasing*, WASH. TIMES, Sept. 23, 2004, at 31, available at <http://www.washingtontimes.com/metro/20040922-100007-3972r.htm> (discussing Maryland State Comptroller William Donald Shaefer’s assessment that undocumented immigrants are draining the state’s health care system while not assimilating into society). *See also* Lisa Richardson, *Immigrant Health Tab Disputed*, L.A. TIMES, May 18, 2003, at B1 (Barbara Coe, president of the California Coalition for Immigration Reform and coauthor of Proposition 187, the California ballot measure that would have barred undocumented immigrants from many social services, proposes a simple solution for Los Angeles County’s Department of Health Services’ budget crisis: “What has to

providing undocumented immigrants with medical care is \$1.45 billion.<sup>5</sup> However, some scholars insist that undocumented immigrants have a positive effect on the economy by occupying unwanted jobs, paying taxes, and underutilizing public assistance.<sup>6</sup> Regardless, within this population is a subset of individuals whose illegal status is not a product of their own volition—undocumented immigrant children.<sup>7</sup> The Supreme Court has already recognized the unique position of these children in *Plyler v. Doe*,<sup>8</sup> holding that states may not deny free public education to undocumented immigrant children.<sup>9</sup> Yet, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)<sup>10</sup> bars both undocumented children and adults from receiving government assistance for health care beyond emergency care, immunizations, and treatment for communicable diseases.<sup>11</sup>

Many scholars have examined the need to provide all immigrants with health care assistance regardless of their status.<sup>12</sup> However, this Note argues that undocumented children are an especially vulnerable class entitled to health care benefits for reasons analogous to their right to

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happen is that the illegals get out and are kept out.”).

5. Cristina Bolling, *Screening Immigrants in ER May Pay Off in Funds*, CHARLOTTE OBSERVER, Sept. 20, 2004, at 1A. Estimated costs of services for undocumented immigrants can vary substantially. In Maryland, state officials’ estimates for undocumented immigrants’ health care costs range from \$30 million to \$100 million. Redding, *supra* note 4.

6. See generally Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453, 1464–74 (1995); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT’L L. 217, 227–34 (1994). But see Fred Dickey, *Undermining American Workers; Record Numbers of Illegal Immigrants Are Pulling Wages Down for the Poor and Pushing Taxes Higher*, L.A. TIMES MAG., July 20, 2003, at 112 (arguing that rising illegal immigrant populations have detrimental effects on California’s economy).

7. See *infra* notes 75, 111–12 and accompanying text.

8. 457 U.S. 202 (1982).

9. *Plyler*, 457 U.S. at 230; see also *infra* notes 59–63 and accompanying text.

10. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (codified in scattered sections of U.S.C.). See *infra* Part IIA.

11. 8 U.S.C. §§ 1611, 1621 (2000); see also *infra* notes 22–23, 32–36 and accompanying text.

12. Prevailing arguments largely center on public health concerns, especially given the high incidence of communicable diseases among immigrant populations. See, e.g., Janet M. Calvo, *Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs*, 16 N.Y.U. REV. L. & SOC. CHANGE 395, 429–30 (1988) (discussing the inadequacies of emergency Medicaid for screening and preventing contagious diseases and the necessary remedies); Julia Field Costich, *Legislating a Public Health Nightmare: The Anti-Immigrant Provisions of the ‘Contract with America’ Congress*, 90 KY. L.J. 1043, 1058 (2002) (“Because immigrants are less likely than U.S. citizens to have health insurance, and because they often come from regions where communicable diseases are more common than in the U.S., denying them access to diagnosis and treatment of these diseases makes it not only likely that they will suffer readily avoidable consequences themselves, but that they will increase citizens’ exposure.”); Shari B. Fallek, *Health Care for Illegal Aliens: Why it is a Necessity*, 19 HOUS. J. INT’L L. 951, 969–77 (1997) (arguing that the high rates of tuberculosis and other contagious diseases among immigrants affect immigrants and citizens alike).

public education, as decided in *Plyler*. This Note does not contend that *Plyler* has any legally binding affect on PRWORA or the current state of health care for undocumented immigrant children. Rather, although the Court couches its opinion in equal protection terms, its rationale transcends constitutional grounds to form persuasive policy-based reasoning for providing undocumented immigrant children with comprehensive government-sponsored health care benefits.<sup>13</sup>

Part II of this Note examines PRWORA and its impact on health care for undocumented immigrant children, including an overview of how undocumented immigrant children currently receive care.<sup>14</sup> Through an introduction to *Plyler* and *Mathews v. Diaz*,<sup>15</sup> Part II also examines the constitutional rights of undocumented immigrants to public services and reviews the public policy arguments presented in *Plyler*.<sup>16</sup> Part III analyzes possible constitutional challenges to PRWORA and related state statutes that bar undocumented immigrant children from government health care benefits.<sup>17</sup> Additionally, Part III examines *Plyler* and the policy parallels between providing undocumented immigrant children with free public education and affording them government assistance for comprehensive health care.<sup>18</sup> The analysis emphasizes extraordinary circumstances in undocumented immigrant children's lives and the tremendous impact of education and health care. Finally, Part IV suggests how state and federal governments can meet the health care needs of undocumented immigrant children.<sup>19</sup>

## II. OVERVIEW

### A. What “Personal Responsibility” Means for the Health of Undocumented Immigrant Children

When President Bill Clinton signed PRWORA<sup>20</sup> in 1996, the Act created a new classification system for immigrants—“qualified”<sup>21</sup> and “not

13. See *infra* Part II.C–D.

14. See *infra* Part II.A–B.

15. 426 U.S. 67 (1976).

16. See *infra* Part II.C–D.

17. See *infra* Part III.A.

18. See *infra* Part III.B.

19. See *infra* Part IV.

20. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of U.S.C.).

21. Qualified immigrants are lawful permanent residents; refugees; persons granted asylum, withholding of deportation, or conditional entrant status; persons paroled into the United States for at

qualified”—that determined their eligibility for federal and state welfare and public benefits.<sup>22</sup> “Not qualified” individuals, including all undocumented immigrants, are ineligible for all non-emergency public benefits.<sup>23</sup> Even qualified immigrants may not receive federal means-tested benefits for the first five years after their entry into the country unless they entered before the enactment of PRWORA.<sup>24</sup> Although this standard is applicable for both qualified adults and qualified children,<sup>25</sup> the Act explicitly exempts a number of federal means-tested benefits for children from the five-year limitation:<sup>26</sup> school lunch programs, child nutrition programs, foster care assistance, student assistance under the Higher Education Act of 1965<sup>27</sup> and the Public Health Service Act,<sup>28</sup> means-tested programs under the Elementary and Secondary Education Act of 1965,<sup>29</sup> and Head Start.<sup>30</sup>

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least a year; and certain battered spouses and children. 8 U.S.C. § 1641 (2000).

22. *Id.*

23. *Id.* §§ 1611(a), 1611(b)(1), 1621(a), 1621(b)(1–3); for benefits given to most qualified immigrants, see *infra* note 32 and accompanying text.

24. 8 U.S.C. § 1613(a) (2000).

[A]n alien who is a qualified alien . . . and who enters the United States on or after August 22, 1996, is not eligible for any Federal means-tested public benefit for a period of 5 years beginning on the date of the alien’s entry into the United States with a status within the meaning of the term “qualified alien.”

*Id.*; see generally Calvo, *supra* note 12, at 418–20 (discussing restrictions on eligibility of immigrants for Medicaid); Recent Legislation, *Welfare Reform—Treatment of Legal Immigrants—Congress Authorizes States to Deny Public Benefits to Noncitizens and Excludes Legal Immigrants From Federal Aid Programs—Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, *Pub. L. No. 104–193*, 110 *Stat. 2105*, 110 HARV. L. REV. 1191, 1191–92 (1997) (discussing PRWORA’s background and effect on welfare benefits for legal immigrants).

