A REVIEW AND ANALYSIS OF UNITED STATES LAWS

CONCERNING UNDOCUMENTED STUDENTS

by

DAVID EDWARD ROBLES

(Under the direction of John Dayton)

ABSTRACT

Research for this study focused on analyzing federal statutes, regulations, case law, legal commentary, and historical documents in order to track the development and determine the current status of laws concerning the education of undocumented alien children in public schools in the United States. The primary data for this study was taken from United States Supreme Court, federal appellate, and district court opinions concerning the law regarding educating undocumented alien children in United States public schools. Legislation involving admission or prohibition of undocumented alien children was also analyzed.

Findings in this study include:

1) In *Plyler v. Doe* (1982), the United States Supreme Court held that under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution protected the right of undocumented students to attend public schools.

2) In *Martinez v. Bynum* (1983), the Court held that residency requirements for school districts are constitutional, only if the requirements are uniformly applied to all on an equal basis.

3) In 1996, the United States District Court, Central District, state of California, in the case of *League of United Latin American Citizens, et al. v. Pete Wilson, et al.*, district court judge Mariana Pfaelzer held that a majority of California's Proposition 187 was unconstitutional based upon the federal authority over immigration policy.

INDEX WORDS: Education, Undocumented alien children, Equal protection, Martinez v. Bynum, Plyler v. Doe, Residency requirement, and Proposition 187

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DAVID EDWARD ROBLES

B.S., North Georgia College & State University, 1997

M.Ed., North Georgia College & State University, 1998

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DAVID EDWARD ROBLES

Major Professor: John Dayton

Committee: Catherine Sielke
Sally J. Zepeda

Electronic Version Approved:

Maureen Grasso
Dean of the Graduate School
The University of Georgia
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DEDICATION

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CHAPTER 1

STATEMENT OF THE PROBLEM

Huddle (1996) noted that the relationship of immigration and education has recently become a heated policy issue because of the proposal to deny taxpayer-financed education to illegal alien children. Miller (1998) believed that the issues surrounding the education of illegal immigrant children are social, political, moral, and economic and as such, involved all citizens of the United States as taxpayers. Miller asserted, "Education is the largest public cost associated with illegal immigration, and it is likely to have long-term consequences" (p. 3).

Because the Family Educational Rights and Privacy Act (1974) prohibits school systems from asking for or obtaining information that would lead officials to believe that the student or their family is in this country illegally, obtaining an accurate number of undocumented students is virtually impossible. However, the best estimates indicate an increasing number of illegal aliens living in the United States have resulted education policy makers to increase funding for programs that provide services to undocumented students.

Seper (2002) stated that programs for undocumented students cost United States taxpayers millions of dollars each year. Miller (1998) noted that there are individuals and groups who feel that the amount of money spent on programs for undocumented students is excessive and should be curtailed or eliminated. In contrast, there are also those who feel that education should be afforded to all, regardless of legal status. Camarota (2001a)

noted that critics of free education for undocumented children point out that recent immigrants tend to pay less taxes than most United States citizens, largely due to lower paying jobs. Critics also argue that tax revenue should be used to educate only United States citizens and lawful resident aliens and they object that the naturalized citizen or resident alien, those who generally pay more in taxes, bear the primary burden of funding for programs that aid non-english proficient undocumented students.

Schmid (2001) estimated that since the 1980s, a new generation of immigrants has populated the nation's schools. The immigrant student population is the fastest-growing and most ethnically diverse segment of America's child population, and according to Schmid, "about one of every five individuals under the age of 18 is either an immigrant or has parents who are immigrants" (p. 71). Schmid (2001) also indicated that since 1990, "the number of school-age children in immigrant families has risen seven times faster than the number of school-age children in United States-born families" (p. 72). Lamberg (1996) reported that by 2010, "20% of school-aged children in this country will be children of recent immigration. This enormous number of recently immigrated students will put a strain on federal, state, and local school resources" (p. 1455). In Camarota's (2001b) testimony before the House Judiciary Committee's Subcommittee on Immigration and Claims, he reported increased funding for education at the federal, state, and local levels. Camarota (2001b) also reported that the Current Population Survey indicated that current United States immigration policy is contributing to the growth in the number of public school children.

Do undocumented students have the right to receive the benefit of a free public education within the United States? The financial and logistical strain of educating those

students has led certain states to conclude that they do not have this right. The state of Texas defended its decision in *Plyler v. Doe* (1982) to exclude undocumented alien children from their classrooms due to fiscal constraints. The state of Texas, in *Martinez v. Bynum* (1983), defended its policy of prohibiting the admission of undocumented alien children who were living with someone other than their parent or legal guardian for the sole purpose of attending free public schools. Stein (1994) reported that the state of California passed Proposition 187, the "Save our State" initiative, which denied individual students who could not prove their legal status of many benefits, including free public education.

Stewart (1993) noted that the Immigration and Naturalization Service (INS) is charged with the responsibility for monitoring the process by which citizens of other countries are admitted into the United States. Camarota (2001b) reported though the exact number of illegal aliens, both children or adults, who cross the borders every year is impossible to ascertain, the number is estimated in the hundreds of thousands. This study reviewed the laws concerning undocumented students in the United States.

Research Questions

This study investigated the following research questions:

1. What is the relevant legal history of laws concerning undocumented students?
2. What is the current status of laws concerning undocumented students?

Procedures

This study employed legal research methodology. Research included an extensive search for relevant sources of law, including federal and state constitutional provisions, legislation, regulations, case law, scholarly commentary, and other relevant documents using the University of Georgia's main and law libraries, internet searches of "Findlaw.com," "Thomas.gov," "Lexis-Nexis.com," and "Google.com." The University System of Georgia's "Galileo" website was used. Microfiche searches were made through the UMI Dissertation Services, as well as the ERIC database. The resulting federal and state constitutional provisions, legislation, regulations, case law and scholarly commentary, and other relevant documents were reviewed, analyzed, and synthesized to construct an accurate historical perspective on the law concerning undocumented students. The researcher sought to develop a current composite perspective on the current legal status of undocumented students.

The literature review is arranged in chronological order to provide the reader with a perspective on the historical development of the law and other litigation concerning this issue. Chapter three is an analysis of the current laws pertaining to undocumented alien students. Chapter four concludes this study with findings and conclusions.

Definition of Terms

When undertaking a review of the educational laws and policy of undocumented students, numerous terms are used in the discussion. A number of authors, courts, and texts give definitions of terms used in this field. For clarity and consistency in understanding this review, the following definitions are included:

Equal Protection

Equal protection guarantees that people in similar situations will be treated in a similar manner. The Fourteenth Amendment of the United States Constitution provides that no state may deny to any person within its jurisdiction the equal protection of the law. In determining if a person's equal protection rights are being violated, the court must first determine if there is a fundamental right or suspect classification involved, and then, the court must determine what level of scrutiny to use in determining the constitutionality of a statute.

Fifth Amendment

The Fifth Amendment to the Constitution (1791) provides that no person shall be required to answer for a capital or otherwise infamous offense unless on indictment or presentment of a grand jury except in military cases; that no persons will suffer double jeopardy; that no person will be compelled to be a witness against himself; that no person shall be deprived of life, liberty, or property without due process of law and that private property will not be taken for public use without just compensation."

Fourteenth Amendment

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (1868) states, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are the citizens of the United States and of the State wherein they reside. No State shall make or enforce any law in which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Fundamental Rights

Fundamental rights are those rights which have their source, and are explicitly or implicitly guaranteed, in the Constitution, for example, the right to exercise your First Amendment freedoms. The Court has determined in *San Antonio Independent School District v. Rodriguez* (1973) that education is not a fundamental right guaranteed by the United States Constitution (pp. 35-36).

Intermediate Scrutiny

Intermediate scrutiny is the test used to determine if there is a tight fit between the purpose of the state and the class affected. The classification must be substantially related to a governmental right.

Procedural Due Process

Procedural due process guarantees procedural fairness where a person's property or liberty is deprived by the government. The person is to be given notice, and has a right to an impartial hearing before he/she is deprived of his/her rights.

Rational Basis Test

A rational basis test is the test used when there is not a suspect class nor a fundamental right involved. The state must show that the state statute is rationally related to a valid state purpose.

Residence

The residence of a student for the purpose of attending free public school in Texas was determined by the residence of the child's "parents, guardian, or person having lawful control of him/her" (Texas Education Code Annotated, 1969). He must live in the district for other reasons than attending free public schools. A child who is emancipated

may establish his own residence to attend free public schools in Texas if he lives in the district for another purpose other than attending free public schools. A child who lives with someone who is not legally in charge of him may attend free public school if he is in the district for other reasons than attending free public schools such as medical reasons.

Strict Scrutiny

Strict scrutiny is used by the courts to determine if a state has a compelling reason for enactment of a statute that threatens a fundamental right or impacts on a suspect class. If a state cannot produce a compelling reason to enact such a statute, then the courts will hold the that statute violates the equal protection clause.

Substantive Due Process

Substantive due process provides that all states and federal legislation must be reasonably related to a legitimate governmental objective.

Suspect Class

Suspect classifications are "those based on race or national origin, religion, and alienage" (American Jurisprudence, 1979, p. 816). Blacks, women, and legal aliens are all suspect classes. The courts have not held that the undocumented aliens are a suspect class.

Undocumented Aliens

Undocumented aliens are persons who are in the United States in violation of the Immigration and Nationality Act. Aliens either entered this country illegally or entered legally and then violated the conditions of entry.

Undocumented Alien Children

For the purpose of this study, undocumented alien children are those who reside with their parents in the United States illegally; children whose parents reside in another country, and children who are living in the United States with someone who is not their "parent, guardian, or persons having lawful control" (Tex Educ. Code Ann., 1969) of them for the sole purpose of attending free public school; or children who walk across the border on a daily basis for the sole purpose of attending free public schools.

CHAPTER 2

A REVIEW OF THE LITERATURE CONCERNING LAWS GOVERNING UNDOCUMENTED STUDENTS

Introduction

Yost (1997) noted that the United States has always been a land of immigrants. The United States' history and folklore is filled with memories of Ellis Island and the Statue of Liberty offering a haven for the tired, hungry, and poor of the world. Perkins (2000) reported that the dramatic increase in the number of new immigrants who have entered the nation during the past two decades has generated considerable attention. Because immigrants are younger than members of the native-born population and tend to have more children of school-age, the increased numbers have had profound implications for the nation's public schools. The increased numbers of students, especially those who require remedial classes for reading and writing the English language have put an extra strain on the budgetary process with which school systems work.

The population of the United States has continued to grow, both with legal and illegal individuals. There are many people who see the United States as a place of opportunity, political and religious freedom, and a prosperous economy. There also people who seek the borders of the United States for themselves and/or their families. The federal government's authority to curb illegal immigration and regulate legal immigration has failed miserably. The states to which illegal people flock have incurred many financial burdens due to the "shadow population" living in their state. The

increased number of people has effectively put a strain on these states' fiscal policies. While there are no clear-cut studies that have shown a negative economic impact on the states' budgets, according to Camarota (2001a), Mexican immigrants pay very little in taxes. Those with lower incomes pay much less in taxes than middle and upper class workers. This means that even if the Mexican immigrants used welfare at the same rate as natives, they would still be a substantial drain on public coffers because their tax payments are dramatically lower. While there is debate among researchers on the fiscal effects of immigrants overall, there is absolute consensus that immigrants with little education are a huge drain on the public budget. While immigration, both legal and illegal, has been a problem in the past, present, and certainly the future, it will be up to the federal government to pass enforceable legislation that will have a lasting impact on the number of illegal aliens and their school-age children within the United States.

Lookadoo (1988) stated that generally throughout the United States, children are allowed to attend public schools whether they reside in the United States legally or illegally. Thus, undocumented alien children who reside in a particular school district are allowed to attend school in that district assuming there are no federal, state, or local policies that would otherwise restrict such attendance. It is the access to public education of undocumented students that must be analyzed from the historical perspective to the current laws and educational policies.

Throughout its history, the United States has struggled with racial inequality, prejudice, discrimination, and other divisive issues. This nation, which began with immigrants, now has contemplated the denial or limitation of educational benefits to children who are undocumented aliens. There are individuals and groups in this country

who feel that taxes spent on the education of undocumented aliens deprives United States citizens and legal residents of services and other educational opportunities. On the other hand, there are citizens and groups who feel that it is a moral obligation to educate all children who show up at the school house door.

The history of the United States is filled with success stories of individuals seeking freedom enjoyed by its citizens. To immigrants, the United States is the land of opportunity and prosperity. It is this thought that brings people to its borders. Immigrants seek the chance to be included in a country that values individual freedoms and provides opportunity. Immigrants also seek a country that is founded on democratic ideals that flourish with individual freedoms and rights. Many immigrants travel great distances and overcome many dangers to live, receive an education, work, and enjoy the freedoms of being an American citizen. This powerful nation, with all its opportunity, is made up of past, present, and future immigrants.

The inscription on the Statue of Liberty written by Emma Lazarus in 1883 reads in part:

> Give me your tired, your poor,
> Your huddled masses yearning to breathe free,
> The wretched refuse of your teeming shore,
> Send these, the homeless, tempest-tost to me,
> I lift up my lamp beside the golden door! (cited in James, 1991, p. 11)

Immigrants see the Statue of Liberty as a beacon of freedom and opportunity.

Early in American history, immigrants were welcomed with open arms. They were the broad shoulders and strong backs of the nation's early economic success. But after years of unregulated population growth, government polices were adopted to stem the tide of immigration. These restrictions were implemented due to rising

unemployment of the country's current citizens. Since the late 19th century, the United States has restricted immigration. According to the Immigration and Nationality Act (2000), any alien who (1) enters or attempts to enter 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) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall have committed a crime (8 U.S.C. § 1325). The Immigration and Nationality Act (2000) also states that individuals who entered unlawfully are subject to deportation (8 U.S.C. §§ 1227 & 1252). To further governmental control over immigration, in 1924, the federal government developed the national origin quota system to control the number of individuals and families emigrating from certain countries (8 U.S.C. § 1001). This quota system was repealed in 1952. The development of this quota system allowed the United States to define a specific number of individuals and/or families from a specific country that would be accepted on United States soil. This Act was the first of many in an attempt to limit the number of immigrants allowed to enter the country legally. This Act also established the United States Border Patrol, whose responsibilities include, among other things, the monitoring, enforcement, and control of the nation's borders.

Crawford (1992) reported that in 1965, Congress abolished the national-origins quota system, a racially restrictive policy that long favored Northwestern Europeans and virtually excluded Asians. This historical event caused another social phenomenon, a massive immigration parallel to the Ellis Island years. Gonzalez (2001) stated that a second wave of immigration, from Latin American and Asian countries, occurred during

the 1980s. The Third World countries were providing 85% of the immigrants, not counting the undocumented. More currently, Stewart (1993) estimated that, "nearly 10 million legal and illegal immigrants entered what many considered to be the "golden doors" of the United States during the 1980s, a period during which 22 million people were added to the national population" (p. 18). The continuous strain of fiscal, political, and national policies have brought about negative attitudes towards immigrants - both legal and illegal.

Van De Mark (1996) noted that immigrants may arrive through a complicated system comprised of legal immigration, family-based immigration, skills-based immigration, nationality-based immigration, refugees and asylum seekers, and illegal immigration. Third World immigrants, because of refugees, and above all, family reunification policies, still comprise the vast majority of the immigration backlog. These facts are a daunting reality of the vast number of individuals who seek the United States as their home. McCarthy (1982) stated that nonetheless, many persons have succeeded in entering the United States unlawfully. According to McCarthy, the lax enforcement of immigration laws coupled with the failure to effectively bar undocumented aliens from employment has resulted in a substantial "shadow population" of illegal immigrants.

According to Camarota (1997), as of October 1996, there were five million illegal aliens living in the United States, with the number growing by 275,000 each year. These estimated numbers were for the "long-term" illegal alien population - those who had been in the United States for at least one year. The INS also estimated that 41% of the illegal population were overstayers and that 59% had "entered without inspection (EWI)." It is also estimated that 54% of the illegal population were from Mexico and that 40% lived in

the state of California. According to Ogletree (2000), "illegal immigrants make up less than 2% of the national population, with the vast majority concentrated in just a few states - California, New Jersey, Arizona, Texas, Illinois, Florida, and New York" (p. 767).

The cost of educating undocumented students has been unclear since the number of students is based upon estimation. Seper (2002) reported that state funds are being depleted on undocumented aliens, especially those in southern border states. A crisis exists in public education, where illegal immigration has had a major effect on elementary and secondary school enrollments. Schools, like hospitals, are prohibited under federal law from denying immigrant students access to a free public education. As a result, the annual cost to taxpayers to provide that education has been estimated in the billions of dollars each year. Seper (2002) also reported that the Urban Institute and others have estimated that 15% of all kindergarten through high school children in California were illegal immigrants, who cost the taxpayers 1.6 billion dollars annually. Elected officials and education and immigration experts do not have specific numbers for New Mexico, Arizona, and Texas, but believe that between 10 and 15 percent of the total enrollment in those states are illegal aliens. With the number of undocumented students in their public school classrooms, states with the high estimated numbers of undocumented alien students sought reimbursement from the federal government through the U.S. court system.

Individual states have filed litigation against the United States federal government, the United States Attorney General, the Director of the Immigration and Naturalization Service, among others for reimbursement of state funds used to educate

those undocumented alien students who had been receiving a free public education. The states of California, Florida, New York, and New Jersey filed suit which claimed that the federal government had failed in its responsibility to secure the United States' borders.

