CONSTITUTIONAL LAW: EQUAL PROTECTION AND EDUCATING ILLEGAL ALIEN CHILDREN

The constitutionality of a state statute limiting the use of state funds for the education of children who are citizens or legally admitted aliens was subject to extensive evaluation by several Texas courts. First challenged in *Hernandez v. Houston Independent School District*,[1] which upheld its constitutionality, the same statute was later found unconstitutional in *Doe v. Plyler*.[2] Following the decision in *Plyler*, numerous actions which had been instituted against other Texas school districts were consolidated in *In re Alien Children Education Litigation*.[3] Challenged as violating the equal protection clause of the fourteenth amendment as well as denying fundamental rights, the statute was again held unconstitutional.

At issue in each of these cases was an amended Texas statute[4] which granted a tuition-free public education to citizen children and

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[1] 558 S.W.2d 121, 123 (Tex. Civ. App. 1977) (rehearing denied; writ of error refused—no reversible error). The matter was considered on appeal from a grant of summary judgment to the State Board of Education by the Travis County District Court. *Id.* Undocumented aliens were permitted to attend school upon payment of a monthly fee. *Id.*

[2] 458 F. Supp. 569 (E.D. Tex. 1978). The Board of Trustees of the Tyler Independent School District refused to enroll any undocumented child without payment of a $1,000 tuition fee. See Note, 11 ST. MARY'S L.J. 549 (1979) for a more detailed discussion of this decision.

[3] MDL No. 398 (S.D. Tex., July 21, 1980). To distinguish petitioners from legally admitted or resident aliens, the court designated this group as undocumented aliens. *Id.* slip op. at 2. School districts generally excluded undocumented aliens or charged a tuition fee. *Id.* at 12.

[4] TEX. EDUC. CODE ANN. tit. 2, § 21.031 (Vernon 1975). The statute states:

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

Id.

legally admitted aliens, and, "by negative implication,"[5] denied this benefit to all others. Prior to 1975, the statute[6] had provided that all children between the ages of six and twenty-one were eligible to attend public schools in their respective school districts.[7] At the request of the Commissioner of Education to interpret the statute, the Attorney General determined that all children within the state, whether legally or illegally present in the United States, were entitled to attend their resident school district public schools.[8] Subsequent to the Attorney General's opinion, the Texas legislature amended the statute to the current reading.[9] The proposed aim of the amended statute was to preserve the "fiscal integrity of state and local education programs" threatened by the anticipated expense of educating this additional population.[10]

In *Hernandez*, the court adopted the position that the equal protection clause did not apply to illegal aliens.[11] It assumed that even if

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[5] MDL No. 398, slip op. at 2.

[6] See Plyler, 458 F. Supp. at 571 n.3 for complete text of the original statute.

[7] MDL No. 398, slip op. at 10-11. No policy as to admission of undocumented children had been developed prior to this time. *Id.*

[8] *Id.* at 11 n.15. The court stated the opinion had been supported by "legislative intent and a plain-meaning construction of the statute." Emphasis was placed on the word "every" to indicate there was to be no exception to the policy by the local school boards. *Id.*

[9] *Id.* at 11-12.

[10] *Id.* at 65.

[11] 558 S.W.2d at 123. Prior to addressing the particular issues presented in these cases, each of the courts reviewed the procedures whereby a challenge is analyzed under the equal protection clause, and applied the pertinent level of review. *Id. See* MDL No. 398, slip op. at 14; 458 F. Supp. at 580. For a more extensive analysis, see Gunther, *The Supreme Court, 1971 Term–Forward: In Search of Evolving Doctrine on a Changing Court: A Mode for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

The purpose of the clause is to "measure the validity of classifications created by state laws" to prevent discrimination by legislative classifications, and to insure equal protection of the law to all "similarly circumstanced persons." San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 59 (1973) (Stewart, J., concurring) (emphasis omitted). *See* MDL No. 398, slip op. at 14. Notwithstanding the discretionary power afforded states in establishing classifications, questions arise when the classification involves one of the recognized suspect classes or affects a fundamental right. McLaughlin v. Florida, 379 U.S. 184, 191 (1964) (prohibiting unmarried interracial couple from living together or occupying same room violates equal protection); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (restricting certain sales on Sunday not in violation of equal protection clause). Any such classification will be declared unconstitutional unless it can be shown necessary to effectuate a compelling state interest. Shapiro v. Thompson, 394 U.S. 618, 634 (1968).

