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The Utilization of Intermediate Scrutiny in Establishing the Right to Education for Undocumented Alien Children: Plyler v. Doe

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CASE NOTE

The Utilization of Intermediate Scrutiny in Establishing the Right to Education for Undocumented Alien Children: *Plyler v. Doe*

The recent decision in the case of Plyer v. Doe *has seemingly solidified the use of the intermediate level of scrutiny as a legitimate standard of review. The Supreme Court, in its refusal to apply both the harsh level of strict scrutiny and the often inadequate lower level of a rational basis standard, sought a mid-level analysis. Thus, the intermediate level of review enabled the Court to hold the Texas statute which denied undocumented alien children a free public education constitutionally infirm.*

I. INTRODUCTION

The plight of the Mexican national in the United States has been disparaging. Living in constant fear, the illegal alien prefers obscurity and anonymity. He does not travel, he lives in poverty, and works for substandard wages; many are afraid to send their children to school. The illegal alien will not be seen picketing or protesting for improved conditions or acknowledgment of rights. Yet, he has been cheated at every chance. The American businessman has been defrauding Mexican nationals since the early 1900's and the American judicial system has deprived them of their basic rights for just as long. Nevertheless, Mexican nationals continue to migrate to this country in record numbers.

In 1975, the illegal alien suffered yet another setback when the Texas State legislature amended section 21.031 of the Texas Education Code.[1] The effect of this amendment[2] was the denial of a

1. Section 21.031 provides, in part:

(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

tuition-free public education to undocumented alien[3] children in the State of Texas. Although the amended statute was in effect in 1975, the Tyler Independent School District did not begin to enforce it until 1977.[4] In 1977, the school district imposed an annual tuition fee of $1,000 per non-resident alien[5] child and admission was denied to those who were unable to pay. Most families could

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the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

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

TEX. EDUC. CODE ANN. § 21.031 (Vernon Cum. Supp. 1982).

2. Previously, the code provided:

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

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

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

TEX. EDUC. CODE ANN. § 21.031 (Vernon 1972) (amended 1975).

3. The term "undocumented alien" typically refers to those Mexican nationals who are in the United States without proper documentation. The documentation is required by the Immigration and Nationality Act. 8 U.S.C. § 1101-1503. (1976 & Supp. IV 1980).

4. The Board of Trustees of the Tyler Independent School District adopted the following policy in July, 1977:

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

Doe v. Plyler, 458 F. Supp. 569, 572 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *aff'd*, 102 S. Ct. 2382 (1982).

5. An alien is defined as: "[A]ny person not a citizen or national of the United States." 8 U.S.C. § 1102. (1976 & Supp. IV 1980) ("national" is used to describe persons owing permanent allegiance to state).

An alien may illegally enter the United States in the following ways:

[a]ny alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or, (3) obtains entry to the United States by a willfully false or mis- leading representation or the willful concealment of a material fact. . . .

8 U.S.C. § 1325 (1976). *See generally* Salinas & Torres, *The Undocumented Mexican*

not afford the tuition. The average salary of an undocumented family in Texas is less than $4,000.00 per year,[6] therefore, the inability to pay tuition left many children with nothing to do but "while away the days."[7]

In 1977, a group of undocumented Mexican children[8] challenged section 21.031 of the Texas Code[9] and sought injunctive and declaratory relief. The plaintiffs claimed they had been denied equal protection of the laws and, in addition, that section 21.031 was preempted by the Immigration and Nationality Act of 1952.[10] The United States District Court for the Eastern District of Texas held that illegal aliens are entitled to equal protection of the laws and that section 21.031 violated the equal protection clause.[11] The court also found the statute in violation of the supremacy clause.[12] On appeal, the Fifth Circuit upheld the district court's

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Alien: A Legal, Social, and Economic Analysis, 13 HOUS. L. REV. 863, 863 n.1 (1976).

6. A recent study revealed that the mean hourly wage for parents of undocumented children is $4.17. This rate, however, is greater than the average hourly wage for undocumented aliens working in the Houston area, which averages $2.75 per hour. Cardenas & Flores, *Socio-Economic and Demographic Characteristics of Undocumented Mexicans in the Houston Labor Market: A Preliminary Report,* at 70 (March 1980) (Coast Legal Foundation, Houston, Tex.).

7. Crewdson, *Access to Free Education for Illegal Alien Children,* N.Y. Times, Aug. 26, 1980, at § B at 10, col. 3.

8. The children, who are residents of Smith County, Texas, were represented by "their parents, as next friends." 458 F. Supp. at 571. Fearful that their identities might be disclosed, the plaintiffs filed the action under fictitious names. Upon motion, the court ordered the plaintiffs' true identities not to be disclosed. *Id.* at 572.

9. *See supra* note 1.

10. 458 F. Supp. at 572. The complaint also alleged charges of denial of due process and discrimination on the basis of national origin. These causes of action were dropped before the case went to trial on the merits. *Id.* at 572 n.4.

11. *Id.* at 593. The fourteenth amendment provides: "No State shall. . .deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

12. U.S. CONST. art. IV, cl. 2. *See* De Canas v. Bica, 424 U.S. 351, 356 (1976). *De Canas* involved a challenge to a state statute prohibiting the employment of aliens who were not legal residents of the United States. The Supreme Court held that the subject matter of the statute was not preempted by federal law, and that states were free to legislate with respect to aliens in this area. However, the court noted that "[e]ven when the Constitution does not itself commit exclusive power to regulate a particular field to the Federal Government, there are situations in which state regulation, although harmonious with federal regulation, must nonetheless be invalidated under the Supremacy Clause." *Id.* at 356. *See generally* 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 (1979).

The district court noted that,

injunction, ruling the statute unconstitutional.[13] However, the appeals court noted that the district court erred in holding section 21.031 in violation of the supremacy clause.[14] The injunction was upheld solely on equal protection grounds.[15]

Several suits challenging the constitutionality of section 21.031 were instituted in both federal and state courts during 1978 and 1979.[16] In *Hernandez v. Houston Independent School District,* a case decided before the ruling in *Doe v. Plyler,* a Texas State Court upheld the constitutionality of section 21.031.[17] In several federal cases, however, the provision was deemed to be constitutionally infirm.[18] In November, 1979, the Judicial Panel on Multidistrict Litigation consolidated four remaining claims[19] against state officials to be heard as a single action in the United States District Court for the Southern District of Texas.[20] In this action, the district court held that section 21.031 violated the equal pro-

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> [w]hile none of these federal laws or policies precisely and expressly prohibits the state conduct complained of in this case, that is not dispositive of the pre-emption challenge, [f]or when the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed.

458 F. Supp. at 592 (quoting Savage v. Jones, 225 U.S. 501, 533 (1912)).

13. 628 F.2d at 461.

14. *Id.* at 453.

15. *Id.* at 450.

16. *E.g.,* Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas, 448 U.S. 1327 (Powell, Circuit Justice 1980) (vacation of circuit court's stay of injunction which admitted undocumented alien children to Houston schools); Boe v. Wright, 648 F.2d 432 (5th Cir. 1981) (affirmed district court's order which granted preliminary injunctive relief, thus allowing undocumented children to attend school in Dallas Independent School District); Hernandez v. Houston Indep. School Dist., 558 S.W.2d 121 (1977) (affirmed grant of summary judgment which found § 21.031 not in violation of equal protection clause and denied admission in the Houston Independent School District to undocumented alien children).

17. 558 S.W.2d at 123. The court held that tuition-free public education was not a right based solely on physical presence within the state. *Id.* at 124.

18. *See* Boe v. Wright, 648 F.2d 432, 434 (5th Cir. 1981) (Reavley, J., and Clark, J., specially concurring) (section 21.031 meets criteria of rational basis test established for equal protection analysis); *In re* Alien Children Educ. Litig., 501 F. Supp. 544 (S.D. Tex. 1980), *injunction stayed,* No. 80-1807 (5th Cir. Aug. 12, 1980), *rev'd sub nom.*; Certain Named & Unnamed Noncitizen Children & Their Parents v. Texas, 448 U.S. 1327 (Powell, Circuit Justice, 1980), *prob. juris. noted,* 452 U.S. 937 (1981), *aff'd,* 102 S. Ct. 2382 (1982).

