

# TO EDUCATE OR NOT TO EDUCATE: THE PLIGHT OF UNDOCUMENTED ALIEN CHILDREN IN TEXAS

The burgeoning growth of illegal migration into the United States over the last two decades<sup>1</sup> has encouraged the search for alternative means<sup>2</sup> to regulate the flow of undocumented aliens<sup>3</sup> into this country.

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1. The number of apprehended deportable aliens increased twenty-fold from 1967 to 1978. UNITED STATES INTERAGENCY TASK FORCE ON IMMIGRATION POLICY, STAFF REPORT, DEPARTMENTS OF JUSTICE, LABOR AND STATE 30 (1979) [hereinafter cited as INTERAGENCY REPORT]. In 1977, the Immigration and Naturalization Service (INS) apprehended 1,033,427 deportable aliens. SENATE COMM. ON THE JUDICIARY, 96TH CONG., 1ST SESS., U.S. IMMIGRATION LAW AND POLICY: 1952-1979, at 71 (Comm. Print 1979) [hereinafter cited as JUDICIARY REPORT OF 1979]. See generally Nafziger, *A Policy Framework for Regulating the Flow of Undocumented Mexican Aliens into the United States*, 56 ORE. L. REV. 63, 97 (1977); Salinas & Torres, *The Undocumented Mexican Alien: A Legal, Social and Economic Analysis*, 13 HOUS. L. REV. 863, 876-81 (1976).

2. Existing law and enforcement practices sufficiently controlled earlier periods of substantial illegal migration following the First and Second World Wars and the Korean War. Historically, economic factors in both the United States and Mexico encouraged the periods of high legal and illegal migration. Beginning in 1971, Congress began to search for new solutions to the illegal migration problem, concluding that the existent laws were relatively ineffectual. See INTERAGENCY REPORT, *supra* note 1, at 396-401; JUDICIARY REPORT OF 1979, *supra* note 1, at 71-76. In 1976 Congress passed a law limiting each country to a 20,000 immigrants per year entry quota based upon a preference system favoring family reunification and skilled workers. Act of Oct. 20, 1976, Pub. L. No. 94-571, 90 Stat. 2703. Prior to the Act, only a 120,000 immigrant visa ceiling for all countries in the western hemisphere limited Mexican immigration. JUDICIARY REPORT OF 1979, *supra* note 1, at 64, 69. In 1977 the Judiciary Committee failed to report out a bill presented by Rep. Rodino, H.R. 9531, 95th Cong., 1st Sess. 123 CONG. REC. 33,493 (1977), that would have imposed fines up to \$1000 per violation on civil employers for hiring undocumented aliens and granted amnesty residence to those persons entering the country unlawfully before January 1, 1970. Bernsen, *Undocumented Aliens: Current Legislative Proposals*, in IN DEFENSE OF THE ALIEN 133-37 (1979). See also UNITED STATES SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, 96TH CONG., 2D SESS., REPORT TO CONGRESS (Comm. Print 1980).

The Reagan Administration has drafted a number of proposals based on a bipartisan select committee study, which former President Carter initially commissioned in 1977. Both the Senate Judiciary Subcommittee on Immigration and Refugee Policy and the House Judiciary Subcommittee on Immigration, Refugees, and International Law began hearings on proposals for a new national immigration policy in September 1981. According to Attorney General William French Smith, the Administration seeks to stem the tide of undocumented aliens by utilizing civil fines of \$500 to \$1,000 per offense and injunctions against employers knowingly hiring undocumented aliens. The Administration, however, proposes granting "renewable term temporary residen[cy]" and eventual permanent resident status for undocumented aliens residing in this country before January 1, 1980. See *September Hearings Set by House, Senate Panels on U.S. Immigration Policy*, 39 CONG. Q. 1445 (1981) [hereinafter cited as *September Hearings*]. See also SELECT COMMISSION ON IMMIGRATION & REFUGEE POLICY, FINAL REPORT ON U.S. IMMIGRATION POLICY & THE NATIONAL INTEREST, 97th Cong., 1st Sess. (1981) [hereinafter cited as FINAL REPORT]; SELECT COMMISSION IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY & THE NATIONAL INTEREST (1981) (Supp. to FINAL REPORT, *supra*) [hereinafter cited as STAFF REPORT].

Currently, the Immigration and Naturalization Service (INS) estimates that from 3.5 to 6 million undocumented aliens are present within our nation at any one time.<sup>4</sup>

The massive influx of undocumented Mexican aliens<sup>5</sup> raises a conflict of interest in American society. On the one hand, accommodation of unskilled farm labor needs in the Southwest, a substantial benefit to the economy, tacitly encourages illegal immigration.<sup>6</sup> On the other

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3. This Note uses the term "undocumented alien" throughout rather than the better-known expression "illegal alien." The Immigration and Nationality Act of 1952 does not define the latter term. 8 U.S.C. § 1101 (1976). Undocumented aliens include aliens who violate the federal immigration laws by entering the country with fraudulent documents or without inspection, by entering lawfully but overstaying the allotted visa period, or by breaching the terms of their lawful entry visa. See INTERAGENCY REPORT, *supra* note 1, at iii; H.R. DOC. No. 202, 95th Cong., 1st Sess. (1977). See also STAFF REPORT, *supra* note 2, at 8.

4. Reliable information concerning the number and characteristics of undocumented aliens is in woefully short supply. *Doe v. Plyler*, 458 F. Supp. 569, 578 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981); FINAL REPORT, *supra* note 2, at 36. As of 1979, the INS Commissioner estimated that the undocumented population ranged from 3 to 6 million because of its general seasonal nature. INTERAGENCY REPORT, *supra* note 1, at 30. In February 1981 the President's Select Commission on Immigration and Refugee Policy concluded that the figure fluctuated between 3.5 and 6 million. Some commentators have referred to more substantial federal estimates. See generally Fogel, *Illegal Aliens: Economic Aspects and Public Policy Alternatives*, 15 SAN DIEGO L. REV. 63 (1977) (4 to 12 million range); Kane & Muñoz, *Undocumented Aliens and the Constitution: Limitations on State Action Denying Undocumented Children Access to Public Education*, 5 HASTINGS CONST. L.Q. 461, 461 n.1 (1978) (6 to 10 million range). See also *United States v. Ortiz*, 422 U.S. 891, 899 n.1 (1975) (Burger, C.J., concurring) ("[t]he Court today recognizes that as many as 12 million illegal aliens are now present in this country").

The most recent estimate, based on a report made by the Census Bureau, is that between 3.5 and 6 million undocumented aliens are in this country. FINAL REPORT, *supra* note 2, at 36, 73.

5. This Note will focus on undocumented Mexican aliens because they constitute the majority of undocumented aliens, particularly in Texas. See INTERAGENCY REPORT, *supra* note 1, at 30. See also *United States v. Brignoni-Ponce*, 422 U.S. 873, 879 n.5 (1975) (92% of the deportable aliens arrested in 1974 were Mexicans). Of the undocumented aliens within the United States, officials estimate that slightly less than one-half are Mexican nationals. See FINAL REPORT, *supra* note 2, at 36.

6. The Fifth Circuit recognized that "[i]llegal aliens can generally be hired to work for substandard wages under substandard conditions, which results in significant savings to their employers . . . [and which may be] passed on to consumers . . ." *Doe v. Plyler*, 628 F.2d 448, 451 n.7 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981). The main incentive behind illegal migration from Mexico is employment opportunities. Most undocumented aliens (as many as 90%) are young adult males who work in the United States part of the year and then return to their families in Mexico. *Doe v. Plyler*, 458 F. Supp. 569, 578 n.11, 585 n.22 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981). The Fifth Circuit has stressed that "Texas has declined to enact the measure most likely to result in lessening the incentive to illegally enter the United States." 628 F.2d at 461. For other material contending that exploited undocumented labor contributes overall to the American economy, see *United States v. Ortiz*, 422 U.S. 891, 900-04 app. (1975) (Burger, C.J., concurring); TEX. ADVISORY COMM., U.S. COMM'N ON CIV.

hand, the sheer number of undocumented Mexicans in contiguous states raises complex issues.<sup>7</sup> Displacement of legal residents from jobs during a time of high unemployment,<sup>8</sup> defeat of labor and workplace reform,<sup>9</sup> and unfair depletion of local resources and government benefits<sup>10</sup> are major concerns.

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RIGHTS, A SURVEY OF THE UNDOCUMENTED POPULATION IN TWO TEXAS BORDER AREAS 39 (1978), *noted in* 16 Hous. L. Rev. 667, 691 n.175 (1979). *See generally* A STUDY OF THE SOCIO-ECONOMIC IMPACT OF ILLEGAL ALIENS ON THE CITY OF SAN DIEGO, SAN DIEGO COUNTY (1977), *noted in* Kane & Muñoz, *supra* note 4, at 464 n.16. *See also* Cooper, *Labor Law: Undocumented Alien Employees, Bargaining Orders, Exhaustion and Other 7th Circuit Cases*, 56 CHI.-KENT L. REV. 303, 313 (1980); Note, *Right of Undocumented Children to Attend Public Schools in Texas*, 4 CHICANO L. REV. 61, 66 (1977).

7. It is estimated that as many as 675,000 undocumented aliens, predominantly from Mexico, are present in Texas. *See* Boe v. Wright, 648 F.2d 432, 439 n.12 (5th Cir. 1981).

8. Both courts and commentators recognize the negative impact of undocumented laborers on the employment opportunities available to legal aliens and citizens of similar socioeconomic stature. *See* De Canas v. Bica, 424 U.S. 351, 356-57 (1976); Doe v. Plyler, 628 F.2d 448, 551 n.7 (5th Cir. 1980); Doe v. Plyler, 458 F. Supp. 569, 585 n.22 (E.D. Tex. 1978); INTERAGENCY REPORT, *supra* note 1, at 21; SUBCOMM. OF THE HOUSE COMM. ON THE JUDICIARY, 93RD CONG., 1ST SESS., ILLEGAL ALIENS: ANALYSIS AND BACKGROUND 12 (Comm. Print 1977) [hereinafter cited as JUDICIARY REPORT OF 1977]; Nafziger, *A Policy Framework for Regulating the Flow of Undocumented Mexican Aliens into the United States*, 2 I. & N.L. REV. 177, 183-86 (1978). *See also* Catz, *Regulating the Employment of Illegal Aliens: De Canas and Section 2805*, 17 SANTA CLARA L. REV. 751 (1977); Reubens, *Aliens, Jobs and Immigration Policy*, 3 I. & N.L. REV. 649 (1979-80); Rodino, *The Impact of Immigration on the American Labor Market*, 27 RUTGERS L. REV. 245 (1974).

Despite the statistics indicating that undocumented aliens cause job displacement, some authorities contend that they represent an additional rather than substitute labor source. Undocumented aliens take many "undesirable" jobs and may induce some industries to remain in the United States rather than move abroad. *See* FINAL REPORT, *supra* note 2, at 39-40.

9. The Supreme Court has recognized that "acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions." *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976).

According to the executive branch, "[i]t is calculated that an illegal worker population in the United States of roughly 4 million would cause the wages of competing low-skill workers to decline by approximately 15 percent." INTERAGENCY REPORT, *supra* note 1, at 22. *See also* FINAL REPORT, *supra* note 2, at 40-41.

10. Existing studies tend to refute this concern. Undocumented aliens apparently shy away from public assistance because they are afraid to risk exposure of their identities to authorities and because there is no welfare tradition in Mexico. *Doe v. Plyler*, 458 F. Supp. 569, 578 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *prob. juris noted*, 101 S. Ct. 2044 (1981). Further, "[t]he statistical evidence is threadbare . . . Much of the problem, again, seems to involve projected anxieties. In general, the presence of [undocumented] aliens 'is always perceived as a threat by local communities until it is discovered that immigrants . . . put a high premium on self-help and self-sufficiency.'" Nafziger, *supra* note 8, at 188-89.

According to the Select Commission's Final Report, 70% of undocumented aliens pay taxes.

Congress' unwillingness to control effectively the flow of undocumented Mexican aliens across the 889 mile Texas-Mexico border encourages states to address "a pressing national problem"<sup>11</sup> in a piecemeal fashion.<sup>12</sup> In 1975 the Texas legislature concluded that the presence of undocumented alien children in state public schools detracts from the quality of public education for legal resident children, and thus enacted a law denying undocumented alien children free public education.<sup>13</sup>

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*See* FINAL REPORT, *supra* note 2, at 38. Governor Babbit of Arizona believes "that through work [undocumented aliens] contribute much and require little from the host society." STAFF REPORT, *supra* note 2, at 58.

11. *Certain Named & Unnamed Non-Citizen Children v. Texas*, 448 U.S. 1327, 1331 (Powell, Circuit Justice, 1980) (recognizing that, given the rising number of unlawful entrants, the illegal migration problem is of national scope). *See* FINAL REPORT, *supra* note 2, at 35-36. The undocumented aliens also consist of large numbers from the Dominican Republic, El Salvador, Haiti, South America, and Asia, residing in all parts of this country. *Id.*

12. Due to Congress' inability to pass legislation restricting employment of undocumented alien workers, some states passed laws designed to lessen the impact of illegal migration. *See* note 2 *supra*. The California statute states that "[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." CAL. LAB. CODE § 2805 (West Supp. 1976). *See* CONN. GEN. STAT. § 31-51k (1979); KAN. STAT. ANN. § 21-4409 (Supp. 1980). *See generally* 2 A. MUTHARIKA, *THE ALIEN IN AMERICAN LAW* 76-87 (1981).