If the classification does not involve one of the aforementioned categories, a second level or rational relationship test will be used. The state must then demonstrate that the classification bears a rational relationship to a legitimate state interest that neither arbitrarily nor invidiously discriminates among members of the class. Frontiero v. Richardson, 411 U.S. 677, 683 (1972); Dandridge v. Williams, 397 U.S. 471, 485 (1970); McLaughlin v. Florida, 379 U.S. 184, 190-91 (1964).

undocumented aliens were entitled to equal protection, in this instance they had not been denied such protection.[12] Applying the accepted review procedures to ascertain the measure of judicial scrutiny, the Texas Civil Court of Appeals reasoned that there was no infringement of a fundamental right and that illegal aliens were not among those classes characterized as suspect, therefore, strict scrutiny was not required.[13] The court viewed the classification as one based upon immigration status, not alienage, noting that alien status was "hardly an unalterable or unchangeable one."[14]

Furthermore, the *Hernandez* court considered education to be a social and economic function of the states upon which the federal government could not infringe. This function afforded Texas the rational relationship needed to restrict the use of state funds.[15] The court paid particular attention to the costs involved in providing education and considered the increased financial burden as sufficient justification to deny the admission of undocumented aliens.[16] While acknowledging that aliens are guaranteed due process of law,[17] the court relied on *Mathews v. Diaz*[18] to support the position that illegal aliens were not entitled to all the benefits afforded citizens and certain non-citizens.[19]

The identical statute was held unconstitutional in *Doe v. Plyler*.[20] Although the policy justifications advanced for the enactment

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Suggested as an intermediate level of review is a minimum rationality approach. A legislature is presumed to have acted constitutionally when establishing a classification. Only when no legitimate purpose is found will the law be set aside. *See* Gunther, *supra*, at 17-20.

[12] 558 S.W.2d at 123. *See* Holley v. Lavine, 529 F.2d 1294 (2d Cir. 1976), *cert. denied*, 426 U.S. 954 (1976) (elimination of AFDC benefits possible denial of equal protection); Graham v. Richardson, 403 U.S. 365 (1971) (welfare benefits conditioned upon possession of United States citizenship or alien residency requirement not against equal protection clause).

[13] 558 S.W.2d at 124 n.1. The court was aware of the suggested "heightened scrutiny" test presented in *Plyler* but believed that because that finding was made in a proceeding for a temporary injunction, it had little precedential value for any future determination by the United States Supreme Court. *Id.*

[14] *Id.* at 124.

[15] *Id.*

[16] *Id.* at 124-25.

[17] *Id.* Rejecting the due process argument, the court found there had been no denial of life, liberty, or property. Those cases which found denial upheld the right to due process. Bolling v. Sharpe, 347 U.S. 497 (1953); Wong Wing v. United States, 163 U.S. 228 (1895); Bolanos v. Kiley, 509 F.2d 1023 (2d Cir. 1975).

[18] 426 U.S. 67 (1976) (regulation of welfare benefits permitted discrimination within the class of aliens).

[19] 558 S.W.2d at 125.