25. See 8 U.S.C. § 1613(a) (2000).

26. *Id.* § 1613(c). Additionally, legislative history indicates that Congress devoted a significant amount of debate to the effect PRWORA would have on children. See Stacey M. Schwartz, *Beaten Before They Are Born: Immigrants, Their Children, and a Right to Prenatal Care*, 1997 ANN. SURV. AM. L. 695, 719–20 (1997) (noting both PWRORA critics and supporters recognized the importance of protecting children). Congress’ desire to protect immigrant children is also evident from the Senate’s approval of an amendment that would have exempted immigrant children from the five-year ban on Medicaid eligibility. Balanced Budget Act of 1997, H.R. 2015, 105th Cong. (1997) 143 CONG. REC. S6647 (daily ed. June 26, 1997).

27. 20 U.S.C. §§ 1070–1099c-2, 1101–1103g, 1134–11235e (2000). The Higher Education Act of 1965 provides financial assistance and special programs to low-income and underrepresented individuals in postsecondary and graduate institutions. See *id.*

28. 42 U.S.C. §§ 241–290b, 292–295p, and 296–297t (2000). Applicable programs of the Public Health Service Act include participation in medical research and investigations, and federal loans for graduate students in related public health fields. *Id.* §§ 241, 292.

29. 20 U.S.C. §§ 6301–6514 (2000). The Elementary and Secondary Education Act of 1965, which was reauthorized and renamed the No Child Left Behind Act in 2002, provides federal funding and sets minimum achievement standards to provide all children with high-quality education. *Id.*

30. 42 U.S.C. §§ 9831–9852 (2000). Administered by the Department of Health and Human Services, the Head Start program is a comprehensive child development initiative for low-income

Conversely, not qualified immigrant children receive no special protections in PRWORA.<sup>31</sup> Thus, PRWORA only provides undocumented immigrant children and other not qualified immigrants with emergency care, immunizations, and treatment for communicable diseases through public assistance.<sup>32</sup> Although undocumented immigrant children have never been eligible for federally-funded health care benefits, before PRWORA some states afforded them state-funded benefits,<sup>33</sup> and many publicly-supported health care providers provided undocumented immigrant children with free or discounted non-emergency care.<sup>34</sup> PRWORA requires these states to enact subsequent laws to “affirmatively” provide undocumented immigrants with such state or locally-funded services if they wish to continue providing them.<sup>35</sup> Moreover, the Act deems that any state choosing to follow the federal classification system for eligibility must use the “least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.”<sup>36</sup> Thus, with states following a federal guideline, undocumented immigrant children cannot even mount strong constitutional challenges under the Fourteenth Amendment.<sup>37</sup>

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children ages birth to five years old and their families. U.S. Department of Health and Human Services, Head Start Bureau, General Information, <http://www.acf.hhs.gov/programs/hsb/about/generalinformation/index.htm> (last visited Sept. 9, 2005).

31. Compare 8 U.S.C. § 1611 (2000) with 8 U.S.C. § 1613(c) (PRWORA’s treatment of most qualified and qualified children).

32. 8 U.S.C. §§ 1611(b)(1), 1621(b) (2000).

33. Texas, California, and New York are among the states that provided undocumented immigrants with publicly-funded care. See Jeffrey T. Kullgren, *Restrictions on Undocumented Immigrants’ Access to Health Services: The Public Health Implications of Welfare Reform*, 93 AM. J. PUB. HEALTH 1630, 1631 (2003).

34. See *id.*

35. 8 U.S.C. § 1621(d) (2000).

A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section *only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.*

*Id.* (emphasis added). Some state entities have questioned the enforceability of this mandate given the absence of penalty provisions. See *infra* note 41.

36. 8 U.S.C. § 1601(7) (2000); see *id.* § 1601(6) (“It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.”).

37. See *Lewis v. Thomson*, 252 F.3d 567, 583 (2d Cir. 2001) (“Although no court of appeals has yet considered [PRWORA’s] denial of prenatal care to unqualified aliens, every court of appeals to consider [PRWORA’s] deprivation of other government benefits to unqualified aliens has found the denial to survive rational basis scrutiny.”). Although the Supreme Court has employed both strict scrutiny and rational basis review of matters pertaining to legal immigrants, the Court has never considered undocumented immigrants a “suspect class” or afforded heightened scrutiny, except in

### B. Undocumented Immigrant Children's Current State of Health

PRWORA creates a dilemma for many states and publicly-funded health care institutions that treat individuals regardless of their immigration status.<sup>38</sup> Since passage of PRWORA, approximately half of the states have enacted affirmative legislation to provide qualified immigrant children with health care benefits lost through the Act.<sup>39</sup> Yet, few have extended these measures to undocumented immigrant children.<sup>40</sup> While some local health care institutions continue to treat all individuals irrespective of immigration status, they do so under threat of legal sanctions.<sup>41</sup>

Consequently, undocumented immigrant children must rely on alternative sources of health care. Community clinics and charities have assumed much of the burden for providing care.<sup>42</sup> Though some community clinics receive government funds, their services are an exception to the restricted government benefits.<sup>43</sup> Furthermore, these clinics are often overtaxed and scarce.<sup>44</sup> In many instances, immigrants depend on “informal or unlicensed health care providers, self-diagnosis, or medications purchased in questionable settings.”<sup>45</sup>

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*Plyler*. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 685–89 (14th ed. 2001); *see infra* Part III.A.

38. *See infra* note 41 and accompanying text.

39. Gabrielle Lessard & Leighton Ku, *Gaps in Coverage for Children in Immigrant Families*, 13 FUTURE CHILD. 101, 108–09 (2003), available at [http://www.futureofchildren.org/usr\\_doc/tfoc13-1g.pdf](http://www.futureofchildren.org/usr_doc/tfoc13-1g.pdf).

40. *Id.* at 109.

41. PRWORA does not explicitly prescribe enforcement or penalty measures, but a Texas Attorney General's 2001 interpretation of the Act concluded that a public hospital district's violation of PRWORA could jeopardize its receipt of state and federal grants and draw legal consequences for “unauthorized expenditure of public funds.” *Whether Harris County Hospital District May Provide Discounted Health Care to Persons Residing in Harris County, Without Regard to Their Immigration or Legal Status*, Op. Tex. Att’y Gen. No. JC-0394, 15–18 (July 10, 2001). The opinion was issued in response to the Harris County Hospital District's request to provide free or discounted nonemergency care to any of its residents, regardless of their immigration status. *Id.* at 1. *See also* Alexander Vivero Neill, Comment, *Human Rights Don't Stop at the Border: Why Texas Should Provide Preventative Health Care for Undocumented Immigrants*, 4 SCHOLAR 405, 421–25 (2002) (discussing the impact of the Attorney General's opinion on immigrants' health care in Texas).

42. For example, through four nonprofit health plans and one nonprofit organization, the California Endowment funded a two-year demonstration project to provide more than 7,500 undocumented immigrant children with subsidized health insurance coverage. *See* Janice Frates et al., *Models and Momentum for Insuring Low-Income, Undocumented Immigrant Children in California*, 22 HEALTH AFF. 259–61 (2003).

43. 8 U.S.C. §§ 1611(b)(1)(D), 1621(b)(4) (2000).