19. Martinez v. Regan, No. H-78-1797 (S.D. Tex. filed Sept. 18, 1978) (Houston ISD). The following actions involved nondeportable undocumented aliens: Garza v. Regan, 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).

20. *In re* Alien Children Educ. Litig., 482 F. Supp 326, 330 (J.P.M.D.L. 1979), *aff'd,* 501 F. Supp. 544 (S.D. Tex. 1980), *injunction stayed,* No. 80-1807 (5th Cir. Aug. 12, 1980), *rev'd sub nom.;* Certain Named and Unnamed Noncitizen Children and Their Parents v. Texas, 448 U.S. 1327 (Powell, Circuit Justice, 1980), *aff'd,* 102 S. Ct. 2382 (1982).

tection clause.[21] On appeal, the Fifth Circuit summarily affirmed the lower court's decision.[22] In 1981, the United States Supreme Court noted probable jurisdiction and consolidated the *Plyler*[23] case and *In Re Alien Children Education Litigation*[24] for review. The Supreme Court affirmed the previous decisions, concluding that section 21.031 violated the equal protection clause by denying certain children a tuition-free public education.[25]

This note examines the historical progress of the Mexican national's silent fight for equal coexistence in the United States. Specifically, it analyzes decisions of the judiciary which have affected the status of the illegal alien in our society. The article also sets forth the progression of the precedent and reasoning utilized by the Supreme Court in its recent decision to afford illegal aliens quasi-constitutional rights. In conclusion, it addresses the prospective effect of the ruling in similar areas of the law.

II. HISTORICAL BACKGROUND

Illegal migration into the United States has increased dramatically.[26] This influx has prompted the search for alternative methods to diminish the flow of undocumented aliens into the United States.[27] Congress has struggled with the task of regulating mi-

21. *In re* Alien Children Educ. Litig., 501 F. Supp. 544, 583-84 (S.D. Tex. 1980). The court also stated that the statute was not preempted by federal law. *See* U.S. CONST. art. VI, cl. 2.

22. While this appeal was pending, the Court of Appeals for the Fifth Circuit upheld the district court's ruling in Doe v. Plyler. Shortly thereafter, the Fifth Circuit summarily affirmed the decision of the Southern District, basing its affirmance on the *Plyler* decision. 448 U.S. 1327 (Powell, Circuit Justice, 1980).

23. 628 F.2d 448 (5th Cir. 1980).

24. 448 U.S. 1327 (Powell, Circuit Justice, 1980).

25. 102 S. Ct. 2382 (1982).

26. 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). In 1977, the Immigration and Naturalization Service 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). *See generally* Nafziger, *A Policy Framework for Regulating the Flow of Undocumented Mexican Aliens into the United States,* 56 OR. L. REV. 63, 66-68 (1977). The author indicates that statistics compiled by the Immigration and Naturalization Service (INS) relating to the number of illegal aliens in the United States, are often misleading and inflated; "[O]ne might just as well conclude, ironically, then the 'problem' of undocumented aliens has declined proportionately as their numbers have swelled." *Id.* at 68. *See also* Salinas & Torres, *supra* note 5, at 876-81.

27. The Reagan Administration, in an attempt to regulate the flow of illegal aliens into the United States, has drafted several proposals based on a bipartisan

gration since the 1870's. The result has been a tremendous mass of legislation which has "aroused the concern of millions and the passions of substantial minorites."[28]

Historically, however, it has been the Mexican immigrant that the United States has feared the most. The influx of Mexican nationals reached a high point in 1924, when an estimated 89,000 Mexicans crossed the United States border.[29] As the public outcry heightened, the immigration policy was tightened.[30] It was strictly enforced until World War II when the United States began experiencing a shortage of manpower. The immigration policy has alternately been strictly enforced and then relaxed during the past century, depending upon domestic conditions such as the labor force, the economy, and public opinion.[31]

Although immigration policy has often fluctuated, it has never been a meaningful deterrent to incoming Mexican nationals. Congress is vested with the exclusive power to establish strict immigration quotas,[32] but has been unable to effectively enforce those quotas.[33] Once an undocumented alien enters the United States, minimum effort, if any, is expended to apprehend him. In essence, a "de facto amnesty prevails."[34] The current trend in im-

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select committee study. The committee, initially commissioned in 1977 by the Carter Administration, seeks to stem the tide of undocumented aliens by imposing fines upon employers who knowingly hire undocumented aliens. Both the House Judiciary Subcommittee on Immigration, Refugees and International Law and the Senate Judiciary Committee on Immigration and Refugee Policy have conducted hearings since September, 1981, on the proposals concerning a new national immigration policy. *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 on Immigration & Refugee Policy, U.S. Immigration Policy and the National Interest (1981) (Supp. to Final Report, *supra*).

28. Higham, *The Politics of Immigration Restriction,* 1 IMMIGRATION AND NATIONALITY L. REV. 1, 1 (1976).

29. *Id.* at 29.

30. Various groups were strongly opposed to the increase in Mexican immigration. The small farmers of the Southwest were being undercut by the advantage of cheap labor to the big cotton farmers. Racial prejudices became more obvious and vindictive. *See* Salinas & Torres, *supra* note 5, at 868. The authors articulate the "push-pull" theory of immigration. The "push" motivates the Mexican nationals to move north because of unemployment and food shortages at home. The "pull" comes from the United States and includes the state's need for cheap labor and the inducement of higher wages.

31. *See generally* Petersen, *The "Scientific Basis of Our Immigration Policy, Commentary XX* at 84 (1955).

32. 8 U.S.C. §§ 1151-1153 (1976 & Supp. IV 1980).

33. 628 F.2d at 451.

34. Hull, *Undocumented Aliens and the Equal Protection Clause: An Analysis of Doe v. Plyler,* 48 BROOKLYN L. REV. 43, 48 (1981) (quoting *In re* Alien Children Educ. Litig., 501 F. Supp. 544, 549 (S.D. Tex. 1980)).

migration policy is reflected in a recently proposed federal law that extends amnesty to a great percentage of undocumented aliens presently in the United States.[35]

Congress' unwillingness or inability to control illegal migration has developed into an apathetic treatment of immigration laws. This has resulted in creating a greater dilemma, which is a staggering disregard for other American laws. Undocumented aliens are afraid to report crimes, testify in court, report serious illness, and contact any type of governmental figure when the need arises.[36] They are fearful of protecting their most basic rights, believing such action may subject them to subsequent deportation. Consequently, the rights of illegal aliens in the United States have not been firmly established by the courts or the legislature, nor have the rights been asserted by the alien himself.[37]

Developments in case law have reflected a contradictory approach toward the illegal alien by the judiciary. Some courts have treated the undocumented alien as an outlaw. The so-called "outlaw theory" treats the alien's physical presence within the United States as violating immigration laws, which in turn, justifies the forfeiture of unrelated legal rights.[38] Other courts have treated illegal aliens as persons within the law, entitling them to basic civil rights.[39] The majority currently recognizes that all persons are entitled to basic civil rights, particularly in the area of due pro-

35. *See September Hearings, supra* note 28 and accompanying text.

36. Final Report, *supra* note 28, at 41-42, 73. *See also* Ortega, *The Plight of the Mexican Wetback*, 58 A.B.A.J. 251, 251 (1972).

37. Approximately one million Mexican "wetbacks" live in the United States. They live in fear and without rights of any kind because they are in this country illegally. They enter the country without papers and thus lack legal status, but this should not deny them basic human rights. We cannot ignore their plight.

Ortega, *supra* note 37, at 251.

The problems of the illegal alien are analogous to those of the Negro. They face the same prejudices in finding housing, jobs, places to eat, and public accomodations. However, the illegal alien is in a more precarious position. He is unable to speak English and rarely seeks help from governmental agencies. *Id.* at 253.

38. The unauthorized presence of an alien in the United States is not a crime under the Immigration and Nationality Act. 8 U.S.C. §§ 1101-1557 (1976 & Supp. IV 1980).