[20] 458 F. Supp. at 571-74. Plaintiffs were all native Mexicans who resided in the Tyler area for from three to thirteen years with each family having at least one preschool age child, who was a citizen of the United States by birth.

of legislation limiting the benefits of the " 'Available School Fund' "[21] were the prevention of the "drain on local education funds" and the utilization of public education funds for citizens and legally admitted aliens, the underlying rationale, as perceived by the court, was the effective deterrence of illegal aliens from entering Texas. The court regarded this rationale as unrelated to the purpose of the enacted legislation.[22]

In urging application of the rational relationship test to uphold the statute, the state relied on reports showing the effects the attendance of undocumented aliens had on the school districts bordering Mexico. However, the *Plyler* court pointed out that similar problems occured with legally admitted aliens of Mexican heritage who were generally of the same socio-economic level as the undocumented aliens and no differentiation was made by assessing a tuition reimbursement.[23] Finding the economic evaluation inaccurate and the relationship between the Available School Fund and the quality of education unreliable, the court noted that little correlation between cost and a decreased pupil enrollment could be shown absent a significant reduction in the student population.[24]

Although recognizing that illegal aliens were not entitled to the same privileges as citizens and legally admitted aliens, the court, in reaffirming an illegal alien's right of due process, agreed with *Bolanos v. Kiley*[25] that "[p]eople who have entered the United States, by whatever means, are 'within its jurisdiction' in that they are within the territory of the United States and subject to its laws."[26] The court then proceeded to determine if, under this analysis, illegal aliens were entitled to equal protection of the laws. In determining which test to apply, it identified four specific reasons that justified application of the highest level of review. Notwithstanding this analysis, the court rejected strict scrutiny and applied the rational basis test.[27]

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[21] *Id.* at 577. The Available School Fund was the money available to the local districts to operate the education program. Sources included local, state and federal funds. *Id.*

[22] *Id.* at 575-78.

[23] *Id.* at 576. These problems included overcrowding of classes with poorly educated children, overage for their grade-level, speaking little or no English. This created the need for bi-lingual education programs with the attendant problems of obtaining qualified personnel yet supported by a low tax base unable to offset the increased costs. *Id.* at 576-77.

[24] *Id.* Removal of the sixty undocumented children attending Tyler area schools resulted in no significant financial savings. *Id.*

[25] 509 F.2d 1023 (2d Cir. 1975).

[26] 458 F. Supp. at 579-80.

[27] *Id.* at 585.

While accepting the holding of *San Antonio Independent School District v. Rodriquez*[28] that education was not a fundamental right, the court viewed this finding to be explicitly and repeatedly limited to the relative deprivation of education; unresolved was the possibility of a strict challenge if access had been absolutely denied.[29] In response to the argument that this policy discriminated on the basis of wealth, the court again looked to *Rodriquez* and suggested that "a clearly defined class of poor people" might require greater judicial attention.[30] The *Plyler* court noted that "a state 'could not, for example, reduce expenditures for education by barring indigent children from its schools.' "[31] Moreover, even if this act was deemed to be social or economic regulation, the court suggested the strictest level of review would not be required.[32] A more appropriate analogy for affording strict review was to the decisions striking down illegitimacy laws which penalized and stigmatized children for the acts of their parents.[33] Finally, rejecting the claim that illegal aliens were a suspect class or a sub-class of aliens entitled to the strict scrutiny test, the court found they were "a separate class, for which suspect status must be independently established."[34]

Additionally, the court extensively compared a California statute which prohibited the knowing employment of illegal aliens and the Texas statute.[35] Following an overview of federal immigration law

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[28] 411 U.S. 1, 35 (1973). This case presented a challenge to the means used to finance Texas public schools. A substantial portion of the monies used for funding education came from property taxes. The differences in taxable property values resulted in per pupil expenditures which, arguably, disadvantaged children in poorer school districts. The state was not required to provide the same quality of education to all children since a fundamental right was not involved. The court suggested a different question might have been presented if total deprivation of education had been involved. *Id.* at 33-35, 37.

[29] 458 F. Supp. at 580.

[30] *Id.* at 581 (citing Rodriquez, 411 U.S. at 25 n.60).

[31] Shapiro v. Thompson, 394 U.S. 618, 633 (1968). *See* 458 F. Supp. at 581-82.

[32] 458 F. Supp. at 582.

[33] *Id.* at 582-83. Most of the plaintiffs were infants when illegally brought into this country and, therefore, could not have participated in the decision to violate United States immigration laws. *Id.* at 582.