44. Lessard & Ku, *supra* note 39, at 110.

45. *Id.* at 107 (citing LEIGHTON KU & ALYSE FREILICH, KAISER COMMISSION ON MEDICAID AND THE UNINSURED, CARING FOR IMMIGRANTS: HEALTH CARE SAFETY NETS IN LOS ANGELES, NEW

As a whole, undocumented immigrant children receive inconsistent and inadequate health care. According to one study, twenty-five percent of undocumented immigrant children in California have no usual source of care.<sup>46</sup> Comparatively, only four percent of their U.S.-born counterparts have no usual source of care.<sup>47</sup> Twenty-two percent of undocumented infant to eleven-year-olds have not seen a medical doctor in the past twelve months,<sup>48</sup> whereas only eight percent of U.S.-born children of both U.S.-born parents share this situation.<sup>49</sup> Although undocumented immigrant children may receive emergency care legally, their utilization rate is approximately half that of their U.S.-born children counterparts.<sup>50</sup>

These low utilization rates are not an indication that undocumented immigrant children do not need the services. In fact, undocumented immigrant children are in decidedly poorer health than non-immigrant children who have higher utilization rates.<sup>51</sup> Rapid enrollment of more than 7,500 children in pilot health insurance programs for undocumented immigrant children also demonstrates a high demand for health coverage.<sup>52</sup> Therefore, PRWORA's limits on government health care benefits for undocumented immigrant children adversely affect an already disadvantaged and needy population.

YORK, MIAMI, AND HOUSTON (2001)).

46. Nadereh Pourat et al., *Demographics, Health, and Access to Care of Immigrant Children in California: Identifying Barriers to Staying Healthy*, HEALTH POL'Y FACT SHEET (UCLA Center for Health Policy Research), Mar. 2003, at 2, available at [http://www.nilc.org/ciwc/tbls\\_other-mats/Imm\\_Children\\_HA\\_Fact\\_Sheet.pdf](http://www.nilc.org/ciwc/tbls_other-mats/Imm_Children_HA_Fact_Sheet.pdf). The fact sheet based its findings on the 2001 California Health Interview Survey, a collaboration of the UCLA Center for Health Policy Research, the California Department of Health Services, and the Public Health Institute. *Id.*

47. *Id.* at 1. Although approximately nine million children in the United States lack health insurance, most children receive coverage from private health insurance (51 million), Medicaid (15 million), State Children's Health Insurance Program (SCHIP) (3 million), or other forms of coverage (such as military health care) (2 million). Kirsten Wysen et al., *How Public Health Insurance Programs for Children Work*, 13 FUTURE CHILD. 171, 171 (citing R.J. MILLS, U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE: 2000 (2001)), available at [http://www.futureofchildren.org/usr\\_doc/tfoc13-11.pdf](http://www.futureofchildren.org/usr_doc/tfoc13-11.pdf).

48. Pourat et al., *supra* note 46, at 2.

49. *Id.*

50. In the past twelve months, twelve percent of undocumented immigrant children and twenty-two percent of U.S.-born children of both U.S.-born parents have visited the emergency room. *Id.*

51. Five percent of U.S.-born children of both U.S.-born parents and twenty-three percent of undocumented immigrant children are in fair or poor health. Pourat et al., *supra* note 46, at 2.

52. See Frates et al., *supra* note 42, at 260. The California Endowment Project funded these programs, and almost all of the endowment grantees met or exceeded enrollment goals soon after implementation. *Id.*

### C. Constitutional Rights of Undocumented Immigrant Children

PRWORA and the state statutes that bar undocumented immigrant children from government health care benefits<sup>53</sup> raise constitutional questions under the Fifth Amendment Due Process<sup>54</sup> and Fourteenth Amendment Equal Protection Clauses.<sup>55</sup> Constitutional analyses in *Plyler v. Doe*<sup>56</sup> and *Mathews v. Diaz*<sup>57</sup> address these concerns.<sup>58</sup>

In 1982, the Supreme Court in *Plyler* recognized access to free public primary and secondary education as undocumented immigrant children's constitutional right under Fourteenth Amendment equal protection.<sup>59</sup> The class action suit<sup>60</sup> challenged a Texas statute<sup>61</sup> that authorized local school

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53. See Wendy Zimmerman & Karen C. Tumlin, *Patchwork Policies: State Assistance for Immigrants Under Welfare Reform*, 1999 URB. INST. 39–41 (1999), available at <http://www.urban.org/UploadedPDF/occ24.pdf> (examining state responses to PRWORA provisions regarding undocumented immigrants). California has been the most aggressive in eliminating benefits for undocumented immigrants; however, other states have implemented more narrow restrictions. *Id.* at 40–41; see also SHAWN FREMSTAD AND LAURA COX, KAISER COMMISSION ON MEDICAID AND THE UNINSURED COVERING NEW AMERICANS: A REVIEW OF FEDERAL AND STATE POLICIES RELATED TO IMMIGRANTS' ELIGIBILITY AND ACCESS TO PUBLICLY FUNDED HEALTH INSURANCE 16–19 (2004), available at <http://www.kff.org/medicaid/upload/Covering-New-Americans-A-Review-of-Federal-and-State-Policies-Related-to-Immigrants-Eligibility-and-Access-to-Publicly-Funded-Health-Insurance-Report.pdf> (discussing state-funded coverage for immigrants who are ineligible for Medicaid or State Children's Health Insurance Program (SCHIP)).

54. U.S. CONST. amend. V. "No person shall . . . be deprived of life, liberty, or property, without due process of law." *Id.*

55. U.S. CONST. amend. XIV, § 1. "[No State shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

56. 457 U.S. 202 (1982).

57. 426 U.S. 67 (1976).

58. For an overview of undocumented immigrants' modern constitutional rights, see Michael R. Curran, *Flickering Lamp Beside the Golden Door: Immigration, the Constitution, & Undocumented Aliens in the 1990s*, 30 CASE W. RES. J. INT'L L. 57, 101–05 (1998).

59. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

60. In September 1977, the suit was filed in the United States District Court for the Eastern District of Texas on behalf of certain school-age children of Mexican origin residing in Smith County, Texas, who could not prove that they had been legally admitted to the United States and were excluded from the public schools of Tyler Independent School District. *Id.* at 206. Similar suits subsequently filed in the other federal courts were consolidated in the Southern District of Texas. *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 550 (S.D. Tex. 1980). The district court held that the statute violated the Equal Protection Clause of the Fourteenth Amendment and did not achieve a compelling governmental interest. *Id.* at 583–84.

61. TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981).

(a) All children who are citizens of the United States or legally admitted aliens. . . shall be entitled to the benefits of the Available School Fund for that year. (b) Every child in the state in this state who is a citizen of the United States or a legally admitted alien. . . shall be permitted to attend public free schools of the district in which he resides. . . . (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



districts to deny enrollment to undocumented immigrant children.<sup>62</sup> The Court ultimately held that the statutory discrimination violated the Equal Protection Clause because it did not further a substantial state interest.<sup>63</sup>

It is well settled that the Constitution's Equal Protection and Due Process Clauses apply to all undocumented immigrants.<sup>64</sup> In *Plyler*, the more difficult question was what level of scrutiny to apply to a statute discriminating against undocumented immigrant children.<sup>65</sup> The Court noted that undocumented immigrant children are not a "suspect class" and that public education is not a "fundamental right," characterizations that would have given rise to strict scrutiny.<sup>66</sup> However, given the potential

admitted aliens who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

*Id.* Granting the plaintiffs permanent injunctive relief, the United States District Court for the Southern District of Texas found that the statute was inconsistent with the Immigration and Nationality Act and federal laws related to funding and discrimination in education. *Plyler*, 457 U.S. at 208 n.5 (citing *Doe v. Plyler*, 458 F. Supp. 569, 590–92 (E.D. Tex. 1978)). Subsequently, the Court of Appeals for the Fifth Circuit upheld the injunction on different grounds. *Id.* at 208. Although the court did not find that federal law preempted the Texas statute, it held that under equal protection, the statute was "constitutionally infirm regardless of whether it was tested using the mere rational basis standard or some more stringent test." *Id.* at 209 (citing and quoting *Doe v. Plyler*, 628 F.2d 448, 458 (5th Cir. 1980)).