39. Favorable decisions by certain courts regarding the civil rights of undocumented aliens do not refer to those areas affecting violation of immigration law. *See* Coules v. Pharris, 212 Wis. 558, 250 N.W. 404 (1933) (Wisconsin Supreme Court denied legal assistance in attempted recovery of wages earned by illegal alien); Janusis v. Long, 284 Mass. 403, 188 N.E. 228, 230 (1933) ("[a] person does not become an outlaw and lose all rights by doing an illegal act.") (quoting National Bank & Loan Co. v. Petrie, 189 U.S. 423, 425 (1902)).

cess and the right of access to the civil courts. However, the "outlaw theory" still remains in effect with regard to other areas of the law.[40]

The trend within the Supreme Court has been to follow the basic policy set forth in the lower courts. The Supreme Court, however, has been more inclined to afford illegal aliens a greater number of rights, albiet those of constitutional dimension. The Court relies on the maintenance of satisfactory international relations as one of its strongest justifications for this recent trend.[41] Yet, illegal aliens still do not receive the benefits provided to United States citizens. Benefits such as welfare, unemployment compensation, insurance coverage, and social security are among those denied to aliens because of their illegal status. A recent study revealed that high percentages of illegal aliens were subsidizing benefit programs which they could rarely utilize.[42] Until the recent Supreme Court decision of *Plyler v. Doe,* illegal aliens had made little progress in achieving any degree of equality with bona fide United States citizens.

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40. *See* Alonso v. California, 50 Cal. App. 3d 242, 123 Cal. Rptr. 536 (1975), *cert. denied,* 425 U.S. 903 (1976) (illegal alien has no right to equal opportunity and may be denied unemployment benefits); Pinilla v. Bd. of Review, 155 N.J. Super. 307, 382 A.2d 921 (1978) (denied unemployment compensation pending proof of legal status).

41. The Supreme Court warned the states that international relations could suffer if each state were allowed to make "repeated interceptions and interrogations" of aliens in the United States. Hines v. Davidowitz, 312 U.S. 52, 66 (1941). The court stated:

> One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when these nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects, inflicted, or permitted, by a government.

Id. at 64.

42. The study found the following percentages of undocumented aliens contributing to governmental programs:

Social Security Taxes Withheld	77.3%
Federal Income Tax Withheld	73.2%
Hospitalization Payments Withheld	44.0%
Filed U.S. Income Tax Returns	31.5%

The following is a list of programs from which illegal aliens benefited:

Hospitals or clinics	27.4%
Collected one or more weeks of unemployment insurance	3.9%
Have children in U.S. schools	3.7%
Participated in U.S. funded job training programs	1.4%
Secured food stamps	1.3%
Secured welfare payments	0.5%

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III. FACTUAL BACKGROUND

The states most affected by the surge of illegal aliens are those bordering Mexico. The legislatures of these states are constantly devising new methods aimed at restricting the flow of illegal migration across their borders. In May 1975, the Texas State legislature enacted one of these alternative methods[43] by amending the state's education code, in an attempt to reduce expenditures for public education in the state. The predictable result of this decision was to place undocumented alien children at a severe social, emotional, and economic disadvantage, possibly for the rest of their lives.[44]

The first suit challenging the constitutional validity of section 21.031 was *Doe v. Plyler,* a class action filed in the United States District Court for the Eastern District of Texas, in September 1977.[45] The district court granted a preliminary injunction enjoining the Tyler Independent School District[46] from restricting

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43. The legislature amended § 21.031 of the Texas Education Code which, in effect, denied undocumented alien children a free public education in the State of Texas. TEX. EDUC. CODE ANN. § 21.031 (Vernon Cum. Supp. 1982). *See supra* note 1 (text of amended statute). *Cf. supra* note 2 (text of original statute).

44. Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Wilkinson, *The Supreme Court, The Equal Protection Clause, And the Three Faces of Constitutional Equality,* 61 VA. L. REV. 945, 977 n.161 (1975) (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)). *See also* Plyler v. Doe, 102 S. Ct. 2382, 2411 (1982) (Burger, C.J., dissenting) (Chief Justice Burger strongly acknowledged the importance of education).

45. 458 F. Supp. 569 (E.D. Tex. 1978). The suit was filed "on behalf of certain school-age children of Mexican origin residing in Smith County, Texas, who could not establish that they had been legally admitted into the United States." 102 S. Ct. at 2389 (1982). The Tyler School District defined a legally admitted alien as "one who has documentation that he or she is legally in the United States, or a person who is in the process of securing documentation from the United States Immigration Service, and the Service will state that the person is being processed and will be admitted with proper documentation." *Id.* at 2389 n.2 (quoting App. to Juris. Statement in No. 80-1538, at p. 38).

46. The named defendants were the superintendent and the members of the

the admission of the plaintiff children to the schools.[47] Upon considering the plaintiffs' motion for permanent injunctive relief, the court found that neither section 21.031 nor the school district's implementation policy of section 21.031 had resulted in restricting the flow of undocumented aliens into Texas.[48] The court noted, however, that increases in the undocumented alien population[49] posed several problems for the school districts in the state.[50] The court found that section 21.031 would exclude a significant number of students from the school districts,[51] thereby resulting in "economies at some level."[52] These savings, however, would

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Board of Trustees of the Tyler Independent School District. The State of Texas intervened as a party defendant. 458 F. Supp. at 572.

47. *Id.* Following evidence in support of the plaintiffs' equal protection claim and upon a showing that plaintiffs would suffer irreparable harm absent interim relief, the court granted the plaintiffs' motion for a preliminary injunction.

48. *Id.* at 575. The Assistant Attorney General for the State of Texas presented the state's reasons and goals underlying the amendment of § 21.031. Essentially, § 21.031 was designed as a financial measure to reduce state funding to the school system. Secondly, it was implemented in an attempt to restrict the flow of illegal aliens into the State of Texas and thus, into their school districts. The legislature found that the increase in migration of Mexican nationals into Texas was creating an adverse "impact on the educational system . . . to the detriment of the citizens. . . ." Record of the Proceedings at 163, Dec. 12, 16, 1977 ("Tr. 12/12"). 458 F. Supp. at 573.

49. One recent study indicated that more than four million immigrants and refugees have entered the United States in the last ten years. The estimated number of illegal aliens is nearly double that figure. Yet, the exact number of undocumented aliens within the United States is unknown. The Immigration and Naturalization Service (INS) no longer estimates the number. Crewdson, *New Administration and Congress Face Major Immigration Decisions,* N.Y. Times, Dec. 28, 1980, at 1, col. 1. *See* Final Report, *supra* note 28, at 36. In 1979, the INS Commissioner estimated the undocumented population at between three and six million. *See generally* Fogel, *Illegal Aliens: Economic Aspects and Public Policy Alternatives,* 15 SAN DIEGO L. REV. 63 (1977). The author compared the general rate of population growth with the growth of illegal immigration. He estimates that the rate of legal immigration is approximately 400,000 annually, and the rate for illegal immigration is probably the same. Fogel postulates that if the U.S. population stops growing, illegal aliens may account for 3/4 of the future increase in the population. *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"). *But see* Final Report, *supra* note 28, at 35-36. (influx of undocumented aliens is problem of national scope, not restricted solely to Mexican nationals).

50. The vast influx of Mexican nationals has created fiscal as well as academic problems for the school system, attributable to the special educational needs of the Mexican immigrant. 458 F. Supp. at 576. *See also id.* at 577 (federal goverment pays 45% of cost of bilingual education; states pay only 20% of remainder).

51. The Dallas Independent School District projected that 2,000 to 5,000 undocumented alien children would enroll in their district, in addition to the 120,000 total student enrollment. Boe v. Wright, 648 F.2d 432, 437 & n.7 (5th Cir. 1981) (Reavely and Clark, J.J., concurring). *Cf. In re* Alien Children Educ. Litig., 501 F. Supp. at 578-79 & n.83 (3.7% of undocumented aliens have children attending school).