Other than Texas, however, no state law presently denies undocumented alien children a free public education. *Certain Named & Unnamed Non-Citizen Children v. Texas*, 448 U.S. 1327, 1328 (Powell, Circuit Justice, 1980). The district court in *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 578-79 & n.88 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981), found that free public education is not a "significant attraction" for undocumented aliens. The court recognized various studies indicating that of the approximately 12% of undocumented Mexican nationals who permanently reside in the United States, between 21% and 29% have school-age children. Out of the entire undocumented population in our country, an estimated 3.7% of the undocumented aliens have children in school. *Id.* at 578 n.83. *Cf.* *Boe v. Wright*, 648 F.2d 432, 437 & n.7 (5th Cir. 1981) (Reavely, J., concurring) (citing the Dallas Independent School District's projection that 2,000 to 5,000 undocumented aliens would enroll in the district in addition to the 120,000 student total enrollment).

13. *See* TEX. EDUC. CODE ANN. tit. 2, § 21.031 (Vernon Supp. 1980). No legislative history accompanies § 21.031. The bill's sponsor, State Representative Ruben Torres, introduced a resolution into the Texas House of Representatives stating, "[a]s the number of illegal aliens in Texas continues to increase, many financially troubled districts find it difficult to provide educational services for alien children without adversely affecting the overall quality of such services." Note, *supra* note 6, at 62 n.11. In a letter dated March 14, 1975, Rep. Torres indicated to Rep. Massey that he primarily intended the law to "eliminate the admission of illegal aliens to public school districts in Texas." Kane & Muñoz, *supra* note 4, at 463 n.13.

A 1977 amendment to § 21.031(d) implies an intent to decrease illegal migration. The subsection's sponsor stated that § 21.031(d) would serve "to make it more difficult for kids to be brought in from Mexico to attend schools in the United States." *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 578 n.84 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981). The *Alien*

On the basis of the Final Report of the Select Commission on Immigration and Refugee Policy, the Reagan Administration presently advocates the passage of a federal law that would extend amnesty to many undocumented aliens.<sup>14</sup> Further, President Reagan supports enactment of a federal law that would penalize employers who hire those aliens retaining their undocumented status under the current proposal.<sup>15</sup> Additional federal legislation, however, is necessary to alleviate the strain that undocumented immigration places on educational systems in border states and other areas across the country.<sup>16</sup>

Congress already has responded to problems created by the massive influx of refugees into this country in the Refugee Education Assistance Act of 1980.<sup>17</sup> Under this Act, Congress has appropriated federal funds to provide general assistance to local education agencies for the education of Cuban and Haitian refugee children and to provide special impact aid for the education of Cuban, Haitian, and Indochinese refugee children. Congress should enact similar legislation to alleviate the impact of undocumented aliens on various educational systems. Without such legislation many school systems may be hard pressed to meet the educational needs of the undocumented alien children of today who, especially in light of the current amnesty proposals, may become the

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*Children* court concluded, "[i]t is not unlikely that similar concerns prevailed in 1975." *Id.* In regard to the California employer law, *see* note 12 *supra*, the court noted that "[i]f [Texas] was genuinely interested in removing inducements for illegal immigration or in preserving public funds dedicated to education, a law sanctioning employers for hiring undocumented persons would do very nicely. Little support exists for such a measure." *Id.* at 544 n.88. *See generally* *Boe v. Wright*, 648 F.2d at 434-41 (Reavley, J., concurring).

14. *See September Hearings, supra* note 2. The Final Report of the Select Commission laments that the worst element of the disregard for immigration laws may well be that it breeds disregard for other American laws. Society bears a heavy cost when an undocumented alien is afraid to testify to witnessing a crime or to report an illness that may endanger the public. *See FINAL REPORT, supra* note 2, at 41-42, 73. Deportation of undocumented aliens would prove to be costly, largely ineffective, injurious to American civil liberties, and subject to court challenge. Legalization would encourage open contributions to society by undocumented aliens, elimination of the depression of American labor standards and wages, targeting of Immigration and Naturalization Service resources to stopping new influxes of undocumented aliens, and the accumulation of reliable data on undocumented aliens necessary to deter migration at its source. *Id.* at 73-74; *STAFF REPORT, supra* note 2, at 63-64, 76.

15. *See* note 2 *supra*.

16. *See* note 11 *supra*. The strain placed by undocumented aliens upon educational resources is not unique to Texas or the border states. On October 17, 1974, the General Superintendent of the Chicago Public Schools implemented a tuition charge for undocumented children. Thereafter, with litigation pending, the Superintendent reversed the tuition policy. *See Limon v. Hannon*, No. 77-3007 (N.D. Ill. Jan., 3, 1979) (dismissed as moot).

17. Refugee Education Assistance Act of 1980, Pub. L. 96-422, 94 Stat. 1799.

legal residents of tomorrow.<sup>18</sup>

This Note addresses the constitutional issues raised by the Texas decision to deny undocumented alien school children a free public education and suggests a method of analysis.<sup>19</sup> The analysis focuses on the equal protection clause of the fourteenth amendment and utilizes both the classification and fundamental right concepts. The primary issues are first, whether undocumented aliens enjoy equal protection of the laws; second, whether absolute denial of education violates a fundamental right; third, whether undocumented aliens constitute a suspect class; fourth, whether section 21.031 of the Texas Education Code would fail under "middle tier" analysis; and finally, whether federal immigration law preempts state legislation that denies undocumented aliens an education.

## I. BACKGROUND

In May 1975 the Texas Legislature amended section 21.031 of the Texas Education Code, which stated that "[e]very child<sup>20</sup> in this state . . . shall be permitted to attend the public free schools of the district in which he resides."<sup>21</sup> The amendment specifies that only resident

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18. See notes 2 & 14 *supra*.

19. *In re Alien Children Educ. Litigation*, 501 F. Supp. 544 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981).

Undocumented children excluded from public schools may also challenge the Texas statute, see note 21 *infra*, on the ground that it violates the Federal Civil Rights Act, 42 U.S.C. §§ 1981, 1983 (1976). For cases holding that noncitizens can assert claims under these sections, see Post-trial Brief for Plaintiff at 15-17, *In re Alien Children Educ. Litigation*, 501 F. Supp. 544 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981). [hereinafter cited as Post-trial Brief for Plaintiff]. See also *Lau v. Nichols*, 414 U.S. 563 (1974) (holding that denial of bilingual education to Chinese-speaking children constituted a violation of Title VI of the Civil Rights Act of 1964).

20. Acting upon the request of the Texas Commissioner of Education, the Attorney General of Texas issued an opinion in April 1975 that concluded that § 21.031 of the Texas Education Code entitled children residing illegally, as well as legally, within the state to a free public school education. The opinion also stated:

Whether the Legislature itself may establish an exception for illegal aliens has not been decided by the higher courts. While we recognize that the United States Supreme Court could sustain an exercise of legislative power, the existing case law indicates that the rights of illegal aliens are protected by 42 U.S.C.A. [§ 1981] and the Fourteenth Amendment to the United States Constitution.

Op. Att'y Gen. H-586, at 3 (1975), *quoted in Doe v. Plyler*, 458 F. Supp. 569, 572 n.3 (E.D. Tex. 1978).

21. Prior to the 1975 Amendment, § 21.031 provided that

- (a) *All children* without regard to color over the age of six years and under the age of 18 years . . . shall be entitled to the benefits of the Available School Fund for that year.

citizen children or legal alien children between the ages of 5 and 21 are entitled to a free public school education.<sup>22</sup> The amended version of section 21.031 allows each school district an independent choice between three alternatives. First, a school district can choose to exclude undocumented alien children.<sup>23</sup> Second, districts may condition attendance upon payment of a tuition fee.<sup>24</sup> Third, a district can con-

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- (b) *Every child in this state* over the age of six years and not over the age of 21 years . . . shall be permitted to attend the 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* over six and not over 21 years of age . . . if such person or his parent, guardian or person having lawful control resides within the school district.

TEXAS EDUC. CODE ANN. tit. 2, § 21.031 (Vernon 1972) (emphasis added).

The Texas Education Agency (TEA) failed to conduct any studies prior to the amendment of § 21.031 to assess the impact of permitting undocumented school children to remain in public schools. Furthermore, the TEA does not presently possess any empirical data concerning the number of children excluded as a result of implementation of § 21.031. Post-trial Brief for Plaintiff, *supra* note 19, at 49.

22. TEX. EDUC. CODE ANN. tit. 2, § 21.031 (Vernon Supp. 1980) presently provides:

- (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.

*Id.* (emphasis added).

23. According to a 1980 study, 45.8% of surveyed Texas school districts with enrollments of 10,000 or more did not admit undocumented alien children even on a tuition basis. Post-trial Brief for Plaintiff, *supra* note 19, at 23-24.

24. Texas Education Agency administrator Edward Randall acknowledges that, "[e]ach [school] district can have its own policy of the type of document required of immigrant children to implement § 21.031." Thus the statute can be interpreted to include children who are not deportable, *see* note 80 *infra*, under federal law. Post-trial Brief for Plaintiff, *supra* note 19, at 89.

The Tyler Independent School District charged undocumented students \$1,000 per year before the court enjoined the tuition system. *Doe v. Plyler*, 458 F. Supp. 569, 571 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *prob. juris noted*, 101 S. Ct. 2044 (1981). In 1976 the Houston schools charged \$90 per month, and the Austin tuition fee ranged between \$1,300 and \$1,728. *See* Note, *supra* note 6, at 62.

tinue to admit undocumented children on a tuition-free basis.<sup>25</sup> This last alternative, however, is economically impractical because the state will not supplement the local costs of educating undocumented children.<sup>26</sup> Thus, a benevolent district's per-pupil state financing is necessarily diluted to the detriment of other students. Presently, a statewide injunction issued by the United States District Court for the Southern District of Texas prohibits the administration of section 21.031.<sup>27</sup>

Section 21.031 successfully withstood a constitutional challenge in a 1977 state court action against the Houston Independent School District. The Court of Civil Appeals for the Third Supreme Judicial District of Texas held, in *Hernandez v. Houston Independent School District*,<sup>28</sup> that section 21.031 violated neither the equal protection clause nor the due process clause of the fourteenth amendment.<sup>29</sup> On appeal, the Texas Supreme Court summarily rejected the application for a writ of error.<sup>30</sup>

In 1978 the United States District Court for the Eastern District of Texas entertained an action challenging the application of section 21.031 in the Tyler Independent School District (Tyler ISD).<sup>31</sup> The district court, in *Doe v. Plyler*,<sup>32</sup> permanently enjoined enforcement of the statute and tuition policy, but only within the Tyler ISD.<sup>33</sup> The

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25. *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 555 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981).

26. *Id.* at 555 & n.17 (schools that freely admit undocumented children are penalized because they receive less per-pupil state financing than districts that choose to exclude such children; consequently, most schools will not freely admit such children). See TEX. EDUC. CODE ANN. tit. 2, § 21.031(a) (Vernon Supp. 1980). But see 1 A. MUTHARIKA, *supra* note 12, at 41 (undocumented children presently attend school free of charge in the Odessa and Tyler Independent School Districts).

27. *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 597 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981).

28. 558 S.W.2d 121 (Tex. Civ. App. 1977).

29. *Id.* at 125.

30. See *Doe v. Plyler*, 458 F. Supp. 569, 574 (E.D. Tex. 1978) (the court rejected the application for writ without opinion).

31. *Id.* at 571. Parents brought the suit on behalf of a group of undocumented children, challenging the Tyler tuition policy and constitutionality of the statute. The State of Texas intervened as a party defendant and the district court ordered transformation of the suit into a class action.

32. *Id.*

33. *Id.* at 593. The district conditioned enrollment of undocumented alien children upon a yearly tuition fee of \$1,000. None of the plaintiffs could afford the tuition, although the court observed that two undocumented children attended schools within the district on a tuition basis. *Id.* at 575. In July 1977 the Tyler School Board implemented § 21.031 by promulgating the policy that:

court determined that section 21.031 violated the fourteenth amendment's guarantee of equal protection of the laws under the "rational relation" test.<sup>34</sup> The decision further held that federal law preempted the statute under the supremacy clause.<sup>35</sup> The Court of Appeals for the Fifth Circuit subsequently affirmed the trial court's issuance of injunctive relief within the Tyler ISD on equal protection grounds,<sup>36</sup> but reversed the district court's finding of preemption.<sup>37</sup>

In 1979 the Judicial Panel on Multidistrict Litigation consolidated four complaints<sup>38</sup> filed against three Texas school districts in the Southern District of Texas.<sup>39</sup> The panel remanded similar suits arising out of the Northern<sup>40</sup> and Western Districts<sup>41</sup> to their original districts, holding them in abeyance pending resolution of the Southern District litigation.<sup>42</sup> The district court resolved the consolidated class action challenge to section 21.031 in *In re Alien Children Education Litigation*,<sup>43</sup> concluding that the statute violated the equal protection clause.<sup>44</sup> Whereas the *Plyler* opinions hinged upon a determination that the state enactment was not rationally related to any of the legiti-

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Illegal alien 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 [Immigration and Naturalization Service] . . . .

*Id.* at 572.

34. *Id.* at 593.

35. *Id.* at 592.

36. *Doe v. Plyler*, 628 F.2d 448, 460-61 (5th Cir. 1980).

37. *Id.* at 452-54.

38. *Martinez v. Reagan*, No. H-78-1797 (S.D. Tex., filed Sept. 18, 1978) (Houston ISD). The following actions concerned nondeportable undocumented aliens: *Garza v. Reagan*, No. H-78-2132 (S.D. Tex., filed Nov. 6, 1978) (Houston ISD); *Cardena v. Meyer*, No. H-78-1862 (S.D. Tex., filed Sept. 27, 1978) (Pasadena ISD); *Mendoza v. Clark*, No. H-78-1831 (S.D. Tex., filed Sept. 22, 1978) (Goose Creek Consolidated ISD).