The state of California filed suit against the United States federal government, *California v. United States* (S. D. Cal. Mar. 3, 1995). The opinion of the district court judge was appealed by California to the 9th Circuit Court of Appeals (1996). In its appeal, California contended that the United States federal government had violated its obligation under the Invasion Clause of Article IV, § 4 of the United States Constitution to protect the state from invasion. The state also contended that the federal immigration policy was in violation of the Guarantee Clause of Article IV, § 4 of the Constitution which provided that the United States shall guarantee to every state in the union a republican form of government. California argued that the federal immigration policy had forced it to spend money that would otherwise not have been a required expenditure, thus depriving it of a republican form of government.

In relation to public schools, California argued that the federal government violated the Tenth Amendment because the state had to allocate funds to pay for the public education of alien children. California also alleged that the United States Attorney General had failed to adequately fulfill her obligation to enforce the country's immigration laws. Lastly, California sought declaratory and injunctive relief in the form of a declaration that the United States Attorney General and the Commissioner of the INS had failed to effectively execute final orders of deportation.

The 9th Circuit Court of Appeals, affirmed the district court's decision to dismiss all relief requests due to California's claim which presented nonjusticiable political

questions and that its statutory claims were not subject to judicial review under the Administrative Procedures Act of the Constitution (Fed. R. Civ. P. 12 (b) (6)).

The state of Florida filed suit against the federal government in *Chiles v. United States* (S. D. Fla. 1994). Florida, as it related to the fiscal responsibilities of educating undocumented students, asserted claims under the Administrative Procedures Act and the United States Constitution, that it had been injured by the federal government's failure to enforce immigration laws. Florida asked for reimbursement of expenses or declaratory relief and an injunction requiring the United States to fulfill its statutory and constitutional duties.

Florida also filed suit against the United States Attorney General under the Administrative Procedures Act for her failure to perform the duties required by the immigration laws. The Attorney General asserted that Florida lacked the standing to raise a political question under federal jurisdiction. The overall statutory scheme established for immigration demonstrated that Congress intended whether the United States Attorney General had been adequately guarding the borders of the United States to be committed to agency discretion by law, therefore, unreviewable.

In regards to the undocumented student issue, Florida alleged that the United States violated the Guarantee and Invasion Clause of Article IV, § 4 and the Tenth Amendment by forcing Florida to provide unreimbursed benefits to illegal immigrants. The district court concluded that whether the level of illegal immigration was actually an "invasion" and violated the guarantee of a republican form of government presented nonjusticiable political questions, which was not under individual state authority.

The 11th Circuit Court of Appeals affirmed the district court's decision in *Chiles v. United States* (1995) by concluding that Florida failed to state a claim upon which relief could be granted by a court. The state of Florida appealed the 11th Circuit Court's decision in *Chiles v. United States* (1995) to the United States Supreme Court, but their petition for a writ of certiorari was denied, *Chiles v. United States* (1996).

New York state senator Frank Padavan, along with other New York state officials filed suit against the federal government in the United States District Court for the Northern District of New York, *Padavan v. United States* (N. D. N. Y. Apr. 18, 1995) in which the plaintiffs alleged that the government's failure to secure the nation's borders had injured the state of New York for costs associated with the education, confinement, health and welfare of legal and illegal aliens. According to the complaint in this case, the federal government failed to control illegal immigration, and this failure had serious financial consequences for the state of New York. The plaintiff alleged that the federal government violated: the Naturalization Clause; the Guarantee Clause; the Invasion Clause; the Tenth Amendment; and the Immigration and Naturalization Act. As a relief, the state of New York sought monetary support from the federal government to compensate the state and its subdivisions for the expenditures it had been forced to make as a result of the federal government's immigration policy.

As to the count of violating the Naturalization Clause, the 2nd Circuit Court of Appeals agreed with the district court's decision by affirming that the immigration policy of the United States was under the federal government's plenary power. The federal government, not the individual state, had the power to establish a uniform rule of naturalization. The state of New York provided no constitutional or statutory support for

their claim. The only argument was a broad assertion that the federal government's plenary power over immigration required it to reimburse New York State. The state contended that since the federal government was responsible for the immigration policy of the nation, it was the federal government's duty to support the state on behalf of the aliens who lived and received benefits there, *Pavadan v. United States* (1996).

The plaintiff alleged that the federal government violated the Guarantee Clause which provided that the United States shall guarantee to every state in the union a republican form of government (U.S. Const. Art. IV, § 4). The 2nd Circuit noted that the Supreme Court traditionally held that claims under the Guarantee Clause were nonjusticiable political questions, *Colegrove v. Green* (1946). After reviewing the district court's decision, the 2nd Circuit held that in the New York complaint, nothing indicated in any way that the federal immigration policies had deprived New York State of a republican form of government, *Pavadan v. United States* (1996).

The plaintiff alleged that the federal government violated the Invasion Clause due to the influx of legal and illegal aliens in the New York State. This "invasion" was caused by the federal government's failure to secure the nations' borders. The 2nd Circuit agreed with the district court's dismissal for New York's failure to make a valid claim upon which relief could be granted. The 2nd Circuit noted that a state must be exposed to an armed hostility from another political entity, such as another state or foreign country that had the intention to overthrow the state's government. The state of New York was not under attack by such an entity, thus making their claim nonjusticiable, *Padavan v. New York* (1996).

The plaintiff contended that the federal government's immigration policy coerced the state of New York into providing social, educational, health, and correctional services in violation of the Tenth Amendment of the United States Constitution. The Tenth Amendment provided that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, were reserved to the States respectively, or to the people," United States Constitution, Amendment X (1791). New York state also alleged "they were required to implement federal mandates by, among other things, the restrictions placed in the form of legislation that they were to enact," *Pavadan v. United States* (1996). The plaintiffs stated that they had to provide emergency care, education, and correctional services to illegal aliens. The 2nd Circuit noted that New York had to provide emergency care due to their voluntary participation in the federal government's Medicaid program. If the state chose not to participate in the program, there would be no federal regulation that required the state to provide those medical services. In reference to the educational question, the 2nd Circuit stated that the educational benefit of any child, including illegal alien children was derived from the Constitution, therefore, could not violate the Tenth Amendment. The correctional services provided by the state stems from its own laws, and not from any federal mandate.

Finally, the plaintiffs alleged that the Immigration and Naturalization Service failed to successfully carry out its duty to control and guard the boundaries and borders of the United States that is required by the Immigration and Naturalization Act (8 U.S.C. § 1103). The 2nd Circuit noted that the decisions related to immigration control were a discretionary matter, and the Administrative Procedures Act precludes judicial review of

matters committed to an agency's discretion of law. The state failed to make a claim which fell under a discretionary decision and thus affirmed the district court's decision.

New Jersey's Governor, Christine Todd Whitman, along with various state officials, filed suit against the United States Attorney General Janet Reno, Commissioner of the INS Doris Meissner, and the Director of the Office of Management and Budget Alice Rivlin, and collectively the United States federal government, for compensation for costs related to the incarceration and education of illegal aliens. New Jersey alleged in their complaint, that as a direct result of the failure of the federal government to control the borders, the state of New Jersey was improperly forced to bear the financial and administrative costs of the imprisonment of illegal aliens who were convicted of crimes in New Jersey. New Jersey was also forced to provide educational services to those students who were in the United States illegally. New Jersey sought a declaratory judgment that it had the right to reimbursement of the costs from the federal government, and an injunction and/or writ of mandamus that required the federal government to disburse funds from the United States Treasury.

New Jersey alleged that the state was forced to absorb the costs of incarcerating and educating illegal aliens, thereby the federal government violated New Jersey's rights under the Tenth Amendment, to determine the manner in which tax funds and state resources were to be expended. The 3rd Circuit Court ruled that the federal government made no directive to New Jersey to prosecute those individuals who were in violation of state law. It was the state of New Jersey who made their own decision to prosecute those who violated state laws. As to the question of educating illegal aliens, the 3rd Circuit

stated that the education of illegal aliens was not derived from any Congressional or executive directive, but from the Constitution itself, *New Jersey v. United States* (1995).

New Jersey also claimed that the federal government violated the Naturalization Clause, which provided a uniform Rule of Naturalization under Article 1, § 8 of the Constitution. New Jersey alleged that the federal government's failure to control the borders of the nation forced the state to bear the burden of a responsibility which is that of the whole nation. With this responsibility, New Jersey incurred the economic problems caused by the invasion of illegal aliens into the state. The 3rd Circuit ruled that they saw no ground on which to read into the Naturalization Clause, an affirmative duty on the part of the federal government to protect states from harm caused by illegal aliens, who are non-governmental third parties.

On a separate count, New Jersey alleged that the federal government, by forcing the state to expend state tax funds and revenues and educate illegal aliens, had taken its property without just compensation in violation of the Takings Clause of the Fifth Amendment. The 3rd Circuit ruled that the federal government's alleged failure to stem the tide of illegal immigrants into New Jersey, while it may have had the incidental effect of causing the state to incur additional law enforcement and educational costs, did not interfere with the state and thus was not a taking of state property for the purposes of the Fifth Amendment, *New Jersey v. United States* (1995).

The failure of the federal government to prevent the entry of illegal aliens into New Jersey was another claim made by the state. The Invasion Clause was the obligation of the federal government to protect each state against invasion. The 3rd Circuit referred to James Madison's *The Federalist,* No. 43 as a guide to the term "invasion." In order for

a state to be afforded the protections of the Invasion Clause, the state must be exposed to an armed hostility from another political entity, such as another state or foreign country that had the intention to overthrow the state's government. New Jersey made no direct claim in which specific allegation indicating how the state's republican form of government was being threatened or compromised by the federal government, *New Jersey v. United States* (1995).

New Jersey also made a generalized claim that the Constitution, "provided with certain well-defined exception, that the federal government could not intrude on the fundamental sovereignty of a state" and that the federal government violated this principle by "failing to implement and enforce its laws," permitting "the invasion of illegal aliens into the state," and refused "to provide reimbursement for the cost of incarcerating and educating them," *New Jersey v. United States* (1996). The 3rd Circuit noted the applicability of the Supreme Court's observation that "state sovereign interest is more properly protected by procedural safeguards inherent in the structure of the federal system than judicially created limitations on federal power," *New Jersey v. United States* (1996).

New Jersey asserted that it was entitled to judicial relief because it had no remedy through the political process established by the Constitution to seek reimbursement and had exhausted all other political and practical remedies, and any further efforts would be futile. The 3rd Circuit found that in view of the absence of any allegation that New Jersey was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless. The 3rd Circuit held that New Jersey had alleged no viable claim, *New Jersey v. United States* (1996).

The district court held that all of New Jersey's constitutional claims were nonjusticiable under the political question doctrine, *New Jersey v. United States* (1995). Each of New Jersey's claims asserted that under the Constitution, it would require a court to evaluate the formulation and implementation of immigration policy by the executive branch. Decisions about how best to enforce the nation's immigration laws in order to minimize the number of illegal aliens crossing the borders patently involved policy judgments about resource allocation and enforcement methods. Such issues fell squarely within a substantive area clearly committed by the Constitution to the political branches. The claims made by New Jersey would therefore be constitutional claims that were nonjusticiable, *New Jersey v. United States* (1996).

The states of Texas and Arizona filed similar claims through their prospective court systems. Both suits filed against the federal government met the same fate as the previously mention states. *Arizona v. United States* (D. Ariz. Apr. 18, 1995) affirmed by the 9th Circuit Court of Appeals in 1995 and *Texas v. United States* (S. D. Tex. Aug. 7, 1995) affirmed by 5th Circuit Court of Appeals in 1995.

The dismissal of these suits reaffirmed the federal government's authority in regards to immigration. The question of state fiscal responsibility was also confirmed in relation to the education of all children regardless of their legal status. The rulings in these suits also provided the affirmation of each state's responsibility of ensuring equal access for all children to a free public education.

Ogletree (2000) believed that while the stereotypical image of an illegal immigrant is of a Latino crossing the United States border at night, more than 40% of illegal immigrants are actually people who entered the country legally but overstayed

their visas. There have been attempts by the federal government to utilize its power to curb the trend of increasing numbers of illegal immigrants that flow into the United States with school-aged children who required educational services, but those attempts have been unsuccessful. The number of school-age children can be an enormous amount to the educational system throughout the nation. Hull (1981) stated that even though the control of immigration is a federal responsibility, the INS has not adequately protected the borders from illegal aliens.

Yost (1997) reported that many American citizens feared that United States jobs were being lost to foreign workers, that illegal aliens benefited from public assistance which drained the economy, and that the refugee program allowed terrorists to enter the United States. The Immigration Reform and Control Act of 1986, Public Law 99-603, provided the federal government with yet another attempt to limit the number of illegal immigrants in this country. The federal government provided sanctions against employers who hired individuals who had failed to produce authentic residency documentation. In turn, this would also limit the number of children who were brought with these workers. The federal government went one step further to limit the number of immigrants into the United States. In October of 1996, President Bill Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104-208, which would prohibit United States sponsors from petitioning for the admission of immigrants unless the sponsor's income was at least one and a half or two times that of the poverty level. This public law also imposed a ten-year ban on the admission of immigrants who were out of status for one year or more. Lastly, Public Law 104-28

punished genuine refugees who sought asylum from persecution if they missed a one-year deadline in applying for asylum. These three actions, along with others, were written to combat illegal immigration.

For the true illegal immigrant, freedoms and economic opportunity were stronger than the rules by which they were to abide. The alien's wish for a better life for themselves and their family brought them to the United States regardless of restrictions. The fact that these illegal immigrants come to the United States is one economic factor, but they also bring their families, most of which are school-age children. Erier (n.d.) noted that the Supreme Court remarked that it is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions at it may see fit to prescribe. While these remarks are based upon those individuals who sought unlawful entry for economic, religious, or political freedoms, these individuals, those in which the Court speaks of, also brought children who require educational services.

The United States Supreme Court's decision in *Brown v. Board of Education* (1954) held that education was perhaps the most important function of the state and local governments. Compulsory school attendance laws and great expenditures for education both demonstrated our recognition of the importance of education to our democratic society. The Court also recognized that education "was the very foundation of good citizenship and where a state had undertaken to provide an opportunity for the education in its public schools, such an opportunity was a right which must be made available to all on equal terms" (p. 493). While the question was primarily brought before the Court due

to segregation concerns, the Court identified the importance of education to all people on equal terms. The Court also stated, "it was doubtful that any child may reasonably be expected to succeed in life if he was denied the opportunity of an education" (p. 493). The *Brown* decision founded the basis for future Court rulings regarding the education of all students and the responsibilities of the individual states.

According to the United States Census Bureau (2002), the population of the United States was approximately 286.5 million. There are also a number of individuals who are not part of the population number who wish to seek residency, attend public schools or universities, obtain temporary or permanent residency, or to obtain economic opportunities. The number of illegal alien immigrants, those who sought various opportunities have created budgetary problems and concerns for many states who were more apt to have a greater number of these individuals within their state. The United States has an educational system that has been strained by a lack of teachers, an increased number of non-English speaking students, and a host of other concerns. The state of California is where the majority of immigrant individuals and families have strained aspects of the state educational system and support services. The legal system has also been affected by the influx of individuals who have no legal basis to be in this country. The costs of incarcerating individuals who break state and federal laws have also strained the state's budget. What recourse do individual states have?

Entwistle (2000) stated that the United States, Canada, and the Caribbean nations were largely the creation of immigrants from many different nations and cultures. Yost (1997) stated that the United States has always been, and continues to be the land of immigrants. Theilheimer (2001) reported that new immigrants arrive in the United States

for a variety of reasons. Many come to improve their economic situation, while others are political and/or religious refugees. Other families many come to gain more freedom, material goods, knowledge, and better living conditions.

Chavez (1992) noted that undocumented immigrants believe that the United States held out chances for *mejor vida* (better life). Undocumented immigrants, as well as legal residents view the United States as the land of opportunity, where the streets are paved with gold, and where hard work and sacrifice can earn upward mobility, at least for their children if not for themselves. Portes and Rumbaut (1996) reported that immigrants come because they can. The legal barriers that are placed to discourage illegal entry are ineffective in preventing determined people from arriving, and the physical barriers have been circumvented, especially if coming from a neighboring country. Many individuals and families come to work, send money home to assist their families, and come to educate school-age children in the public schools.

Immigrants, both legal and illegal, seek opportunity. Many individuals seek a better life than from which they came, be it Mexico, Europe, Canada, or Asia, all with the same aspiration of living the "American Dream." In the state of California, there are an estimated two million illegal immigrants. These immigrants are massive amounts of unskilled labor for many companies - landscaping, service industry, agricultural, to name a few. The immigrants seek to live in a place which provides economic opportunity for them. Again, many of these immigrants come with school-aged children who require an education.

The United States' borders have been in and continue to be a beacon for individuals and families seeking a better life. The immigration of people from various

lands has been one of the United States' greatest contributions for those seeking opportunity. Many individuals and families make long and dangerous treks to reach their goal - United States' soil. While there is a process for those who seek to live, work, and be educated in this land, the process is a very long and demanding one. There are many who circumvent the process and come to the United States illegally or under false pretense. The policy of utilizing taxpayer money for the educating of undocumented students has been a current hot issue with the general public as well as state and federal legislators.