62. *Plyler*, 457 U.S. at 206.

63. *Id.* at 230.

64. *Id.* at 210. The Court said, "Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Id.* (citing *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing v. U.S.*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

65. TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981); *see supra* note 61.

66. *Plyler v. Doe*, 457 U.S. 202, 223 (1982).

Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a "constitutional irrelevancy." Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the matter in which education is provided to its population.

*Id.* (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–39 (1973)). Strict scrutiny under the Fourteenth Amendment requires the demonstration of a compelling state interest to justify unequal protection. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."); *Plyler*, 457 U.S. at 216 (explaining that the court must determine whether or not a statute challenged under the Equal Protection Clause "bears some fair relationship to a legitimate public purpose"). In order for the Court to apply strict scrutiny to state legislation, it must find that the statute disadvantages a "suspect class" or encroaches on a "fundamental right" that is either explicitly or implicitly granted in the Constitution. *Plyler*, 457 U.S. at 216–17. The Court describes "suspect classes" as groups that "have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Id.* at 217 n.14 (citing *San Antonio Indep. Sch. Dist.*, 411 U.S. at 28, *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938)). For example, the Court has traditionally afforded racial classifications strict scrutiny. *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291

impact the statute had on the children's lives and the nation,<sup>67</sup> the Court concluded that the state must demonstrate the rationality of the statute by showing it furthers a substantial goal of the state.<sup>68</sup>

In *Diaz*, lawfully-admitted immigrants challenged a federal statute that conditioned immigrants' eligibility for Medicare benefits on continuous residence for five years and admission for permanent residence.<sup>69</sup> The Court held that the statute did not deprive immigrants of liberty or property without due process of law.<sup>70</sup> At the crux of the Court's reasoning in *Diaz* was its deference to Congress and the President for matters relating to immigration and naturalization.<sup>71</sup> Moreover, the Court emphasized that immigrants' due process rights did not entitle them to all benefits associated with citizenship.<sup>72</sup>

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(1978) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."); *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny."). The Court also grants strict scrutiny for fundamental rights, such as suffrage. *See, e.g., Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding that a voting poll tax was unconstitutional under the Equal Protection Clause because "the right to vote is too precious, too fundamental to be so burdened or conditioned").

67. *See infra* Part III.B.2.

68. *Plyler*, 457 U.S. at 223–24.

In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.

*Id.*

69. *Mathews v. Diaz*, 426 U.S. 67, 70 (1976). The statute in question read as follows:

Every individual who (1) is entitled to hospital insurance benefits under part A, or (2) has attained age 65 and is a resident of the United States, and is either (A) a citizen or (B) an alien lawfully admitted for permanent residence who has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment under this part, is eligible to enroll in the insurance program established by this part.

*Id.* at 70 n.2 (quoting 42 U.S.C. § 1395o (1970 ed. and Supp. IV)). Although two of the plaintiffs in *Diaz* were neither permanent residents nor residents for at least five years, a third plaintiff was a permanent resident who did not meet the durational requirement. *Id.* at 70.

70. *Diaz*, 426 U.S. at 87.

71. *Id.* at 81–82 ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."). The Court distinguished *Graham v. Richardson*, 403 U.S. 365 (1971), which held that state statutes denying welfare benefits to immigrants not meeting a required durational residence violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 84. The *Diaz* Court explained, "it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens." *Id.*

72. *Diaz*, 426 U.S. at 78. The Court reasoned,

[t]he fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of

#### D. Policy Arguments in *Plyler v. Doe*

In *Plyler*, the Court outlined several policy arguments in its rationale.<sup>73</sup> First, the Court repudiated the notion that undocumented immigrant children should be punished for their unlawful presence.<sup>74</sup> Unlike their parents, the Court argued, children can neither remove themselves from the country nor alter their immigration status.<sup>75</sup>

Second, *Plyler* differentiated public education from other forms of welfare through “the lasting impact of its deprivation on the life of the child.”<sup>76</sup> The Court stressed that education is essential to preserve a democratic system of government and provide individuals with the means to lead economically productive lives that benefit all.<sup>77</sup> Indeed, “[b]y denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”<sup>78</sup>

citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification.

*Id.*

73. *Plyler v. Doe*, 457 U.S. 202, 218–30 (1982).

74. *Id.* at 219–20. The Court noted:

[p]ersuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants.

*Id.*

75. *Id.* at 220 (“Their ‘parents have the ability to conform their conduct to societal norms,’ and presumably the ability to remove themselves from the State’s jurisdiction; but the children who are plaintiffs in these cases ‘can affect neither their parents’ conduct nor their own status.’”) (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

76. *Plyler*, 457 U.S. at 221. The Court noted:

[i]lliteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.

*Id.* at 222.

77. *Plyer*, 475 U.S. at 221. “[E]ducation has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.” *Id.*

78. *Id.* at 223. For further discussion about the importance of education and its impact on immigrant children, see Ruby Takanishi, *Leveling the Playing Field: Supporting Immigrant Children from Birth to Eight*, 14 FUTURE CHILD. 61, 64–65 (2004), available at [http://www.futureofchildren.org/usr\\_doc/Ruby\\_Takanishi.pdf](http://www.futureofchildren.org/usr_doc/Ruby_Takanishi.pdf). Scholars make similar arguments about the necessity of adequate health care for children. See generally *id.*; Loretta M. Kopelman & Michael G. Palumbo, *The U.S. Health Delivery System: Inefficient and Unfair to Children*, 23 AM. J. L. & MED. 319, 323 (1997).

The Court also noted undocumented immigrant children's potentially indefinite stay in the country.<sup>79</sup> The Court considered the Attorney General's testimony before Congress on the matter: "[W]e have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community."<sup>80</sup> Also, the Court acknowledged broad federal powers for granting relief from deportation.<sup>81</sup> As a consequence, many undocumented immigrant children would either remain indefinitely in the country under their illegal status or become lawful residents of the United States.<sup>82</sup>

In *Plyler*, the State of Texas argued that the discriminatory statute had the legitimate purpose of stemming illegal immigration.<sup>83</sup> Yet, the Court and immigration scholars agree that illegal immigrants enter the country seeking employment opportunities, not education or health care for their children.<sup>84</sup> Regardless of immigration or citizenship status, ninety percent

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79. *Plyler v. Doe*, 457 U.S. 202, 226, 230 (1982).

80. *Administration's Proposals on Immigration and Refugee Policy: J. Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the H. Comm. on the Judiciary and the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary*, 97th Cong. 9 (1981) (statement of William French Smith, Attorney General), quoted in *Plyler*, 457 U.S. at 218–19; see also U.S. GEN. ACCOUNTING OFFICE, TESTIMONY BEFORE THE SUBCOMM. ON IMMIGRATION, BORDER SECURITY, AND CLAIMS, COMM. ON THE JUDICIARY, H.R. HOMELAND SECURITY: OVERSTAY TRACKING IS A KEY COMPONENT OF A LAYERED DEFENSE, (2003) (identifying weaknesses in the Department of Homeland Security's overstay tracking system and its effects on domestic security), available at <http://www.gao.gov/new.items/d04170t.pdf>; Jerry Seper, *Revolving Door at Border*, WASH. TIMES, July 21, 2004, at A01 ("A monthlong investigation by *The Washington Times* found that a shortage of detention space and lack of manpower force federal authorities to regularly release illegal aliens back on the streets of America—and often to ignore requests to pick up illegals in the custody of state and local officials."); *But see* Alfonso Chardy, *U.S. Agents Trying to Find 400,000 for Deportation*, MIAMI HERALD, Mar. 14, 2004, at 1 (discussing new efforts to identify and deport undocumented immigrants); Cam Simpson et al., *Immigration Crackdown Shatters Muslims' Lives*, CHI. TRIB., Nov. 16, 2003, at 1 (discussing new immigration deportation initiatives targeting men from Islamic countries).