52. 458 F. Supp. at 576. The amount of funding granted to the school districts by the state and federal governments is based on a per student assessment. The

not necessarily improve the quality of education as the state contended.[53] It was also found that section 21.031 affected a small sub-class of illegal aliens, primarily those migrants who came to the United States with their families.[54] Noting that the statute completely deprives the illegal alien children of an education if tuition is not paid, the court stated, "the illegal alien of today may well be the legal alien of tomorrow."[55] These uneducated children "[a]lready disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices . . . will become permanently locked into the lowest socio-economic class."[56] On September 14, 1978, the United States District Court for the Eastern District of Texas held that illegal aliens were entitled to due process and equal protection, provided they were physically within the United States and subject to its laws. The Court concluded that section 21.031 violated the equal protection clause and the supremacy clause.[57] The United States Court of Appeals for the Fifth Circuit upheld the decision,[58] but found the lower court had erred in holding section 21.031 violated the supremacy clause.[59]

Various other suits which challenged the constitutionality of

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state would realize savings upon a decrease in student enrollment. *Id.* at 577. *See also* 102 S. Ct. at 2412-13 & n.10 (1982) (Burger, C.J., dissenting) (discussing state's ability to protect its economy and channel saved revenue into other governmental services).

53. The district court found that the nexus between the "economy measure" of excluding certain students' enrollment in the school district and the desired goal, "increasing educational quality for the remaining students," was "unreliable and often perverse in operation." 458 F. Supp. at 577. *See also supra* notes 23 & 24.

54. 458 F. Supp. at 578. *See also In re* Alien Children Educ. Litig., 501 F. Supp. at 578 n.83 (free public education is not "significant attraction" for undocumented aliens coming into the United States).

55. 458 F. Supp. at 577.

56. *Id. See generally* Wilkinson, *supra* note 45, at 976-1017.

57. 458 F. Supp. at 590-93.

58. 628 F.2d 448 (5th Cir. 1980).

59. The district court ruled that § 21.031 interfered with an area preempted by federal law. 458 F. Supp. at 592. The court's rationale was based more on humane grounds than on legal grounds. Describing the federal immigration policy as one designed to deal with the problem of illegal entry at the source, the court found § 21.031 to be inhumane, as it allowed illegal aliens to establish roots in the United States and then subjected them to second-class citizenship. Fearing § 21.031 as a policy which promoted second-class citizenship, the court found it inconsistent with, and therefore preempted by, federal immigration law policy. *Id. Accord* De Canas v. Bica, 424 U.S. 351 (1976) (Constitution affords federal government exclusive power to make "uniform Rule of Naturalization" and by extension, exclusive power to regulate immigration); *see, e.g.,* Fong Yue Ting v. United States, 149 U.S.

the Texas statute were filed in the United States District Courts for the Southern, Western, and Northern Districts of Texas during 1978 and 1979.[60] Upon the state's motion,[61] these claims were consolidated and heard as a single action in the District Court for the Southern District of Texas.[62] That court ruled that section 21.031 violated the equal protection clause stating that "absolute deprivation of education" required the use of "strict judicial scrutiny," especially when "the absolute deprivation is the result of complete inability to pay. . . ."[63] The district court made the following determinations: (1) the state's economic concerns were not a compelling state interest;[64] (2) there was no evidence to support the contention that exclusion of illegal alien children from the school district would improve the quality of education;[65] and (3) both groups of children, those illegal aliens statutorily excluded[66] and those resident children not excluded, had the same basic educational needs.[67] In conclusion, the court reasoned that "§ 21.031

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698 (1893); Chy Lung v. Freeman, 92 U.S. 275 (1875) (federal policy, being supreme law of land, preempts any state law that conflicts or interferes with its domain).

The court of appeals concluded that there was neither an express nor implied intent by Congress to rule that programs denying illegal aliens access to public education are preempted by the federal government. The court further noted that the conflicts perceived by the district court were "illusory," and § 21.031 does not conflict with federal policy. 628 F.2d at 453.

60. *See supra* note 16.

61. The State of Texas, in addition to the Texas Education Agency and local officials, was named as a defendant in each suit. 102 S. Ct. at 2391.

62. *In re* Alien Children Educ. Litig., 482 F. Supp. 326 (J.P.M.D.L. 1979), *aff'd*, 501 F. Supp. 544 (S.D. Tex. 1980), *injunction stayed*, No. 80-1807 (5th Cir. Aug. 12, 1980), *rev'd sub nom.* Certain Named and Unnamed Noncitizen Children and Their Parents v. Texas, 448 U.S. 1327 (Powell, Circuit Justice, 1980), *aff'd*, 102 S. Ct. 2382 (1982).

63. 501 F. Supp. at 582. *See also infra* note 83 (elements of strict scrutiny).

64. 501 F. Supp. at 582. "The . . . Equal Protection Clause . . . measure[s] the validity of classifications created by state laws." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 59 (1973) (Stewart, J., concurring). When strict scrutiny is triggered, the state must prove that the statute is tailored to further a compelling state interest, and 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); Dunn v. Blumstein, 405 U.S. 330, 342 (1972); Graham v. Richardson, 403 U.S. 365, 374-75 (1971); Shapiro v. Thompson, 394 U.S. 618, 633 (1969). *See generally* Levinson, *The Right to a Minimally Adequate Education for Learning Disabled Children*, 12 VAL. U.L. REV. 253 (1978).

65. 501 F. Supp. at 583. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 24 n.56, 42-43 & n.86, 46 n.101 (1973) (no direct correlation between amount expended per student and quality of education received).

66. The children not 'legally admitted' are those without documents. It is important to note that this is not equivalent to deportable. Many of the undocumented children are not deportable. None of the named plaintiffs is under an order of deportation. Immigration experts testified that it is most unusual for the Immigration and Naturalization Service to initiate deportation proceedings against children.

501 F. Supp. at 583 n.103.

67. Id. at 583. *Cf.* Doe v. Plyler, 458 F. Supp. at 589 (educational needs of those

was not carefully tailored to advance the asserted state interest in an acceptable manner."[68] Pending an appeal of this decision, the Fifth Circuit ruled section 21.031 was constitutionally infirm, upholding the district court decision in *Doe v. Plyler.*[69] Based on the *Plyler* decision,[70] the Fifth Circuit summarily affirmed the ruling of the Southern District in the appeal of *In re Alien Children Education Litigation.*[71] Noting probable jurisdiction,[72] the United States Supreme Court consolidated both cases and rendered its decision on June 15, 1982. The Supreme Court held the Texas statute was in violation of the equal protection clause of the fourteenth amendment.[73]

IV. EQUAL PROTECTION ANALYSIS

The Supreme Court was faced with an issue of first impression in determining whether the equal protection clause applies to illegal aliens.[74] The Fifth Circuit was the first court to unequivocally hold that illegal aliens were entitled to equal protection guaran-

excluded by § 21.031 are for most part no different than needs of children legally attending schools).

68. 102 S. Ct. 2382, 2391 (1982) (quoting *In re* Alien Children Educ. Litig., 501 F. Supp. at 583-84.

69. 628 F.2d at 461.

70. Both district courts held § 21.031 unconstitutional. Their decisions, however, were based on different reasons. The Eastern District Court held the statute unconstitutional because they found the state's enactment of it was not rationally related to the state's asserted goals. The Southern District Court concluded that § 21.031 violated the equal protection clause after subjecting it to a strict judicial scrutiny test. The Southern District Court also noted that the statute impaired a previously unrecognized fundamental right, that of access to free public education. 501 F. Supp. at 564.

71. 448 U.S. 1327 (Powell, Circuit Justice, 1980).

72. 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted,* 451 U.S. 968 (1981), *aff'd,* 102 S. Ct. 2382 (1982) and 448 U.S. 1327 (Powell, Circuit Justice, 1980), *prob. juris. noted,* 452 U.S. 937 (1981), *aff'd,* 102 S. Ct. 2382 (1982).

73. 102 S. Ct. 2382 (1982). The Supreme Court did not address the preemption issue which was presented by Appellees in both cases. The Court reasoned that, "[i]n light of our disposition of the Fourteenth Amendment issue, we have no occasion to reach this claim." *Id.* at 2391 n.8.