This chapter presents a chronological account of the development of a legal basis for the educating of undocumented students in the public school systems. Part one describes the Texas education code that denied a free public education to those students who could not provide documentation of their legal status within the United States. Students who could not provide documentation of legal status were charged the monetary tuition of $1,000 per school year. This Texas education code was eventually challenged based on the Fourteenth Amendment of the Constitution. The case, *In Re Alien Children Education Litigation* (1980), was combined with the part two's case which involved the same Texas education code which prohibited the entrance of any student into the free public schools who could not provide documentation of legal status within the United States. Both cases were combined and decided with the Court's ruling in *Plyler v. Doe* (1982). Part three continues with another issue of undocumented students living with someone other than their parents or legal guardians for the sole purpose of attending free public schools. These students, whose parents were undocumented, attended free public schooling in the state of Texas. The school district policies were challenged. Eventually,

the Supreme Court made their decision regarding student residency in *Martinez v. Bynum* (1983). Part four discusses California's Proposition 187, an initiative that denied undocumented students access to public education, both at the elementary and secondary level. Proposition 187 also provided for the coordination between school personnel with law enforcement and federal immigration personnel. The United States District Court, Central District of California heard the case of *League of United Latin American Citizens, et al. v. Pete Wilson, et al.* (1995). Lastly, part five identifies state attorney general opinions and other memoranda related to the education of undocumented students.

The examination of the two United States Supreme Court opinions regarding the legal basis for the educating of undocumented students must be thoroughly analyzed. Regarding the public education of undocumented students, the Court has provided two opinions related to this topic: *Plyler v. Doe* (1982), and *Martinez v. Bynum* (1983).

In Re Alien Children Education Litigation (1980)

Background

During 1978 and 1979, suits challenging the constitutionality of §21.031 of the Texas Education Code, which denied access to a free public education, were brought against the state of Texas in United States District Court, for the Southern District of Texas (1980). The plaintiffs, the children and their parents, alleged that §21.031 denied these children their equal protection rights, was preempted by the Supremacy Clause of the United States Constitution*, In re Alien Children Education Litigation* (1980). (See Appendix A for text of §21.031)

Prior to September 1, 1975, the Texas Education Code provided that all children between six and twenty-one years of age were entitled to attend the public schools of the district where they resided. The funds for this entitlement were provided to the school districts by the state in proportion to the school district's average daily attendance. All children were counted in the calculation of average daily attendance provided they satisfied the age and residency requirement.

In April, 1975, the Attorney General of Texas, upon request made by the Commissioner of Education, issued an opinion holding that all children within the state were entitled to attend public school in the district of the residence whether they were legally or illegally within the United States. Prior to the Attorney General's opinion, there had been no established policy regarding the admissions of undocumented alien children to the public schools. A small number of school districts excluded undocumented alien children at that time.

In May of 1975, the Texas Legislature amended the Texas Education Code, §21.031. The amended statute provides in pertinent 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 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 of this state shall admit into the public free schools of the district free of tuition all person 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 (pp. 544-555).

Undocumented children were not entitled to attend public school and they were not to be counted when calculating the average daily attendance which determined the school district's share of the Available School Fund. The local school districts were given permission to deny admission or to permit attendance upon payment of tuition. The effect of the new statute was to exclude undocumented children from the Texas public schools. Although some school district continued to educate all children, the majority excluded the undocumented children or required tuition payment.

At district court trial, Texas asserted that the influx of undocumented alien children would a detrimental effect on the Texas educational system. The state calculated estimations of undocumented alien children who would attend the Texas public schools. The court found the state's estimations unreliable and flawed. In regard to the fiscal impact of undocumented alien children in the budgetary process, Texas believed that §21.031 was an acceptable statute in the economic arena. The state's position was that the primary purpose of §21.031 was to restrict the use of

public educational funds to educate citizens and legally admitted aliens to prevent a drain on its educational funds which were allocated according to the number of students in average daily attendance in a school system. Section 21.031 did not allow school districts to count undocumented alien children in the average daily attendance figures. The school districts, which admitted undocumented alien children would have to either raise more local funds or cut back on programs.

The court noted that §21.031 and the Tyler Independent School District policy should be subjected to close judicial scrutiny because the plaintiffs were being absolutely deprived of any education, and they were a politically powerless minority, forced to suffer because of the misdeeds of parents over whom they have no control. The plaintiffs also contended that the fiscal justification presented by the Tyler Independent School District was insufficiently compelling to justify discrimination.

The United States District Court, Southern District of Texas held that the fiscal integrity was not a compelling state interest. Second, the court also ruled that Texas did not prove that excluding undocumented alien children from school was in any way necessary to the improvement of the education in the state of Texas. Third, the court held that Texas had not shown that the classification used actually advances the state interest. The classification employed by the statute is a function of federal immigration status. The undocumented alien children are otherwise similarly situated to the other children in the state. Nothing about their immigration status by itself distinguished them from other children in terms of their educational needs. The court noted that undocumented alien children residing in the state of Texas are entitled to equal protection under the law. Section 21.031 of the Texas Education Code did not

employ a classification which is necessary or substantially related to a compelling governmental interest. Accordingly, the court held that, "§21.031 violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution" (pp. 583-584). The defendants, Texas, appealed the district court's decision.

On appeal to the United States Court of Appeals, Fifth Circuit, the presiding judge, Frank M. Johnson, held that §21.031 was not preempted by federal law. Johnson reasoned that for a statute to be preempted it must interfere with a Congressional purpose, and Congress must clearly occupy the area in question. The court ruled that the federal government did not occupy the field of educating undocumented alien children. Since there were no federal laws regulating the education of undocumented alien children, the court held that §21.031 did not interfere with a congressional purpose.

The court held that undocumented alien children were entitled to equal protection of the law because the Fourteenth Amendment to the Constitution says that a state cannot deny to any person within the jurisdiction of the state equal protection rights. The court ruled that §21.031 violated the children's equal protection rights whether tested during mere rational basis standard or some more stringent standard. The court held that even though the state alleged the statute's purpose was to save state educational funds for citizens and legal aliens that could not be the only basis for excluding these children from public school. The court held that §21.031 was unconstitutional, and that undocumented alien children were entitled to a free public education. Texas and Tyler Independent appealed the case to the United States Supreme Court because they did not believe that undocumented alien children were

entitled to a free public education since they were in the United States illegally. The case, *In Re Alien Children Education Litigation* (1980) was consolidated and decided in *Plyler v. Doe* (1982).

Plyler v. Doe (1982)

Background

The case was originally heard in the United States District Court, Eastern District, Tyler Division on September 14, 1978. It was brought by the parents of a group of undocumented students who resided in Smith County, and who were denied access to a free public education in pursuant to §21.031 of the Texas Education Code and the Tyler Independent School District. The school district policy denied students access to a free public education unless they made a yearly tuition payment of $1,000. Prior to the full enforcement of §21.031, Tyler Independent School District had allowed all students, regardless of their legal status, access to a free public education. This open enrollment of (non)legal students resulted in an increase in the number of students who were undocumented. The students in question, required additional educational services which cost the school additional district funds. The Tyler Independent School District felt that their liberal enrollment policy caused an increase of new students who required additional educational services and thus, caused a strain on their finite resources. The board of trustees adopted a policy beginning with the school year of 1977, which denied students who could not provide documentation that they were in this country legally a free public education. These undocumented students were required to pay a tuition of $1,000 annually for access to an education within the Tyler Independent School District.

In September of 1977, the parents of the undocumented students filed suit in the United States District Court, *Doe v. Plyler* (1978), for a preliminary injunction against §21.031 of the Texas Education Code. The parents complained that §21.031, as implemented by the Tyler Independent School District, denied the undocumented students the equal protection rights under the Fourteenth Amendment to the United States Constitution. The parents, who were now the plaintiffs, also alleged that §21.031 was preempted by the Immigration and Nationality Act (8 U.S.C. § 1101).

The state of Texas, the defendant, asserted that they would prove that §21.031 of the state of Texas education code was an acceptable law in regard to fiscal budgetary matters of the state. The defendant, also would prove that the negative impact that the increasing number of undocumented students had on the state of Texas's educational system, especially in the various locations where large groups of Mexicans lived within the state. The defendant's position was that the main purpose of §21.031 was to restrict the use of public educational money to educate students who were citizens or legally admitted aliens. This restriction would prevent taxpayer funds from being spent on students who did not have a legal basis for receiving such a benefit. The state educational funding was based on the number of students in average daily attendance in a school system. According to §21.031, school districts were prohibited from counting undocumented students in their average daily attendance count, which resulted in no additional funds for undocumented students. This provided each school district with a dilemma; either raise more local funds to make up the shortfall, or cut back on other programs.

Tyler Independent School District and the state of Texas presented testimony in *Doe v. Plyler* (1978) that demonstrated the physical and fiscal liabilities of overcrowded school systems which had a high number of undocumented students. These schools, primarily located near the Mexico and Texas borders, had students who spoke very little English and were well below grade level. The state also estimated that in 1977, the cost to educate an undocumented needy student was $1,740 per year. This cost was over $400 more than for the average student. Texas asserted that, "the undocumented students were a financial drain on the system's educational funding, and that the parents of the students were usually poor, and therefore, had little effect to offset the additional costs of their children's education because they paid very little of the state's taxes" (pp. 577-578).

The plaintiffs argued that §21.031 and the Tyler Independent School District policy should be subjected to close judicial scrutiny due to the fact that the students were to be deprived of any type of education. The students were also minors, who in fact, did not have the power to affect change within the system or have any effect over their parents' actions, i.e. illegally entering the United States.

The state of Texas, the defendant, stated that the undocumented aliens (the students), were not entitled to equal protection under the law because they were in the United States illegally, and therefore, were not persons within the jurisdiction of the state. The defendants also argued that §21.031 and the Tyler Independent School District policy were state responsibilities in the social and economic area. These areas did affect freedoms guaranteed by the United States Constitution. Texas also argued that the case

brought against them required only relaxed judicial scrutiny, and that the decision to spend public money on United States citizens and legally admitted aliens satisfied the rational basis test.

The district court held that the undocumented alien children were entitled to equal protection because they were in fact within the jurisdiction of the state. The district court also ruled that §21.031 was unconstitutional and violated the undocumented alien children's equal protection rights. The court held that since Texas prohibited the enrollment of the undocumented children, and enrolled another group, legally admitted alien children, who had similar educational problems, as unconstitutional, based upon the Equal Protection Clause of the Constitution, the Fourteenth Amendment (1868).

According to the district court, Texas could not deny the undocumented alien children access to a free public education just to save state funds. The district court also held that "the statute was defeated…federal laws covered both illegal aliens and the education of disadvantaged children" (pp. 585-586). The defendants were permanently prohibited from implementing §21.031. Both the Tyler Independent School District and the state of Texas appealed the district court's decision. They believed that undocumented alien children were not entitled to a free public education because they were in the United States illegally and thus, are not entitled to such a benefit. The appellants also believed that §21.031 was rationally related to a state purpose in the economic area and not preemptive of any federal jurisdiction.

The appeal for the state of Texas and the Tyler Independent School District was heard in the United States Court of Appeals, Fifth Circuit, in October of 1980. The 5th Circuit Court held in *Doe v. Plyler* (1980) that §21.031 was not preempted by federal

law. The 5th Circuit also noted for a statute to be preempted, it must interfere with a Congressional purpose. The 5th Circuit stated that Congress must clearly occupy the area in question. Since the federal government did not occupy the field of educating undocumented alien children, and since there were no federal laws regulating their education, then §21.031 did not interfere with a Congressional purpose.

The 5th Circuit also held that undocumented alien children were entitled to equal protection of the law because the Fourteenth Amendment of the United States Constitution (1868) stated that a state could not deny to any person within the jurisdiction of the state equal protection rights. It did not matter if the person in question was in the jurisdiction legally or illegally. The 5th Circuit also held that §21.031 violated the undocumented alien children's equal protection rights "whether tested during mere rational basis standard or some more stringent standard" (p. 458). The 5th Circuit held that even though the state alleged that §21.031's purpose was to save the state's educational funds for citizens and legal aliens, it could not be the only basis for excluding these children from free public school. The 5th Circuit held that §21.031 was unconstitutional, and that the undocumented alien children were entitled to a free public education. Texas and the Tyler Independent School District appealed the 5th Circuit's decision to the United States Supreme Court because they did not believe that these children were entitled to a free public education since they were in the United States illegally.

The Supreme Court noted that the Fourteenth Amendment provided that "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" (1868). The

appellants argued at the outset that undocumented aliens, because of their immigrant status, were not "persons within the jurisdiction" of the state of Texas, and that they therefore have no right to the equal protection of Texas law. The Court rejected this argument. The Court held that whatever the status, legal or illegal, under the immigration laws, an alien was a "person." The Court held that aliens, even those who entered unlawfully, had long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments, *Shaughnessy v Mezie* (1953); *Wong Wing v. United States* (1896). The Court also held that aliens were protected from governmental discrimination by the Fifth Amendment, *Mathews v. Diaz* (1976).

In *Shaughnessy v. Mezie (1953)*, the Court held in relevant part:

> (a) The power to expel or exclude aliens was a fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control (p. 210).
>
> (b) While aliens who had entered the United States, even illegally, may be expelled only after proceedings conforming to traditional standard of fairness encompassed in due process of law, an alien on the threshold of initial entry stands on a different footing. Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry was concerned (p. 212).
>
> (c) A lawful resident alien may not captiously be deprived of his constitutional rights to procedural due process. But an alien who seeks to re-enter after having left the United States for purposes of his own has the status of an entrant alien for constitutional purposes (p. 213).

In *Wong Wing v. United States* (1896), the Court held, in relevant part:

"Aliens within the territory of the United States were entitled to the protection of the Fifth and Sixth Amendments of the Federal Constitution regulating procedures in criminal cases" (p. 238).

The Fifth Amendment reads, in relevant part: "No person shall …be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation," U.S. Const. Amend. V (1791).

In *Mathews v. Diaz* (1976), the Supreme Court held:

> The district court had jurisdiction over Espinosa's claim, which (unlike the other appellees' claims) squarely raised the question of the constitutionality of the five-year residence requirements (pp. 74-77).
>
> The statutory classification in §1395o (2)(B) did not deprive the appellees of liberty or property in violation of the Due Process Clause of the Fifth Amendment (pp.77-78).

The state of Texas, the appellants, believed that the Equal Protection Clause and Due Process Clause did not apply to those individuals who unlawfully entered the United States. Texas viewed that those who unlawfully entered the United States as not in the "jurisdiction" of the state, even if they were physically located with the boundaries of the state. Therefore, they were not subject to protection laws. The Court held that the constricting of the phrase, "within the jurisdiction" was not a logical conclusion, *Plyler v. Doe* (1982). The Court had previously ruled that all people within the jurisdiction of a state were protected under the Fourteenth Amendment. The Court stated:

> The Fourteenth Amendment to the Constitution was not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions were universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the protection of the laws was a pledge of the protection of equal laws (p. 212).

The Court held that all persons, regardless of legal status, that were in the jurisdiction of a state, were protected from governmental discrimination and had protection benefits afforded to them.

The Court ruled that there was no support for Texas's belief that due process was somehow of greater importance than equal protection. The Court held in the contrary, that they determined that each aspect of the Fourteenth Amendment reflected a small limitation of state power. To permit a state to employ the phrase "within its jurisdiction" in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws were designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment. The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective was fundamentally at odds with the power the state asserted to classify persons subject to its laws as nonetheless excepted from its protection.

Use of the phrase "within its jurisdiction" thus did not detract from, but rather confirmed, the understanding that the protection of the Fourteenth Amendment extended to anyone, citizen or stranger, who was subjected to the laws of a state, and reached into every corner of a state's territory. Although a person's initial entry into a state, or into the United States, was unlawful, and that he may for that reason be expelled, could not negate the simple fact of his presence, he was subjected to the full range of obligations imposed by the state's civil and criminal laws. Until he leaves the jurisdiction - either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States - he was entitled to the equal protection of the laws that a state may choose to establish.

The Court's conclusion that the illegal aliens, who were plaintiffs in these cases, may claim the benefit of the Fourteenth Amendment's guarantee of equal protection only began the inquiry. The more difficult question was whether the Equal Protection Clause had been violated by the refusal of the state of Texas to reimburse local school boards for the education of children who could not demonstrate that their presence within the United States was lawful, or by the imposition by those school boards of the burden of tuition on those children.

The Court also had to rule on the question of whether the Equal Protection Clause had been violated by Texas when it refused to reimburse local school boards for the financial resources spent on students who could not provide legal documentation of their legal status within the United States. The Court noted in *F. S. Royster Guano Co. v. Virginia* (1920) that the Equal Protection Clause directed that, "all persons similarly circumstanced shall be treated alike" (p. 415). The Court also noted in *Tigner v. Texas* (1940) that, "the Constitution did not require things which were different in fact or opinion to be treated in law as though they were the same" (p. 147). The initial discretion to determine what was "different" and what was the "same" resided in the legislatures of the states. A legislature had substantial latitude to establish classifications that roughly approximated the nature of the problem perceived, that accommodated competing concerns both public and private, and that accounted for the limitation on the practical ability of the state to remedy every ill. In applying the Equal Protection Clause to most forms of state action, the Court, in *Plyler* (1982), sought only the assurance that the classification at issue bear some fair relationship to a legitimate public purpose.

The Court's consideration of the standard appropriate for the evaluation of §21.031 should also be noted. The Court noted that the incapability or lack of enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, had resulted in the creation of a substantial "shadow population" of illegal migrants - numbering in the millions within the borders (p. 218). This situation rose the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society made available to citizens and lawful residents. The existence of such an underclass presented a most difficult problem for a nation that prided itself on the adherence to principles of equality under law.