81. *Plyler*, 457 U.S. at 226. "In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed." *Id.*

82. *Plyler*, 457 U.S. at 230. "[T]he record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States." *Id.*

83. *Plyler*, 457 U.S. at 228 ("[A]ppellants appear to suggest that the State may seek to protect itself from an influx of illegal immigrants.").

84. *Id.* ("The dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country, or presumably to the State of Texas, in order to avail themselves of a free education.") (footnote omitted); see Pia Orrenius & Madeline Zavodny, *Immigration Policy: What are the Consequences of an Amnesty for Undocumented Immigrants?*, 9 GEO. PUBLIC POL'Y REV. 21, 24–25 (2004) (discussing how economic motivations and family reunification, rather than welfare and medical services, drive undocumented immigrants to migrate illegally to the United States); Neill, *supra* note 41, at 413 ("The magnet that attracts illegal Mexican migration to the United States is the lure of economic opportunity."). A study on

of uninsured immigrant children have at least one working parent, and more than half have parents with full-time, year-round employment.<sup>85</sup> In fact, since they fear being reported, undocumented immigrants are less likely to use public benefits while still contributing to the local labor force.<sup>86</sup>

The *Plyler* Court also rejected the State's contention that undocumented immigrant children burden its ability to provide high-quality public education.<sup>87</sup> Similarly, providing services to undocumented immigrant children does not prevent the government from providing other children with quality health care. Rather, the American Academy of Pediatrics advocates adequate care for all children, regardless of immigration status,<sup>88</sup> arguing that "[d]enying legal and illegal immigrants access to basic health care would not only deprive them of needed services but also disrupt the provision of services to other children by redirecting resources from providing services to sorting and enforcement of more restrictive eligibility standards."<sup>89</sup> From a public health perspective,

undocumented immigrants receiving dialysis care found that most patients were unaware of their renal problems prior to immigrating, and, in comparison to Americans receiving the same treatment, they were twice as likely to be employed. George N. Coritsidis et al., *The Initiation of Dialysis in Undocumented Aliens: The Impact on a Public Hospital System*, 43 AM. J. KIDNEY DISEASES 424, 430 (2004). *But see* Richard Whitt et al., *Immigration Nation*, ATLANTA J.-CONST., Apr. 25, 2004, at E1 ("The promise of a free education for their children was one factor that brought Rodrigo and Geneva Rea from south-central Mexico to Atkinson County in south Georgia.").

85. ANNE MORSE, NATIONAL CONFERENCE OF STATE LEGISLATURES, SCHIP AND ACCESS FOR CHILDREN IN IMMIGRANT FAMILIES 5 (2005) (citing E. RICHARD BROWN ET AL., UCLA CENTER FOR HEALTH POLICY RESEARCH, ACCESS TO HEALTH INSURANCE AND HEALTH CARE FOR CHILDREN IN IMMIGRANT FAMILIES (1999)), available at <http://www.ncsl.org/programs/health/Forum/pub6682.htm>.

86. *Plyler*, 457 U.S. at 228 ("[T]he available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc."); Costich, *supra* note 12, at 1065 ("One of the many chilling effects on U.S. immigration law is the unwillingness of non-citizen or undocumented parents to enroll their U.S. citizen children in programs for which they are eligible, such as Medicaid or SCHIP."); *see also* Bradley J. Condon & J. Brad McBride, *Do You Know the Way to San José? Resolving the Problem of Illegal Mexican Migration to the United States*, 17 GEO. IMMIGR. L.J. 251, 258 (2003) ("There appears to be no correlation between state of destination of foreign-born residents and the strength of the existing social safety net."); Pourat, *supra* note 46; *cf.* Marc L. Berk et al., *Health Care Use Among Undocumented Latino Immigrants*, 19 HEALTH AFF. 51, 57–58 (2000) (showing undocumented Latino immigrants or their family members seldom use financial public assistance, i.e. social security, but are more likely to use nonfinancial assistance, i.e. food stamps).

87. *Plyler*, 457 U.S. at 229. "[T]he record in no way supports the claim that exclusion of undocumented immigrant children is likely to improve the overall quality of education in the State." *Id.*

88. Costich, *supra* note 12, at 1064.

89. Comm. on Cmty. Health Servs., Am. Acad. of Pediatrics, *Health Care for Children of Immigrant Families*, 100 PEDIATRICS 153, 154 (1997), *quoted in* Costich, *supra* note 12, at 1064–65; *see also* Tal Ann Ziv & Bernard Lo, Denial of Care to Illegal Immigrants-Proposition 187 in California, 332 NEW ENG. J. MED. 1095 (1995).

undocumented immigrant children who receive inadequate health care also unnecessarily expose their citizen siblings<sup>90</sup> and classmates to health risks.<sup>91</sup> The rate of tuberculosis and other infectious diseases is ten to thirty times higher in countries of origin for most immigrants.<sup>92</sup> Once they arrive in the United States, undocumented immigrant children often live in poor conditions, which exacerbate their already vulnerable state.<sup>93</sup> Even though PRWORA permits treatment for communicable diseases, many infectious diseases such as tuberculosis are asymptomatic and thus easily overlooked by laymen.<sup>94</sup>

In 1982, the *Plyler* Court concluded that illegal immigrants did not pose any significant burden on Texas' economy.<sup>95</sup> However, currently, many argue that illegal immigrants significantly drain both state and national economies.<sup>96</sup> In response to a United States Government Accountability Office (GAO) inquiry, a few states reported annual costs for educating undocumented immigrant children to be between \$50 million and \$1.04 billion.<sup>97</sup> While these figures are certainly substantial

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90. Immigration rights advocates often argue that it is illogical to deny undocumented immigrants health care benefits since most immigrant households have mixed immigration statuses. See Costich, *supra* note 12, at 1060 ("Immigrant families with mixed status (e.g., undocumented parents with U.S.-born citizen children) may defer or withhold care for eligible members out of fear that undocumented relatives will be discovered.").

91. See generally Costich, *supra* note 12.

92. Matthew T. McKenna et al., *The Epidemiology of Tuberculosis Among Foreign-Born Persons in the United States, 1986 to 1993*, 332 NEW ENG. J. MED. 1071, 1074 (1995) (citing Mario C. Raviglione, Dixie E. Snider & Arata Kochi, *Global Epidemiology of Tuberculosis: Morbidity and Mortality of a Worldwide Epidemic*, 273 J. AM. MED. ASS'N 220-26 (1995)).

93. Fallek, *supra* note 12, at 970 ("Those involved in migratory behavior are often the poorest. . . who must contend with poor, temporary housing. This forces too many already stressed and sometimes ill individuals into very close proximity in an environment that increases the likelihood of disease transmission.") (citing Pauline Vaillancourt Rosenau et al., *Health and Health Consequences of NAFTA after the Devaluation of the Peso* 18-19 (1995) (citation omitted)).