74. Historically, the rights of illegal aliens have not been clearly defined. Due to the reluctance of illegal aliens to challenge improprieties, the courts have rarely taken a stance with regard to their status in the United States. A recent study concluded that "[u]ndocumented persons are in the extremely precarious position of being unable to assert themselves without subjecting themselves to possible deportation or prosecution." A Report of the Texas Advisory Committee to the United States Committee on Civil Rights, *Sin Papales: The Undocumented In Texas,* at 32 (Jan. 1980). *See also supra* notes 31, 38 & 40.

tees.[75] These guarantees, set forth in the fourteenth amendment, provide, "[N]o State shall. . .deprive any person of life, liberty or property without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*"[76] The conflicts confronting the courts in the illegal alien education cases originate from this clause. Issues involving illegal aliens that were considered by the Supreme Court include: whether illegal aliens are within a state's jurisdiction for purposes of constitutional protection, and if so, to what extent is protection afforded these non-citizens? An important decision deeply affecting the future rights and privileges of illegal aliens was reached on June 15, 1982, when the United States Supreme Court granted undocumented alien children the right to a tuition-free public education. This decision has, in effect, placed illegal aliens on an equal level with all American children striving for an education.

The Supreme Court held that illegal aliens are "within the jurisdiction" of a state when they are physically within its borders, thus entitling them to equal protection guarantees. The Court then addressed the issue of whether section 21.031 violated the equal protection clause. Concluding that "all persons similarly circumstanced shall be treated alike,"[77] the Supreme Court found the Texas statute unconstitutional. However, the Court deviated from some of the basic reasoning used to substantiate the lower courts' decisions.[78] For example, the Supreme Court did not accept appellees' contentions that education is a fundamental right[79] implicitly embodied in the Constitution.[80] The Court also rejected the argument that the undocumented aliens were a sus-

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75. The Fifth Circuit held that § 21.031 violated the equal protection clause in denying undocumented alien children a free public education. 628 F.2d at 450.

76. U.S. CONST. amend. XIV, § 1 (emphasis added).

77. 102 S. Ct. at 2394 (quoting F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

78. 501 F. Supp. at 556-58. The district court classified the plaintiffs as a suspect class. *See also supra* note 20 and accompanying text.

In *Plyler,* the Fifth Circuit refused to classify the plaintiffs as a suspect class and did not explicitly hold education as a fundamental right. However, in the majority opinion, Judge Johnson implied an unwillingness to abandon the fundamental interest branch of a strict judicial scrutiny standard of review. 628 F.2d at 457. ("We decline to find that complete denial of free education to some children is not a denial of fundamental right").

79. The Supreme Court has previously held fundamental rights to include: the right to interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969); the right to vote, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); the right to free exercise of religion, Sherbert v. Verner, 374 U.S. 398 (1963); the right to freedom of association, Bates v. City of Little Rock, 361 U.S. 516 (1960); and the right to a criminal appeal, Griffin v. Illinois, 351 U.S. 12 (1956).

80. "Public education is not a 'right' granted to individuals by the Constitution." 102 S. Ct. at 2397. *See also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

pect class.[81] The Court did not utilize the strict judicial scrutiny analysis[82] in determining the validity of section 21.031, but rather, the statute was analyzed according to an intermediate standard of review.[83] Intermediate or middle tier review is a less stringent standard used to determine whether certain legislation has a substantial relationship to the state interest advanced.[84] The Court concluded that section 21.031 did not efficiently further a substantial state goal, and was therefore unconstitutional.[85]

A. The Illegal Alien As a "Person"

In order to invoke constitutional guarantees, it must first be established that those who seek protection are warranted in so doing. In recent years, the Supreme Court has expanded its interpretation of the equal protection clause and the fourteenth amendment. This resulted in a broadening of the category of groups protected by the equal protection clause.[86] The Supreme Court interpreted "within its jurisdiction" as a geographic or territorial qualification, not solely limited to those persons or citizens who are legally within the states' boundaries.[87] The Court has also ruled that aliens, even those within the country illegally, are "persons" recognized by the Constitution, thereby enabling them to invoke guarantees provided in the fifth and fourteenth

81. 102 S. Ct. at 2398. *But see id.* at 2404 (Blackmun, J., concurring) (providing education to some and denying it to others automatically "creates class distinctions").

A "suspect class" is defined as a "discrete and insular minority whose members possess some immutable characteristic determined by birth alone and who by virtue of this characteristic suffer some special disability." Comment, *Recent Decisions: Undocumented Aliens—Equal Protection and the Right to a Free Public Education: Doe v. Plyler,* 33 ALA. L. REV. 181, 188 (1981) (footnote ommited); *see also* United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938).

82. The strict scrutiny test is used to determine if a state statute threatens a fundamental right or affects a suspect class. *See generally* Wilkinson, *supra* note 45. *See, e.g.,* Rosber, *Aliens and Equal Protection: Why Not the Right to Vote?,* 75 MICH. L. REV. 1092 (1977), *reprinted in* 2 IMMIGRATION AND NATIONALITY L. REV. 79, at 91-96 (1978-1979).

83. *See infra* note 98 and accompanying text (intermediate standard of review analysis).

84. *Cf. infra* note 95 (elements of rational basis standard).

85. 102 S. Ct. at 2402.

86. *See generally* Perry, *Modern Equal Protection: A Conceptualization and Appraisal,* 79 COLUM. L. REV. 1023, 1026-28 (1979).

87. "Every citizen or subject of another country, *while domiciled here,* is within the allegiance and the protection, and consequently *within the jurisdiction* of the United States." 102 S. Ct. at 2392 n.10 (emphasis added) (quoting United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898)).

amendments.[8889]

The appellants continued to utilize the "outlaw theory" in *Doe v. Plyler.* They argued that persons are not "within the jurisdiction" of a state if they are there illegally. An analysis of the original meaning attached to the phrase, "within its jurisdiction," and the policy behind the enactment of the fourteenth amendment contravenes the appellants' contention. The congressional debate of the equal protection clause revealed, "the phrase 'within its jurisdiction' . . . was intended in a broad sense to offer the guarantee of equal protection to all within a State's boundaries, and to all upon whom the State would impose the obligations of its laws."[90] Thus, the meaning of the phrase is reciprocal in nature; anyone subjected to the state's laws is also protected by them. The ruling, agreed upon by both factions of the Court,[91] defined illegal aliens as "persons within the jurisdiction" of the State of Texas and thus entitled to invoke the equal protection guarantees of the fourteenth amendment.[92]

B. Equal Protection: Standards of Evaluation

For purposes of evaluating state legislation, the equal protection doctrine concerns itself with the nature of the discrimination and the nature of the burdens or benefits involved.[93] Thus, the statute in question is classified to determine the standard of review to be utilized in evaluating its validity under the Constitution. Normally, application of the equal protection clause to state action only requires that the state legislation bear some reason-

88. 102 S. Ct. at 2391-92; *See also* Shaughnessy v. Mezei, 345 U.S. 206 (1953) (illegal alien is "person" in ordinary sense of term); United States v. Wong Kim Ark, 169 U.S. 649 (1898) (defined "jurisdiction" as used in geographical sense); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (Court held illegal aliens entitled to protection of due process clause and implied they are also within fourteenth amendment's protection); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (provisions contained in equal protection clause are "universal in their application, to all persons within the territorial jurisdiction." *Id.* at 369).

89. CONG. GLOBE, 39th Cong., 1st Sess., 1033-34 (1866) (remarks of Rep. Bingham in support of fourteenth amendment as originally written). "I submit to the judgment of the House, that it is impossible for mortal man to frame a formula of words more obligatory than those already in that instrument, enjoining this great duty upon the several states and on several officers of every State in the Union." *Id.*

90. 102 S. Ct. at 2393.

91. "I have no quarrel with the conclusion that the Equal Protection Clause of the Fourteenth Amendment *applies* to aliens who, after their illegal entry into this country, are indeed physically 'within the jurisdiction' of a State." 102 S. Ct. at 2409 (Burger, C.J., dissenting).

92. *Id.* at 2392-93.