39. *In re Alien Children Educ. Litigation*, 482 F.Supp. 326, 330 (J.P.M.D.L. 1979).

40. *Boe v. Wright*, No. 3-79-0440-D (N.D. Tex., Sept. 11, 1980), *aff'd*, 648 F.2d 432 (5th Cir. 1981).

41. *Roe v. Holm*, No. MO-79-CA-49 (W.D. Tex., filed June 26, 1979); *Coe v. Holm*, No. MO-79-CA-54 (W.D. Tex., filed July 5, 1979).

42. *In re Alien Children Educ. Litigation*, 482 F. Supp. 326, 330 (J.P.M.D.L. 1979).

43. 501 F. Supp. 544 (S.D. Tex. 1980), *prob. juris noted*, 101 S. Ct. 3078 (1981). According to the court, the class consisted of 120,000 undocumented children across the state of Texas, none of whom was the subject of a deportation. Further, many of the children are not deportable and will permanently reside in this country. See FINAL REPORT, *supra* note 2, at 74-75.

44. 501 F. Supp. at 564, 597.

mate goals asserted by the state,<sup>45</sup> the *Alien Children* court subjected section 21.031 to strict judicial scrutiny.<sup>46</sup> The court declared that the Texas statute impaired a previously unrecognized fundamental right of access to existent public education under the United States Constitution.<sup>47</sup>

The Court of Appeals stayed, without opinion, the statewide injunction in *Alien Children*.<sup>48</sup> Thereafter, Justice Powell, sitting as Circuit Justice, overturned the stay,<sup>49</sup> holding that "the balance of harm [created by section 21.031] weigh[ed] heavily upon the children."<sup>50</sup> Although Justice Powell did not address the substantive issues of the case, he stated that it is "not unreasonable" to speculate that five members of the Supreme Court might agree with the decision the district court reached in *Alien Children*.<sup>51</sup>

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45. See *Doe v. Plyler*, 628 F.2d 448, 461 (5th Cir. 1980); *Doe v. Plyler*, 458 F. Supp. 569, 593 (E.D. Tex. 1978).

46. 501 F. Supp. at 564.

47. *Id.* at 564, 597. The Supreme Court has never decided whether educational opportunity is a fundamental right. *Certain Named & Unnamed Non-Citizen Children v. Texas*, 448 U.S. 1327, 1329 (Powell, Circuit Justice, 1980). Some lower courts, however, have held that the federal Constitution guarantees a certain minimum level of education. See *Fialkowski v. Shapp*, 405 F. Supp. 946, 958 (E.D. Pa. 1975); *Mills v. Board of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1974). See generally Levinson, *The Right to a Minimally Adequate Education for Learning Disabled Children*, 12 VAL. U.L. REV. 253 (1978). See also note 91 *infra*.

48. See *Certain Named & Unnamed Non-Citizen Children v. Texas*, 448 U.S. 1327, 1328 (Powell, Circuit Justice, 1980).

49. *Id.* at 1334.

50. *Id.* Justice Powell determined that the "irreparable harm" suffered by the undocumented children from denial of any education over the course of five years easily outweighed the additional burdens that the injunction would place upon the school districts. Powell nevertheless qualified his order by concluding:

If the [individual] district can demonstrate because of the number of undocumented alien children within its jurisdiction or because of exceptionally limited resources, the operation of the injunction would severely hamper the provision of education to all its students during the coming year the granting of a stay would be justified.

*Id.* Yet, Justice Powell noted that the affidavits indicated that the injunction might severely strain only the Houston ISD and that the district court had stated that it would stay its injunction if individual school districts could demonstrate that compliance would present an "exceptional difficulty." *Id.* at 1334 n.4.

51. *Id.* at 1332. Justice Powell further explained:

This is not to suggest that I have reached any decision on the merits of this case or that I think it more probable than not that we will agree with the District Court. Rather, it recognizes that the Court's decision is reasoned, that it presents novel and important issues, and is supported by considerations that may be persuasive to the Court of Appeals, or to this Court. Further, it may be possible to accept the District Court's decision without fully embracing the full sweep of its analysis.

*Id.* This language is particularly interesting in light of the fact that Justice Powell authored the majority opinion in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), which

Subsequently, in *Boe v. Wright*,<sup>52</sup> the Fifth Circuit held that the Dallas Independent School District violated the equal protection clause by prohibiting undocumented children access to a public education.<sup>53</sup> The court summarily concluded that its holding in *Doe v. Plyler* controlled.<sup>54</sup> Circuit Judge Reavely concurred on the basis of the *Doe v. Plyler* holding. Judge Reavely, however, stated that the state's interest in decreasing educational costs to avoid diminution of the quality of education was a rational justification for excluding undocumented aliens from free public education.<sup>55</sup>

## II. EQUAL PROTECTION ANALYSIS

The due process clause<sup>56</sup> of the fourteenth amendment protects undocumented aliens.<sup>57</sup> The United States Supreme Court, however, has never addressed the question whether equal protection of the laws<sup>58</sup>

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held that a relative deprivation of education claim did not invoke strict scrutiny of the classifications. Powell left open the question whether an absolute deprivation of education, such as a tuition policy, might require heightened judicial scrutiny.

52. 648 F.2d 432 (5th Cir. 1981).

53. *Id.* at 433 & n.6.

54. *Id.*

55. *Id.* at 434-41 (Reavely, J., concurring).

56. U.S. CONST. amend. XIV, § 1, which reads in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

57. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (dictum), recognized that the fourteenth amendment's due process clause extends to undocumented aliens:

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* . . . is entitled to that constitutional protection.

*Id.* (footnotes omitted) (emphasis added). See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness"); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-98 n.6 (1953) (quoting *The Japanese Immigrant Case*, 189 U.S. 86, 100-01 (1903)) (executive officers cannot arbitrarily take into custody and deport one "who has entered the country, and has become subject in all respects to its jurisdiction . . . although alleged to be illegally here"); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-50 (1950) ("this Court long ago held that an antecedent deportation statute must provide a hearing . . . for aliens . . . who had been here some time even if illegally"). See also *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Williams v. Williams*, 328 F. Supp. 1380, 1383 (D.V.I. 1971); *Martinez v. Fox Valley Bus Lines, Inc.*, 17 F. Supp. 576, 577 (N.D. Ill. 1936).

58. *Doe v. Plyler*, 628 F.2d 448, 454 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981); *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 567 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981). See also *Boe v. Wright*, 648 F.2d 432, 434 n.1 (5th Cir. 1981) (Reavely, J., concurring).

under the fourteenth amendment applies to undocumented aliens.<sup>59</sup> The plain meaning of the equal protection clause dictates the conclusion that undocumented children are beneficiaries of its coverage because undocumented children are clearly "persons" residing within the jurisdiction of the state.<sup>60</sup> Furthermore, the legislative history of the

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59. U.S. CONST. amend. XIV, § 1. The amendment reads in pertinent part, "nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws."

60. First, the structure of § 1 of the fourteenth amendment warrants the conclusion that undocumented aliens enjoy equal protection of the laws. The privileges and immunities clause embraces only "citizens." The Supreme Court has determined that the "any person" language of the due process clause extends to undocumented as well as documented aliens. See note 57 *supra*. Certainly the narrower language of the equal protection clause, "any person within its jurisdiction," must apply to undocumented aliens because they are persons residing in the state of Texas. Neither surreptitious means of entry nor violation of federal law after a legal entry detract from the fact that undocumented aliens are "within the jurisdiction" and subject to the laws of our country. In 1872 the Supreme Court noted that "[a]ll strangers [within this country] are under the protection of the sovereign while they are within his territories, and owe a temporary allegiance in return for that protection." *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 154 (1872) (quoting *R. Wildman, INSTITUTES ON INTERNATIONAL LAW* 40 (1850)). See *Doe v. Plyler*, 628 F.2d 448, 454 (5th Cir. 1980) ("aliens illegally within this country are clearly persons within the jurisdiction of the state in which they reside . . . under the simple language of the Fourteenth Amendment"); *Castillo-Felix v. Immigration & Naturalization Serv.*, 601 F.2d 459, 461, 467 (9th Cir. 1979) (undocumented petitioner can assert equal protection rights); *United States v. Cortes*, 588 F.2d 106, 110 (5th Cir. 1979) ("once aliens have become subject to liability under United States law, they also have the right to benefit from its protection"); *Bolanos v. Kiley*, 509 F.2d 1023, 1025 (2d Cir. 1975) (dictum) ("the due process and equal protection clauses of the 14th Amendment apply to aliens within the United States and even to aliens whose presence here is illegal"); *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 568 (S.D. Tex. 1980) ("undocumented aliens . . . are 'persons within the jurisdiction' of the state"), *prob. juris. noted*, 101 S. Ct. 3078 (1981); *United States v. Otherson*, 480 F. Supp. 1369, 1371 (S.D. Cal. 1979) (undocumented aliens are protected by 18 U.S.C. § 242 (1976), which is based upon the equal protection clause); *Doe v. Plyler*, 458 F. Supp. 569, 579 (E.D. Tex. 1978) ("[n]either the language nor the logic of the fourteenth amendment supports the proposition that the guarantee of equal protection of the laws does not extend to illegal aliens"), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981). *But see* *Burrafato v. United States Dep't of State*, 523 F.2d 554, 557 (2d Cir. 1975) (illegal alien does not have standing to sue for denial of a visa), *cert. denied*, 424 U.S. 910 (1976); *Alonso v. California*, 50 Cal. App. 3d 242, 248, 123 Cal. Rptr. 536, 540 (1975) (illegal alien has no constitutional right to equal opportunity of employment), *cert. denied*, 425 U.S. 903 (1976).

Second, the Supreme Court has interpreted the fourteenth amendment to mean exactly what it states:

The Fourteenth Amendment is not confined to the protection of citizens . . . . [The due process and equal protection] provisions are universal in their application, to *all persons within the territorial jurisdiction* without regard to differences of race, of color, or *nationality*; and the equal protection of the laws is a pledge of the protection of *equal laws*. Applying this reasoning to the 5th and 6th Amendments, it must be concluded that *all persons within the territory of the U.S.* are entitled to the protection guaranteed by those amendments . . . .

*Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (emphasis added).

Third, the due process clause is a constitutional guarantee equally as basic as the equal protec-

amendment supports the conclusion that violation of the Immigration and Naturalization Act does not preclude equal protection clause coverage.<sup>61</sup>

### A. *Fundamental Right Analysis*<sup>62</sup>

If a state statutory classification violates a right the federal Constitution assures, the right is "fundamental," and the appropriate level of

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tion clause. *Doe v. Plyler*, 628 F.2d 448, 456 n.18 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981). The extensiveness of the equal protection clause differs, however, when the class is statutorily created by the federal government:

Although both amendments require the same analysis . . . the two protections are not always co-extensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State. On the other hand, when a federal rule is applicable to a limited territory . . . and when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause.

*Hampton v. Mow Sung Wong*, 426 U.S. 88, 100 (1976). This Note deals only with state classifications. The *Alien Children* court, in response to the contention that due process embracement of undocumented aliens does not infer similar equal protection coverage, stated that:

It is illogical to argue that the rights protected by the Due Process Clause should not determine which persons are protected by the equal protection clause. Analysis which focuses on the rights embraced by the two provisions sorely misapprehends the issue whether undocumented aliens are protected by the equal protection clause.

*In re Alien Children Educ. Litigation*, 501 F. Supp. at 568 n.46. See also 11 ST. MARY'S L.J. 549, 562-63 (1979).

Finally, the lack of authority to support the proposition that undocumented aliens enjoy equal protection can be attributed primarily to the fear of exposure to deportation risked by asserting legal rights.

61. A sponsor of the fourteenth amendment stated:

The last two clauses of the first section of the amendment disables a State from depriving not merely a citizen but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State . . . .

[I]t will, if adopted by the States, forever disable everyone of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within its jurisdiction.

71 CONG. GLOBE 2755 (May 23, 1866). Thus a provision requiring nonresident children to pay a school tuition is constitutional because such persons do not reside "within its jurisdiction." *DeLeon v. Harlingen Consol. Independent School Dist.*, 522 S.W.2d 922, 925 (Tex. Civ. App. 1977). Furthermore, equal protection coverage accorded to undocumented aliens residing within Texas obviously does not demand that Texas "provide a tuition-free education to foreign children living abroad" as contended in *Hernandez v. Houston Independent School Dist.*, 558 S.W.2d 121, 124 (Tex. Civ. App. 1977).

62. The federal courts have not addressed the potential fourteenth amendment substantive due process claim within this issue. Due process analysis is applied to protect "fundamental" constitutional liberties. As a result of the era of *Lochner v. New York*, 198 U.S. 45 (1905), courts are hesitant to analyze an issue under substantive due process when equal protection grounds are

judicial inquiry is strict scrutiny.<sup>63</sup> The strict scrutiny test requires a state to demonstrate that the discriminatory classification is necessary to effectuate a compelling governmental interest.<sup>64</sup> Further, the Constitution need not explicitly enumerate a right in order to qualify it as fundamental.<sup>65</sup> The Constitution also protects implied fundamental interests that are necessary to uphold explicitly enumerated fundamental rights.<sup>66</sup> The Supreme Court has held that a relative deprivation of educational opportunity does not violate a fundamental right.<sup>67</sup> The Court, however, has not addressed whether total denial of access to an ongoing primary or secondary school system is constitutionally permissible.<sup>68</sup>

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available. See G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 938-39, 946 (10th ed. 1980). See generally *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

63. See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

64. The equal protection clause "measure[s] the validity of *classifications* created by state laws." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., concurring). Legislatures must draft classifications fairly and treat similarly-situated people alike. When strict scrutiny is triggered by a suspect class or impingement upon a fundamental interest, the state has the burden of showing that the statute is precisely tailored to further a compelling interest. Further, the state must show that it has adopted the least drastic alternative. See *In re Griffiths*, 413 U.S. 717, 721-22 (1973); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 447 n.7 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972); *Graham v. Richardson*, 403 U.S. 367, 374-75 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). See generally 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 (1972).