94. Costich, *supra* note 12, at 1060 ("Latent tuberculosis is by definition asymptomatic, and the symptoms of early disease stages are easily overlooked."); see C. Robert Horsburgh, *Priorities for the Treatment of Latent Tuberculosis Infection in the United States*, 350 NEW ENG. J. MED. 2060, 2066 (2004) (concluding that identifying and fully treating those with latent tuberculosis is integral to eliminating tuberculosis in the United States).

95. *Plyler v. Doe*, 457 U.S. 202, 228 (1982) ("There is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy.").

96. See *supra* note 4 and accompanying text; see also Halle I. Butler, Note, *Educated in the Classroom or on the Streets: The Fate of Illegal Immigrant Children in the United States*, 58 OHIO ST. L.J. 1473, 1486-87 (1998) (noting that current concerns about educating undocumented immigrant children include both economic and social issues).

97. Reported estimates ranged from \$50 million to \$87.5 million in Pennsylvania to \$932 million to \$1.04 billion in Texas. U.S. GOV'T. ACCOUNTABILITY OFF., REPORT TO THE CHAIRMAN, COMM. ON THE JUDICIARY, H.R., ILLEGAL ALIEN SCHOOLCHILDREN: ISSUES IN ESTIMATING STATE-BY-STATE COSTS 13 (2004), available at <http://www.gao.gov/new.items/d04733.pdf>. Of the twenty-two state governments surveyed, only three responded: Texas, Pennsylvania, and North Carolina. *Id.* at 12.

burdens to state budgets, they are the product of speculative assumptions and estimates because schools do not record immigration status data.<sup>98</sup> Estimated variables included the total undocumented immigrant population in the state, the percentage of the undocumented population that is school-aged children, and the percentage of the children actually attending public schools.<sup>99</sup> Consequently, it is difficult to quantify the cost of educating undocumented immigrant children.

### III. ANALYSIS

#### A. *Impact of Plyler v. Doe and Mathews v. Diaz on Undocumented Immigrant Children's Constitutional Right to Health Care*

The *Plyler* Court held that state statutes discriminating against undocumented immigrant children had to further a substantial goal of the state.<sup>100</sup> Unfortunately, even assuming that barring undocumented immigrant children from health care benefits does not further a substantial state interest, the equal protection holding in *Plyler* has limited, if any, legal impact on denying health care benefits to undocumented immigrant children. *Plyler* noted that the federal government has plenary authority to determine immigration policies,<sup>101</sup> and states may follow federal guidelines for treating undocumented immigrants.<sup>102</sup> Whereas no federal rule barred undocumented immigrant children from public schools,<sup>103</sup>

98. *Id.* at 2. Although state governments, school districts, the National Center for Education Statistics (NCES), the Census Bureau, and the Department of Homeland Security collect data on school enrollments, expenditures, and/or estimated immigration populations, none have sufficient data to calculate the number of undocumented immigrant schoolchildren. *Id.* The Census Bureau has proposed a plan to calculate state-by-state undocumented immigrant age-group estimates; however, the data will not be available before 2007–09. *Id.*

99. *Id.* at 13. To calculate its costs, Texas used a nongovernmental organization's estimate of the number of school-aged undocumented immigrant children living in Texas and multiplied that figure by the upper and lower bounds of a range based on the assumption that 66.8 to 74.9 percent of the children were attending public schools. *Id.* Pennsylvania assumed that 10 to 18 percent of the Department of Homeland Security's estimate for undocumented immigrants residing in their state were children attending public schools. *Id.* The state then multiplied this figure by the upper and lower bounds of the range by average per pupil expenditures and added additional costs for supplemental services. *Id.*

100. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

101. See U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have Power . . . To establish a uniform Rule of Naturalization.”).

102. *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982) (“[I]f the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction.” (citing *De Canas v. Bica*, 424 U.S. 351 (1976))).

103. *Plyler*, 457 U.S. at 226 (“[T]he classification reflected in § 21.031 does not operate harmoniously within the federal program.”).

PRWORA excludes undocumented immigrant children from state health care benefits.<sup>104</sup> Thus, given the federal directive on the matter, it is unlikely that *Plyler* will provide constitutional grounds for overturning state statutes limiting undocumented immigrant children's access to state health care benefits.

Without strong equal protection arguments against individual state statutes, the remaining constitutional question is whether PRWORA itself violates undocumented immigrant children's rights to due process under the Fifth Amendment.<sup>105</sup> Because *Diaz* unequivocally held that immigrants' due process rights did not entitle them to all benefits associated with citizenship,<sup>106</sup> it is unlikely that its precedence will result in ruling PRWORA in violation of immigrants' due process rights. Specific to undocumented immigrants, the Court maintained in dictum, "The illegal entrant [cannot] advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests."<sup>107</sup> However, in light of the Court's subsequent *Plyler* decision,<sup>108</sup> it is possible that the Court would make an exception for undocumented immigrant children. Nevertheless, given the Court's tolerance for discrimination against lawfully admitted immigrants in *Diaz*, the Court is not likely to rule that PRWORA's discrimination against illegal immigrant children violates their due process rights.

Based on *Plyler* and *Diaz*, PRWORA and state statutes denying undocumented immigrant children health care benefits are likely to survive Fifth and Fourteenth Amendment challenges. However, the Court's treatment of undocumented immigrant children in *Plyler* transcends constitutional relevancy to form compelling policy arguments that support providing undocumented immigrant children with government health care benefits. Regardless of its legal applicability to PRWORA and related state statutes, *Plyler* recognizes the unique characteristics of undocumented immigrant children. The next section discusses these characteristics and why undocumented immigrant children are deserving of government health care benefits.

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104. 8 U.S.C. § 1621(a) (2000); *see supra* note 23 and accompanying text.

105. *See supra* note 64 and accompanying text.

106. *See supra* note 72 and accompanying text.

107. *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

108. *See supra* notes 65–68 and accompanying text.



B. “Special Members of [an] Underclass”<sup>109</sup>

1. *Penalizing Children for Their Parents’ Actions is Unjust*

Undocumented immigrant children’s illegal status disqualifies them from receiving government health benefits.<sup>110</sup> It is the same status that excluded children from Texas’ public schools under the statute overturned in *Plyler*. However, as the *Plyler* Court noted, children “can affect neither their parents’ conduct nor their own status.”<sup>111</sup> Undocumented immigrant children today have no more control over their immigration status than undocumented immigrant children did in 1982 and remain “special members of [an] underclass.”<sup>112</sup> Though it may seem just to withhold government health care benefits from persons unlawfully present in the United States, the justification is less persuasive when the persons affected have little or no responsibility for their unlawful presence.<sup>113</sup> Thus, punishing children for their parents’ illegal actions violates fundamental notions of justice and fails to effectively deter the parents.<sup>114</sup>

2. *Excluding Undocumented Immigrant Children Has A Lasting Impact*

Neither public education nor health care are rights granted to individuals by the Constitution. Nevertheless, *Plyler* granted access to public education because of the unique role of education in society.<sup>115</sup> Similar to education, health care is distinguishable from other welfare

109. *Plyler v. Doe*, 457 U.S. 202, 219 (1982).

110. 8 U.S.C. §§ 1611(a), 1621(a) (2000).

111. *Plyler*, 457 U.S. at 220 (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

112. *Plyler*, 457 U.S. at 220.