93. *See generally,* Gunther, *Foreward: In Search of Evolving Doctrine On A Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 12-24 (1972) (theory of policy underlying equal protection doctrine).

able relationship to a legitimate state interest.[94] Although the equal protection clause was designed as a restriction on state action inconsistent with constitutional guarantees, a more stringent test would not be applied unless a "suspect class" or "fundamental right" were involved. If state legislation threatens a "suspect class" or impinges upon a "fundamental right," strict judicial scrutiny would require the state to prove that the legislation in question had been "precisely tailored to serve a compelling governmental interest."[95]

The Court has recently developed a third level of review.[96] The "intermediate" or "middle tier" standard of review is used only in the limited situation where the legislation cannot be classified as "facially invidious" yet, it affects too valuable a right to be evaluated by the rational basis standard.[97] This level of evaluation concentrates on the effects the legislation will have with regard to well established constitutional principles. In effect, it is the protection of important values which stem from the Constitution, although not explicitly provided for in the document. The

94. The rational basis standard of review is utilized only when determining the constitutionality of state action that does not involve a "suspect class" or fundamental constitutional right. The statute is presumed constitutional unless it can be shown that the state had no rational basis for implementing it or unless it can be shown that its implementation does not justify the state's desired goal. *See* Levin, *The Courts, Congress, And Educational Adequacy: The Equal Protection Predicament,* 39 MD. L. REV. 187, 191-94 (1979); *See also supra* note 82 (definition of "suspect class"), and *supra* note 80 (fundamental rights provided by the Constitution).

95. 102 S. Ct. at 2394-95. *See also supra* note 65.

96. *See* Craig v. Boren, 429 U.S. 190 (1976) (Supreme Court utilized "middle tier" analysis in evaluating constitutionality of Oklahoma statute forbidding sale of beer based on age and gender); Lalli v. Lalli, 439 U.S. 259 (1978) (intermediate standard of review used in ruling New York statute constitutional); University of Cal. Regents v. Bakke, 438 U.S. 265 (1978) (discussing court's role in evaluating state action). *But see* Mathews v. Lucas, 427 U.S. 495 (1976) (Blackmun, J., dissenting). Justice Blackmun, commenting on the intermediate standard of review stated, "[t]hese matters of practical judgment and empirical calculation are for [the state]. . . . In the end, the precise accuracy of [the state's] calculations is not a matter of specialized judicial competence; and we have no basis to question their detail beyond the evident consistency and substantiality." 427 U.S. at 515-16.

97. The Court, clarifying its position on the use of an intermediate standard of review stated, "[i]n expounding the Constitution, the Court's role is to discern 'principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.'" 102 S.Ct. at 2395 n.16 (quoting University of Cal. Regents v. Bakke, 438 U.S. 265, 299 (1978) (Opinion of Powell, J.) (quoting A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 114 (1976)).

intermediate level of review seeks assurances that the state action furthers a *substantial* interest of the state.

Evaluation of the constitutionality of a particular piece of legislation mandates the use of several steps to determine the applicable standard of review.[98] The following sections focus on determinations made by the Supreme Court in selecting the proper standard of review.

1. The Suspect Class

Traditionally, the principle of equality has been forcefully stressed in American society. Yet, historically, certain classes have been continuously prejudiced. In 1938, the Supreme Court took a stance to rectify this injustice. Realizing that certain classes deserve special judicial protection, the Court, in *United States v. Carolene Products Co.* stated, "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."[99] In the years following the *Carolene Products* decision, the Court has held that classifications based on national origin,[100] race,[101] and alienage,[102] are "suspect," due to the nature of the interest affected.

98. If a "suspect class" or fundamental right is involved, strict judicial scrutiny must be utilized. *See* McLaughlin v. Florida, 379 U.S. 184 (1964); Hirabayashi v. United States, 320 U.S. 184 (1943). *See also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Graham v. Richardson, 403 U.S. 365 (1971); United States v. Carolene Prod. Co., 304 U.S. 144 (1938). When a constitutional principle is affected, the intermediate standard of review is applied. *See supra* note 96. Other allegations of unconstitutionality are evaluated by the rational basis standard. *See supra* note 94.

99. 304 U.S. 144, 153 n.4 (1938).

100. *See* Castenada v. Partida, 430 U.S. 482 (1977); Oyama v. California, 332 U.S. 633, 644-46 (1948); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

101. *See, e.g.,* McLaughlin v. Florida, 379 U.S. 184 (1964). *See also* University of Cal. Regents v. Bakke, 438 U.S. 265 290-91 (1978) (opinion of Powell, J.).

102. *See* Graham v. Richardson, 403 U.S. 365 (1971) (state restrictions on resident aliens suspect under the equal protection doctrine and subject to strict judicial scrutiny). Various Supreme Court and lower court decisions following *Graham* found other restrictions based on alienage to be unlawful under the equal protection clause. *See* Nyquist v. Mauclet, 432 U.S. 1 (1977) (scholarships denied due to alienage); Examining Bd. of Eng'rs. v. Flores de Otero, 426 U.S. 572 (1976) (restrictive requirements in field of civil engineering); *In re* Griffiths, 413 U.S. 717 (1973) (restrictions in legal profession); Sugarman v. Dougall, 413 U.S. 634 (1973) (restrictions in state civil service). Lower courts have also held certain restrictions based on alienage unconstitutional. *See, e.g.,* Taggart v. Mandel, 391 F. Supp. 733 (D. Md. 1975). *Cf.* Takahasi v. Fish and Game Comm'n., 334 U.S. 410, 420 (1948) ("[t]he power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."). *But cf.* Ambach v. Norwick, 441 U.S. 68 (1979) (upholding New York statute prohibiting employment of aliens as school teachers); Foley v. Connelie, 435 U.S. 291 (1978) (upholding state statute prohibiting aliens employment as police officers).

However, the Court has not, and seemingly will not, afford *illegal* aliens suspect classification status. In the *Plyler* decision, the Court rejected the appellees' claim that illegal aliens are a suspect class.[103]

The Court, in broadening the categories of groups labeled "suspect," sought to abolish state legislation which imposed disabilities upon certain groups that have been disfavored due to circumstances beyond their control. Several criteria have been utilized in classifying a group as suspect.[104] Three elements, set forth in *Frontiero v. Richardson,*[105] were: (1) the class must suffer from "an immutable characteristic determined solely by the accident of birth"; (2) historically, the group must have experienced degradation and subterfuge; and (3) the group, as a whole, must lack "effective political power and redress."[106] According to these criteria, the Supreme Court could not justifiably label illegal aliens as a "suspect class." Since the illegal alien enters the United States voluntarily, he is not suffering as a result of an accident of birth.[107] Secondly, having no effective political power or redress, the illegal alien seemingly meets the third requirement of the criteria suggested to define a suspect class. However, neither the Constitution nor the federal government afford the illegal alien any political rights.[108] Thus, the illegal alien is not politically impotent due to historical deprivation or prejudice. The Supreme Court, upon denying suspect status to illegal aliens, concluded that "[a]t the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation."[109]

103. 102 S. Ct. at 2396 n.19. "We reject the claim that 'illegal aliens' are a 'suspect class.'" Id.

104. *See generally* Wilkinson, *supra* note 45 ("[t]he law of suspect classes is largely one of latent confusion"). The Court has not indicated how many elements of the *Carolene Products* and *Frontiero* criteria must be established to attain suspect class status.

105. 411 U.S. 677 (1973).

106. Wilkinson, *supra* note 45 at 980 (footnote omitted).

107. A convincing argument contends that the illegal aliens who are contesting § 21.031 are not here voluntarily. Rather, the minor children, unable to control their parents' behavior or residence, are compelled to remain involuntarily and illegally in the United States. *See also infra* notes 118-25 and accompanying text.

108. The United States Constitution provides that only citizens of the United States may hold offices; U.S. CONST. art. I, §§ 2 & 3; article II, § 1 limits the office of president to a "natural born Citizen"; while the fifteen, sixteenth, twenty-fourth and twenty-sixth amendments restrict voting rights to citizens.

109. 102 S. Ct. at 2396.

2. Education: A Fundamental Right?

Any classification that operates to impede or prevent satisfaction of a fundamental interest is presumed to offend the guarantees provided in the equal protection clause. If an interest is characterized as "fundamental", it must be afforded to all on an equal basis, unless the state can justify its discriminatory action by proving its necessity in furthering a compelling state objective. Therefore, unless a right is given a "fundamental" classification, legislation which restricts that right will not be analyzed under a strict scrutiny standard of review.