65. *Mobile v. Bolden*, 446 U.S. 55 (1980). See Yarbrough, *The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-So Fundamental "Rights" or "Interests" Through a Flexible Conception of Equal Protection*, 1977 DUKE L.J. 143. Fundamental rights implied within the Constitution include the right to receive information, see, e.g., *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Stanley v. Georgia*, 394 U.S. 557 (1969); the right of association, see, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958); *DeJonge v. Oregon*, 299 U.S. 353 (1937); the right to interstate travel, see, e.g., *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Guest*, 383 U.S. 745 (1966); the right to vote in state elections, see, e.g., *Kramer v. Union School Dist.*, 395 U.S. 621 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 553 (1964); the right to privacy and marital relations, see, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right of access to criminal trials, see, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); the right of access to the criminal appeals system, see, e.g., *Douglas v. California*, 372 U.S. 353 (1962); *Griffin v. Illinois*, 351 U.S. 12 (1955).

66. See note 65 *supra*.

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

68. See notes 91-99 & 101-02 *infra* and accompanying text.

1. *Absolute Deprivation and Relative Deprivation of Educational Opportunity Concerns in San Antonio Independent School District v. Rodriguez*

Numerous Supreme Court decisions acknowledge the immeasurable importance of educating all individuals in our society.<sup>69</sup> In the context of school desegregation, in *Brown v. Board of Education*,<sup>70</sup> the Court emphasized the relationship between achievement and educational opportunities, and stressed the need to distribute education rights to everyone equally.<sup>71</sup> Nine years ago, however, the Supreme Court, in *San Antonio Independent School District v. Rodriguez*,<sup>72</sup> determined that individuals do not enjoy a fundamental right of equal educational opportunity under the Constitution.

The *Rodriguez* claimants asserted that the Texas public school expenditure scheme severely deprived children of educational benefits in the poorer school districts.<sup>73</sup> The scheme involved state contributions to individual school districts based upon the assessable value of private property within the district.<sup>74</sup> Property-rich districts received considerably greater state aid than property-poor districts.<sup>75</sup> Thus, the system produced substantial interdistrict disparities in per-pupil expenditures. The *Rodriguez* opinion concluded that the relative deprivation of educational benefits suffered by persons in property-poor Texas school districts did not violate the equal protection clause.<sup>76</sup>

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69. See, e.g., *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 29-30 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *id.* at 238-39 (White, J., concurring); *Abington School Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); *Adler v. Board of Educ.*, 342 U.S. 485, 493 (1952). See also *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Interstate Consol. State Ry. v. Massachusetts*, 207 U.S. 79, 87 (1907).

70. 347 U.S. 483 (1954).

71. The Court stated:

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.

72. 411 U.S. 1, 35 (1973).

73. *Id.* at 23.

74. *Id.* at 8-15.

75. *Id.*

76. *Id.* at 37. The Court observed that the relative difference in district spending levels did not interfere with fundamental rights: "Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its

Justice Powell, writing for the majority, distinguished *Rodriguez* from earlier cases involving absolute deprivation.<sup>77</sup> *Rodriguez* involved only a relative deprivation of rights. In contrast, the net effect of section 21.031 is *complete* denial of existing educational opportunities.<sup>78</sup> The deprivation undocumented alien children suffer is absolute because most of the children's parents are indigent and, therefore, cannot afford to pay a tuition;<sup>79</sup> because many schools totally exclude undocumented children without offering a tuition option;<sup>80</sup> because private schools are unable to absorb undocumented children,<sup>81</sup> and be-

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children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved . . . ." *Id.*

77. *Id.* at 20-25. The Court reviewed prior equal protection decisions with more precisely definable classes and absolute rather than comparative deprivations. The cases included *Bullock v. Carter*, 405 U.S. 134 (1972) (Texas candidate filing fee completely barred those unable to afford the sum from candidacy); *Tate v. Short*, 401 U.S. 395 (1971) (incarceration of indigents because they cannot afford criminal fines); *Douglas v. California*, 372 U.S. 353 (1963) (defendant's indigency denied him appellate counsel); *Griffin v. Illinois*, 351 U.S. 12 (1956) (de facto discrimination against indigent criminal defendants unable to afford trial transcripts in order to make an appeal). See also *In re Alien Children Educ. Litigation*, 501 F. Supp. 544 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981).

78. *Doe v. Plyler*, 628 F.2d 448, 458-61 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981); *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 564 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981); *Doe v. Plyler*, 458 F. Supp. 569, 580 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981).

79. *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 570 (S.D. Tex. 1980) ("[t]he evidence is quite clear that the parents of undocumented children are, for the most part, indigent"), *prob. juris. noted*, 101 S. Ct. 3078 (1981). None of the named plaintiffs in *Alien Children*, Post-trial Brief for Plaintiff, *supra* note 19, at 25, or in *Doe v. Plyler*, 458 F. Supp. at 575, were able to afford payment of a tuition. The *Plyler* court, however, recognized that 2 of the estimated 40 undocumented children in the Tyler District did enroll in school on a tuition basis. Recent studies, accepted into evidence in *Alien Children*, indicated that the mean hourly wage for undocumented workers in Texas is under \$3.00 per hour. Post-trial Brief for Plaintiff, *supra* note 19, at 26. In 1978, the United States Civil Rights Commission observed that "[t]he situation in South Texas for the undocumented person . . . resembles the early slavery in the United States." *In re Alien Children Educ. Litigation*, 501 F. Supp. at 570. See also *United States v. Ortiz*, 442 U.S. 891, 900-04 app. (Burger, C.J., concurring).

80. A random sample in 1980 revealed that nearly one-half of the interviewed Texas schools did not enroll undocumented children on a tuition basis. See note 23 *supra*. In the same survey 72.9% of 60 school districts indicated that they would charge a tuition or exclude all undocumented children. The "total exclusion" policy ignores the fact that many undocumented children are not deportable. In *Alien Children*, the court observed that

[a]ll of the named plaintiff children in this litigation . . . are likewise documentable [despite lacking documentation] and will probably never be deported from the United States. They are part of the 'quarter of a million Mexicans who are currently awaiting [for their visas] . . . we are often speaking of a seven year wait.'

Post-trial Brief for Plaintiff, *supra* note 19, at 91.

81. *Id.* at 23.

cause so-called "alternative" schools are inadequate.<sup>82</sup>

In *Alien Children*, the district court found that the state failed to demonstrate that even a single undocumented child in Texas presently attends school on a tuition-payment basis.<sup>83</sup> Conceivably, parents of some undocumented alien children can afford a tuition. Therefore, if absolute deprivation is a prerequisite to the formulation of a fundamental interest argument,<sup>84</sup> only the undocumented children of indigent families are so deprived. In *Rodriguez*, Justice Powell concluded that if a state predicated public school admission for all children upon a tuition payment, heightened judicial scrutiny would be appropriate.<sup>85</sup> He recognized that the absolute denial of education to a discrete group of indigent children would elicit far greater judicial scrutiny than the court applied in *Rodriguez*.<sup>86</sup> Thus, according to *Rodriguez*, heightened scrutiny is the appropriate judicial standard by which to analyze the impact of section 21.031 upon undocumented alien school children.

## 2. *The Twin Concerns of Rodriguez Are Not Applicable Within the Context of Section 21.031*

The two major judicial concerns in *Rodriguez* that produced the

82. *Id.* at 23-24.

83. 501 F. Supp. 544, 561 (S.D. Tex. 1980) ("there is no evidence of any child being admitted to public schools in those districts which condition admission upon the receipt of tuition"), *prob. juris. noted*, 101 S. Ct. 3078 (1981).

84. See note 77 *supra*. The Supreme Court in *Bullock v. Carter*, 405 U.S. 134 (1972), recognized that as long as the basis of discrimination is clearly defined, the exact parameters of a class may remain unclear for equal protection purposes. See also *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 69 (1973) (White, J., concurring); *id.* at 93 (Marshall, J., dissenting); *Reynolds v. Sims*, 377 U.S. 533, 544-56 (1964).

Thus, it may be true that all undocumented children, given their general predicament of poverty, "constitut[e] a class sufficiently definite to invoke the protection of the Constitution." 411 U.S. at 69 (White, J., concurring).

85. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 25 n.60 (1973). Justice Powell stated:

If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today.

On another occasion, the Supreme Court addressed the same general issue, concluding that "a State may not accomplish such a purpose [cost-cutting public education] by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools." *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

86. 411 U.S. at 25 n.60. See generally *Griffin v. School Bd.*, 377 U.S. 218 (1964).

Court's holding are inapplicable in the section 21.031 context. First, Justice Powell's *Rodriguez* opinion stressed the Court's inability, and thus unwillingness, to define the quality of education that the Constitution entitles each child.<sup>87</sup> The Court did not pretend to possess the expertise to determine the minimal amount of education guaranteed to each child, particularly in view of the lack of present means to measure education in qualitative terms.<sup>88</sup> The cases arising as a result of section 21.031, however, do not involve a claim for any subjective quantum of education. Rather, the claimants seek an opportunity to participate in an ongoing educational system freely available to other children.<sup>89</sup>

Justice Powell's second concern in *Rodriguez* was that the Court should not judicially legislate by intermeddling in state fiscal matters.<sup>90</sup> Judicial deference to state fiscal discretion is the general rule rather than the exception.<sup>91</sup> A court decision entitling undocumented alien children access to public education, however, does not intrude upon state legislative prerogative.<sup>92</sup> Such a decision dictates only that the state should make educational opportunities available to all children whose parents reside in Texas and contribute to the state school fund. Undocumented aliens, like citizens, pay taxes that partially finance the

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87. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973).

88. *Id.*

89. *See Doe v. Plyler*, 628 F.2d 448, 456 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981); *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 557 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981); *Doe v. Plyler*, 458 F. Supp. 569, 580 (E.D. Tex. 1980), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981).

90. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 31-36 (1973). *See Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (Stewart, J., concurring), in which Justice Stewart stated that it is not the function of the Court to "pick out particular human activities, characterize them as "fundamental," and give them added protection . . . ." To the contrary, the Court simply recognizes, as it must, an established constitutional right . . . ." *Id.* *See also Mobile v. Bolden*, 446 U.S. 55, 76, (1980); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

91. *See Madden v. Kentucky*, 309 U.S. 83 (1940). The Court stated: "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized . . . . [I]n taxation, even more than other fields, legislatures possess the greatest freedom in classification." *Id.* at 87-88. A cost-cutting or fiscal integrity justification standing alone, however, cannot overcome an impingement on a constitutional guarantee. "[W]hen litigants present constitutional claims, [despite their novelty], the courts must endeavor to determine whether their arguments are supported by the Constitution. The presumptive validity which normally attaches to the actions of state legislatures is no cause to shirk that responsibility." *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 557 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981).

92. *See In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 564 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981).

public school system.<sup>93</sup>

### 3. *Nexus Argument: the Right of Access to an Education is a Fundamental Right*

The Supreme Court has yet to address whether there exists an implied constitutional right of access to public education.<sup>94</sup> In *Rodriguez* Justice Powell stated that the Court should refrain from “super-legislating” by arbitrarily characterizing various human activities as fundamental.<sup>95</sup> Nonetheless, the right of access to public education demands judicial protection because it emanates from the Constitution rather than transient social values.<sup>96</sup> The appellees in *Rodriguez* maintained that the right to some modicum of education is interwoven tightly within the fabric of other constitutional guarantees.<sup>97</sup> They asserted that the nexus between education and the constitutional rights to speak, to receive information, and to vote in state elections is so close that the Constitution guarantees the right to a minimum level of education.<sup>98</sup> Rather than reject this proposition, the *Rodriguez* Court declined to address it.<sup>99</sup>

The *Rodriguez* opinion concluded that Texas equipped each child with at least the minimum skills necessary to enjoy “the rights of speech” and “full participation in the political process.”<sup>100</sup> Though individuals are not entitled to “the most *effective* speech or the most *in-*

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93. *Id.* at 570.

Nearly all of the recent studies which discuss the contributions of undocumented aliens to local, state and federal tax bases strongly suggest that this group pays more into the tax structure than they take out through social services. . . . The public school education in Texas is financed primarily through sales taxes and *ad valorem* property taxes. Undocumented aliens are unable to escape the payment of those taxes; they buy consumer goods and they indirectly contribute property tax revenue through the payment of rent. . . . Thus, the assertion that undocumented aliens should pay tuition to contribute to their share of the costs of education is nonsense.

*Id.* at 570-71 & n.55. See generally *Doe v. Plyler*, 458 F. Supp. 569, 578 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981); JUDICIARY REPORT OF 1977, *supra* note 8, at 23.

94. *Certain Named & Unnamed Non-Citizen Children v. Texas*, 448 U.S. 1327, 1331-32 (Powell, Circuit Justice, 1980).

95. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33, (1973).

96. See note 105 *infra*.

97. 411 U.S. at 35-36.

98. *Id.*

99. *Id.* at 36. The Court concluded, “[w]e need not dispute any of these propositions.” *Id.*

100. *Id.* at 37.

formed electoral choice"<sup>101</sup> under the first amendment, complete exclusion from an ongoing school system denies one of *meaningful* speech and a *minimally* informed electoral choice.