113. See *supra* notes 111–12 and accompanying text. See also *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 573 (S.D. Tex. 1980). In that trial, one undocumented immigrant girl testified that she entered the country at five months old and was the daughter of a United States citizen and a documented resident immigrant. *Id.* However, due to difficulty in obtaining her Mexican birth certificate, she remained an undocumented immigrant. *Id.* Another undocumented child had siblings born in the United States, and therefore, they were citizens. *Id.* The court noted, “[t]hose who were born a few years prior to the unlawful entry are no more responsible for it than those born shortly afterwards.” *Id.*

114. *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

[V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . 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 . . . child is an ineffectual—as well as unjust—way of deterring the parent.

*Id.* (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) (footnote omitted)).

115. See *supra* notes 76–78 and accompanying text.

benefits through the lifetime impact its absence has on the life of a child. Adequate health care is vital to the very being of a child and is inextricably tied to all other determinants of a child's ability to thrive, including education.<sup>116</sup> Furthermore, the United States affords undocumented immigrant children the right to free public education. However, children may not be able to succeed in the classroom if they are in poor health.<sup>117</sup> In his concurring opinion in *Plyler*, Justice Blackmun commented, "Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve."<sup>118</sup> Similarly, without adequate health care, undocumented immigrant children remain at an overwhelming competitive disadvantage in the classroom,<sup>119</sup> and the opportunities afforded them and the nation through *Plyler* remain elusive.<sup>120</sup>

### 3. *Undocumented Immigrant Children May Never Be Deported*

The potential lifetime effect of discriminating against undocumented immigrant children is even more troubling in light of the fact that many of the children may remain in the United States indefinitely, and some may even become lawful residents.<sup>121</sup> In the *Plyler* decision, evidence indicated that the government lacked the motivation and capability to identify and

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116. See Takahashi, *supra* note 78, at 63 (arguing "family economic security, access to health care, and access to sound early education" is the "three-legged stool of child well-being by age eight").

117. See Kopelman & Palumbo, *supra* note 78, at 323 ("Children who are sick cannot compete as equals and thus are denied equality of opportunity with other children."); Takahashi, *supra* note 78, at 64 ("The capacity of all children to do well in school is related to several factors, including their health status . . .").

118. *Plyler v. Doe*, 457 U.S. 202, 234 (1982).

119. See *supra* note 117 and accompanying text.

120. See *supra* notes 117–18 and accompanying text.

121. See *Plyler v. Doe*, 457 U.S. 202, 230 (1981) ("[T]he record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States."); see also *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 597 (S.D. Tex. 1980) ("One fact remains free from serious dispute: the great majority of the undocumented children who have been or would be excluded from the public schools pursuant to the State statute are or will become permanent residents of this country."); Brad Heath, *Immigrant Cases in Legal Limbo*, DETROIT NEWS, June 1, 2004, at A1 (reporting on the two-year backlog in Michigan immigration courts to decide whether illegal immigrants may remain in the country). At the *In re Alien Children* trial, Bishop John Edward McCarthy aptly testified:

We are keeping certain people poor, and what we are manufacturing now is a monumental social cost to our society ten and fifteen and twenty years from now . . . . We are manufacturing ignorance; to be ignorant in society is to be nonproductive; to be nonproductive means for many instances to be forced into a state of crime . . . . [W]hether it be right now in the form of modest increases in tuition, in public school operating cost, or . . . in terms of social cost . . . fifteen years from now, we will pay this bill . . . .

*In re Alien Children Educ. Litig.*, 510 F. Supp. at 597.

deport undocumented immigrants.<sup>122</sup> Although the post-September 11 United States is more motivated to identify and deport illegal immigrants,<sup>123</sup> enforcement officials still lack the resources to fully enforce immigration laws.<sup>124</sup> Moreover, an undocumented child's immigration status is likely to change. Each year, more than 100,000 undocumented immigrants change their status by obtaining legal residence or valid immigration visas.<sup>125</sup> Additionally, it is likely that undocumented immigrant children in particular may become lawful residents through marriage to a citizen.<sup>126</sup> Therefore, excluding undocumented immigrant children from government health care benefits may impose irreversible health and social consequences on the basis of a tenuous legal status.

#### 4. *Excluding Undocumented Immigrant Children is an Ineffective Method of Deterring Illegal Immigration*

Both the State of Texas and Congress justified their restrictions against undocumented immigrant children as deterrents for illegal immigration.<sup>127</sup> However, undocumented immigrants migrate chiefly for economic motivations, rather than welfare benefits.<sup>128</sup> One student scholar notes, "Even if denied preventative care, undocumented immigrants will not simply shrug their shoulders and return home. Failure to provide this care will only leave undocumented immigrants vulnerable to 'irreversible pain, disability and even loss of life' with no ability to respond."<sup>129</sup> Furthermore, immigrants may not interpret exclusion from government health benefits as exclusion from all health services. As previously discussed, undocumented immigrants receive care from community clinics, charities,

122. See *supra* note 80 and accompanying text.

123. See, e.g., Chardy, *supra* note 80, at 1 ("Federal immigration officials, in a significant strategy shift that is sending shudders through immigrant communities, are for the first time aggressively tracking down foreign nationals who have been ordered deported but who have managed to evade capture."); Simpson et al., *supra* note 80, at 1 (discussing the U.S. government's deportation of more than 13,000 Muslim men following September 11th for "high national security concerns").

124. See, e.g., U.S. GEN. ACCOUNTABILITY OFFICE, *supra* note 80, at 16 ("Weaknesses in [the Department of Homeland Security's] current overstay tracking system and the magnitude of the overstay problem make it more difficult to ensure domestic security."); see also Seper, *supra* note 80, at A01.

125. U.S. IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 1, at 11.

126. See *supra* note 125 and accompanying text.

127. *Plyler*, 457 U.S. at 228; 8 U.S.C. § 1601(6) (2000) ("It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.").

128. See *supra* note 84 and accompanying text.

129. Neill, *supra* note 41, at 429 (quoting *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 261 (1974)).

and informal or unlicensed practitioners.<sup>130</sup> In reality, these sources of care are overextended and unable to adequately meet the needs of undocumented immigrant children.<sup>131</sup> Some immigrants may even conclude that the emergency care that they and their children may receive is sufficient; however, emergency care alone is both inadequate and expensive.<sup>132</sup> Thus, denying undocumented immigrant children health care benefits will only cause harm without deterring their parents from unlawful conduct.<sup>133</sup> If the government seeks to discourage illegal immigration, it should focus its efforts instead on enforcing or modifying existing laws against employing undocumented immigrants.<sup>134</sup>

5. *Exclusion of Undocumented Immigrant Children is Not Likely to Improve the Overall Quality of Health Care*

Among the factors considered in *Plyler* was the potential negative effect undocumented immigrant children had on the quality of Texas' public education.<sup>135</sup> The Court found that excluding this group of children was unlikely to improve the overall quality of the state's education system.<sup>136</sup> The analogous argument holds true for undocumented immigrant children's impact on the health care system. In fact, not only does the exclusion of undocumented immigrant children not improve the quality of health care in the United States, it is potentially detrimental to the health of other children.<sup>137</sup> Thus, providing health care benefits to undocumented immigrant children would preserve the quality of care for all children. By deferring treatment until they qualify for emergency care, individuals with communicable diseases expose countless others to illness.<sup>138</sup> For undocumented immigrant children, the exposed population likely includes their classmates. Communicable diseases do not

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130. See *supra* notes 42, 45 and accompanying text.

131. See *supra* notes 44, 51–52 and accompanying text.

132. See *infra* notes 152–56 for discussion on health and economic benefits of preventative care over emergency care.

133. See *supra* Part III.B.4.

134. See Orrenius & Zavodny, *supra* note 84, at 30–32 (proposing that guest worker program combined with enforcement of legal status at workplaces would most effectively discourage illegal immigration). *But see* Condon & McBride, *supra* note 86, at 292–294 (arguing that amnesty and guest worker programs will be insufficient in stemming illegal immigration from Mexico unless they are coupled with efforts to improve conditions and stimulate Mexico's economy).