[34] *Id.* at 583.

[35] *Id.* at 582-84. *See* DeCanas v. Bica, 424 U.S. 351 (1976). While an equal protection challenge had not been raised in *DeCanas*, the *Plyler* court contended, nevertheless, it presented an opportunity for equal protection analysis. Further distinguishing *DeCanas* both on the question of constitutionality of section 21.031 and the suspect class issue, they determined that aliens were not "a suspect class when they [were] in violation of state laws or regulations whose underlying purpose [was] in conformity with a federal objective." 458 F. Supp. at 583. Suspectness was raised, however, by the history of abuse and exploitation suffered by aliens which was "unrelated to the federal bases for their exclusion." *Id.*

under the McCarran-Walter Act,[36] the court concluded that, unlike the California statute, the Texas statute was not "intended to, nor [did] in fact, implement any express or apparent federal objective" to control immigration.[37] It could not reasonably be suggested that the system of charging tuition for undocumented children impeded the flow of illegal immigration which ultimately "protect[ed] the domestic labor market."[38] Likewise, the tuition fee charged was higher than the determined cost of providing education which might "be the type of invidiously motivated state action" for which the suspect classification doctrine was designed.[39] The court maintained, however, these considerations would be unnecessary if strict scrutiny applied automatically when a state, acting independently of the federal exclusionary purpose, accepted the presence of illegal aliens and then subjected them to discriminatory laws.[40]

Ultimately, the *Plyler* court determined those four areas were not ones in which the Supreme Court had designated strict scrutiny to be appropriate. In any event, since defendants' action was not rationally related to the objective sought, strict scrutiny was unwarranted.[41] Because the problems presented were not unique to undocumented children but were the same as those presented by legally admitted resident alien children, the court found that the state's discrimination between legal and illegal aliens had no rational basis to the alleged purpose of saving money.[42] Although the evidence demonstrated that Mexican emigration resulted in serious overcrowding in the border area schools augmented by the low economic status of the families involved and created an additional burden upon the local school system, exclusion of the undocumented children was "irrational . . . and ineffectual."[43] The court advanced the possibility that the state adjust its financing scheme to minimize the differences between the border districts and the better-financed districts.[44]

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[36] 8 U.S.C. §§ 1101 to 1503 (1976); 458 F. Supp. at 583-84. The Immigration and Nationality Act of 1952 limits immigration, excludes aliens without visas and makes illegal entry a criminal offense. Enacted to protect the domestic labor force, a secondary purpose is assumed to be the reunion of alien family members. *Id.*

[37] 458 F. Supp. at 584.

[38] *Id.* at 585.

[39] *Id.*

[40] *Id.* at 583.

[41] *Id.* at 585.

[42] *Id.* at 586-89. *See* note 24 *supra.*

[43] 458 F. Supp. at 589.

[44] *Id.* at 590.

The preemption challenge presented a more difficult question for the court to resolve. While it could not find that the statute expressly conflicted with federal laws, *Plyler* focused attention on the federal government's general interest in education, particularly that of disadvantaged children, and federal policy relative to immigration.[45] Accepting the rationale of *Savage v. Jones*[46] that implications created by state laws carry as much effect as express prohibitions, the court found "[t]he Texas statute challenged here defeats the clear implications of federal laws covering both illegal aliens and education of disadvantaged children."[47] Therefore, it was held to be preempted by federal law since the disadvantages created by permitting such a law to be in effect could not easily be remedied, if at all, and conflicted with the humanistic goals of federal policy.[48]

In re Alien Children offered the most comprehensive analysis of the challenges raised concerning this statute,[49] and adopted many of the arguments advanced in *Plyler*. In an opinion authored by Judge Woodrow Seals, the court analyzed the constitutionality of the statute under the equal protection clause of the fourteenth amendment, the effect upon fundamental rights guaranteed by the Constitution, the possible preemption by federal legislation in matters dealing with

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[45] *Id.* at 590-91. *See* 20 U.S.C. § 241(a) (1976), and the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 to 1503 (1976).