The Supreme Court may deem an interest "fundamental" if it is "preservative of" constitutionally guaranteed civil and political rights.<sup>102</sup> The important aspects of the rights to speak, receive information, and vote are effectively eviscerated without a concomitant right of access to public schools.<sup>103</sup> The right to receive information is reduced to a "hollow privilege" if a child is not "taught to read, assimilate, and utilize available knowledge."<sup>104</sup> The school is the main source of information for a child. State denial of access to the panoply of factual data,

101. *Id.* at 36.

102. The Court stated in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), that: Long ago in *Yick Wo v. Hopkins*, 118 U.S. 356, 370 [1886], the Court referred to 'the political franchise of voting' as a 'fundamental political right, because of *preservation of all rights.*' Recently in *Reynolds v. Sims*, 377 U.S. 533, 561-62 [1964], we said "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is *preservative of other basic civil and political rights*, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized . . . ."

*Id.* at 667 (emphasis added). The *Alien Children* court interpreted this language to mean that fundamental rights are either "preservative of" or "substantially related to" constitutionally guaranteed political and civil rights. 501 F. Supp. at 558.

103. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Supreme Court held that the Constitution guarantees a right of access to criminal trials. The Court developed this right by merging the first amendment right to receive information with the related prohibition on government limitation of "the stock of information from which members of the public may draw." *Id.* at 576. The Court (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)) concluded that "without the freedom to attend [criminal trials, which people have exercised for centuries,] important aspects of freedom of speech and 'of the press could be eviscerated . . . .'" *Id.* at 580 (citations omitted). The same logic applies in regard to an argument for a right of access to education.

104. This was the appellee's contention as advanced in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). The argument is highly persuasive in light of the Court's language in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969): "It is the right of the public to receive *suitable access to social, political, esthetic, moral, and any other ideas* and experiences which is crucial here. That right may not constitutionally be abridged . . . ." *Id.* at 390 (emphasis added). See note 65 *supra*. Texas prohibits the flow of ideas to children in two ways. First, children are denied the opportunity to hear information and ideas in school. Second, a functional illiterate in our society lacks meaningful access to available channels of information. An illiterate person is denied the ability to analyze and construct opinions about information he takes in from various sources. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), took notice of the fact that "[t]he classroom is peculiarly the '*market place of ideas.*' The Nation's future depends upon leaders trained through wide exposure to [a] *robust exchange of ideas* . . . ." *Id.* at 603 (emphasis added). See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 112 (1973) (Marshall, J., dissenting); *Serrano v. Priest*, 5 Cal. 3d 584, 607-08, 487 P.2d 1241, 1258, 96 Cal. Rptr. 601, 618 (1971); Gard, *San Antonio Independent School District v. Rodriguez: On Our Way to*

ideas, and experiences provided to other children in an established school system is impermissible.<sup>105</sup> Moreover, the absence of formal instruction in the basic skills of communication and speech renders the exercise of purposeful free speech illusory.<sup>106</sup> Denied the ability to process information and to articulate beliefs, an uneducated individual is essentially precluded from meaningful participation in the political

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*Where?*, 8 VAL. U.L. REV 1, 16-19 (1973); Preovolos, *Rodriguez Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75, 92-93 (1980).

Education is also vital to cultural assimilation and the preservation of our societal values.

Children who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community. This is not peculiar to race; in this setting, it can affect any children who, as a group, are isolated by force of law from the mainstream.

*Milliken v. Bradley*, 433 U.S. 267, 287 (1977).

105. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The Court stated that it is essential to protect the choice to seek knowledge actively in order for individuals to exercise their right to receive information traditionally available to the public. Otherwise, the lack of choice would severely undermine the right to receive information. *Id.* at 575-76.

A related constitutional argument complements the right to receive information. The Court has held that the "right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). Furthermore, "[p]eople assemble in public places not only to speak or to take action, but also to listen, observe, and learn; indeed they may 'assembl[e] for any lawful purpose.'" *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 578 (citations omitted). Because the public school house historically is a freely accessible public place, the right of assembly in a public place may create the right of access to public education. See also *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 63 (1973) (Brennan, J., dissenting) ("education is inextricably linked . . . to the rights of free speech and association").

106. The Court stated in *Shelton v. Tucker*, 364 U.S. 479 (1960), that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Id.* at 487. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 63 (1973) (Brennan, J., dissenting); *id.* at 112-13 (Marshall, J., dissenting) (Justice Marshall noted particularly that education is intimately tied to free speech and that education enhances enjoyment of speech throughout one's life); *Guadalupe Organization, Inc. v. Tempe Elementary School*, 587 F.2d 1022, 1026 (9th Cir. 1978) (*Rodriguez* suggests that a statute does not meet equal protection standards when each child is not provided the "opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process"); *Serrano v. Priest*, 5 Cal. 3d 584, 607, 487 P.2d 1241, 1258, 96 Cal. Rptr. 601, 618 (1971) ("education . . . supports each and every other value of a democratic society—participation, communication . . . to name but a few"); Brief for Appellee at 31-32, *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973) ("the meaningful exercise of [free speech] . . . is dependent upon his ability to speak intelligently and knowledgeably") [hereinafter cited as Brief for Appellee].

The impact of denial of education upon undocumented children is magnified by the language barrier. The end result is permanent illiteracy. *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 561-62 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981). Illiteracy renders speech far less meaningful. See Preovolos, *supra* note 104, at 88.

process.<sup>107</sup> Thus, an important theme of democracy, the expression of varying views and ideas, breaks down without an educated populace able to exercise its first amendment rights.<sup>108</sup>

Certain basic necessities of life, such as adequate food and decent shelter, are not fundamental interests guaranteed by the Constitution.<sup>109</sup> Education, however, is distinguishable from subsistence needs in the context of a constitutional nexus argument.

First, education, unlike subsistence needs, is analogous to an important service that constitutes a fundamental right. In *Maheer v. Roe*<sup>110</sup> the Supreme Court held that indigent women are not entitled to government subsidized nontherapeutic abortions as a fundamental right.<sup>111</sup> The Court stated that abortion services are unlike the fundamental right of appellate review of criminal convictions in that the latter is a

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107. The Supreme Court has acknowledged that "[p]roviding public schools ranks at the very apex of the function of a State . . . [S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system." *Wisconsin v. Yoder*, 406 U.S. 205, 213, 221 (1972). For material concerning the interrelationship between education and the right of meaningful access to the political system, see *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 63 (1973) (Brennan, J., dissenting); *id.* at 112-14 (Marshall, J., dissenting); SELECT SENATE COMM. ON EQUAL EDUC. OPPORTUNITY, 92D CONG., 2D SESS., THE COSTS TO THE NATION OF INADEQUATE EDUCATION 46-47 (Comm. Print 1972); Brief for Appellee, *supra* note 106, at 34; Amicus Curiae Brief for the NEA at 17-20, *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973) [hereinafter cited as Amicus Curiae Brief]; Prevolos, *supra* note 104, at 88-90; Lindquist & Wise, *Developments in Education Litigation: Equal Protection*, 5 J.L. & EDUC. 1, 20-21 n.82 (1976). See generally Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305 (1969).

Recognizing that most resident undocumented aliens remain here permanently, the *Alien Children* court noted that states cannot withhold the right of access to the ballot box to citizens. Because many undocumented children can eventually apply for citizenship, a lack of formal education will effectively preclude their access to the ballot as citizens. *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 563-64 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981). Furthermore, though the system denies aliens full political participation, they nonetheless may play an important role in the political process. *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977).

108. See *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963). The Court noted that "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government." *Id.* at 230.

109. See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (the interest in safe, decent housing is not constitutionally mandated); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (despite the language of *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970), the importance of welfare benefits does not raise them to a level of constitutional protection). See also *Mobile v. Bolden*, 446 U.S. 55, 76 (1980); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973); *Jefferson v. Hackney*, 406 U.S. 535, 549 (1972).

110. 432 U.S. 464 (1977).

111. *Id.* at 474.

“governmental monopoly in which participation is compelled.”<sup>112</sup> Primary and secondary education, like the criminal justice system, however, is a government monopoly insofar as education is provided almost exclusively by the state.<sup>113</sup> Furthermore, just as participation in the criminal justice system is compulsory for penal code violators, the state requires school attendance for all resident children except undocumented aliens.<sup>114</sup> Education is a government benefit that “ranks at the very apex of the functions of a state” and is largely unavailable in the private sector.<sup>115</sup> Education should be afforded the equivalent

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112. *Id.* at 471 n.6.

113. See *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956). State programs providing persons welfare payments, food, and shelter are supplemental to benefits freely attainable within the private sector. Education is, and historically has been, an essential state function. The *Alien Children* court stated, “[w]ith respect to a service which is provided as an essential function of government and not by the private sector, exclusion from access to that service will result in absolute deprivation. . . . [Denial of access to public schools] should be scrutinized carefully.” *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 563 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981).

In *Harris v. McRae*, 448 U.S. 297 (1980), the Supreme Court recognized that although the right to an abortion is fundamental, see *Roe v. Wade*, 410 U.S. 113 (1973), the government is under no obligation to provide funds for indigent women who seek this service. The Court recognized that the government did not create the obstacle preventing indigent women from procuring an abortion and that the “good” was available in the free market. *Harris v. McRae*, 448 U.S. at 315-16. In § 21.031, see note 26 *supra*, the government is denying an existent state benefit to a class of children financially incapable of affording either a public or private school education. Furthermore, education emanates almost entirely from the public sector. Cost, lack of available spaces, and the numerical shortage of schools preclude private education from serving as a viable alternative for undocumented children.

The Court in *Maher v. Roe*, 432 U.S. 464 (1977), noted that the criminal justice system is “a governmental monopoly in which participation is compelled.” *Id.* at 471 n.6. Education is also essentially a governmental monopoly. Only a relatively minor number of children’s parents can even consider private education as an alternative.

No other governmental enterprise has so firm or complete a grip on so many people. In no other field have the states so long and so deliberately assumed such *complete*, near *monopoly* responsibility and required the vast majority of their citizens to participate in a state-run enterprise. The states do not, for example, assume equivalent responsibility for their citizens’ food and housing needs. They do not compel the vast majority of citizens to eat state food or live in public housing.

Amicus Curiae Brief, *supra* note 107, at 21-22 (emphasis added).

114. Justice Powell stated in *Maher v. Roe*, 432 U.S. 464, 471 n.6 (1977), that participation in the criminal justice system is compelled. Attendance in public schools is compulsory in Texas. See TEX. EDUC. CODE ANN. tit. 2, § 21.032 (Vernon 1972).

115. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). See *Foley v. Connelie*, 435 U.S. 291, 297 (1978) (public education fulfills “a most fundamental obligation of government to its constituency”). In *Alien Children*, the court heard testimony that “the private schools are apparently unable to absorb these children” because nonreligious private schools are geared for a small, wealthy

“fundamental” status accorded to the right of access to criminal appellate review.

Second, Justice Powell posited in *Rodriguez* dictum that undernourished and ill-housed persons, by virtue of their poverty, may derive “the least enjoyment from the benefits of the First Amendment.”<sup>116</sup> The inability to afford food or shelter may temporarily inhibit the full exercise of first amendment rights. Yet wealth, or lack thereof, is not an immutable trait.<sup>117</sup> The poor and hungry of today are not necessarily the destitute of tomorrow. By contrast, the *Alien Children* court found that exclusion from school *permanently* precludes acquisition of formal literacy skills.<sup>118</sup> Thus, the lack of a formal education plagues an individual throughout his entire life and denies him the skills required to exercise first amendment rights in a meaningful way.

#### 4. *Undocumented Aliens Enjoy First Amendment Rights*

The label “illegal alien” is an amorphous characterization of an alien whom the Immigration and Naturalization Service might deport if it knew of his or her presence.<sup>119</sup> The lawfulness of an alien’s presence

portion of the population; parochial schools have lengthy waiting lists; and parochial schools in Texas are suffering financial difficulties. Post-trial Brief for Plaintiff, *supra* note 19, at 23.

Furthermore, Texas has recognized the importance of public education. Article VII, § 1 of the Texas Constitution states:

A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

TEX. CONST. art. VII, § 1. The State Constitution of 1869 required that the state erect a uniform system of free public schools for all children between six and eighteen, art. IX, § 1, with compulsory attendance, art. IX, § 5. *See* TEX. CONST. ANN. art. VII, § 1 (Vernon 1876). By 1884, the enactment of the school law firmly entrenched universal public education in Texas.

116. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973). The Court was citing Schoettle, *The Equal Protection Clause in Public Education*, 71 COLUM. L. REV. 1355, 1389-90 (1971). Schoettle argued that the ill-housed and ill-fed are not given the chance to maximize their educational opportunities. *Id.* In recognition of this problem, the federal government has legislated to provide indigent school children with free lunches and clothing. *See* note 208 *infra*. Economic conditions may still preclude the hungry and poorly housed children from maximizing educational opportunities; § 21.031, however, denies undocumented children in Texas any educational opportunities.

117. 411 U.S. at 121 (Marshall, J., dissenting).

118. *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 561-62 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981). Also, personal poverty is not a permanent disability; one may escape its shackles. *Id.*

119. *See Federation for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564 (S.D. Tex. 1980). The court stated:

under the Immigration and Nationality Act<sup>120</sup> hinges upon a deportation hearing determination rather than his or her undocumented status.<sup>121</sup> First, many undocumented aliens enjoy de facto amnesty because federal laws mandate unenforceable entry quotas.<sup>122</sup> Second, if authorities discover an undocumented alien residing within this country, he or she may be subject to deportation.<sup>123</sup> Federal immigration laws, however, entitle an apprehended alien to an adversarial administrative hearing.<sup>124</sup> He or she is presumed nondeportable until a contrary finding is made by an immigration judge.<sup>125</sup> Because of numerous defenses under the deportation statutes, many undocumented aliens are not deportable.<sup>126</sup> Thus, aliens residing in the United States are entitled to the presumption of legal presence.