> The Court held in *Trimble v. Gordon* (1977) that the children, who were the plaintiffs, and who were unlawfully present within the United States were special members of the general adult illegal alien, who made their own conscious choice to enter the United States unlawfully, fully aware of the illegal status. There were those who saw those minor children as individuals who were unlawfully present in the United States, and therefore, were prohibited from receiving protections. Those arguments did not apply with the same force as they would for an adult. The children, who were the plaintiffs in these cases, were special members of this underclass. The children did not have a choice in their entrance into the United States under unlawful conditions. Their parents had the ability to remove

> themselves from the state's jurisdiction; but the children who were plaintiffs in these cases could affect neither their parent's conduct nor their own status (p. 770).

The issue of children and their effect on their undocumented status was noted in *Plyler* (1982). The Court held that one who willfully entered the United States unlawfully, was in fact, a violator of immigration laws. The argument of Texas's §21.031 was directed against children, and imposed its discriminatory burden on the basis of a legal characteristic over which children had little control. It was thus difficult to conceive a rational justification for penalizing these illegal alien children for their presence within the United States, yet that appeared to be the precise effect of §21.031.

The United States Supreme Court ruled in *San Antonio Independent School Dist. v. Rodriguez* (1973), "that public education was not a specific "right" granted to individuals by the Constitution" (pp. 35-36). In *Meyer v. Nebraska* (1923), the Court noted that importance of education had been widely accepted as a form that promoted the basic ideals of American values and culture. The deprivation of such an important facet within the nation's society not only affected the individual, but the society as a whole. The Court noted, "the American people have always regarded education and the acquisition of knowledge as matters of supreme importance" (p. 400). The Court also noted that education was the primary means of preparing citizens for participation within a democratic form of government. Education also provided the basic tools which individuals might utilize to lead them to economic success. Denial of education to an isolated group, such as illegal alien children, would in effect, keep those individuals in

the lowest social, intellectual, and psychological level of society. In regards to the Court's opinion related to the denial of education of the plaintiffs, the Court relied on *Brown v. Board of Education* (1954), when it stated:

> Today, education is perhaps the most important function of the state and local governments. Compulsory 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 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 in which must be available to all on equal terms (p. 493).

A question also raised by the Court was whether the plaintiffs were treated as a suspect class. The Court held in *Plyler* (1982) that the undocumented alien children could not be treated as a suspect class based on their unlawful presence in the United States in violation of federal law. The Court noted that §21.031 imposed a lifetime hardship on a discrete class of children who were not accountable for the their parents' unlawful act of entering the United States unlawfully. Without the opportunity for access to an education, those students would be stigmatized for the rest of their lives due to the illiteracy. They would be unable to live within their civic environment, and their ability to be a constructive member of society would also be hindered. In determining the rationality of §21.031, the Court took into account its cost to the country and to the innocent children. The Court did not consider Texas's rationale as furthering some substantial goal of the state.

The Court noted that the Constitution granted Congress the power to "establish a uniform Rule of Naturalization," (Art. I, § 8, cl. 4). Congress drew in plenary power,

with respect to foreign relations and international trade, and to close its borders. The power to classify aliens was that which the federal government could do, only when they have taken into account the relationship between the alien and the nation. The individual state legislatures rarely had such power to classify aliens. The Court relied on *De Canas v. Bica* (1976), which provided that the state had some authority with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal (p. 356). In *De Canas* (1976), "the state's rationale was to prevent illegal aliens from employment who did not have prior permission" (p. 361). The Court did not find any corresponding rationale when it came to the education issue of §21.031. The classification of §21.031 did not align itself with any federal programs, thus, Texas could not qualify §21.031 as a law that furthered a federal law.

The Court held in *De Canas v. Bica (1976)*, in relevant part:

> Section 2805 (a) of the California Labor Code, which prohibited an employer from knowingly employing aliens who were not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers, held not to be unconstitutional as a regulation of immigration or as being preempted under the Supremacy Clause by the Immigration and Nationality Act (pp. 354-365).
>
> (a) Standing alone, the fact that aliens were the subject of a state statute did not render it a regulation of immigration. Even if such local regulation had some purely speculative and indirect impact on immigration, it did not thereby become a constitutionally prescribed regulation of immigration that Congress itself would be powerless to authorize or approve (pp. 354-356).

The Court could not deny the educational benefit of illegal alien children, who were unlawfully present in the United States, by no fault of their own. The Court felt that in the area of special constitutional sensitivity presented by *Certain Named and Unnamed Undocumented Alien Children* (1980) and *Plyler v. Doe* (1982), and in the absence of any

contrary indication fairly discernible in the present legislative record, the Court perceived no national policy that supported the state in denying the illegal alien children an elementary education.

Lastly, the Court stated, "If the state were to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest - no such showing was made by Texas." Accordingly, the judgment of the Courts of Appeal in each case was affirmed (p. 230).

Opinion of the Court

Justice Brennan delivered the opinion of the Court for the *Plyler v. Doe* (1982) 5-4 decision, which Justices Marshall, Blackmun, Powell, and Stevens concurred. Justice Brennan stated that the question presented by these cases was whether, "consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-aged children, the free public education that was provided to children who were citizens of the United States or legally admitted aliens" (p. 205). The Court also acknowledged that there had been restrictions to the lawful entry of individuals into the United States. There were also laws which prohibited such action included in the Immigration and Nationality Act (2000), and those who had entered unlawfully were subject to deportation (8 U.S.C. §§ 1227, 1252 & 1325). But despite these existing laws, which prohibited unlawful entry, the Court noted in *Plyler* (1982), that there was a substantial number of individuals who had succeeded in entering the country without inspection, and now lived within various states, including the state of Texas.

In May of 1975, the Texas State Legislature revised its education laws to deny from the local school districts any state funds for the education of those students who could not show documentation of their legal status within the United States. This revision allowed local school districts to deny enrollment of any student who could not show that they were legally admitted into this country. The cases involved with §21.031 were challenged on their constitutional provisions. The majority of the Court provided various observations and rulings when delivering their opinion of *Plyler v. Doe* (1982). The Court provided the following:

> This is a class action, filed in the United States District Court for the Eastern District of Texas in September 1977, 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. The action complained of the exclusion of plaintiff children from the public schools of the Tyler Independent School District. The Superintendent and members of the Board of Trustees of the School District were named as defendants; the state of Texas intervened as a party-defendant. After certifying a class consisting of all undocumented school-age children of Mexican origin residing within the school district, the District Court preliminarily enjoined defendants from denying a free education to members of the plaintiff class. In December 1977, the court conducted an extensive hearing on the plaintiffs' motion for permanent injunctive relief (p. 206).

In considering this motion for permanent injunctive relief in *Doe v. Plyler* (1978), the district court made extensive findings of fact. The court found that neither §21.031 nor the school district policy implementing it, "had neither the purpose or effect of keeping illegal aliens out of the state of Texas" (p. 575). The defendant claimed that §21.031 was simply a financial measure designed to avoid a drain on the state's fiscal responsibilities of providing a free public education to all within the jurisdiction of the state of Texas. The district court also recognized that the increases in population resulting from the immigration of undocumented aliens into the United States had created

problems for the public schools of the state, and that these problems were amplified by the special educational requirements, both academically as well as language-based, of the immigrant children. The district court also noted, however, that the increased number of student enrollment was due to the admission of United States citizens and legal admitted aliens. The district court noted that educational funding from both the state and federal governments was based primarily on the number of children enrolled. In net effect then, barring undocumented children from the schools would save money, but it would not necessarily improve the quality of education. The district court further observed that the impact of §21.031 was borne primarily by a very small subclass of illegal aliens, "entire families who had migrated illegally and - for the practical purposes - permanently to the United States" (p. 578). Finally, the district court noted that under current laws and practices, "the illegal alien of today may well be the legal alien of tomorrow," and that without an education, the undocumented children, "already disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, . . . would become permanently locked into the lowest socio-economic class" (p. 577).

The district court held that illegal aliens were entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment, and that §21.031 violated that Clause. Suggesting that "the state's exclusion of undocumented children from its public schools. . . may well be the type of invidiously motivated state action for which the suspect classification doctrine was designed." The district court held that it was unnecessary to decide whether the statute would survive a "strict scrutiny" analysis because, in any event, the discrimination embodied in the statute was not supported by a rational basis (p. 585). The district court also concluded that the Texas statute violated

the Supremacy Clause and found §21.031 to be inconsistent with the scheme of national regulation under the Immigration and Nationality Act, and with federal laws that pertained to funding and discrimination in education. The district court discerned no express federal policy to bar illegal immigrants from education.

The Court of Appeals for the Fifth Circuit upheld the district court's injunction, *Doe v. Plyler* (1980). The court of appeals held that the district court had erred in finding the Texas statute pre-empted by federal law and noted that *De Canas* (1976), had not foreclosed all state regulation with respect to illegal aliens. The Court of Appeals also found no express or implied congressional policy favoring the education of illegal aliens. The appeals court therefore concluded that there was no pre-emptive conflict between state and federal law. With respect to equal protection, however, the court of appeals affirmed in all essential respects the analysis of the district court, *Doe v. Plyler* (1980), when it concluded that §21.031 was "constitutionally infirm regardless of whether it was tested using the mere rational basis standard or some more stringent test," (p. 458).

Concurring Opinion of the Court

Justice Marshall wrote separately in *Plyler* (1982), stressing the fundamental importance of education within the nation's society and its close relationship with basic constitutional values. Marshall believed that the facts of these cases demonstrated the wisdom of rejecting a rigid approach to the equal protection analysis, and allowing varied levels of scrutiny depending upon the issue. Marshall viewed that a class-based denial of public education is incompatible with the Equal Protection Clause of the Fourteenth Amendment.

Concurring Opinion of the Court

Justice Blackmun also wrote separately in *Plyler* (1982) emphasizing the fundamental rights issue brought up in *San Antonio v. Rodriguez* (1973). Justice Blackmun noted that the Court, in *Rodriguez* (1973) articulated a firm rule: fundamental rights are those that are "explicitly or implicitly guaranteed by the Constitution" (pp. 33-34). Justice Blackmun also noted in *Plyler* (1982) that:

> when the state provides an education to some and denies it to others, it immediately and inevitably creates class distinctions of a type fundamentally inconsistent with those purposes, mentioned above, of the Equal Protection Clause. Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve. And when those children are members of an identifiable group, that group – through the state's action – will have been converted into a discrete underclass (p. 234).

Justice Blackmun also noted that the structure of the immigration statutes make it impossible for the state to determine which aliens are entitled to residence, and which eventually will be deported. Justice Blackmun believed that the Court's carefully worded analysis recognized the importance of the equal protection and preemption interests which are crucial.

Concurring Opinion of the Court

Justice Powell also wrote a separate concurring opinion in *Plyler* (1982). Justice Powell noted the ongoing illegal immigration problem, in which parents bring their children across the border for opportunity. Justice Powell noted that, "the children of

these individuals are illegal through no fault of their own and should not be left out on the street uneducated, thus, singled out for a lifelong penalty and stigma" (pp. 238-239).

The state's denial of education to these children bears no substantial relation to any substantial interest. The state has attempted to equate the children as the cause of their fiscal shortcomings. Justice Powell also noted previous district and appellate court decisions concerning undocumented alien children.

Dissenting Opinion

Chief Justice Burger, along with Justices White, Rehnquist, and O'Connor dissented with the majority. The minority believed that the business of the United States' social policies was not that of the judicial system. The minority in *Plyler (1982)* noted that the Constitution did not constitute the judicial as "Platonic Guardians" nor did it allow the Court the power to strike down laws due to their differing philosophies of social standards, wisdoms, or common sense. The majority, "in the minority's beliefs, made no attempt whatsoever to disguise that its' decision was to make up for Congress's lack of efficiency to protect the nation's borders from millions of illegal aliens. With this in mind, it was not the function of the judicial to provide the leadership that Congress lacked in regard to the illegal alien problem" (p. 244).

The minority also noted that the Equal Protection Clause did not require identical treatment of different categories of persons. In the context of this, Texas had a legitimate reason in the protection of the allocation of the state's finite educational resources. Texas's distinction based not only on its own legitimate fiscal interest, but on the classifications established by the federal government in its immigration laws and policies, was not unconstitutional in the eyes of the minority. The Equal Protection Clause

provided a state with great latitude in distinguishing between different groups of people. In the end, the minority felt that the majority made a result-oriented policy for which they had no business in.

The minority also believed that the majority erred in their ruling that the illegal alien children were entitled to any special treatment under the Equal Protection Clause because they lacked control over their parents' decisions to unlawfully enter the United States. The majority also erred in their position stating that §21.031 was irrational because it denied the educational benefits of "innocent" children. The minority believed that the Equal Protection Clause protected against arbitrary and irrational classifications, and against invidious discrimination that stemmed from prejudice and hostility; it was not an all-encompassing "equalizer" designed to eradicate every distinction for which persons were not "responsible" (p. 245).

The minority argued that the Equal Protection Clause guaranteed similar treatment of similarly situated persons, but did not mandate a constitutional hierarchy of governmental services. The Court raised and lowered the degree of judicial scrutiny in equal protection cases according to a transient Court majority's view of the societal importance of the interest affected. The minority felt, "the majority took on a legislative role, a role in which they lacked the authority and competence" (p. 248).

The significant question raised by the minority was whether the requirement of tuition from illegal alien children who attended public schools was a rational and legitimate means of furthering the state's fiscal ends. By definition, illegal aliens had no right whatsoever to be present in the United States, and the state may elect to deny governmental services at the expense of those who are lawfully present within the state.

The Court's decision in *De Canas* (1976), ruled that it was lawful to prohibit the employment of illegal aliens to protect fiscal interests of the lawful residents. The majority failed to explain why the unlawful entry and illegal residency was not a factor when it came to benefits only provided to state residents and those who were lawfully present within the state. The Constitution did not provide a cure for every social ill, nor did it allow judges with a mandate to attempt to such cures. It was Congress's responsibility, not the Court's, to provide legislation that would guide and protect the states from unfair fiscal responsibilities.

The United States Supreme Court's decision in *Plyler v. Doe* (1982) held that a Texas statute which withheld from local school districts any state funds for the education of children who were not "legally admitted" into the United States, and which authorized local school districts to deny enrollment to such children, violated the Equal Protection Clause of the Fourteenth Amendment. After consideration, the Court denied petition for a rehearing of the decision, *Plyler v. Doe* (1982).

Martinez v. Bynum (1983)

Background

Roberto Morales was born in the United States in 1969, thus he is a U.S. citizen by birth. His parents were Mexican citizens who resided in Reynosa, Mexico. The young Roberto Morales left Reynosa in 1977 to live with his sister Oralia Martinez in McAllen, Texas to attend free public school. Morales resided with Martinez as his custodian. Martinez agreed to be his custodian, but had no intention to be his guardian. Because of this lack of guardianship, Morales was not entitled to a free public school

education within the McAllen School District. §21.031(b) and (c) of the Texas Education Code required the local school authorities to admit him if he or "his parent, guardian, or the person having lawful control of him" resided in the school district, but (d) denied tuition-free admission for a minor who lived apart from a "parent, guardian, or other person having lawful control of him under an order of a court," if his presence in the school district was "for the primary purpose of attending the public free schools."

The main focus of the suit was the guardianship of the student and whether the student was a bona fide resident within the school district. The state of Texas defined "custodian" as "the adult with whom the child resided, §51.02(4) of the Texas Family Code (1975). The Texas Family Code also defined "guardian" as "the person who, under court order, is the guardian of the child or the public or private agency with whom the child has been placed by a court." Since Morales was not living with his guardian when he applied for admission for entrance into school for the fall of 1977, he was denied acceptance for admission into the school district.

In *Martinez v. Bynum* (1983), it is noted that in December of 1977, Martinez, acting as next friend of Morales, and four other adult custodians of school-aged children filed suit with the District Court for the Southern District of Texas against the Texas Commissioner of Education, the Texas Education Agency, four local school districts, and various local school officials within those districts. Morales and the other adult custodians, the plaintiffs, alleged that §21.031(d), "both on its face and as applied by defendants, violated certain provisions of the Constitution, including the Equal Protection Clause, the Due Process Clause, and the Privileges and Immunities Clause." The plaintiffs sought preliminary and permanent injunctive relief (p. 324).

The district court denied a preliminary injunction in August of 1978. The court found that the local schools applied a very liberal standard in regard to residency and guardianship standards. The court was found that the school board allowed students admission into the free public schools if they found "any" reasonable existence that the children lived within the school district with someone other than their parents or legal guardians.

After the denial of preliminary injunction, the plaintiffs re-filed their suit, but narrowed the scope of their claims. The plaintiffs wanted a declaration that §21.031(d) was unconstitutional on its face. The plaintiffs also sought an injunction which would prohibit Texas from the denial of the children's admission to a free public school in pursuant to §21.031(d), as well as restitution of certain tuition payments, costs, and attorney's fees. The district court again ruled in favor of the defendants. The court concluded that the legitimate reason for the use of §21.031(d) was that it worked in concert with a state's interest in which protected and preserved the quality of educational services to bona fide residents. In an appeal by two of the plaintiffs to the United States Court of Appeals for the Fifth Circuit, they were again denied relief. The decision was submitted to the United States Supreme Court, who granted certiorari and heard the case on January 10, 1983.