[46] 225 U.S. 501, 533 (1912).

[47] 458 F. Supp. at 593.

[48] *Id.* at 592.

[49] MDL No. 398, slip op. at 3, 4, 7-10. The Judicial Panel on Multidistrict Litigation determined that the actions filed against state and local school districts throughout the state involved similar questions of fact and consolidated pretrial proceedings in the Southern District of Texas. Waiving proper venue, the parties agreed to a hearing by the district court on the constitutionality of the statute. The court dismissed the state's motion that the matter was one involving predominant state interests. It also rejected plaintiff's collateral estoppel challenge based on *Plyler* because, while the issues were similar, the questions presented in this consolidated action were much broader. *Plyler* involved the constitutionality of the statute as applied to the Tyler Independent School District as contrasted with the state-wide constitutionality at issue here. *Plyler* also involved a far fewer number of children within the class defined as undocumented. Although granting plaintiff's request to proceed as a class action, the court ruled that the transferor courts should determine whether plaintiff's claims for damages could be maintained as a class.

The class was defined as:

> All children who are over five and not over 21 years of age at the beginning of the scholastic year and have been or will be denied admission to the public schools in the State of Texas on a tuition-free basis because of the alienage provisions of Section 21.031 of the Texas Education Code.

Id. at 10. The court was satisfied that the class representatives met the requirements of Federal Rule 23(a) and that injunctive relief under Rule 23(b)(2) was inappropriate in this situation. *Id.*

Judge Seals' order granting petitioner's request for declaratory judgment and requiring the school districts to admit these children was stayed by the Court of Appeals for the Fifth Circuit.

immigration, and the potential conflict with federal treaties and policies.[50] Concluding that the equal protection clause encompassed this class of plaintiffs as " 'persons within the jurisdiction' of the state,"[51] Judge Seals declared the statute to be unconstitutional. He rejected the arguments based on preemption[52] and conflict with federal policies but determined that access to education was a fundamental right which could not be infringed upon by the state.[53] According to Judge Seals, the statute effectively denied undocumented children admission to public schools because the school districts were given the discretionary power to admit or deny enrollment. Although some school districts continued to educate all children within the district, most excluded undocumented children or imposed a tuition requirement.[54] The court emphasized that consideration of the statute could not focus solely on the prohibited use of state funds since undocumented children may not be included in assessing a district's portion of the Available School Fund.[55] Since the statute characterized "undocumented children differently from all other children with respect to admission to the public schools," and had been amended after the Attorney General's opinion, the court concluded that the amendment had been utilized by school districts to legally "exclude undocumented children."[56]

Reiterating the Supreme Court's decision in *Rodriquez* that a right to education was not explicitly provided by the Constitution, the court pointed out that any law implicitly impinging upon a fundamental right was "presumptively unconstitutional."[57] The statute in question absolutely deprived "the benefits of education" to some children while providing this same opportunity to others which was a constitutional claim not determined in *Rodriquez*.[58] Employing the

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The Supreme Court, through Justice Powell, vacated the stay in order for the children of illegal aliens to enter school in September of 1980. 49 U.S.L.W. 3133 (Sept. 9, 1980) (Powell, J., in chambers).

[50] MDL No. 398, slip op. at 2.

[51] *Id.* at 38.

[52] *Id.* at 68, 78.

[53] *Id.* at 86-87.

[54] *Id.* at 12.

[55] *Id.* Funding was based on the average daily attendance of those children satisfying the age and residency requirements. *See* note 89 *infra* and accompanying text.

[56] MDL No. 398, slip op. at 13. The court noted that school districts which included undocumented children were penalized under the state's financing scheme since they received less money per pupil than districts which totally excluded such children. *Id.*

[57] *Id.* at 15. *See* note 28 *supra* and accompanying text.