135. *Plyler v. Doe*, 457 U.S. 202, 229 (1982).

136. *Id.*

137. See *supra* Part III.B.5 and accompanying text.

138. See *supra* notes 90–94 and accompanying text.

discriminate according to immigration status; hence, preventative health care benefits should not do so either.

6. *Possible Economic Burdens Do Not Outweigh Undocumented Immigrant Children's Well-Being*

Although *Plyler* found that illegal immigrants did not pose any significant burden on Texas' economy,<sup>139</sup> the issue remains at the center of much debate.<sup>140</sup> Some critics even contend that the *Plyler* Court could not have anticipated the current consequences of illegal immigration on the education system, and therefore, the decision is no longer good law.<sup>141</sup> However, the current cost of educating undocumented immigrant children is uncertain,<sup>142</sup> and the GAO warns that concern about costs may be unnecessarily heightened because general education costs are high and the undocumented immigrant population is estimated to be large.<sup>143</sup> Given the variables involved in estimating the number of undocumented immigrant children attending public schools,<sup>144</sup> the economic impact of educating them is difficult to quantify.

Similarly, opponents to educating undocumented immigrant children also allege that the undocumented immigrant population is draining the health care system.<sup>145</sup> However, like the rise in education costs,<sup>146</sup> skyrocketing costs for the entire health care system, irrespective of immigrant care, may be the cause of these outcries. In 2001 alone, state and federal governments spent a total of \$225 billion on Medicaid, including \$34 billion to cover fifteen million children.<sup>147</sup> It is also unlikely that health care for undocumented immigrant children has or would have damaging economic effects on states. First, all immigrant children

139. *Plyler*, 457 U.S. at 228.

140. See *supra* notes 4–6 and accompanying text.

141. See generally Butler, *supra* note 96, at 1485 (discussing critics' argument that "the ever-growing illegal immigrant population has consequences in the United States today that were unforeseeable in 1982").

142. See *supra* notes 97–99 and accompanying text.

143. U.S. GOV'T. ACCOUNTABILITY OFFICE, *supra* note 97, at 4. Total expenditures for primary and secondary public schools across the nation in the 1999–2000 school year were \$359 billion. *Id.* at 5.

144. See *supra* notes 98–99 and accompanying text.

145. See, e.g., Richardson, *supra* note 4, at B1 (discussing how some Californians blame undocumented immigrants for Los Angeles County Department of Health Services' budget crisis).

146. See *supra* note 143.

147. WYSEN ET AL., *supra* note 47, at 174 (citing ANDY SCHNEIDER, KAISER COMMISSION ON MEDICAID AND THE UNINSURED, THE MEDICAID RESOURCE BOOK 83 (2002)).

underutilize health care services in comparison to citizen populations.<sup>148</sup> Second, although it is difficult to estimate the population of undocumented immigrant children, even the most generous calculations are a small fraction of the fifteen million children currently receiving Medicaid.<sup>149</sup> In 2001, an estimated 341,000 undocumented immigrant children lived in California,<sup>150</sup> where over forty percent of the nation's total undocumented immigrant population resides.<sup>151</sup> Thus, the undocumented immigrant children population is relatively small and will have minimal impact on existing costs and care.

Rather than increasing costs, providing undocumented immigrant children with government health care assistance might actually lower costs, since it provides a consistent source for preventative care.<sup>152</sup> Instead of seeking costly emergency care for conditions complicated by delayed treatment,<sup>153</sup> undocumented immigrant children may remedy ailments with less expensive preventative care before the conditions worsen.<sup>154</sup> California's current system for enrolling undocumented immigrants in emergency Medicaid prior to an emergency occurring illustrates the advantages of providing benefits before the crisis.<sup>155</sup> In comparison to states that enroll undocumented immigrants on an ad hoc basis after an emergency occurs, California is able to cover far more immigrants at a much lower per capita cost.<sup>156</sup>

Although the economic burden of providing for undocumented immigrant children is far more contentious today than it was when the Court decided *Plyler*,<sup>157</sup> the precise cost of undocumented immigrant children on state and federal budgets remains uncertain. Often lost in lengthy debates about the costs of education and health care for undocumented immigrant children is the principle that economic cost does

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148. See *supra* notes 48–50 and accompanying text.

149. See Wysen, *supra* note 47, at 171.

150. See Pourat et al., *supra* note 46, at 1.

151. U.S. IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 1, at 15.

152. See *supra* Part III.B.5.

153. See *supra* note 90 and accompanying text.

154. Treating advanced diseases is more costly to both the individual and the general public if the disease is communicable. Costich, *supra* note 12, at 1069 (“The cost to a community of an outbreak of multiple-drug-resistant tuberculosis . . . far exceeds the cost of providing screening and treatment for persons with latent forms of the disease before they progress to the level of requiring drug regimens that cost thousands of dollars per person.”).

155. Lessard & Ku, *supra* note 39, at 111–12 (citing LEIGHTON KU & B. KESSLER, URBAN INSTITUTE, REPORT TO THE OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, THE NUMBER AND COST OF IMMIGRANTS ON MEDICAID: NATIONAL AND STATE ESTIMATES (1997)).

156. *Id.* (citing Ku & Kessler, *supra*).

157. See *supra* notes 95–98 and accompanying text.

not justify conditioning benefits that are fundamental to a child's well-being.<sup>158</sup> Hence, possible economic burdens for the government should not bar undocumented immigrant children from receiving health care benefits.

#### IV. CONCLUSION

The United States should accord undocumented immigrant children the same health care benefits it provides other children through Medicaid and SCHIP.<sup>159</sup> Although legal precedent does not provide compelling constitutional arguments,<sup>160</sup> policy arguments are persuasively in favor of amending PRWORA to exempt children from its bar on public benefits for undocumented immigrants.

Although Congress should amend PRWORA to give undocumented immigrant children access to government health care benefits, legal eligibility alone will not provide undocumented immigrant children the health care they need. Given undocumented immigrant children's underutilization of the emergency care already legally afforded them,<sup>161</sup> it is unlikely that they would take full advantage of government health care benefits. Thus, availability of government health care benefits for undocumented immigrant children must be coupled with tremendous outreach and enrollment efforts.<sup>162</sup> Furthermore, under existing allowances in PRWORA, Congress and the states should also make larger investments in maintaining and developing community clinics, since many undocumented immigrant children currently rely on their services for care.<sup>163</sup>

Undocumented immigrant children are a special subclass entitled to government health care assistance. Unlike the children in *Plyler*, undocumented immigrant children without government health care under PRWORA are unlikely to succeed on constitutional grounds.<sup>164</sup> Nevertheless, arguments advanced in *Plyler* demonstrate the impact of

158. See Part III.B.3 for discussion about the fundamental nature of education and health care for children.

159. For an explanation of how Medicaid and SCHIP work and provide health care for children, see WYSEN et al., *supra* note 47, at 174–81.

160. See *supra* Part III.A.

161. See *supra* notes 50–51 and accompanying text.

162. Outreach and enrollment efforts should mirror successful state plans for enrolling legal immigrant children in state health care benefits. See MORSE, *supra* note 85, at 11–13. Methods include bilingual informational and application materials, interpreters, application assistance, and partnerships with community organizations, ethnic associations and businesses that serve immigrants. *Id.* at 11.

163. See *supra* notes 42–44 and accompanying text.

164. See *supra* Part III.A.

education and uniqueness of these innocent children. Analogous arguments for providing undocumented immigrant children with health care benefits should afford them heightened protection.

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