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[T]he very concept of "illegal alien" amounts only to a vague notion of a person who might be deported if his or her presence were known to the authorities. But the determination of that legal fact can be a complicated process, as our numerous cases involving attempts by the INS to deport residents of this country demonstrate. The Immigration and Nationality Act is long and complex, full of provisos and exceptions.

*Id.* at 573-74 n.12

120. 8 U.S.C. §§ 1101-1503 (1976).

121. *See* 8 U.S.C. § 1251 (1976).

122. Former Commissioner of the Immigration and Naturalization Service Leonel J. Castillo acknowledges that undocumented aliens enjoy de facto amnesty. *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 559 n.23 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981). Courts recognize that "Congress has not allocated sufficient funds to stem the tide of immigration from Mexico. This nation has set immigration quotas which are simply disregarded. It thus is likely that many of the undocumented persons in the country will remain here for years as a result of government inaction." *Id.* at 559. President Reagan endorsed de jure amnesty for undocumented aliens during his campaign. Additional legislation may be forthcoming. *See* notes 14-15 *supra* and accompanying text.

123. 8 U.S.C. §§ 1325-1326 (1976). *See Doe v. Plyler*, 458 F. Supp. 569, 582 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981).

124. An undocumented alien has a right of continued residence in this country until an immigration judge determines that such person is deportable. *See* 8 U.S.C. §§ 1105(a), 1242 (1976); 8 C.F.R. § 36 (1981). *See also* *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955); *Heikkila v. Barber*, 345 U.S. 229 (1953).

The burden of proof rests upon the government in these adversarial proceedings. *See Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276 (1966). *See also* 8 C.F.R. § 242 (1980); note 56 *supra*.

125. *See* note 140 *infra*. *See also* 8 C.F.R. § 101 (1981).

126. A person who is technically deportable can still assert a wide variety of defenses to deportation (generally based upon humanitarian grounds), including an appeal to the U.S. Attorney General. *See* 8 U.S.C. §§ 1182(c), -(h)-(i), 1251(f), 1253(h), 1254, 1259 (1976). *See also* *United States v. Osuna-Picos*, 443 F.2d 907 (9th Cir. 1971) (illegal entrant permitted to stay because of close family ties); *Vitales v. Immigration & Naturalization Serv.*, 443 F.2d 343 (9th Cir. 1971) (alien overstaying her visa not required to leave because of certain close ties with relatives); *Lee Fook Chuey v. Immigration & Naturalization Serv.*, 439 F.2d 244 (9th Cir. 1971) (same).

Given the presumption of lawful immigration status, undocumented alien children should receive some of the same rights the Constitution guarantees to legal aliens.<sup>127</sup> Documented aliens residing in this country are entitled to first amendment rights of speech, press, religion, assembly, and association.<sup>128</sup> Similarly, undocumented aliens should enjoy some measure of protection under the first amendment.<sup>129</sup> Whether a person in the United States may exercise first amendment rights is a question extrinsic to his or her immigration status.<sup>130</sup> Political considerations weigh heavily in the formulation of the immigration laws,<sup>131</sup> and thus courts should not apply them to resolve constitutional issues; the "rights of man are not a function of immigration status."<sup>132</sup>

The Supreme Court has held that an undocumented person "do[es]

127. Documented aliens enjoy fourth amendment rights, *see* *United States v. Ortiz*, 422 U.S. 891 (1975); a right of access to the courts, *see* *Nizamuddowlah v. Bengal Cabaret, Inc.*, 92 Misc. 2d 220, 399 N.Y.S.2d 854 (1977); the right to work as a civil engineer, *see* *Examining Bd. of Engineers v. Flores de Otero*, 426 U.S. 572 (1976); the right to receive state financial assistance for higher education, *see* *Nyquist v. Mauclet*, 432 U.S. 1 (1977); the right to practice law, *see* *In re Griffiths*, 413 U.S. 717 (1973); and the right to receive welfare benefits, *see* *Graham v. Richardson*, 403 U.S. 365 (1971). *See generally* 1 A. MUTHARIKA, *supra* note 12.

Although aliens cannot vote, *see* *Skaft v. Rorex*, 553 P.2d 830 (Colo. 1977), or participate in political functions, *see* *Ambach v. Norwick*, 441 U.S. 68 (1979); *Foley v. Connelie*, 435 U.S. 291 (1978), they may indirectly participate in the political arena, *see* *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977). The Constitution explicitly affords several rights only to citizens. *See, e.g.*, U.S. CONST. art. II, § 1, cl. 5 (eligibility for the office of president); *id.* art. IV, § 2, cl. 1 (privileges and immunities of the states); *id.* amend. XV, § 1 (right to vote cannot be denied or abridged by race, color, or previous condition of servitude). Thus, the implication is that persons within our territorial jurisdiction are entitled to many constitutional rights not specifically reserved to citizens. Though the courts have recognized an ascending scale of rights to which aliens become entitled as they obtain more indicia of citizenship, *see* *Johnson v. Eisentrager*, 339 U.S. 763 (1950), undocumented aliens should receive at least first amendment protection.

128. *Bridges v. California*, 314 U.S. 252 (1941).

129. *See* 1 C. ANTIEAU, *MODERN CONSTITUTIONAL LAW* § 9.23 (1969). Professor Antieau asserts that undocumented aliens enjoy the right to communicate (speak and receive information) while in this country.

130. *In re Alien Children Educ. Litigation*, 501 F. Supp. 544 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981).

Courts may decide the extent of the liberties and freedoms enjoyed by undocumented persons without treading on congressional control over immigration. . . . Congressional power to exclude aliens does not imply state power to infringe the rights of undocumented persons within this jurisdiction to receive and to exchange ideas . . . . [Thus], the infringement of first amendment rights is not rendered inconsequential by the immigration status of the persons affected.

*Id.* at 560.

131. *See* *Hampton v. Mow Sung Wong*, 426 U.S. 88, 101 n.21 (1976).

132. *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 559 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981).

not become an outlaw and lose all rights by doing an illegal act."<sup>133</sup> Undocumented aliens, at worst, are liable under federal misdemeanor prosecution.<sup>134</sup> Prosecution and imprisonment, however do not fully strip one of his first amendment rights.<sup>135</sup> Suspected wrongdoers, given the presumption of innocence before proof of guilt, are not arbitrarily denied their constitutional rights.<sup>136</sup> Therefore, undocumented children, whose parents may or may not be subject to deportation or federal prosecution at a later date, do not lose protection under the first amendment.<sup>137</sup> Freedom from punishment in the absence of personal guilt is a recognized right.<sup>138</sup> Undocumented children are powerless to choose their place of residency and are not legally or morally culpable for their immigration status.<sup>139</sup> Thus, the denial of public education is both an inappropriate penalty for a state to impose upon innocent children and a violation of their first amendment rights.<sup>140</sup>

### B. *Suspect Class Analysis*

When a state law discriminates against an identifiable group constituting a "suspect class," courts apply heightened judicial scrutiny.<sup>141</sup> Under strict judicial review, the state must demonstrate that the classi-

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133. *National Bank & Loan Co. v. Petrie*, 189 U.S. 423, 425 (1903).

134. *See* 8 U.S.C. §§ 1325-1326 (1976). The punishment entails imprisonment up to six months in prison and/or a fine of not more than \$500. A second offense constitutes a federal felony.

135. *See Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945). The court stated that, "[a] prisoner retains all rights of an ordinary citizen except those expressly or by necessary implication taken from him by law." *Id.* *See generally* R. SANDERS, H. KERPER, G. KILLINGER & J. WATKINS, *PRISONERS' FIRST AMENDMENT RIGHTS WITHIN THE INSTITUTION* (1979).

136. *See Taylor v. Kentucky*, 436 U.S. 478, 483-86 (1978).

137. The fact that officials may prosecute a child or his parents at a subsequent date should not permit states to deny undocumented children an education.

138. *See Robinson v. California*, 370 U.S. 660 (1962); *Scales v. United States*, 367 U.S. 203 (1961); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

139. *See Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972); *St. Ann v. Palisi*, 495 F.2d 423, 425 (5th Cir. 1974). Texas gives parents the right to physical possession of their children and to establish their offspring's legal domicile. *TEX. FAM. CODE ANN.* tit. 2, § 12.04(1) (Vernon Supp. 1980). Parents also have a duty to control their children. *Id.* § 12.04(2).

140. Although exclusion from education is not a criminal penalty, its effect upon children is disastrous. Uneducated children from Spanish-speaking, poor families are denied any opportunity to escape the shackles of poverty and ignorance. *See generally Doe v. Plyler*, 458 F. Supp. 569, 577 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981).

141. *See Nyquist v. Mauclet*, 432 U.S. 1, 9 (1977); *Castaneda v. Partida*, 430 U.S. 482 (1977); *In re Griffiths*, 413 U.S. 717, 721-22 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 447 n.7 (1972);

fication is necessary to accomplish a compelling government interest or purpose.<sup>142</sup> Realistically, application of strict scrutiny is fatal to the statute.<sup>143</sup>

Race is the paradigm suspect class.<sup>144</sup> The Supreme Court, however, has extrapolated from it two additional suspect classes: nationality<sup>145</sup> and alienage.<sup>146</sup> Relying heavily upon Justice Stone's rationale in *United States v. Carolene Products Co.*,<sup>147</sup> the Supreme Court in *Graham v. Richardson*<sup>148</sup> declared that alienage is a suspect class.<sup>149</sup>

### 1. *Undocumented Alien Classification*

To date, no court has categorized undocumented aliens as a suspect class.<sup>150</sup> Three explanations account for the hesitancy of lower courts to expand the list of suspect classes or to categorize undocumented aliens as a subclass of legal aliens.<sup>151</sup> First, a state cannot purposefully discriminate against a suspect class.<sup>152</sup> A determination that undocumented aliens are suspect would prohibit a state from denying the

Dunn v. Blumstein, 405 U.S. 330, 342 (1972); *Graham v. Richardson*, 403 U.S. 365, 375-76 (1971); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Hernandez v. Texas*, 347 U.S. 475, 477-79 (1954).

142. See note 141 *supra*.

143. See generally *Gunther*, *supra* note 64.

144. See *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 260 (1979); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964); *Brown v. Board of Educ.*, 347 U.S. 483, 487 (1954).

145. See *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Hernandez v. Texas*, 347 U.S. 475 (1954).

146. See *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977); *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 601 (1976); *In re Griffiths*, 413 U.S. 717, 729 (1973); *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973); *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Chapman v. Gerard*, 456 F.2d 577, 579 (3d Cir. 1972).

147. 304 U.S. 144 (1938). Justice Stone stated that, "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* at 153 n.4 (dictum).

148. 403 U.S. 365 (1971). The Court declared that, "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny . . . [A]liens as a class are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate." *Id.* at 372.

149. *Id.*

150. See generally *In re Alien Children Educ. Litigation*, 501 F. Supp. 544 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981); *Doe v. Plyler*, 458 F. Supp. 569 (E. D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981).

151. See also *Doe v. Plyler*, 628 F.2d 448, 457 n.25 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1980).

152. See notes 141-43 *supra* and accompanying text. The state, however, need only change the parameters of the class.

group the state's bounty in all contexts. Second, recent Supreme Court decisions indicate an unwillingness to find new suspect classifications.<sup>153</sup> In particular, the Court has refused to elevate illegitimacy and gender to suspect status.<sup>154</sup> Third, in *Ambach v. Norwick*<sup>155</sup> and *Foley v. Connelie*<sup>156</sup> the Supreme Court carved a "governing functions" exception out of the suspect class of alienage.<sup>157</sup> These decisions illustrate the Court's disinclination to use alienage as a blanket suspect classification.<sup>158</sup> Thus, the confluence of these three factors suggests that the Supreme Court will not find that undocumented aliens constitute a suspect class.

Nonetheless, undocumented aliens are more deserving than legal aliens of suspect classification and heightened judicial protection from the majoritarian political process.<sup>159</sup> Undocumented aliens are a "discrete and insular minority" and meet the traditional indicia of suspectness—disability, history of purposeful unequal treatment, and political impotence—enumerated in *Rodriguez*.<sup>160</sup>

The long history of invidious economic, social, and legal exploitation

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153. See *DeCanas v. Bica*, 424 U.S. 351 (1976). Although the claimants did not have standing to assert an equal protection claim, the Court's preemption analysis supports a conclusion that undocumented aliens are not a suspect class. The Court, using equal protection terminology, concluded that the statute prohibiting employment of undocumented aliens protected "vital state interests" and was "tailored to combat effectively the perceived evils." *Id.* at 357. See generally Note, *The Equal Treatment of Aliens: Preemption on Equal Protection*, 31 STAN. L. REV. 1069, 1081 (1979).

For cases refusing to extend suspect classification, see *Mathews v. Lucas*, 427 U.S. 495 (1976) (illegitimacy); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (age). See generally Levin, *The Courts, Congress, and Educational Adequacy: The Equal Protection Predicament*, 39 MD. L. REV. 187, 226 (1979).

154. See *Craig v. Boren*, 429 U.S. 190 (1976) (gender); *Mathews v. Lucas*, 427 U.S. 495 (1976) (illegitimacy). In both instances, a majority of the Court failed to characterize the classes as suspect. See generally *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

For cases denying or determining admission to school based upon gender, see *Berkelman v. San Francisco Unified School Dist.*, 501 F.2d 1264 (9th Cir. 1974); *Kirstin v. Rectors & Visitors of Univ. of Va.*, 309 F. Supp. 184 (E.D. Va. 1970).

155. 441 U.S. 68 (1979).

156. 435 U.S. 291 (1978).