[58] MDL No. 398, slip op. at 16.

rationale of *Yick Wo v. Hopkins*[59] in conjunction with the dicta adopted in *Rodriquez*, however, the court determined that "a right [was] fundamental when it [was] preservative of or substantially related to other basic civil and political rights which [were] guaranteed by the Constitution."[60] The focus of the analysis then centered on whether a total deprivation of education warranted strict scrutiny because education was closely connected to the guaranteed rights of speech and voting.[61] The evidence demonstrated that this deprivation was absolute and further showed the educational, emotional and psychological damage suffered by those children who were absolutely devoid of education.[62]

Central to the issue of the infringement on rights, however, was the questionable nature of petitioners' legal status. Nevertheless, the court concluded that despite their present immigration status, petitioners would ultimately remain in this country and, as such, should not be denied rights provided to others because these rights were "not a function of immigration status."[63]

Judging other services provided by the state as less vital to the "essence of government," the court stated that education could not be viewed in the same context as economic or social welfare legislation.[64] While accepting the restraints placed on judicial interference in areas generally reserved for the legislature, the *In re Alien Children* court assumed that when there was total exclusion

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[59] 118 U.S. 356, 370 (1866) (illegal aliens entitled to due process).

[60] MDL No. 398, slip op. at 17. *Rodriquez* evaluated the nexus between education and freedom of speech and the right to vote. 411 U.S. at 35-36.

[61] MDL No. 398, slip op. at 18.

[62] *Id.* at 22. Some children attended private schools but most could not afford the tuition required by either the public or private schools. An insufficient number of private schools existed to accomodate the number of children involved while the alternative schools established did not provide a quality substitute for public schools. *Id.* at 22-23. Testimony offered by several child psychiatrists and psychologists stressed the psychological, educational and social detriment suffered by these children. *Id.* at 23-25.

[63] *Id.* at 20, 23-26. *See* Bridges v. Wixon, 326 U.S. 135 (1945). This decision enumerated the rights available to aliens once they had lawfully entered the country. The "entry" doctrine recognized congressional power and authority to regulate the admission, exclusion or expulsion of aliens relative to their immigration status but was not authorization for the courts to determine what constitutional rights were to be enjoyed by aliens, legally or illeglly present. MDL No. 398, slip op. at 20-21. See Comment, 16 HOUS. L. REV. 667 (1979) for further discussion of this doctrine.

The Select Commission on Immigration and Refugee Policy recommended a "one-time" amnesty for some illegal aliens, possibly conditioned on a residency requirement. It further suggested imposing civil and criminal penalties for those who employ illegal aliens. N.Y. Times, Feb. 27, 1981, § A, at 1.

[64] MDL No. 398, slip op. at 26. *Cf.* Mathews v. Diaz, 426 U.S. 67 (1976) (alien's entitlement to Medicare benefits may be subject to residency requirements).

from access to an essential state function which was closely connected to protected constitutional rights, strict scrutiny should be exercised. Finding access to education to be a fundamental right, however, did not require the state to provide the same qualitative enjoyment of that right.[65] Analogizing to the right to vote demonstrated that insuring access to the voting process did not require equality of result, but only the opportunity to engage in the process because a protected right was involved. In like manner, access to education did not involve restructuring the educational system to guarantee equal treatment but simply required a recognition of that right. Only when inequality of voting opportunity or educational training resulted from a discriminatory or racial bias would strict judicial scrutiny be warranted.[66]

The nature and extent of the scrutiny required was a further question before the court. Assessing the state's claim that the statute was *per se* permissible, the court acknowledged that a state could categorize aliens differently from citizens when there was adequate justification. The court stated "that undocumented aliens were not a suspect class" even though little effort was made to remove them once discovered, and inadequate measures were taken to prevent their abusive exploitation.[67] Categorization based on citizenship, or lack thereof, was a matter in which the federal government had ultimate control and upon which the state could not impose restrictions.[68]

Comparing the due process guarantee with the equal protection right, the *In re Alien Children* court reasoned that undocumented children came within the provisions of the equal protection clause since they were persons within the jurisdiction of the state despite their illegal status. While distinctions may be made between citizens and aliens, this occurred only when there was "an overriding national interest."[69] In this instance, it was the federal right to control

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[65] MDL No. 398, slip op. at 27-29.