Education, although recognized as an important interest,[110] has never been deemed a "fundamental right."[111] In *San Antonio Independent School District v. Rodriguez* the Court stated, "[e]ducation . . . is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."[112] The Court, persuaded by well established precedent, again recognized education as an extremely vital interest but failed to confer upon it the "fundamental" status necessary to allow the Court strict scrutiny in its

110. The importance of education in our society is well established. Justice Marshall stated, in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973),

> [w]hatever the severity of the impact of insufficient food or inadequate housing on a person's life, they have never been considered to bear the same direct and immediate relationship to constitutional concerns for free speech and for our political processes as education has long been recognized to bear. Perhaps the best evidence of this fact is the unique status which has been accorded public education as the single public service nearly unanimously guaranteed in the Constitutions of our States. Education, in terms of constitutional values, is much more analogous, in my judgment, to the right to vote in state elections than to public welfare or, public housing. Indeed, it is not without significance that we have long recognized education as an essential step in providing the disadvantaged with the tools necessary to achieve economic self-sufficiency.

Id. at 115 (Marshall, J., dissenting).

In Milliken v. Bradley, 433 U.S. 267 (1977) the Court recognized education as a vital interest. The Court explained:

> [c]hildren 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.

Id. at 287.

In Brown v. Board of Educ., 347 U.S. 483 (1954) it was stated that, "[t]oday, education is perhaps the most important function of state and local governments." *Id.* at 493. And further, "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Id.*

111. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (education not a fundamental right).

112. *Id.* at 35.

review of section 21.031.[113]

3. An Intermediate Standard of Review

Refusal to define illegal aliens as a suspect class and reluctance to classify education as a fundamental right, consequently, prohibits the utilization of the strict judicial scrutiny standard as the requisite level of review. Yet, the Court also refused to apply the rational basis standard of review. Reasoning that section 21.031 places a severe discriminatory burden on minor children who are unable to control their illegal status, the Court sought a higher level of review, because the statute denied those children the extremely important benefits of the institution of education.[114] The Court, therefore, chose an intermediate standard of review to be used in its analysis of the Texas statute.[115]

Although the Court does not categorize illegal aliens as a suspect class, the Court does afford this particular group of children a special status.[116] This special classification has been referred to as "sensitive" rather than "suspect."[117] The Texas statute classifies a select group of minor children and "imposes its discriminatory burden on the basis of a legal char- acteristic over which children can have little control."[118] In essence, section 21.031 penalizes children for the acts of their parents.[119] Thus, the "legal burden" does not "bear some relationship to [the] individual responsibility or wrongdoing."[120] However, this type of classification

113. 102 S. Ct. at 2398. "Nor is education a fundamental right. . . ." *Id.*

114. *Id.* at 2396-97.

115. Much criticism has been directed at the recently devised intermediate standard of review. Chief Justice Burger, in the dissenting opinion of *Plyler,* notes that, although the Court refuses to use the strict scrutiny standard of review, the Court "spins out a theory custom-tailored to the facts" by "patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis." *Id.* at 2409 (Burger, C.J., dissenting). *See generally* Gunther, *supra* note 94, at 17-20.

116. 102 S. Ct. at 2396. "The children who are plaintiffs in these cases are special members of this underclass." *Id. See also supra* note 109.

117. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 1090 (1978) (recognizing that gender and illegitimacy are "sensitive" and not "suspect" classes).

118. 102 S. Ct. at 2397.

119. The Supreme Court has previously recognized that it is unfair to stigmatize children who are not responsible for their birth. These illegal alien children have no control over their Mexican nationality, their place of residence, or their parents' violation of immigration laws. *See* Lalli v. Lalli, 439 U.S. 259 (1978) (afforded illegitimate child "sensitive" class status); Trimble v. Gordon, 430 U.S. 762 (1977) (children cannot affect their parents' conduct).

120. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972). The Court contin-

tends to support the view that the equal protection clause is an "equalizer," designed to abolish every handicap afflicting persons not directly responsible for the hardship.[121] Critics of this special categorization rely on persuasive precedent maintaining that the equal protection clause does not require identical treatment of all individuals.[122] Congress also has refused to treat all individuals in an equal manner.[123]

Had the Court relied solely on its classification of illegal alien children as a "sensitive" class to justify an intermediate level of review, conceivably the rationale would have been subject to meritorious attack.[124] However, given the importance of the interest involved, the Court correctly analyzed section 21.031 according to an "equality of opportunity" theory.[125] Justice Marshall, in his dissenting opinion in *Dandridge v. Williams,* supported a sliding-scale or intermediate level of review approach:

> In my view, equal protection analysis of this case is not appreciably advanced by the *a priori* definition of a "right," fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.[126]

Justice Marshall further distinguished the importance of equal-

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ued: "[v]isiting. . .condemnation on the head of an infant is illogical and unjust. Obviously, no child is responsible for his birth and *penalizing* the . . . child is an ineffectual - as well as unjust - way of deterring the parent." *Id.* (footnote omitted) (emphasis added).

121. 102 S. Ct. at 2396.

122. *See* Jefferson v. Hackney, 406 U.S. 535 (1972); Reed v. Reed, 404 U.S. 71 (1971); Tigner v. Texas, 310 U.S. 141 (1940).

123. *See* Mathews v. Diaz, 426 U.S. 67 (1976). Several nonconstitutional benefits are denied undocumented aliens because of their illegal status. *See* 7 U.S.C. § 2015(f) (Supp. 1981) (excluding illegal aliens from participation in the food stamp program); 42 U.S.C. § 1382c(a)(1)(B) (1974) (excluding illegal aliens from supplemental security income for aged, blind, and disabled); Aid to Families with Dependent Children, 45 C.F.R. § 233.50 (1979) (excluding illegal aliens); Medicaid, 42 C.F.R. § 435.402 (1981) (excluding illegal aliens). *See also* 5 C.F.R. § 7.4 (1982) (excluding aliens from most federal jobs by making them ineligible to take civil service exam).

124. But the need for great caution in such intervention is apparent. The relationship that efforts to redress relative economic disadvantage bear to the process of personal self-realization, whether in an educational, career, or any other sense, is often a subtle and unfathomable one. Welfare benefits, for example, may in certain instances spark individual incentives but in other instances depress it. . . . Furthermore . . . no judicial attempt to redress economic inequality can be launched without *serious* intrusion upon the fundamental mission of the legislative branch to collect and disburse public funds. Vindication of important opportunity rights, however, often can and should be accomplished short of direct interference with so important a political prerogative.

Wilkinson, *supra* note 45, at 986-87 n.208 (emphasis added).

125. *See generally* Wilkinson, *supra* note 45, at 976-998 (analysis of judiciary's role in equality of opportunity).

126. 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting).

ity of opportunity with regard to education as opposed to the equality of opportunity in receiving benefits such as public welfare and housing.[127] He equated the close relationship of education with highly regarded constitutional values.[128] A high level of importance concerning the institution of education was also espoused by Chief Justice Burger in the dissenting opinion of *Plyler v. Doe,* where he stated, "[t]he importance of education is beyond dispute."[129] However, upon concluding that education is not a fundamental right, Chief Justice Burger criticizes the court for labeling it as such.[130] This criticism is unfounded.[131] The Supreme Court never classified education as a fundamental right. Education is afforded status as an extremely important interest, an interest that "has a fundamental role in maintaining the fabric of our society."[132] Combining education as a "special" interest with the classification of undocumented alien children as a "sensitive" class, the Court is able to justify its choice of an intermediate standard of review in its analysis of section 21.031.[133]

4. The "Substantiality" of the State's Asserted Goals

In applying an intermediate standard of review, the challenged statute must be analyzed to determine if it furthers a substantial

127. *See, e.g., supra* note 41.

128. 411 U.S. at 109, 110, 116 (Marshall, J., dissenting).