157. See 441 U.S. at 75; 435 U.S. at 295. But see 75 MICH. L. REV. 1092 (1977).

158. See generally Note, *supra* note 153.

159. See *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977).

160. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). The Court depicted a suspect class as a class "saddled with such disabilities . . . , subjected to such a history of purposeful unequal treatment, [and] relegated to such a position of political powerlessness as to command . . . [special judicial solicitude]." *Id.* at 28.

of undocumented persons, particularly in Texas, continues today.<sup>161</sup> Undocumented immigrants "are exploitable and more vulnerable than any other group in the United States."<sup>162</sup> Undocumented aliens are also politically powerless. They cannot vote and must rely upon other groups to seek redress for their plight in the political process.<sup>163</sup> Undocumented aliens attract little political representation, as evidenced by the failure of Congress to remedy their exploitation.<sup>164</sup> Furthermore, the fear of deportation precludes most undocumented aliens from asserting their legal rights in a judicial forum.<sup>165</sup>

Despite the fact that documented aliens can attain citizenship and divest themselves of suspect status, they are entitled to heightened judicial protection until they attain citizenship.<sup>166</sup> Similarly, courts should afford children of undocumented aliens suspect status until they too become citizens. Undocumented status is a characteristic that most school-aged children cannot control.<sup>167</sup> Undocumented aliens' children are particularly vulnerable and susceptible to stigmatization because they cannot rely upon their parents to protect their rights. Thus, heightened judicial scrutiny should extend at least to the discrete and insular class of school-aged undocumented children.

## 2. *Indigency Classification*

Supreme Court decisions require fulfillment of three criteria before the Court will strike down de facto wealth discrimination. First, a clearly defined class is necessary.<sup>168</sup> Second, the class must face absolute deprivation of access to a state benefit that is not within the "area of economics or social welfare."<sup>169</sup> Third, de facto wealth discrimination must impinge upon a fundamental interest or involve a suspect

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161. See notes 2-10 *supra*. See also Post-trial Brief for Plaintiff, *supra* note 19, at 42-44.

162. Post-trial Brief for Plaintiff, *supra* note 19, at 43 (statement of Leonel Castillo, former INS Commissioner).

163. *Id.* at 44.

164. See notes 2-4 *supra*. In 1977 and 1979 committees failed to report out bills that would have granted a fair number of undocumented aliens total or partial amnesty.

165. *Doe v. Plyler*, 458 F. Supp. 569, 578 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981).

166. See *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977).

167. See notes 116-18 *supra*.

168. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 19, 22, 25 (1973); *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 579 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981).

169. See *United States v. Kras*, 409 U.S. 434, 446 (1973). See also notes 109-17 *supra*.

class.<sup>170</sup> Although the *Rodriguez* claimants failed to meet these requirements, the section 21.031 discrimination fulfills all three.

In *Rodriguez*, Justice Powell indicated that the appellees failed to demonstrate that the Texas school finance scheme disadvantaged "any definable category of 'poor' people."<sup>171</sup> The class of undocumented children that section 21.031 excludes from public school is definable in "terms of their inability to pay the prescribed sum."<sup>172</sup> Thus, the law discriminates against a distinct class of disadvantaged undocumented children on the basis of their indigency.

Undocumented alien families' poverty and lack of alternative educational sources absolutely deny the children access to an education.<sup>173</sup> Moreover, education is distinguishable from other public services by its widely recognized importance, the monopolistic character of public education, and the fact that the state compels public school attendance.<sup>174</sup> Most public benefits supplement goods and services that are readily accessible in the private sector. Education, by contrast, is a service available almost exclusively from the public sector.<sup>175</sup>

Finally, wealth classifications alone are not suspect.<sup>176</sup> As recognized by Justice Marshall, poverty per se does not necessarily render a discrete and insular minority group politically powerless.<sup>177</sup> Nor does wealth discrimination entail the onerous social stigma associated with racial discrimination.<sup>178</sup> Furthermore, poverty is not necessarily a permanent disability.<sup>179</sup> Consequently, Supreme Court decisions invalidating discrimination against indigents concern statutory infringements upon constitutional rights.<sup>180</sup> In *Harper v. Virginia Board of Educa-*

170. See notes 109-16 *supra*.

171. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973).

172. *Id.* at 25 n.60.

173. See notes 66-67 *supra*. But see *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 807 (1969) (dictum) (wealth and race are "factors which would independently render a classification highly suspect"). See generally Levin, *supra* note 153, at 198 n.53.

174. See notes 109-17 *supra*.

175. See note 113 *supra*.

176. See generally *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

177. *Id.* at 121-22 (Marshall, J., dissenting).

178. *Id.*

179. *Id.*

180. See *Bullock v. Carter*, 405 U.S. 134 (1972); *Harper v. Virginia Bd. of Elec.*, 383 U.S. 663 (1966); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956). See also *Tate v. Short*, 401 U.S. 395 (1971) (indigents incarcerated because of their inability to pay); *Williams v. Illinois*, 399 U.S. 235 (1970) (same).

tion<sup>181</sup> the Court concluded that the right to vote is denied to indigents if a state imposes a poll tax upon voters.<sup>182</sup> Similarly, if an indigent cannot pay for trial transcripts or hire an appellate attorney, the criminal appeals process is unconstitutionally inaccessible.<sup>183</sup> The Texas decision to exclude undocumented children from public schools denies the access to education that should extend to all children in this country.<sup>184</sup> If access to education is a fundamental right, section 21.031 must be invalid on wealth discrimination grounds.

### 3. Nationality Classification

Section 21.031 arguably discriminates against a class of aliens by nationality. Nationality constitutes a suspect class.<sup>185</sup> Although the statute denies all undocumented alien children a formal education, the law, in practice, has an impact almost exclusively on undocumented Mexican children.<sup>186</sup> In *Tayyari v. New Mexico State University*<sup>187</sup> a district court reviewed a university policy denying admission to citizens of nations holding American citizens hostage.<sup>188</sup> The court struck down the policy, holding that the university based the classification upon national origin, although the school's policy did not single out any specific nationality.<sup>189</sup> Similarly, a court may reasonably infer that section 21.031 discriminates against a national group: Mexicans.

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181. 383 U.S. 663 (1966).

182. *Id.* at 668.

183. *See* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

184. *See* notes 91-118 *supra* and accompanying text.

185. *See* McLaughlin v. Florida, 379 U.S. 184 (1964); Hernandez v. Texas, 347 U.S. 475 (1954); Oyama v. California, 332 U.S. 633, 650 (1948) (Murphy, J., concurring). *But see* Korematsu v. United States, 323 U.S. 214 (1944). *See also* Sugarman v. Dougall, 413 U.S. 634 (1973), in which Justice Rehnquist stated:

The state statute that classifies aliens on the basis of country or origin is much more likely to classify on the basis of race, and thus conflict with the core purpose of the Equal Protection Clause, than a statute that . . . merely distinguishes between alienage as such and citizenship as such.

*Id.* at 655 (Rehnquist, J., dissenting). For cases involving Hispanic discrimination and education, see *Keyes v. School Dist. No. 1*, 313 F. Supp. 61 (D. Colo. 1970), *rev'd in part*, 445 F.2d 990 (10th Cir. 1970), *aff'd*, 413 U.S. 189 (1973).

186. *See* Doe v. Plyler, 628 F.2d 448, 451 n.6 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981). The court noted, "Mexican nationals are not the sole target of Section 21.031, which includes all aliens whose presence in the United States is not legal. The vast majority of the excluded class, however, are Mexican nationals . . ." *Id.*

187. 495 F. Supp. 1365 (D.N.M. 1980).

188. *Id.*

189. *Id.* at 1373.

A state statute or school policy having a negative impact on an ethnic or national group constitutes an invidious and constitutionally impermissible classification when the claimant can prove discriminatory intent or purpose.<sup>190</sup> The claimant need not show, however, that discrimination against a discrete group is the sole or dominant purpose of the policy.<sup>191</sup> Courts may infer discriminatory purpose after a review of the magnitude of disproportionate impact and other relevant historical data.<sup>192</sup> The inference is particularly strong if the legislature could readily foresee the disparate impact of the statute at the time of enactment.<sup>193</sup> If a discriminatory purpose is shown, the defendant must prove that absent the alleged intentional discrimination, the same result would have occurred.<sup>194</sup>

Until 1975, section 21.031 entitled both Mexican-American and Mexican residents of Texas to public education.<sup>195</sup> The record of invidious discrimination by the State of Texas and its schools against resident Mexican-Americans and Mexicans within the field of public education, however,<sup>196</sup> suggests that section 21.031 is but another example of discriminatory conduct. After reviewing the previous extensive practice of segregating Mexican-Americans in inferior "Mexican schools," a district court in *United States v. Texas*<sup>197</sup> concluded that the extent of educational discrimination in 1981 rivaled the magnitude of state supported segregation and discrimination existing in Texas in 1971.<sup>198</sup> Consequently, the court held that Texas had subjected Mexican-Americans to de jure discrimination in violation of the equal protection clause of the fourteenth amendment.<sup>199</sup>

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190. See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 413 (1977); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

191. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

192. See *Washington v. Davis*, 426 U.S. 229, 242 (1976).

193. See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979).

194. See *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 211 n.17 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971).

195. See notes 20-21 *supra*.

196. See *United States v. Texas*, 506 F. Supp. 405, 411-12 (E.D. Tex. 1981).

197. 506 F. Supp. 405 (E.D. Tex. 1981).

198. *Id.* at 411. See also *United States v. Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), *aff'd*, 447 F.2d 441 (5th Cir. 1971).

199. See *United States v. Texas*, 506 F. Supp. at 413. See also *United States v. Texas Educ. Agency*, 600 F.2d 518 (5th Cir. 1979).

Because proof of intentional past discrimination on the basis of national origin by school systems may raise the inference of impermissible conduct,<sup>200</sup> Texas' historical discrimination against Mexicans in its educational system implies that section 21.031 may incorporate a discriminatory purpose. Furthermore, the complete denial of education to a distinct class is arguably more odious than a dual school system predicated upon segregation of races. The only court that has addressed this issue, however, held that section 21.031 classifies on the basis of immigration status rather than nationality.<sup>201</sup> The *Alien Children* court reached this conclusion because section 21.031 does not discriminate against all Mexican nationals residing in Texas.<sup>202</sup>

### C. *Middle Tier Scrutiny*

Courts examine illegitimacy and gender classifications with an intermediate or "middle tier" standard of review.<sup>203</sup> The test imposes upon the government the burden to show that the classification is substantially related to an important governmental objective.<sup>204</sup> Thus, the statutory classification must not be arbitrary and must rest upon a distinction substantially and fairly related to the purpose of the legislation. Furthermore, the statute should treat similarly situated persons alike.<sup>205</sup>

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200. See *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537 (1979); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 201 (1973).

201. *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 573-74 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981).

202. *Id.*

203. Cases in which the Court applied the middle tier test for gender-based discrimination include *Wengler v. Druggist Mut. Ins. Co.*, 446 U.S. 142 (1980); *Califano v. Westcott*, 443 U.S. 76 (1979); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Orr v. Orr*, 440 U.S. 268 (1978); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); and *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). See also Hughes, *Equal Protection and Due Process: Contrasting Methods of Review Under Fourteenth Amendment Doctrine*, 14 HARV. C.R.-C.L.L. REV. 529, 541-45 (1979); Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U.L.Q. 160, 162-72.

Cases in which the Court applied the middle tier test for illegitimacy-based discrimination include *Lalli v. Lalli*, 439 U.S. 259 (1978); *Trimble v. Gordon*, 430 U.S. 762 (1977); and *Mathews v. Lucas*, 427 U.S. 495 (1976).

204. The test, as stated in *Craig v. Boren*, 429 U.S. 190 (1976), is whether the classification "serve[s] important governmental objectives and [is] substantially related to achievement of those objectives." *Id.* at 197.

205. See *Reed v. Reed*, 404 U.S. 71, 76 (1971); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Although the *Doe v. Plyler*<sup>206</sup> decisions professed application of the lower, rational relation tier of equal protection scrutiny to invalidate section 21.031, they in fact applied a "middle tier" level of analysis.<sup>207</sup> Furthermore, the concurring opinion in *Boe v. Wright* recognized that section 21.031 is permissible under rational relation scrutiny.<sup>208</sup>

If access to education is not a fundamental right and undocumented aliens are not members of a suspect class, intermediate tier judicial scrutiny is appropriate. This level of scrutiny is particularly applicable in instances involving discrimination against what Professor Tribe refers to as a "sensitive," but not suspect, class.<sup>209</sup> Section 21.031 classifies against a "sensitive" class because it penalizes children who are undocumented aliens. The vulnerability of these children to discrimination is magnified considerably by virtue of their undocumented alien status. The combination of the "sensitive" class of undocumented alien children with the important interest of education creates a strong case for middle tier scrutiny.<sup>210</sup>

The Supreme Court has recognized that it is unfair to penalize or stigmatize children who are not responsible for the circumstances of their birth.<sup>211</sup> Undocumented alien children have no control over their birth in Mexico, their parents' residency decision, or their parents' violation of the Immigration and Nationality Act.<sup>212</sup> Recognizing that "legal burdens should bear some relationship to individual responsibil-

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206. 628 F.2d 448 (5th Cir. 1980); 458 F. Supp. 569 (E.D. Tex. 1978).