Opinion of the Court

Justice Powell delivered the majority opinion for the Court which consisted of Chief Justice Burger, Justices Brennan, White, Blackmun, Rehnquist, Stevens, and O'Connor. The majority believed that the Court had a long-standing issue in dealing with residency requirements within the states. The Court had always recognized the

individual state's right to protect and preserve the interests of its "bona fide" residency requirements. The Court had previously ruled in *Vlandis v. Kline* (1973), that the "legitimate interest" permitted a "state to establish such reasonable criteria for in-state status as to make virtually certain that students who were not, in fact, bona fide residents of the state, but who had come solely for educational purposes, could not take advantage of the in-state rates" (pp. 453-454).

While examining §21.031 of the Texas Education Code, the Court recognized the school district's rights to apply a uniform criteria to establish residence. The Court held that school districts may require students to be bona fide residents within their local school boundaries. If school districts required a residency requirement, such a requirement, if applied uniformly to all students, and which furthered a legitimate state interest, that is, assured that the educational service was enjoyed by students who had met the bona fide residency requirement would meet constitutional standards. The Court found that such a requirement did not violate the Equal Protection Clause of the Fourteenth Amendment. The requirement did not hinder or penalize the constitutional right of interstate travel, which allowed children to move in, out, or around Texas. A bona fide residency requirement simply required that students establish proper residency prior to applying for services that were restricted to residents.

The Court explained in *Milliken v. Bradley* (1974), the justification for local residence requirements in the public schools. The Court noted that:

> No single tradition in public education was more deeply rooted than local control over the operation of schools; local autonomy had long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process….Local control over the educational process afforded citizens an opportunity to participate in decision-making, permitted the

> structuring of school programs to fit local needs, and encouraged experimentation, innovation, and a healthy competition for educational excellence (pp. 741-742).

The importance of school local control had always been one that the Court had legally supported. It was a function paramount to the success of school districts across the nation. Local planning would suffer greatly if residency requirements were not applied uniformly - fluctuating school populations would make it impossible to predict enrollment, thereby, under-or-over estimating school supplies, teacher allotments, teacher-student ratios, the purchasing of school textbooks, equipment, and other supplies.

The central focus on the question of the Court was whether or not §21.031(d) was a bona fide resident requirement. The plaintiff challenged §21.031(d) to its constitutionality in the facial aspect. The definition of residency was the main focal point in the matter. The Court sought a previous decision from a state of Maine as its guidance to the definition question. In the state of Maine, a similar court issued was answered, in *Inhabitants of Warren v. Inhabitants of Thomaston* (1857) it was held that:

> "When a person voluntarily takes up his abode in a given place, with the intention to remain permanently, of for an indefinite period of time; or, to speak more accurately, when a person takes up his abode in a given place, without any present intention to remove therefrom, such place of abode becomes his residence" (p. 406).

This two-part classic definition of residence had been recognized as a minimum standard in a wide range of contexts time and time again, e.g. *Kiehne v. Atwood* (1979); *Bullfrog Marina, Inc v. Lentz* (1972); *Estate of Schoof v. Schoof* (1964). The Court held that a state may impose the bona fide residence requirement for tuition-free admission to its public schools. The Court's decision was based on the several states' "intention to remain" requirement in this context. The Court held in *Vlandis v. Kline* (1973), "that the

domicile of an individual was his true, fixed and permanent home and place of habitation. It was the place to which, whenever he was absent, he had the intention of returning" (p. 454).

Therefore, the Court held that the school district generally would be justified in requiring school-age children or their parents to satisfy this traditional, basic residence criteria - to live in the district with a bona fide intention of remaining there before it treated them as residents. This does not imply that the parents/children may never leave, but they must have a bona fide intention to stay within the local school district locality.

Texas Education Code §21.031 authorized the school district to provide Morales free public school services without payout paying tuition if he had the bona fide intention to remain in the school district indefinitely. If Morales had the bona fide intention of remaining in the local school district, he would have had a reason for being there other than attending school. This intention would provide Morales the educational benefits of §21.031. The Texas statute goes far beyond §21.031. Texas had stood, that as long as a child was not living in the district for the sole purpose of attending free public schools, he had satisfied the residency requirement.

The Court noted that the Constitution permitted a state to restrict eligibility for tuition-free education to its bona fide residents. The Court held that §21.031 was a bona fide residence requirement that satisfied constitutional standards.

Concurring Opinion of the Court

Justice Brennan wrote separately in *Martinez* (1983) to stress that in his opinion, the case involves only a facial challenge to the constitutionality of §21.031. Brennan felt that the Court did not pass on the statute's validity as applied to children in a range of

specific factual contexts. Concerning the case, Brennan noted that, "the Court did not decide whether the statute is constitutional as applied to the plaintiff, a U.S. citizen whose parents are nonresident aliens. Brennan felt that a different set of considerations would be implicated which might effect significantly an analysis of the statute's constitutionality" (p. 334).

Minority Opinion of the Court

Justice Marshall dissented from the majority of the Court in *Martinez v. Bynum* (1983). He felt that the majority erred in its ruling due a misinterpretation of the Texas statute that granted free public education to every school-age child who resided in the state except for one who lived apart from his or her parents or guardians in order to attend free public schools. The majority's understanding of the concept of "residence" and past Court opinions concerning the constitutionality of residence requirements also concerned Marshall. Marshall felt that the statutory classification, "which allowed for the prohibition of admission of school-age children to a free public education because of their reasons for residing in Texas is not a good enough reason to deny them educational services, for the benefit of the state" (p. 334). Marshall also believed that the statute was unconstitutional on its face under the Equal Protection Clause of the Constitution.

The petitioner challenged the constitutionality of the classification created by the Texas statutes governing the eligibility for admission to the local free schools under §21.031 of the Texas Education Code. Any child may be admitted under §21.031, if they resided with "a parent, guardian, or other person having lawful control of them" (p. 335). If the child resided with a "custodian" and was living with this person for the sole purpose of attending school, they were denied admission. Marshall felt that the majority

also erred in not addressing the constitutionality of the classification contained in the statute. Instead, the majority denied only a portion of children; those who resided in the state for the sole purpose of attending free public schools and who intended to leave the district after the completion of their education. The majority reasoned that the residency requirement would deny such students whose only desire was to stay within a local school district to utilize the free public school system. The majority failed to distinguish between those who intended to leave upon the completion of their education and those who do not.

Marshall stated that the majority also erred in their approach to the question of the term, "intent to remain indefinitely" (p. 338). The majority used that term as a restriction of residential requirement, which put an imposition of that restriction of a free public education is presumptively valid. It was clear that the residence requirement, not the domicile, was the traditional standard of eligibility for lower school education, just as residency was used for tax purposes and post-high school. The state of Texas was thereby denying free public education to any child who intended to leave the district at some time in the future. Marshall pointed out that even if it were permissible to deny free education to residents who expected to leave the state at some future date, the statute could not escape constitutional scrutiny because it did not apply this test uniformly. Under §21.031, the free public schools of Texas were generally open to any child who is a resident of the state. Admission was not limited to residents who intended to remain indefinitely in Texas. Justice Marshall cited:

> In *Brownsville Independent School District v. Gamboa* (1973), the Texas court considered whether a school district had improperly excluded two children who claimed that they were eligible to attend the local free schools under Texas Education Code Annotated §21.031, prior to the amendment of the provision in

> 1977 to add subsection (d). One child, an American citizen by reason of birth in Texas, had lived in Mexico since infancy with parents who were Mexican citizens. At the age of six, he left his parents' home and came to live with his maternal aunt in Brownsville for the purpose of attending the public free schools. He lived in his aunt's home as part of her household for 16 months with only a single brief interruption. She was appointed the child's guardian. The court concluded from this that "[t]here is sufficient permanency in the plaintiff's residence status within the defendant's district to satisfy the statutory requirement" of residence (p. 448).

Because the intent requirement was applied to only one class of children it could not be characterized as a bona fide residence requirement. Marshall noted in *Martinez* (1983) that, "a state may not pick and choose among classes of state inhabitants to decide which will be subjected to particular parts of the statute. Marshall also noted that §21.031 could not withstand the careful scrutiny that was warranted under the Equal Protection Clause" (pp. 345-346).

The Texas statute was not narrowly tailored to achieve a substantial state interest. The state did not attempt to justify the classification by reference to its interest in the safety and well-being of children within its boundaries. The state instead contended that the principal purpose of the classification is to preserve educational and financial resources for those most closely connected to the state. That reasoning leads to believe that all others, "not closely connected to the state, fall under a different classification, which again, could not withstand careful scrutiny" (p. 348).

Another justification that Texas cited with the application of §21.031 was that the local schools would be able to negate population fluctuations. Texas, unfortunately, used §21.031 as a vague tool to predict numbers that may of may not have had unpredictable

fluctuations. The Texas statute did not uniformly apply to all students, since there was no evidence that the application did in fact solve a population fluctuation problem that did not necessarily exist.

Marshall believed that the magnitude of the population fluctuation problem that Texas claimed to exist, was simply too narrow. It could not be applied fairly to the general population. There were no hard facts to suggest that a greater number of undocumented alien students who would enter the school system than any other students. It was of great importance that once public schooling had begun, students should be able to complete it. The Texas statute that denied students admission to the free public schools because they resided in their locality for the sole purpose of attending school and they may or may not have the "intent to remain." On the other hand, students who had satisfied the "residency requirement" may move from locality to locality without denial of educational services (pp. 350-351). Marshall rejected the majority's conclusion and held that §21.031(d) violated the Equal Protection Clause of the Constitution.

California and Proposition 187

Background

Ludovina & Morse (1999) noted that despite the United States' historical image as a "melting pot," immigration had long evoked fears in the parts of the country most affected by it. In recent years, such fears had been propagated once again by factions in those states most apt to receive immigrants. Part of the argument turns around allegations that immigrants, and especially undocumented immigrants, cause the cost of providing social services, including education, to increase beyond reason. Acting on

such fears, citizens have sometimes supported anti-immigrants provisions. Proponents and those against legislation have provided varying viewpoints to the general public.

Neuman (1996) noted that the campaign for the "control of our borders is partly a struggle over the future racial, linguistic, and cultural development of American society" (p. 187). Miller (1998) stated that the issues surrounding the education of illegal immigrant children were social, political, moral, and economic. They involve all persons as community members and taxpayers, and also as employers and colleagues. Education is the largest public cost associated with illegal immigration, and it was likely to have long-term consequences. Perkins (2000) observed that immigrants were generally younger than members of the native-born population and tended to have more children of school-age. This could have profound implications for the nation's public schools, such as school overcrowding. There had been many efforts by legislators to undermine the United States Supreme Court's opinions regarding the education of undocumented students. It was their utmost priority to provide their state with the independent option to educate these children or not to educate them. Gonzales (1999) noted that the failure of immigration laws to stem the tide of increasing numbers of undocumented individuals, particularly vis-á-vis Mexican, resurrected xenophobic sentiments. The backlash was so intense that a whole series of measures was introduced to combat Mexican immigration. According to Lasso (1995), the irony is that this nation of immigrants, and the scapegoating of immigrants is one of the enduring prejudices in our history. The measure, which denied illegal immigrants and the families health care, welfare, and public education was endorsed by California's Governor Pete Wilson, a Republican, and staunch restrictionist. He felt that the citizens of California were being unfairly burdened

with the overwhelming number of illegal immigrants. Governor Wilson's re-election campaign efforts solidified his belief in the measure. Wilson believed that with the passage of Proposition 187, would have legal challenges which he welcomed. He attempted direct reversal of the Supreme Court's decision in *Plyler v. Doe* (1982).

On November 8, 1994, the voters in the state of California passed Proposition 187, the "Save Our State" initiative. The stated purpose of the proposition was to provide for the cooperation between state and local government agencies, and to establish a system of required notification by and between such agencies, to prevent illegal aliens in the United States from receiving benefits or pubic services in the state of California. After the initiative was passed, several actions challenging the constitutionality of Proposition 187 were commenced in the state and federal courts in California.

Plaintiffs in *League of Latin American Citizens v. Pete Wilson* (C. D. 1995) filed consolidated actions seeking declaratory and injunction relief to bar California Governor Pete Wilson, from enforcing the provisions of proposition 187. On November 16, 1994, the District Court, Central District of California, entered a temporary restraining order enjoining the implementation of sections 4, 5, 6, 7, and 9 of the initiative. The district court granted in part and denied in part the motions for summary judgment. District court judge Mariana Pfaelzer reviewed Proposition 187.

<u>Purpose and Effect of Proposition 187</u>

Within Proposition 187, there are five types of provisions.

(1) provisions which require state officials to verify or determine the immigration status of arrestees, applicants for social services and health care, and public

school students and their parents by either classifying persons based on state-created categories of immigration status or verifying immigration status by reference to federal immigration law.

(2) provisions which require state officials to notify individuals that they are apparently present in the United States unlawfully and that they must either obtain legal status or leave the United States.

(3) provisions which require state agencies to report immigration status information to state and federal authorities, and to cooperate with the INS regarding person whose immigration status is suspect.

(4) provisions which require facilities to deny social services, health care services and public education to individuals based on immigration status.

(5) criminal penalties for falsifying immigration documents.

The initiative has a dual purpose and effect. The classification, notification and cooperation/reporting provisions taken together constitute a regulatory scheme designed to deter illegal aliens from entering or remaining in the United States.

Severability of the Initiative

In determining the validity of Proposition 187, the district court was mindful of its obligation to uphold the initiative to the fullest extent possible. California laws holds that all presumptions favor the validity of initiative measures and mere doubt as to validity is sufficient. Initiatives must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. A finding that a section, subsection or subpart of Proposition 187 is preempted by federal law does not end the court's inquiry with respect to the validity of the initiative. Rather, "a finding that any provision is preempted requires the

court to determine whether that provision is severable from the balance of the initiative so that the remaining may take effect" (p. 765).

California courts have prescribed three criteria by which a reviewing court must asses the severability of invalid provisions of statutes. In order to be severable, the invalid provision must be grammatically, functionally, and volitionally separable. A provision is grammatically severable if it constitutes a distinct and separate provision which can be removed as a whole without affecting the wording of any other provisions or where the valid and invalid parts can be separated by paragraphs, sentences, clauses, phrases or even single words.

A provision is functionally severable if the remaining provisions can stand on their own, are capable of separate enforcement, can be given effect, and/or can operate independently of the invalid provisions.

Lastly, an invalid provision is volitionally severable if the remaining provisions would likely have been adopted by the people had they foreseen the invalidity of the challenged provision, or if the provision was not so critical to the enactment of the initiative that the measure would not have been enacted in its absence.

The plaintiffs contended that Proposition 187 was not severable because its pervasive unconstitutionality leaves nothing to salvage. In addition, they argued that the provisions of the initiative failed to meet the three criteria for severability. The defendant countered that the initiative met all three severability tests. That is, the defendants argued that the initiative was volitionally severable because the severability clause reflects the electorate's intent to accept the implementation of any valid provisions notwithstanding the invalidation of others. It was grammatically severable because each section,

subsection and subpart of the initiative can be severed from others without rendering remaining sections unintelligible. Also, it was functionally severable because each section, subsection and subpart is capable of operating independently from the others. Thus, any provisions of Proposition 187 which are preempted must be severed from the initiative.

Whether Proposition 187 is Preempted Under Federal Law

The question of whether provisions of Proposition 187 are preempted by federal law is governed by the Supreme Court's decision in *De Canas v. Bica* (1976). In *De Canas*, the Court set forth three tests to be used in determining whether a state statute related to immigration is preempted. Pursuant to *De Canas,* if a statute fails any one of the three tests, it is preempted by federal law. The three *De Canas* tests provide that:

1) Under the first test, "the Court must determine whether a state statute is a regulation of immigration since the power to regulate immigration is unquestionably and exclusively a federal power" (pp. 354-355).
2) Under the second test, "even if the state law is not an impermissible regulation of immigration, it may still be preempted if there is a showing that it was the clear and manifest purpose of Congress to effect a complete ouster of state power, including state power to promulgate laws not in conflict with federal laws with respect to the subject matter which the statute attempts to regulate" (p. 356).
3) Under the third test, "a state law is preempted if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (p. 363).

Whether Proposition 187 Constitutes an Impermissible Regulation of Immigration

The federal government possesses the exclusive power to regulate immigration. The Court noted in *De Canas,* the power to regulate immigration is unquestionably exclusively a federal power. That power derives from the Constitution's grant to the federal government of the power to establish a uniform Rule of Naturalization, U.S. Const. Art. I, § 8, cl. 4. Congress has exercised its power over immigration in the Immigration and Nationality Act, 8 U.S.C (2000). The Immigration and Nationality Act is a comprehensive regulatory scheme which regulates the authorized entry, length of stay, residence status and deportation of aliens.

Because the federal government bears the exclusive responsibility for immigration matters, the states can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States.

District court judge Mariana Pfaelzer noted that Proposition 187's verification, notification and cooperation/reporting requirements directly regulate immigration by creating a comprehensive scheme to detect and report the presence and affect the removal of illegal aliens. The scheme requires state agents to question all arrestees, applicants for medical and social services, students, and parents of students about their immigration status; to obtain and examine documents relating to the immigration status of such persons; to identify suspected illegal immigrants present in California; to report suspected illegal immigrants to state and federal authorities; and to instruct people suspected of being in the United States illegally to obtain legal status or leave the country.