> I believe that the close nexus between education and our established constitutional values with respect to freedom of speech and participation in the political process makes this a different case from our prior decisions concerning discrimination affecting public welfare, [citations omitted] or housing. There can be no question that, as the majority suggests, constitutional rights may be less meaningful for someone without enough to eat or without decent housing. But the crucial difference lies in the closeness of the relationship.

Id. at 115 n.74.

129. 102 S. Ct. at 2411 (Burger, C.J., dissenting).

130. *Id.* While the majority does not classify education as a fundamental right, they seemingly afford it fundamental right status. Chief Justice Burger criticizes this use of the intermediate scrutiny. "Yet we have held repeatedly that the importance of a governmental service does not elevate it to the status of a "fundamental right" for purposes of equal protection analysis." *Id.*

131. "Public education is not a 'right' granted to individuals by the Constitution." 102 S. Ct. at 2397.

132. *Id.*

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

Id. at 2398.

state interest. A statute may be analyzed for "substantiality" by a dual inquiry: 1) what legitimate interest does the state seek to promote; and 2) what fundamental personal interests are being endangered by the state's action? In carrying out these inquiries, a court must examine several elements: 1) the status of the group affected; 2) the importance of the interest denied or burdened; and 3) the validity and significance of the state interest to be served.

Texas, via section 21.031, seeks to enhance state revenues by denying certain children a tuition-free education.[134] In addition, it is argued that savings resulting from enforcement of section 21.031 will improve the quality of education for those children legitimately deserving the state benefit.[135] The appellants, in further support of section 21.031, claim that undocumented children are properly denied the benefit of education because of their illegal status in the United States, and therefore, the statute is in compliance with established congressional policy.[136] While the majority in *Plyler* never offers a definitive statement as to whether a reduction in state expenditures is a legitimate state goal, the minority does address the issue, stating, "[y]et I assume no member of this Court would argue that prudent conservation of finite state revenues is *per se* an illegitimate goal."[137] Concededly, a reduction in state expenditures may well be viewed as a legitimate state interest, however, the dissenting Justices failed to examine this determination in light of the harsh result of section 21.031.[138] Furthermore, the State produced no evidence in support of the contention that the exclusion of a certain class of children would improve the overall quality of education in Texas.[139] Secondly, the Court found the state's argument citing congressional policy in support of section 21.031 to be without merit. Traditionally, the judiciary has declined to interfere with areas reserved for Congress.[140] However, noting the importance of the interest at stake,

134. *But see* Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (dictum) (arbitrarily denying admission to certain students, in an effort to reduce education expenditures, is unconstitutional).

135. *See supra* note 54 and accompanying text.

136. 102 S. Ct. at 2398-99.

137. *Id.* at 2412 (Burger, C.J., dissenting).

138. Chief Justice Burger concludes that a state may "reasonably, and constitutionally, elect not to provide [illegal aliens] with governmental services at the expense of those who are lawfully in the State." 102 S. Ct. at 2412 (footnote ommitted). However, Chief Justice Burger reaches this conclusion with respect to "governmental services," whereas education was afforded higher status than that of benefit or service. *Id.* at 2411 (Burger, C.J., dissenting).

139. *See supra* note 54 and accompanying text. *See also* 501 F. Supp. at 583 (savings from amount of money spent on each child will not greatly affect the quality of education).

140. Mathews v. Diaz, 426 U.S. 67, 81 (1976).

the Court states, "this traditional caution does not persuade us that unusual deference must be shown the classification embodied in § 21.031."[141] Texas also contends that section 21.031 is harmonious with congressional policy because it is aimed at curtailing illegal migration into Texas, and further, that a state is afforded the opportunity to act with respect to illegal aliens so long as such action is in concert with federal policy. The Supreme Court, however, found no congressional policy supporting the denial of education to illegal alien children and also noted that the appellants failed to establish that section 21.031 acted as a successful tool in discouraging the immigration of illegal aliens.[142] Thus, the stated goals were not of substantial character when compared with the interest endangered by the operation of section 21.031.[143] This conclusion, even though "noble and compassionate,"[144] is the only result that could have logically followed from the standard of review imposed by the Supreme Court.

V. Future Impact

Overall, the *Plyler* decision may have a detrimental effect on the strength of the democratic system. Rendering a favorable decision in an area previously exempt from judicial review, the Supreme Court has received criticism in the aftermath of its decision invalidating section 21.031 as unconstitutional. It is conceivable that the Court has overstepped its boundaries as the dissenting Justices accuse.[145] Arguably however, the extreme importance of the subject matter must be noted. Even the Court's staunch critics acknowledge the consequential long-term benefits which will result from the decision.[146]

141. 102 S. Ct. at 2399.

142. *Id.* at 2398-99. *See* De Canas v. Bica, 424 U.S. 351 (1976) (giving states the power to act concerning illegal aliens provided those acts are in keeping with established federal objectives).

143. 102 S. Ct. at 2402.

144. *Id.* at 2408.

145. "Today's cases, I regret to say, present yet another example of *unwarranted* judicial action which in the long run tends to contribute to the weakening of our political processes." *Id.* at 2414 (Burger, C.J., dissenting) (footnote omitted) (emphasis added). *See also supra* note 126.

146. *Id.* at 2413-14 (Burger, C.J., dissenting). Chief Justice Burger conceded, "[d]enying a free education to illegal alien children is not a choice I would make were I a legislator. Apart from compassionate considerations, the long-range costs of excluding any children from the public schools may well out-weigh the costs of educating them." *Id.*

The most crucial aspect of the *Plyler* decision was the selection of the standard of review to be used in analyzing the statute for constitutional validity. Had the Court chosen a rational basis standard, illegal alien children may well have been legally denied free public education. The refusal of the dissent to refute the standard of review chosen was the point at which they failed to justify section 21.031 under the Constitution. Basic constitutional arguments proposed by the dissent, however compelling, do not effectively address the situation as presented by the majority of the Court. It appears that this intermediate level of review will be frequently utilized by the Court in future cases which deal with emotional issues, issues governed by the canons of humanity rather than rigid legalities. It is with this tool, the flexible intermediate level of review, that the Court will set new trends in the law.

VI. Conclusion

It is hard to conceive of any one institution that is more important in every aspect than the institution of education. Yet, also of extreme importance are the fundamental constitutional principles regarding the separation of the three branches of the American government. The tremendous task facing the Supreme Court in the *Plyler* case was that of striking a balance between the two vital interests.

Education has, historically, been accorded an extremely high level of importance. The Court's previous policy of allowing states wide latitude in educational practices and procedures has not necessarily come to an end.[147] The Court has interfered in a very limited manner and then, only in order to protect an extremely important interest. Justice Marshall, in his dissent in *Rodriguez* stated that, "[t]he majority's holding can only be seen as a retreat from our *historic commitment* to equality of educational opportunity. . . . In my judgment, the right. . .to an equal start in life. . .is far *too vital* to permit state discrimination."[148] The "historic commitment" of which Justice Marshall speaks, may refute the critics' allegation that the Supreme Court has, by overstepping its boundaries, intruded upon an area previously untouched. In taking this controversial stance, the Supreme Court will eventually be given credit for its crucial part in preserving

147. Courts, specifically federal courts, have been reluctant to infringe upon educational practices of the states. *See generally* Hamilton, *School Order Brings Inequity,* Washington Post, Feb. 9, 1975, at A1, col. 6 (discussing court interference with school system).

148. 411 U.S. 1, 70-71 (1973) (Marshall, J., dissenting) (emphasis added).

equality of opportunity, a principle inherent in our Constitution.[149] The Court has succeeded in "shift[ing] our focus from special and competing categories of children, to concentra[tion] on articulating a standard of basic education for *all* children."[150] "[I]mposing [a] societal obligation to provide a minimally satisfactory life"[151] can hardly be seriously criticized. The Court's decision seeks to afford to all, whether citizen, legal alien, or illegal alien, an equal opportunity to achieve social, emotional, and economic stability.

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149. In *Shelton v. Tucker,* the Court stated, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." 364 U.S. 479, 487 (1960). Years later, the Court again acknowledged the vast importance of education. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Abington School District v. Schempp, 374 U.S. 203 (1963).

150. Levin, *supra* note 95 at 263 (emphasis original).

151. *Id.*