207. The Fifth Circuit and the district court both acknowledged that strict scrutiny could have been the appropriate review, but concluded that they need not resolve the question because the defendants advanced no rational basis for the discrimination. In only one case has the Court used a traditional rational relation test to overturn a state statute. *Morey v. Doud*, 354 U.S. 457, 465-66 (1957), *overruled*, *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (*per curiam*). *See generally* *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

208. In *Boe v. Wright*, 648 F.2d 432 (5th Cir. 1981), Circuit Judge Reavely, concurring, correctly observed that a discriminatory legislative classification is presumably constitutional under a rational relation analysis. *Id.* at 434 (Reavely, J., concurring). *See* *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*). Under the rational basis test, the equal protection clause is violated only if the classification is wholly irrelevant to the state's objective. *See, e.g.*, *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

209. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1090 (1978). Professor Tribe recognizes that gender and illegitimacy, though not suspect classes, are "sensitive" classes.

210. *Id.*

211. *See* *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972); *Glonn v. American Guar. & Liab. Ins.*, 391 U.S. 73, 75 (1968); *Levy v. Louisiana*, 391 U.S. 68, 71 (1968).

212. *See In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 573 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981); *Doe v. Plyler*, 458 F. Supp. 569, 582 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981).

ity or wrongdoing,"<sup>213</sup> the Fifth Circuit, in *St. Ann v. Palisi*,<sup>214</sup> struck down a child's suspension from school that resulted from his mother's misconduct in striking an assistant principal.<sup>215</sup> Similarly, numerous Supreme Court decisions have applied a middle tier test to invalidate state statutes that draw lines on the basis of illegitimacy.<sup>216</sup> Illegitimate children, like undocumented children, are not culpable for their parents' wrongs. To stigmatize and penalize undocumented children by barring them from the education system "is an ineffectual—as well as an unjust—way of deterring the parent."<sup>217</sup>

Texas contended in the *Doe v. Plyler* decisions and in *Alien Children* that the exclusion of an identifiable group of children would save the state money and improve the quality of education for all other students.<sup>218</sup> To accomplish this end, Texas employed the most drastic available means: total exclusion of undocumented children from the schools.<sup>219</sup>

If fiscal integrity alone could justify all statutory classifications, courts would be powerless to invalidate many discriminatory statutes.<sup>220</sup> Additional justifications for the classification are necessary. In *Alien Children*, the court found that Texas failed to substantiate its additional justification, the impact of the exclusion of undocumented children upon the quality of education.<sup>221</sup> The state offered no evidence demonstrating that admission of an estimated 120,000 undocumented children would have a grave impact upon the quality of education.<sup>222</sup> The admission of these children might result in a slight diminution of per-pupil expenditures.<sup>223</sup> *Rodriguez*, however, held that the quality of education is not directly correlated to the amount of money expended

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213. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

214. 495 F.2d 423 (5th Cir. 1974).

215. *Id.*

216. *See* note 206 *supra*.

217. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

218. *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 574 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981). The argument, that providing education to undocumented children induces illegal entries, is an impermissible purpose. Measures designed to have a direct impact upon immigration are preempted. *See, e.g., DeCanas v. Bica*, 424 U.S. 351 (1976).

219. 501 F. Supp. at 583.

220. *See* note 91 *supra*.

221. 501 F. Supp. at 583.

222. *Id.* at 580.

223. *Id.*

on each pupil.<sup>224</sup> Furthermore, despite its healthy economy and net operating surplus, Texas ranks only forty-second nationally in per-pupil expenditures.<sup>225</sup> Rather than exclude a group of children from its schools, Texas can appropriate additional money to improve the quality of education.

The *Alien Children* court found that Texas failed to show “that the classification actually advances the state interest.”<sup>226</sup> The classification, in fact, is merely an engraftment of federal immigration criteria and fails to treat similarly situated persons alike.<sup>227</sup> Section 21.031 is underinclusive in that undocumented Mexican children are indistinguishable from documented Mexican and Mexican-American children in terms of their educational needs and characteristics. Both groups of children are generally in need of bilingual education, free meals, and free clothing programs provided through state and federal funding.<sup>228</sup>

Further, section 21.031 is overinclusive in that undocumented parents, like other parents, finance public education.<sup>229</sup> Public school education in Texas is funded predominantly through sales taxes and *ad valorem* property taxes.<sup>230</sup> Undocumented alien parents necessarily must pay those taxes when they buy consumer goods and pay rent.<sup>231</sup> It is nonsensical to assert that tax-paying poor families should contribute their “fair share” of the costs of education by payment of a tuition.<sup>232</sup> The courts have recognized that such an assertion is similarly unsuited to undocumented families.<sup>233</sup>

Thus, section 21.031 is not substantially related to the government’s interest in providing children with a quality education. The means em-

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224. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 24 n.56, 42-43 & n.86, 46 n.101 (1973).

225. 501 F. Supp. at 580.

226. *Id.* at 583.

227. *Id.*

228. *Id.* at 583 n.104. The federal government is the largest contributor to these programs. Federal funds are not prohibited for the education of undocumented children. In fact, such children are included in the government counts used to allocate funds for the states. *See Doe v. Plyler*, 458 F. Supp. 569, 589 n.28 (E.D. Tex. 1978), *aff’d*, 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981).

229. *See* note 93 *supra* and accompanying text.

230. 501 F. Supp. at 583. *See also* note 74 *supra* and accompanying text.

231. *See* note 93 *supra* and accompanying text. *See also* FINAL REPORT, *supra* note 2, at 38 (many long-term undocumented aliens “contribute to their school systems through various forms of local taxation”).

232. *See* notes 85-86 *supra*.

233. *See* note 93 *supra* and accompanying text.

ployed by Texas, in fact, are not effective in achieving the desired end. The distinction drawn between undocumented children and documented or citizen children is not fairly or substantially related to the objective of improving the quality of education.

### III. PREEMPTION ANALYSIS

Federal law preempts state legislation, under the supremacy clause,<sup>234</sup> if it encroaches upon an area of federal responsibility or concern. The preemption doctrine involves a two-part inquiry. First, under the "occupation" wing, state enactments are invalid if federal legislation evinces congressional intent to occupy the field.<sup>235</sup> Thus, if Congress expressly ordains an intention to occupy a field or "the nature of the . . . subject matter permits no other conclusion," state authority is "ousted."<sup>236</sup> Second, state legislation is invalid if it is in conflict with, or serves as an effective obstacle to, the achievement of federal purposes or objectives.<sup>237</sup>

Recent Supreme Court decisions narrowed the broad scope once extended to the federal preemption doctrine.<sup>238</sup> *De Canas v. Bica*<sup>239</sup> involved a California statute criminally penalizing employers who hire undocumented aliens. Although Congress possesses the exclusive power to regulate immigration,<sup>240</sup> the Court held that the state statute was valid because Congress did not unmistakably manifest an intent to occupy the field of employment of aliens and the statute was not an obstacle to the achievement of any congressional purpose.<sup>241</sup> Thus, the Court determined that the state restriction did not entail regulation of federal immigration matters or impinge upon federal objectives.

Applying the *De Canas* rationale, both the Fifth Circuit and the

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234. U.S. CONST. art. VI, cl. 2.

235. See Catz & Lenard, *Federal Pre-emption and the "Right" of Undocumented Alien Children to a Public Education: A Partial Reply*, 6 HASTINGS CONST. L.Q. 909, 912-13 (1979); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 626, 646-49 (1975).

236. *De Canas v. Bica*, 424 U.S. 351, 356 (1976) (quoting *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)).

237. See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

238. See, e.g., *De Canas v. Bica*, 424 U.S. 351 (1976); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *Merril Lynch, Pierce, Fenner & Smith, Inc., v. Ware*, 414 U.S. 117 (1973); *Goldstein v. California*, 412 U.S. 546 (1973).

239. 424 U.S. 351 (1976).

240. *Id.* at 355, 364.

241. *Id.* at 355-56.

Southern District of Texas found that section 21.031 is not invalid under the supremacy clause.<sup>242</sup> Title I of the Elementary and Secondary Education Act of 1965,<sup>243</sup> the Immigration and Naturalization Act,<sup>244</sup> and the Articles of the United Nations Charter and the Charter of the Organization of American States<sup>245</sup> do not preempt section 21.031.<sup>246</sup> Therefore, neither national nor international law preempts section 21.031.

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242. See *Doe v. Plyler*, 628 F.2d 448, 451 (5th Cir. 1978), *prob. juris. noted*, 101 S. Ct. 2044 (1981); *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 584-88 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981). *But see Doe v. Plyler*, 458 F. Supp. 569, 590-92 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981).

243. 20 U.S.C. §§ 2701-2854 (Supp. III 1979). Though undocumented children are counted in the Title I migrant "formula" to determine the federal funds allotted to Texas, the *Alien Children* court concluded that some children are "formula eligible," but do not benefit from the federal funds. *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 587 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981). Further, although Title I is silent on the matter, the Fifth Circuit concluded that Congress failed *expressly* to include undocumented children in the program. *Doe v. Plyler*, 628 F.2d 448, 453-54 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981). Because Texas can comply with the federal statutes despite § 21.031, the *Alien Children* court concluded that there is no specific conflict between the state and federal programs. 501 F. Supp. at 587. Moreover, Title I is not a mandatory act; it is merely a funding provision. *Doe v. Plyler*, 628 F.2d at 453. Thus, even if § 21.031 disqualifies Texas' participation in Title I, the federal statute does not require free public education grants for undocumented aliens. *Id.* See also *New York State Dept. of Social Servs. v. Publino*, 413 U.S. 405 (1973). *But see Rogers v. Brockett*, 558 F.2d 1057 (5th Cir. 1979), *cert. denied*, 444 U.S. 827 (1980).

244. 8 U.S.C. §§ 1101-1503 (1976). The Immigration and Naturalization Act (INA) does not preempt § 21.031. Section 21.031 is not an exercise of exclusive federal power or state legislation in an area occupied by Congress to the exclusion of the states. *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 588 n.118 (S.D. Tex. 1980), *prob. juris. noted*, 101 S. Ct. 3078 (1981). The INA is mainly concerned with the "terms and conditions of admission to the country and the subsequent treatment of aliens *lawfully* in the country." *De Canas v. Bica*, 424 U.S. 351, 359 (1976) (emphasis added). Both employment of and education for undocumented aliens are concerns peripheral to the INA.

245. See Protocol of Buenos Aires, Feb. 27, 1967, arts. 31, 47, 21 U.S.T. 607, T.I.A.S. No. 6847 (amending Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361); U.N. CHARTER arts. 55, 56. Though the two international agreements state that each member nation shall promote education, they fail to preempt § 21.031 because the charters are neither self-executing nor indicative of a clear commitment to educating undocumented children within each nation. *Doe v. Plyler*, 628 F.2d 448, 453-54 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981). Article 47 of the Organization of American States Charter stresses that participants are to promote education within the constitutional limits of each country: "The Member States will exert the greatest efforts, in accordance with their constitutional processes, to insure . . . the right to education." See also *Zschernig v. Miller*, 389 U.S. 429 (1968); *Oyama v. California*, 332 U.S. 633, 673 (1948) (Murphy, J., concurring).

246. See notes 242-45 *supra*.

#### IV. CONCLUSION

Justice Powell's majority opinion in *Rodriguez* specifically leaves open the question of whether access to public education is a fundamental right guaranteed by the Constitution. The answer to the question is clear. The nexus between education and numerous first amendment rights is so close that denial of public education amounts to a denial of the right of speech, the right to receive information, and the right to participate in the political process. Furthermore, a child's immigration status does not bear upon the applicability of first amendment rights. The first amendment should afford undocumented alien children residing within our country many of the same rights documented alien residents enjoy.

Undocumented aliens warrant suspect class status even more than legal aliens. Economic and legal exploitation of undocumented aliens far exceeds deprivations suffered by documented aliens under the majoritarian political process. Section 21.031 may also impermissibly discriminate against undocumented alien children by wealth or nationality. In light of recent Supreme Court decisions, however, it is unlikely that the Court will analyze section 21.031 discrimination on suspect class grounds.

If the Supreme Court refuses to classify access to public education as a fundamental right, the Court should apply a middle tier equal protection test. Although the state interest in providing children with a quality education is important, Texas cannot demonstrate that exclusion of undocumented children serves this end. The state has available more appropriate means to insure quality education for children residing within the state.

Undocumented aliens' problems are not peculiar to border states. They affect the entire nation. Congress, following the strategy of the Select Commission on Immigration and Refugee Policy, is now developing comprehensive legislative alternatives. As more Mexicans and people of other nationalities enter this country, legally and illegally, the demands upon many public programs will increase dramatically. The impact, particularly on education, will continue to be great. Responsive federal assistance analogous to the Refugee Education Assistance Act of 1980 is necessary to alleviate the impact of growing concentrations of undocumented children in some school systems across the country.

Undocumented aliens that reside in this country must provide their children with an education to assist them in becoming productive adults. Many of these children, who constitute only a small percentage of the overall undocumented population, will become legal residents, particularly if Congress accepts President Reagan's proposals. The rationale behind denying such children an education is simply unfounded.

The height of the irony underlying section 21.031 is exemplified by Mexican families that have entered this country surreptitiously with a child born in Mexico. Children born in these families after entry into the United States are American citizens. Section 21.031 would deny public school admission to one child in the family, yet entitle the other child to free public education by virtue of the fortuitous location of his or her birth.

The policy of excluding a class of children from school produces illiterate, unassimilated, and unproductive adults. Denial of education to undocumented alien children will damage the long-term interests of Texas. Justice Powell perceptively recognized that denial of education traps these children indefinitely within the poorest and most exploited class in our country. He predicted that this condition will force many of these uneducated children into a life of crime or dependency upon public assistance.<sup>247</sup> Although the Texas legislature designed section 21.031 to save money, it may produce a future net loss by denying the state the benefits of potentially productive adults.

*Craig Heberton IV*

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247. *Certain Named & Unnamed Non-Citizen Children v. Texas*, 448 U.S. 1327, 1332-33 (Powell, Circuit Justice, 1980).