Whether Proposition 187 is Preempted because Congress intended to occupy the field

Under the second *De Canas* test, even if a statute is not an impermissible regulation of immigration, it may still be preempted if there is a showing that Congress intended to occupy the field which the statute attempts to regulate. As noted, the Constitution commits the power to regulate immigration exclusively to the federal government. Congress has fully occupied the field of immigration through enactment and implementation of the Immigration and Naturalization Act, 8 U.S.C. (2000). Since the classification, notification and cooperation/reporting requirements contained in sections 1 and 4 through 9 constitute a scheme to regulate immigration, those provisions are necessarily preempted under the second *De Canas* test.

Whether Proposition 187 is Preempted Because it Directly Conflicts with Federal Law

The final inquiry under *De Canas* is whether, although the Immigration and Naturalization Act contemplates some room for state legislation, Proposition 187 is preempted in whole or in part because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Section 7 denies public elementary and secondary education to children who are in the United States in violation of federal law, and children who are citizens or otherwise legally present, but whose parents or guardians are in the United States unlawfully. This denial of public education directly conflicts with federal law as announced in the Supreme Court's decision in *Plyler v. Doe* (1982). In *Plyler*, the Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens. The Court rejected each

of the state's proffered justifications for denying education to undocumented children, including the desire to protect itself from an influx of illegal immigrants, to preserve the state's limited resources for the education of its lawful residents, and to remove the alleged undocumented children imposed on the state's ability to provide high-quality public education. It found the states justifications to be constitutionally insufficient to deny children access to a basic education and noted the conflict that would result if the state were to deny education to a child enjoying an inchoate federal permission to remain. Section 7's denial of a public education based on the immigration status of the child or the child's parent(s) or guardian(s) conflicts with and is preempted by federal law as announced by the Supreme Court in *Plyler*. The remaining provisions of section 7, subsections (b), (c), (d), and (e), require school districts to verify the immigration status of prospective and current students and their parents or guardians, to notify students and parents or guardians of their suspected unlawful status, and to report such information to state and federal officials. These provisions, aimed at regulating immigration or affecting a denial of public education that is prohibited by federal law, have no permissible purpose. Therefore, section 7 is preempted in its entirety.

Opinion Relating to the Exclusion of Illegal Aliens from Public Schools

Judge Pfaelzer held that subsections (a), (b), and (c) together, assure that undocumented children will be denied access to public education. In subsection (b), in sections 5 and 6, she held that the only purpose and effect of subsections (d), (e), and (f) is to ensure that persons determined by the state to be in the United States unlawfully are transitioned to their country of their origin.

Judge Pfaelzer also held that an analysis of section 7 under the rigors of the first *De Canas* test is not necessary to sustain the Court's ruling on the plaintiff's motions. In light of the Court's ruling decision in *Plyler v. Doe* (1982), in which the Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits states from excluding undocumented alien children from public schools, section 7 in its entirety conflicts with and therefore is preempted by federal law.

Proposition 187 stirred up controversies on all fronts. It brought strong feelings and thoughts to many individuals and groups. The economics of illegal immigration was a major issue when it came to education, which was a major financial burden for states most affected by the great numbers of undocumented students. Schuck and Smith, as cited in Neuman (1996) noted that the net costs imposed by the citizen children of undocumented aliens, including the opportunity costs of using up immigration slots, must be balanced against the costs of denying legal citizenship status given that so many of these individuals would remain. These costs included the blighting of the children's lives and harm to United States society and values that would result from the creation of a hereditary undocumented caste. There may also be costs to citizens rendered less secure in their citizenship by the adoption of citizenship criteria that are harder to prove. Schuck and Smith, as cited in Neuman (1999), stated that the campaign for the "control of our borders was partly a struggle over the future racial, linguistic, and cultural development of American society" (p. 187).

State Attorney Generals' Opinions and Memorandums

State attorney generals from various states have opined to the question of educating students on the basis of their undocumented status or residency. In 1981, Bob Corbin, the attorney general of the state of Arizona, became aware of children who resided in Safford County, who were not receiving a free education because they were not citizens of the United States, although they were residents of the school district. Corbin's opinion is as stated:

> Because of several legal developments in the last five or six years concerning the rights of resident aliens to receive free public education, it is my opinion that persons who were not citizens of the United States, but who had established "residency" in our state, were entitled to a free public education. Corbin went on to say it is the children, whether or not they were citizens of the United States, were entitled to receive a free public education, notwithstanding the citizenship status of the parent or parents, 1981 Ariz. AG Lexis 67. (B. Corbin, personal communication, June 9, 1981).

In that opinion, Corbin also provided guidance to the school system in regard to the enrollment of students in public schools. Corbin advised that inquiry into the citizenship of the student or parent should not be done. He also advised to enroll children whose parents or custodial parents were living within the district, notwithstanding their citizenship status.

In 1982, the State Superintendent of Schools for the State of Georgia requested that State Attorney General Michael J. Bowers answer the question of the entitlement of aliens to a free public education. Bowers, cited *Plyler v. Doe* (1982), when he affirmed that a local school district may not deny a free public education to an alien, legally admitted to the United States or not, solely on the basis of his status as an alien, 1982 Op. Atty Gen. Ga. 158. (M. J. Bowers, personal communication, October 21, 1982).

In 1987, Edward Semonian, Clerk for the Circuit Court for the City of Alexandria, Virginia requested that Virginia State Attorney General Mary Sue Terry answer the question: May public school officials require a guardianship order for a child who was not a citizen or resident of the school district in order to be enrolled in school and receive a free public education? Terry noted in *Plyler* (1982), that although education was not a fundamental constitutional right, education clearly had a "fundamental role in maintaining the fabric of our society." Children who were illegal aliens may not be presumptively excluded from the free public schools. The students in question may be required, however, as others are required, to establish that they are bona fide residents of a jurisdiction before qualifying for free public schooling in that jurisdiction, *Martinez v. Bynum* (1983). Terry also noted that it was constitutionally permissible to presume that residence which is established solely for the purpose of obtaining tuition-free schooling is not bona fide residence, provided such presumption is consistently, not selectively, applied, 1987-1988 Op. Atty. Gen. Va. 374. (M. S. Terry, personal communication, December 18, 1987).

In 1999, State of Virginia Senate member William C. Mims requested that Virginia State Attorney General Richard Cullen answer the question of whether a local school board, in attempting to ascertain whether a student applicant satisfied the residency requirements for attendance in a particular public school, may inquire into the citizenship or visa status of the student. Virginia State Attorney General Cullen answered this question by stating that, "the Virginia General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth." Cullen referred to a 1979 Virginia State Attorney General that

stated the citizen or visa status of an alien student does not affect his eligibility for tuition-free education. In regard to residency, Cullen stated that residence of a child was determined by the child's residence with a legal guardian, such as a natural or adoptive parent, a court-appointed guardian, or in the case of parental death, a person *in loco parentis*. Thus, children who had established a bona fide residence were entitled to attend the schools of the county, 1999 Op. Va. Att'y Gen. 105. (R. Cullen, personal communication, April 14, 1999).

In 2001, Clark S. Brody, Deputy Superintendent of Public Instruction, Department of Education of the State of Oregon, issued an executive memorandum in regard to undocumented students' rights to attend public schools, Oregon Department of Education (ODE) Executive Memorandum 119-2000-01. Brody, in his memorandum, cited both Oregon law and the United States Supreme Court. Brody stated that both Oregon law and the Supreme Court affirmed the right of undocumented youth to education in Oregon without regard to the citizenship of the child or parent. Brody also noted that under Oregon law, the resident school district was obligated to provide a free education for all children between the ages of 5 and 19 who resided in the district. Whether or not a student was a resident must be determined by other Oregon laws, which contained no provision for citizenship (C. S. Brody, personal communication, February 15, 2001).

CHAPTER 3

CURRENT STATUS OF LAWS CONCERNING UNDOCUMENTED STUDENTS

Introduction

This chapter provides a summary and analysis of the current status of the law concerning undocumented students. Relevant constitutional law, case law, and current Congressional legislation is reviewed to provide a composite perspective on the current status of undocumented students attending U.S. public schools.

United States Constitution

The Constitution establishes, among other things, the authority of Congress to establish laws and regulations in regard to naturalization. It grants Congress the power to establish a uniform rule of naturalization (U.S. Const. Art. I, § 8). It also provides Congress with plenary power concerning foreign relations, international trade, and regulation of its borders.

Under Article II of the Constitution, the members of the Executive branch, are charged with enforcing the laws established through the legislative process, including federal immigration and naturalization laws. The Department of Justice, which falls under the Executive branch of government, has the primary responsibility for the Immigration and Naturalization Service (INS), its manning, enforcement of laws, and administrative processes (U.S. Const. Art. II, § 2).

In regard to the judicial relationship between the federal government and each individual state, Article VI, § 2 of the U.S. Constitution, the Supremacy Clause, states in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

Article VI provides Congressional authority to establish laws by which all states would be bound. This Article provides for "federal preemption," which holds that a state may not enact legislation relating to a matter that is under federal jurisdiction, if the statute interferes with valid federal legislation. Accordingly, since the federal government has the responsibility of immigration and naturalization, each individual state cannot establish rules of citizenship. Therefore, each state cannot use state laws that are pre-emptive by federal law concerning immigration (U.S. Const. Art. II, § 2).

The United States Constitution does not specifically state guidelines or regulations in regard to the education of undocumented students. But it does contain amendments that have implications, the Fifth and Fourteenth Amendments to the U.S. Constitution. The Fifth Amendment of the United States Constitution (1791) states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fifth Amendment also provides a due process for individuals, including those whose presence in the United States is illegal. It provides a procedural due process for all

individuals whose life, liberty, or property is threatened. The Court held in *Mathews v. Diaz* (1976) that the Fifth Amendment protects aliens, whose presence in the United States is unlawful, from invidious discrimination by the federal government (p. 73).

The Fourteenth Amendment of the United States Constitution (1868) also referred to as the Equal Protection Amendment, is another amendment which affects the educational laws regarding undocumented students. The Fourteenth Amendment states in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law in which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This amendment applies to all people within a state territory regardless of citizenship status, including undocumented students. The Supreme Court has ruled in *Shaughnessy v. Mezie* (1953); *Wong Wing v. United States* (1896); and *Yick Wo v. Hopkins* (1886) that aliens, even aliens whose presence in the United States in unlawful, are recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments.

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Current Federal Legislation - Senate Bill 1291 (2001)

One piece of legislation currently under consideration is The Development, Relief and Education for Alien Minors Act, known as the DREAM Act. On August 8, 2001, the proposal was introduced during the 1st session of the 107th Congress by Senator Orrin Hatch of Utah and co-sponsor Maria Cantwell of Washington. Senate Bill 1291 amends the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIR),

Public Law 104-208, to repeal the denial of an unlawful alien's eligibility for higher education benefits based on state residence unless a United States national is similarly eligible without regard to such state residence. In relation to the education of undocumented students, the bill authorizes the Attorney General to cancel the removal of, and adjust to permanent resident status, an alien who: (1) has attained the age of 12 prior to enactment of this Act; (2) files an application before reaching the age of 21; (3) has earned a high school or equivalent diploma; (4) has been physically present in the United States for at least five years immediately preceding the date of enactment of this Act (with certain exceptions); (5) is a person of good moral character; and (6) is not inadmissible or deportable under specific criminal or security grounds of the Immigration and Nationality Act.

The Act authorizes the Attorney General to take similar steps with respect to an alien who: (1) would have met such requirements during the four-year period immediately preceding the enactment of this Act; and (2) is enrolled in, or graduated from, an institution of higher education.

The Act also directs the Attorney General to establish a procedure permitting an alien to apply for cancellation and adjustment without being placed in removal proceedings. It provides for: (1) expedited application processing without additional fees; and (2) the confidentiality of application information. The Attorney General is also to report annually on the number, status, and disposition of applications under the Act. As of June 20, 2002, the bill was placed on the Senate Legislative Calendar under the General Orders, Calendar No. 425. (See Appendix C for full text of S. 1291)

United States Supreme Court Rulings

The Court's landmark 5-4 decision in *Plyler v. Doe* (1982) in which Justices Brennan, Marshall, Blackmun, Powell, and Stevens concurred the question of whether the state of Texas may deny to undocumented school-aged children the benefit of an education, the free public education that it provided to children who were citizens of the United States or legally admitted aliens was consistent with the Equal Protection Clause of the Fourteenth Amendment. The Court also had to consider the laws which restricted the lawful entry of individuals into the United States. Other factors which the Court had to consider were the laws which prohibited unlawful entry into the country, the Immigration and Nationality Act (8 U.S.C. §1325) (2000), and those who had entered unlawfully were subject to deportation, Immigration and Nationality Act (8 U.S.C. §§1251, 1252) (2000). Despite the existing laws which prohibited unlawful entry, many individuals entered the country without inspection, and settled in various states throughout the nation.

The Court heard the arguments in the *Plyler v. Doe* (1982). This case was combined with *Certain Named and Unnamed Undocumented Alien Children et al. v. Texas* (1980). Together, these two cases were argued before the Court. Both cases claimed the legal right to deny undocumented students the benefit of attending free public schools in Texas. The state of Texas sought the denial of undocumented students who could not show documentation of their legal status within the United States. In *Certain Named and Unnamed Undocumented Alien Children et al. v. Texas* (1980), the suit was brought by the parents of a group of undocumented students residing in Smith County, who were denied access to a free public education in pursuant to §21.031 of the Texas

Education Code and the Tyler Independent School District. This school district policy denied students access to a free public education unless they made a yearly tuition payment of $1,000.

In considering this motion for permanent injunctive relief, the district court made extensive findings of fact. The court found that neither §21.031 nor the school district policy implementing it had "either the purpose or effect of keeping illegal aliens out of the state of Texas," *Doe v. Plyler* (1978). Respecting the defendants' further claim that §21.031 was simply a financial measure designed to avoid a drain on the state's fiscal responsibilities of providing a free public education to all within the jurisdiction of the state of Texas. The Court recognized that the increases in population resulting from the immigration of undocumented aliens into the United States had created problems for the public schools of the state, and that these problems were amplified by the special educational requirements, both academically as well as language-based, of the immigrant children. The Court noted, however, that the increasing numbers of student enrollment was due to the admission of United States citizens and legal admitted aliens. It also found that the exclusion of all undocumented children from the public schools in Texas would eventually result in a leveling off of financial costs for the education of all students, including the illegal alien children. The Court noted that educational funding from both the state and federal governments was based primarily on the number of children enrolled. In net effect then, barring undocumented children from the schools would save money, but it would not necessarily improve the quality of education, *Doe v. Plyler (*1978). The Court further observed that the impact of §21.031 was borne primarily by a very small subclass of illegal aliens, "entire families who have migrated

illegally and - for the practical purposes - permanently to the United States" (p. 578). Finally, the Court noted that under current laws and practices, "the illegal alien of today may well be the legal alien of tomorrow," and that without an education, these undocumented 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" (p. 577).

The district court held that illegal aliens were entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment, and that §21.031 violated that clause. Suggesting that "the state's exclusion of undocumented children from its public schools. . . may well be the type of invidiously motivated state action for which the suspect classification doctrine was designed." The Court held that it was unnecessary to decide whether the statute would survive a "strict scrutiny" analysis because, in any event, the discrimination embodied in the statute was not supported by a rational basis (p. 585). The district court also concluded that the Texas statute violated the Supremacy Clause. The Court found §21.031 inconsistent with the scheme of national regulation under the Immigration and Nationality Act, and with federal laws pertaining to funding and discrimination in education. The Court discerned no express federal policy to bar illegal immigrants from education.

The United States Supreme Court in *Plyler v. Doe* (1982) held that a Texas statute which withholds from local school districts any state funds for the education of children who were not "legally admitted" into the United States, and which authorizes local school districts to deny enrollment to such children, violated the Equal Protection Clause of the Fourteenth Amendment (p. 202).

The plaintiffs of the suit who challenged the constitutionality of the Texas statute claimed that they may claim benefit of the Equal Protection Clause, which reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are the citizens of the United States and of the State where in they reside. No State shall make or enforce any law in which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws (U.S. Consti. Amend. XIV).

The Court saw fit that for whatever legal or nonlegal status under immigration laws, an alien is a "person" in any ordinary sense of the term. The Court previously recognized that illegal aliens are also "persons" who are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. The due process and equal protection provisions of the Fourteenth Amendment are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. Therefore, even though the aliens have illegally entered the country, they are benefited by the protection of the Due Process Clause and Equal Protection Clause. The Court confirmed in *Plyler* (1982) that "within its jurisdiction" extended to anyone, "citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a state's territory" (p. 202).

The Court ruled that the discrimination of the Texas statute cannot be considered rational unless if furthers some substantial goal of the state. Although undocumented resident aliens cannot be treated as a "suspect class," and although education is not a "fundamental right," so as to require the state to justify the statutory classification by showing that it serves a compelling governmental interest, nevertheless, the Texas statute imposed a lifetime hardship on a discrete class of children not accountable for their

parents actions - entering the United States illegally. These children can neither affect their parents' conduct nor their own undocumented status. The Court denied petition for a rehearing of the decision in *Plyler v. Doe* (1982b).

Majority Opinion of *Martinez v. Bynum* (1983)

The Court found another Texas education statute constitutional. The residency requirement which Texas enforced upon children who were living with adults other than their parents for the sole purpose of attending a free public school was held constitutional. Chief Justice Burger, Justices Brennan, White, Blackmun, Powell, Rehnquist, Stevens, and O'Connor concurred with the majority opinion in regard to the argument of residency and the benefit of a free public education to undocumented students. Their 8-1 decision held that Texas's educational residency requirement was valid and constitutional. The majority believed that the Court had a long-standing history in dealing with residency requirements within the states. The Court has always recognized the individual state's right to protect and preserve the interest of its "bona fide" residency requirements. The Court had previously ruled in *Vlandis v. Kline* (1973), that the "legitimate interest" permits a "state to establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the state, but who have come there solely for educational purposes, cannot take advantage of the in-state tuition rates" (pp. 453-454).

While examining §21.031 of the Texas Education Code, the Court recognized the school district's rights to apply a uniformed criteria to establish residence. The Court held that school districts may require students to be bona fide residents within their local school boundaries. The school districts require a residency requirement, if such a

requirement is applied uniformly to all students prior to admission. Such a requirement, again, if applied uniformly, furthering a legitimate state interest, that is, assuring that the educational services are enjoyed by students who have met the bona fide residency requirement. The Court found that such a requirement does not violate the Equal Protection Clause of the Fourteenth Amendment. The requirement does not hinder or penalize the constitutional right of interstate travel, which allows children to move in, out, or around Texas. A bona fide residency requirement simply requires that students establish proper residency prior to applying for services that are reserved for residents.

The importance of local school control has always been one that the Court has legally supported. It is a function paramount to the success of school districts across the nation. Local planning would suffer greatly if residency requirements were not applied uniformly - fluctuating school populations would make it impossible to predict enrollment, thereby, under-or-over estimating school supplies, teacher allotments, teacher-student ratios, the purchasing of school textbooks, equipment, and other supplies.

The central focus on the question of the Court was whether or not §21.031(d) is a bona fide resident requirement. The plaintiff challenged §21.031(d) to its constitutionality in the facial aspect. The definition of residency is the main focal point in this matter. The Court sought a previous decision from a state of Maine suit as its guidance to the definition question. The State of Maine, in *Inhabitants of Warren v. Inhabitants of Thomaston* (1857) held that:

> "When….a person voluntarily takes up his abode in a given place, with the intention to remain permanently, or for an indefinite period of time; or, to speak more accurately, when a person takes up his abode in a given place, without any present intention to remove therefrom, such place of abode becomes his residence.…"

This two-part classic definition of residence has been recognized as a minimum standard in a wide range of contexts time and time again, e.g. *Kiehne v. Atwood* (1979); *Bullfrog Marina, Inc v. Lentz* (1972); *Estate of Schoof v. Schoof* (1964). The Court held that a state may impose bona fide residence requirements for tuition-free admission to its public schools. The Court's decision is based on several states' "intention to remain" requirement in this context. The Court held in *Vlandis v. Kline* (1973) that the domicile of an individual is his true, fixed, and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning.

Therefore, the Court held that the school district generally would be justified in requiring school-age children or their parents to satisfy the traditional, basic residence criteria - to live in the district with a bona fide intention of remaining there before it treated them as residents (this does not imply that the parents/children may never leave), but must have a bona fide intention to stay within the local school district locality.

Texas Education Code §21.031 provided the school district to provide Morales free public school services without payout paying tuition if he has the bona fide intention to remain in the school district indefinitely. The Court noted that the Constitution permits a state to restrict eligibility for tuition-free education to its bona fide residents. The Court held that §21.031 was a bona fide residency requirement that satisfies constitutional standards.

United States Courts of Appeals

To deal with the issue of federal reimbursement for state funds spent on undocumented students in public schools, the incarceration, and health care costs of

undocumented individuals, several states filed suits against the federal government of the United States. In *California v. United States* (1996), the state contended that the federal government failed in protecting the state from invasion. The state claimed that the government violated the state's Tenth Amendment by forcing the state to spend educational funds on individuals who were in the country illegally. California also claimed that the Attorney General had failed to enforce the country's immigration laws. Lastly, California sought declaratory and injunctive relief by a declaration that the Attorney General and the Commissioner of the INS had failed to effectively execute final orders of deportation. The 9th Circuit affirmed the district court's decision to dismiss all relief requests based upon federal jurisdiction protected by the United States Constitution, Fed. R. Civ. P. 12(b)(6), *California v. United States* (1996).

Governor Lawton Chiles of the state of Florida, among other officials for the state filed suit against the federal government. Governor Chiles and the state of Florida asserted claims under both the Administrative Procedures Act and the United States Constitution. Florida asked for equitable restitution of its unreimbursed expenses or for declaratory relief and an injunction requiring the United States to fulfill its statutory and constitutional duties. The 11th Circuit Court affirmed the district court's decision and dismissed all counts, concluding the claims presented nonjusticiable political questions, *Chiles v. United States* (1995).

New York state senator Frank Padavan, along with other state officials also filed suit against the federal government. According to the plaintiffs, the federal government failed to control illegal immigration, and the failure had serious financial consequences for New York. The plaintiffs alleged that the federal government violated the

Naturalization Clause, the Guarantee Clause, the Invasion Clause, the Tenth Amendment, and the Immigration and Naturalization Act. The state of New York sought monetary support from the federal government to compensate the state and its subdivisions for expenditures it had constrained to make as a result of the federal government's immigration policy. The 2nd Circuit Court noted that the decisions relating to immigration control are discretionary matters, and the Administrative Procedures Act precludes judicial review of matters committed to agency discretion by law. The court also noted that the state failed to make a claim which fell under a discretionary decision and thus, affirmed the district court's decision, *Pavadan v. United States* (1996).

New Jersey Governor Christine Todd Whitman, along with other state officials filed suit against the U.S. Attorney General, Commissioner of the INS, and the Director of the Office of Management and Budget, collectively the United States federal government for compensation for the incarceration and education of illegal aliens. New Jersey alleged that the federal government failed to control its borders, and the state of New Jersey was improperly forced to bear the financial burden of incarcerating illegal aliens. New Jersey was also forced to provide educational services to those students who were in the United States illegally. New Jersey sought declaratory judgment for reimbursement from the federal government. The focal point of New Jersey's claim was that the federal government violated the state's Tenth Amendment by forcing the state to absorb the cost for incarceration and the education of illegal aliens, thus determining the manner in which state tax funds were expended. New Jersey claimed that the federal government violated the Naturalization Clause, the Takings Clause of the Fifth Amendment, and the Invasion Clause. The 3rd Circuit Court found that in view of the

absence of any allegation that New Jersey was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless, New Jersey had no viable claim for reimbursement. The political branches of government were responsible for the immigration policy judgments, not the individual states. The New Jersey claims were therefore constitutional claims that are non-justiciable, *New Jersey v. United States* (1996).

The state of Texas and Arizona filed similar claims through their prespective court systems. Both suits filed against the federal government met the same fate of the previously mentioned states, *Arizona v. United States* (1995) and *Texas v. United States* (1995).

The dismissal of these suits reaffirmed the federal government's authority in regard to immigration. The question of state fiscal responsibility was also confirmed in relation to the education of all children regardless of their legal status. Furthermore, the rulings in these suits provided affirmation of each state's responsibilities to ensure equal access for all children to a free public education.

United States District Courts

The state of California's Proposition 187, the "Save Our State" initiative sought to deny the benefit of free public education to those individuals who could not provide official documentation of their legal status within the country. After the proposition was overwhelmingly approved by the voters of California, several lawsuits were filed based upon the proposition's constitutionality in the United States District Court, Central District of California.

The plaintiffs, League of United Latin American Citizens (LULAC), brought a motion for a summary judgment in which they contended that Proposition 187 was unconstitutional on the sole ground that the initiative is preempted by the federal government's exclusive constitutional authority over the regulation of immigration and the federal government's exclusive authority or the regulation of immigration.

After hearing arguments, district court judge Mariana Pfaelzer made rulings in regard to Proposition 187's prohibition of illegal aliens from public schools. Judge Pfaelzer held that section 7, subsections (a) through (c) of the initiative, require schools to verify the immigration status of children for the purposes of denying access to public elementary and secondary education. Subsection (d) requires verification of the immigration status of the parents of school children. Subsection (e) requires that school districts report the illegal status of any parent, guardian, enrollee, or pupil to the state agencies of the INS. Subsection (f) requires school districts to fully cooperate in accomplishing an orderly transition to a school in the child's country of origin.

Judge Pfaelzer also held that subsections (a), (b), and (c), together, assure that undocumented children will be denied access to public education. In subsection (b), in sections 5 and 6, the only purpose and effect of subsections (d), (e), and (f) is to ensure that persons determined by the state to be in the United States unlawfully are transitioned to the country of their origin.

Lastly, Judge Pfaelzer held that an analysis of section 7 under the rigors of the first *De Canas* test is not necessary to sustain the Court's ruling on the plaintiff's motions. In light of the Court's ruling decision in *Plyler v. Doe* (1982), in which the Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits states

from excluding undocumented alien children from public schools, section 7 in it entirety conflicts with and therefore is preempted by federal law.

State Attorney Generals' Opinions and Memorandums

State attorney generals' opinions have affirmed the state role in the education of all students. State Attorney Generals from Arizona, Georgia, and Virginia have all referenced the *Plyler* (1982) decision as the legal basis to provide the educational benefit to all children, regardless of the immigration status. The States' Attorney Generals also concurred with the bona fide residency requirement that the Court held in the *Martinez v. Bynum* (1983). The Deputy Superintendent of Public Instruction, in the Department of Education for the state of Oregon issued an executive memorandum noting the obligation of all Oregon schools to provide a free public education for all children between the ages of 5 and 19 who resided in the district.

In summary, the United States Constitution specifically grants Congress the authority to establish laws and regulations in regard to naturalization (U.S. Const. Art. I, § 8). The Constitution charges the executive branch of the federal government with enforcing established regulations and naturalization laws (U.S. Const. Art. II, § 2). In regard to the relationship between the federal government and individual states, the Supremacy Clause of the Constitution provides federal preemption (U.S. Const. Art. VI, § 2). The United States Supreme Court has held, using the Constitution as a basis, that undocumented students are protected under the Fourteenth Amendment's Equal Protection Clause, a ruling which has provided those students with the guarantee of admission in United States public schools, *Plyler v. Doe* (1982). The Court has also ruled

that residency requirements for students within school districts is constitutional, if applied uniformly to all students, *Martinez v. Bynum* (1983). With the growing population of students in the United States, certain states had filed unsuccessfully, litigation in which the states sought reimbursement funds which were expended on undocumented students. The suits were filed against the United States government. The Court of Appeals in each case dismissed the suits due to political questions that the court found unjusticiable, *Arizona v. United States* (1995), *California v. United States* (1996), *Chiles v. United States* (1995), *New Jersey v. United States* (1996), *Padavan v. United States* (1996), and *Texas v. United States* (1995). The United States District Court, Central District, for the state of California held that the prohibition of student admission into United States public schools due to lack of citizenship documentation was unconstitutional, *League of Latin American Citizens et. al. v. Pete Wilson* (1995). Attorney Generals from the states of Arizona, Georgia, and Virginia noted that children, regardless of their legal status, are afforded the benefit of access to public education. The state of Oregon Deputy Superintendent of Public Instruction noted that the state had an obligation to provide an education to all children, regardless of legal status.

Current Status of the Law Concerning Undocumented Students

Consistent with the above reviewed legal cases, an appropriate current status concerning undocumented students in U.S. public schools consists of:

1. The Fifth Amendment to the Constitution (1791) provides due process to all individuals, regardless of legal status.

2. The Fourteenth Amendment to the Constitution (1868) provides the benefit of equal protection of laws to all individuals subject to the jurisdiction of a state.
3. Current Congressional legislation is underway to amend the Illegal Immigration Reform and Immigration Responsibility Act of 1996.
4. Students, regardless of their legal status, may not be limited or prohibited from access to U.S. public schools, *Plyler v. Doe* (1982).
5. It is constitutional to enforce a residency requirement, if the requirement is equally applied to all, *Martinez v. Bynum* (1983).
6. Reimbursement to states for the costs of educating undocumented aliens is a non-reviewable political question, *Arizona v. United States* (1995), *California v. United States* (1996), *Chiles v. United States* (1995), *New Jersey v. United States* (1996), *Padavan v. United States* (1996), and *Texas v. United States* (1995).
7. The District Court, Central District for California held that the section 7 of Proposition 187, the sections dealing with the exclusion of illegal aliens from public schools, was preempted by federal law, *League of Latin American Citizens et. al. v. Pete Wilson* (1995).

CHAPTER 4

FINDINGS, CONCLUSIONS, AND EPILOGUE

Findings

This chapter provides a summary of this study's findings and conclusions. This study found that:

1. The Development, Relief, and Education for Alien Minor Act (S. 1291), a proposal that would amend the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Public Law 104-208, to repeal the denial of an unlawful alien's eligibility for higher education benefits based on state residence unless a United States national is similarly eligible without regard to such state residence.
2. In relation to the education of undocumented students, the bill authorizes the Attorney General to cancel the removal of, and adjust to permanent resident status, an alien who: (1) has attained the age of 12 prior to enactment of this Act; (2) files an application before reaching the age of 21; (3) has earned a high school or equivalent diploma; (4) has been physically present in the United States for at least five years immediately preceding the date of enactment of this Act (with certain exceptions); (5) is a person of good moral character; and (6) is not inadmissible or deportable under specific criminal or security grounds of the Immigration and Nationality Act. Public Law 104-208, to repeal the denial of an

unlawful alien's eligibility for higher education benefits based on state residence unless a United States national is similarly eligible without regard to such state residence.

3. The Act authorizes the Attorney General to take similar steps with respect to an alien who: (1) would have met such requirements during the four-year period immediately preceding the enactment of this Act; and (2) is enrolled in, or graduated from, an institution of higher education. The Act also directs the Attorney General to establish a procedure permitting an alien to apply for cancellation and adjustment without being placed in removal proceedings. It provides for: (1) expedited application processing without additional fees; and (2) the confidentiality of application information. The Attorney General is also to report annually on the number, status, and disposition of applications under the Act. As of June 20, 2002, the bill was placed on the Senate Legislative Calendar under the General Orders, Calendar No. 425.
4. The Supreme Court's ruling in *Plyler v. Doe* (1982) held that each child was entitled to the benefit of an education based upon the Due Process Clause of the U.S. Constitution's Fifth Amendment (1791) and the Equal Protection Clause of the Fourteenth Amendment (1868).
5. In *Plyler* (1982), the Court held that the yearly tuition of $1,000 which undocumented alien children were required to pay for admission to public schools due to their lack of proper immigration documentation was unconstitutional.
6. The Court held in *Martinez v. Bynum* (1983) that it is permissible for the state of Texas to establish a residency requirement for its school children for admission to

public schools. The Court found that residency requirements are constitutional, but only if they are properly defined, uniformly applied, and designed to further a substantial state interest.

7. In *League of Latin American Citizens v. Pete Wilson* (C. D. 1995), the denial of educational benefit to those students who were unable to provide legal immigration status was unconstitutional. The District Court found that California's Proposition 187, the "Save our State" proposal, was unconstitutionally because it denied the educational benefit to undocumented children.

Conclusions

Based on these findings, this study concluded that:

1. The Constitution provides due process protections to all individuals, regardless of their legal status, U.S. Const. Amend. V (1791).
2. The Constitution provides Equal Protection under the law to all individuals who are subject to the jurisdiction of the United States, U.S. Const. Amend. XIV (1868).
3. The proposed Development, Relief, and Education for Alien Minor Act, S. 1291 (2001) would allow undocumented alien children access to higher education, and would also allow individuals to seek legal status when certain criteria are met.
4. While the Court has held in *San Antonio Independent School District v. Rodriguez* (1973) that education is not a fundamental right guaranteed by the United States

Constitution, the benefit of attending a U.S. public school is protected for all, regardless of their legal status by the Fifth and Fourteenth Amendments of the Constitution, *Plyer* (1982).

5. If a state enacts a residency requirement for attendance purposes, it must be applied uniformly to all persons, *Martinez* (1983).

Epilogue

The education of undocumented children can be viewed from a purely legal perspective, but should also be considered from a moral and social perspective. Illegal aliens have previously come to the United States, illegal aliens are currently attempting to enter the United States, and illegal aliens will continue to come to the United States for many reasons. But if America is going to live up to the motto on the Statue of Liberty, it is America's moral obligation to educate all children who seek the promise of American opportunity, and are willing to work hard to realize the American Dream.

As a nation of immigrants, it is fair and reasonable to ask "how would I like to be treated?" The answer to that question is likely and fairly "like everyone else." The equal protection clause guarantees all persons within the jurisdiction of the United States the equal protection of the laws, but the reality has not always matched the rhetoric. As a nation, Americans have discriminated, prejudged, and placed people into stereotypical roles and a caste system.

Undocumented aliens are not an exception to this practice. Placed in the lower end of the economic hierarchy, these laborers, field workers, landscapers, and service

industry workers are in jobs which lack much opportunity for advancement, without real educational opportunity. But given their precarious legal status, undocumented aliens remain quiet and hardworking. This social status will become permanent if their children are not allowed to attend public schools with the possible opportunity for higher education. Further, this provision of educational opportunity will benefit society as a whole. Serving as a general laborer is honest and honorable work. But if they are denied educational opportunity, how many future, teachers, doctors, lawyers, "Mozarts," and "Ensteins" will spend their lives as general laborers and fail to achieve their true potential? From this perspective, educating these children is not only the right thing to do morally and ethically, it is the smart thing to do for the common good. The future challenges we face are enormous, and we do not have one child to waste. Educating these children is the right thing to do, and it is the smart thing to do

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APPENDIX A – TEXT OF TEXAS EDUCATION CODE §21.031

Texas Education Code §21.031, reads in relevant 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 on the first day of September of the year in which admission is sought shall be permitted to attend free public schools of the district in which he resides or in which his parents, guardians, or the persons having lawful control of him reside at the time he applies for admission.

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

(d) In order for a person under the age of 18 years to establish a residence for the purpose of attending the free public schools separate and apart from his parenst, guardians, or other persons having lawful control of him under an order of a court, it must be established that his presence in the school district in not for the primary purpose of attending the free public schools. The board of trustees shall be responsible for

determining whether an applicant for admission is a resident of the school district for purposes of attending the public schools.

(g) In addition to the penalty provided by §37.10, Penal Code, a person who knowingly falsifies information on a form required for enrollment of a student in a school district is liable to the district if the student is not eligible for enrollment in the district but is enrolled on the basis of false information. The person is liable, for the period during which the ineligible student is enrolled, for the greater of (1) the maximum tuition fee the district may charge under §21.063 of this code or (2) the amount the district has budgeted for each student as maintenance and operating expense.

APPENDIX B - TEXT OF CALIFORNIA'S PROPOSITION 187

Proposition 187

SECTION 1. Findings and Declaration.

The people of California find and declare as follows:

That they have suffered and are suffering economic hardship caused by the presence of illegal aliens in this state.

That they have suffered and are suffering personal injury and damage by the criminal conduct of illegal aliens in this state.

That they have rights to the protection of their government from any person or persons entering this country unlawfully.

Therefore, the People of California declare their intention to provide for cooperation between their agencies of state and local governments with the federal government, and to establish a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California.

SECTION 2. Manufacture, Distribution or Sale of False Citizenship or Resident Alien Documents: Crime and Punishment.

Section 113. Is added to the Penal Code, to read:

Section 113. Any person who manufactures, distributes or sells false documents to conceal the true citizenship or resident alien status of another person is guilty of a felony,

and shall be punished by imprisonment in the state prison for five years or by a fine of seventy-five thousand dollars ($75,000).

SECTION 3. Use of False Citizenship or Resident Alien Documents: Crime and Punishment.

Section 114. Is added to the Penal Code, to read:

Section 114. Any person who uses false documents to conceal his or her true citizenship or resident alien status is guilty of a felony, and shall be punished by imprisonment in the state prison for five years or by a fine of twenty-five thousand dollars ($25,000).

SECTION 4. Law Enforcement Cooperation with the Immigration and Naturalization Service (INS).

Section 834b is added to the Penal Code, to read:

Section 834b. (a) Every law enforcement agency in California shall fully cooperate with the United States Immigration and Naturalization Service regarding any person who is arrested if he or she is suspected of being present in the United States in violation of federal immigration law.

(b) With respect to any such person who is arrested, and suspected of being present in the United States in violation of federal immigration laws, every law enforcement agency shall do the following:

(1). Attempt to verify the legal status of such person as a citizen of the United States, an alien lawfully admitted as a permanent resident, an alien lawfully admitted for a temporary period of time or as an alien who is present in the United States in violation of immigration laws. The verification process may include, but shall not be limited to, questioning the person regarding his or her date and place of birth and entry into the

United States, and demanding documentation to indicate his or her legal status.

(2). Notify the person of his or her apparent status as an alien who is present in the United States in violation of federal immigration laws and inform him or her that, apart from any criminal justice proceedings (sic), he or she must either obtain legal status or leave the United States.

(3). Notify the Attorney General of California and the United States Immigration and Naturalization Service of the apparent illegal status and provide any additional information that may be requested by any other public entity.

(c). Any legislative, administrative, or other action by a city, county, or other legally authorized local government entity with jurisdictional boundaries, or by a law enforcement agency, to prevent or limit the cooperation required by subdivision (a) is expressly prohibited.

SECTION 5. Exclusion of Illegal Aliens from Public Social Services.

Section 10001.5. Is added to the Welfare and Institutions Code, to read:

Section 10001.5 (a) In order to carry out the intention of the People of California that only citizens of the United States and aliens lawfully admitted to the United States may receive the benefits of public social services and to ensure that all persons employed in the providing of those-services shall diligently protect public funds from misuse, the provisions of this section are adopted.

(b) A person shall not receive any public social services to which he or she may be otherwise entitled until the legal status of that person has been verified as one of the following:

(1). A citizen of the United States.

(2). An alien lawfully admitted as a permanent resident.

(3). An alien lawfully admitted for a temporary period of time.

(c) If any public entity in this state to whom a person has applied for public social services determines or reasonably suspects, based upon the information provided to it, that the person is an alien in the United States in violation of federal law, the following procedures shall be followed by the public entity:

(1). The entity shall not provide the person with benefits or services.

(2). The entity shall, in writing, notify the person of his or her apparent illegal immigration status, and that the person must either obtain legal status or leave the United States.

(3). The entity shall also notify the State Director of Social Services, the Attorney General of California and the United States Immigration and Naturalization Service of the apparent illegal status, and shall provide any additional information that may be requested by any other public entity.

SECTION 6. Exclusion of Illegal Aliens from Publicly Funded Health Care.

Chapter 1.3 (commencing with Section 130) is added to Part 1 of Division 1 of the Health and Safety Code, to read:

Chapter 1.3. Public-Funded Health Care Services.

Section 130. (a) In order to carry out the intention of the People of California that, excepting emergency medical care as required by federal law, only citizens of the United States and aliens lawfully admitted to the United State may receive the benefits of publicly-funded health care, and to ensure that all person employed in the providing of

those services shall diligently protect public funds from misuse, the provision of this section are adopted.

(b) A person shall not receive any health care services from a publicly-funded health care facility, to which he or she is otherwise entitled until the legal status of that person has been verified as one of the following:

(1). A citizen of the United States.

(2). An alien lawfully admitted as a permanent resident.

(3). An alien lawfully admitted for a temporary period of time.

(c) If any publicly-funded health care facility in this state from whom a person seeks health care services, other than emergency medical care as required by federal law, determines that the person is an alien in the United States in violation of federal law.

(1). The facility shall not provide the person with services.

(2). The facility shall, in writing, notify the person of his or her apparent illegal immigration status, and that the person must either obtain legal status or leave the United States.

(3). The facility shall also notify the State Director of Social Services, the Attorney General of California and the United States Immigration and Naturalization Service of the apparent illegal status, and shall provide any additional information that my be requested by any other public entity.

(d) For the purposes of this section “publicly-funded health care facility” shall be defined as specified in Section 1200 and 1250 of the Health and Safety Code as of January 1, 1993.

SECTION 7. Exclusion of Illegal Aliens from Public Elementary and Secondary Schools.

Section 48215. Is added to the Education Code to read:

Section 48215. (a) No public elementary or secondary school shall admit, or permit the attendance of, any child who is not a citizen of the United States, an alien lawfully admitted as a permanent resident, or a person who is otherwise authorized under federal law to be present in the United States.

(b) Commencing January 1, 1995, each school district shall verify the legal status of each child enrolling in the school district for the first time in order to ensure the enrollment or attendance only of citizens, aliens lawfully admitted as permanent residents, or person who are otherwise authorized to be present in the United States.

(c) By January 1, 1996, each school district shall have verified the legal status of each child already enrolled and in attendance in the school district in order to ensure the enrollment or attendance only of citizens, aliens lawfully admitted as permanent residents, or persons who are otherwise authorized under federal law to be present in the Unite States.

(d) By January 1, 1996, each school district shall also have verified the legal status of each parent or guardian of each child referred to in subdivision (b) and (c) above, to determine whether such parent or guardian is one of the following:

(1) A citizen of the United States.

(2) An alien lawfully admitted as a permanent resident.

(3) An alien lawfully admitted for a temporary period of time.

(e) Each school district shall provide information to the State Superintendent of Public Instruction, the Attorney General of California and the United States Immigration and Naturalization Service regarding any enrollee or pupil, or parent or guardian, attending a public elementary or secondary school in the school district determined or reasonably suspected to be in violation of federal immigration laws within forty-five days after becoming award of an apparent violation. The notice shall also be provided to the parent or legal guardian of the enrollee or pupil, and shall state that an existing pupil may not continue to attend the school after ninety calendar days from the date of the notice, unless legal status is established.

(f) For each child who cannot establish legal status in the United States, each school district shall continue to provide education for a period of ninety days from the date of the notice. Such ninety-day period shall be utilized to accomplish an orderly transition to a school in the child's country of origin. Each school district shall fully cooperate in this transition effort to ensure that the educational needs of the child are best served for that period of time.

SECTION 8. Exclusion of Illegal Aliens from Public Postsecondary Educational Institutions.

Section 66010.8. Is added to the Education Code, to read:

Section 66010.8. (a) No public institution of postsecondary education shall admit, enroll, or permit the attendance of any person who is not a citizen of the United States, an alien lawfully admitted as a permanent resident, in the United States, or a person who is otherwise authorized under federal law to be present in the United States.

(b) Commencing with the first term or semester that begins after January 1, 1995, and at

the commencement of each term or semester thereafter, each public postsecondary educational institution shall verify the status of each person enrolled or in attendance at that institution in order to ensure the enrollment or attendance only of United States citizens, aliens lawfully admitted as permanent residents in the United States, and persons who are otherwise authorized under federal law to be present in the United States.

(c) No later than forty-five days after the admissions officer of a public postsecondary educational institution becomes aware of the application, enrollment, or attendance of a person determined to be, or who is under reasonable suspicion of being, in the United States in violation of federal immigration laws, that officer shall provide that information to the State Superintendent of Public Instruction, the Attorney General of California and the United States Immigration and Naturalization Service. The information shall be provided to the applicant, enrollee, or person admitted.

SECTION 9. Attorney General cooperation with the Immigration and Naturalization Service.

Section 53069.65. Is added to the Government Code, to read:

53069.65. Whenever the state or a city, or a county, or any other legally authorized local governmental entity with jurisdictional boundaries reports the presence of a person who is suspected of being present in the United States in violation of federal immigration laws to the Attorney General of California, that report shall be transmitted to the United States Immigration and Naturalization Service. The Attorney General shall be responsible for maintaining on-going and accurate records of such reports, and shall provide any additional information that may be requested by any other government entity.

SECTION 10. Amendment and Severability.

The statutory provisions contained in this measure may not be amended by the Legislature except to further its purpose by statute passed in each house by roll call vote entered in the journal, two-thirds of the membership concurring, or by statute that becomes effective only when approved by the voters. In the event that any portions of this act or application thereof to any person or circumstance is held invalid, the invalidity shall not affect any other provision or application of the act, which can be given effect without the invalid provision or application, and to that end the provisions of this act are severable.

APPENDIX C - TEXT OF SENATE BILL 1291 (2001)

Section 1. Short title.

This Act may be cited as the "Development, Relief, and Education for Alien Minors Act" or the "DREAM Act."

Section 2. RESTORATION OF STATE OPTION TO DETERMINE RESIDENCY FOR PURPOSES OF HIGHER EDUCATION BENEFITS.

Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Division C of Public Law 104-208; 110 Stat. 3009-672; 8 U.S.C. 1623) is repealed.

Section 3. CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS OF CERTAIN ALIEN HIGH SCHOOL GRADUATES WHO ARE LONG-TERM RESIDENTS OF THE UNITED STATES.

(a) Special Rule for Certain High School Graduates.

(1) In general. Except as otherwise provided in paragraph

(2), notwithstanding any other provision of law, the Attorney General may cancel the removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States, if the alien applies for such cancellation and adjustment of status and demonstrates that -

(A) the alien has attained 12 years of age prior to the date of enactment of the Act;

(B) the alien has not, prior to the date of filing an application form cancellation of removal and adjustment of status under this subsection, attained the age of 21 years;

(C) the alien, prior to the date of filing an application for cancellation of removal and adjustment of status under this subsection has received a certificate of graduation from a school providing secondary education or the recognized equivalent of such certificate;

(D) has maintained a continuous physical presence in the Unite States for a period of not less than 5 years immediately preceding the date of enactment of this Act;

(E) the alien is a person of good moral character; and

(F) is not inadmissible under section 212(a)(2) (8 U.S.C. 1182(a)(2)) or 212(a)(3) (8 U.S.C. 1182(a)(3)) or deportable under section 237(a)(2) (8 U.S.C. 1227 (a)(2)) or 237(a)(4) (8 U.S.C. 1227(a)(4)) of the Immigration and Nationality Act.

(2) Exceptions.

(A) Rehabilitation and hardship to certain aliens. Notwithstanding subparagraph (F) of paragraph (1), the Attorney General may cancel the removal of, and adjustment to the status of an alien lawfully admitted for permanent residence, an alien (other than an alien convicted of an aggravated felony, as defined in section 101(a) (43) of the Immigration and Nationality Act (8 U.S.C. 1101 (a)(43)) or an alien who is inadmissible under section 212(a)(3) (8 U.S.C. 1182(a)(3)) or deportable under section 237(a)(4) (8 U.S.C. 1227(a)(4)) of such Act) who but for that subparagraph would qualify for cancellation of removal and adjustment of status under this section if the alien demonstrates rehabilitation and that the alien's removal will result in exceptional and extremely unusual hardship to the alien or a United States citizen or lawful permanent resident spouse, parent, or child.

(B) Aliens qualifying before the date of enactment. Notwithstanding paragraph (1), the Attorney General may cancel the removal of, and adjust to the status of an alien unlawfully admitted for permanent residence, an alien if -

(i) the alien would have met the requirements of paragraph (1) at any time during the 4-year period immediately preceding the date of enactment of this Act; and

(ii) the alien has graduated from, or is, on the date of filing an application for cancellation of removal under this subsection, enrolled in the United States in an institution of higher education, as defined by section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001).

(3) Procedures.

(A) In general. The Attorney General shall by regulation establish a procedure that permits aliens to apply for cancellation of removal and adjustment of status available under this subsection without being placed in removal proceedings, except that, in addition, such cancellation of removal and adjustment of status shall be available in removal proceedings. In the case of an alien in an exclusion or deportation hearing, suspension of cancellation of removal, together with adjustment of status, shall be available.

(B) Treatment prior to graduation.

(i) In general. Notwithstanding any other provision of law, an alien described in clause (ii) may not be removed so long as the alien continues to meet the criteria of that clause.

(ii) Covered aliens. An alien described in this clause is an alien who does not meet the requirements of paragraph (1)(C) but is otherwise able to demonstrate prima facie eligibility for cancellation of removal and adjustment of status under this section and has

a reasonable opportunity of meeting all the requirements of cancellation of removal and adjustment of status under this section in the future.

(iii) Work authorization. The Attorney General shall grant an alien described in clause (ii) authorization to engage in employment in the United States.

(C) Expedited processing of applications; prohibition on fee.

Regulations promulgated under this paragraph shall provide that applications for cancellation of removal and adjustment of status under this subsection will be considered on an expedited basis and

(4) Confidentiality of information.

(A) Prohibition. Neither the Attorney General nor any other official or employee of the Department of Justice may-

(i) use the information furnished by the applicant pursuant to an application filed under this subsection for any purpose other than to make a determination on the application;

(ii) permit anyone other than a sworn officer or employee of the Department of Justice or, with respect to an application filed under this subsection with a designated entity, that designated entity, to examine applications filed under this subsection.

(B) Penalty. Whosoever knowingly uses, publishes, or permits information to be examined in violation of this subsection shall be fined not more than $10,000.

(b) Termination of Period of Continuous Period. For purposes of this section, any period of continuous physical presence in the United States of an alien who applies for cancellation of removal and adjustment of status under subsection (a) shall not terminate when the alien is served notice to appear under section 239(a) of the Immigration and

Nationality Act (8 U.S.C. 1229) or any other document notifying the alien of the initiation of immigration proceedings under that Act.

c) Treatment of Certain Breaks in Presence. An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsection (a)(1)(D) if the alien had departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days, except that an alien may remain eligible for cancellation of removal and adjustment of status under this section notwithstanding a failure to maintain continuous physical presence in the United States if the alien demonstrates that failure is due to exceptional circumstances, as defined by section 240(e)(1) of the Immigration and Nationality Act (8 U.S.C. 1229a(e)(1)), or circumstances described in subparagraphs (A), (B), or (C) of section 244(b)(1) of the Immigration and Nationality Act (8 U.S.C. 1254a(b)(1)).

(d) Statutory Construction. Nothing in this subsection may be construed to apply a numerical limitation on the number of aliens who may be eligible for cancellation of removal under section 240A of the Immigration and Nationality Act (8 U.S.C. 1229b).

(e) Regulations. Not later than 180 days after the date of enactment of this Act, the Attorney General shall publish regulation implementing this section. Such regulations shall be effective immediately on an interim, final basis, but are subject to change and revision after public notice and opportunity for a period for public comment.

Section 4. ANNUAL REPORT.

Not late than one year after the date of enactment of this Act, and annually thereafter, the Attorney General shall submit a report to the Committees of the Judiciary of the Senate and the House of Representatives and the Secretary of Education setting forth -

(1) the number of aliens who applied for cancellation of removal and adjustmentof status under section 3.

(2) the number of aliens who were granted cancellation of removal and adjustment of status under section 3.

(3) the number of aliens who applied for cancellation of removal and adjustment of status under section 3 but whose applications were denied and the basis for the denial of each application; and

(4) the number of pending applications for cancellation of removal and adjustment of status under section 3.