[66] *Id. See also* Mobile v. Bolden, 100 S. Ct. 1490 (1980) (at-large electoral system did not violate fourteenth or fifteenth amendments unless motivated by a discriminatory purpose); Harper v. Virginia Bd. of Elec., 383 U.S. 663 (1966) (state poll tax discriminated on the basis of voter's ability to pay).

[67] MDL No. 398, slip op. at 32.

[68] *Id.* at 31-32 & n.42.

[69] *Id.* at 33. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915). Although both decisions involved legally admitted aliens, the courts reasoned that the fourteenth amendment included all persons in a state's jurisdiction. All were protected from the unequal treatment by state law if there was no strong federal interest in defeating state control.

immigration. Judge Seals proposed that this rationale controlled when a state engaged in regulating aliens.[70]

Noting that the Supreme Court had never specifically considered the issue of an undocumented alien's entitlement to equal protection, the court construed the decisions dealing with the due process right afforded to undocumented aliens, to permit the conclusion that they were likewise eligible for the equal protection privilege.[71] Focusing on the language of the clause, it determined that as "persons" within the state, undocumented aliens were bound by the laws of the state and consequently entitled to its benefits.[72] While legislation could be narrowly construed, it could not differentiate between "persons subjected to such legislation."[73] Asserting that recognition had already been made of the right to due process and equal protection by aliens, even those illegally present, the court concluded illegal aliens were entitled to protection of the amendment when subject to legislation involving a fundamental right absent a compelling state interest.[74]

When legislation allegedly discriminates on the basis of wealth, the required conditions of an identifiable, impoverished class totally barred from state economic or social welfare benefits must be found. The evidence in *In re Alien Children* revealed a definable class of persons, generally indigent, who could not afford the tuition imposed; therefore, the statute discriminated on the basis of wealth.[75] Application of strict scrutiny was permissible since this deprivation was viewed as similar to the restrictions on the ability to vote and the right to a full defense in criminal prosecution.[76] "Equal protection did not imply the abolition of differences created by wealth" but rather, insured opportunity to obtain state services, not based on one's ability to pay.[77]

Reviewing two other arguments presented by plaintiffs, the court first observed that this classification punished children for abuses committed by their parents, a position inconsistent with our concept of justice.[78] Thus, the statute was unconstitutional since, such

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[70] MDL No. 398, slip op. at 33-34 & n.45.

[71] *Id.* at 35. *See* Mathews v. Diaz, 426 U.S. 67 (1975); Yick Wo v. Hopkins, 118 U.S. 356 (1886); note 17 *supra*. Legislative history of the fourteenth amendment provided additional support for this interpretation. MDL No. 398, slip op. at 35. *See* note 1 *supra* and accompanying text.

[72] MDL No. 398, slip op. at 37.

[73] *Id.*

[74] *Id.* at 34-38.

[75] *Id.* at 39.

[76] *Id.* at 41.

[77] *Id.* at 42-43.

[78] *Id.* at 43-44.

classification was deemed impermissible unless "substantially related" to a state interest which was more important than one which satisfied use of the rational relationship test.[79] Responding second to the claim of discrimination because of national origin, the court found that the statute was formulated on the basis of immigration status, not alienage, since no evidence existed that Hispanic aliens were subject to greater supervision than other illegal aliens.[80] Therefore, this statute was not unconstitutional since classification was not based on any particular national heritage.

Evaluation next centered on the state's three arguments: the large number of undocumented children potentially eligible for school attendance, the resulting fiscal impact on the state school funds, and the effect upon the quality of bilingual education and desegregation efforts. Asserting that the equal protection clause did not apply to undocumented aliens, the state argued that even invidious discrimination was permissible or, alternately, that a rational basis existed for the statute.[81]

Although few studies were conducted by the state to bolster the position adopted, those that were concentrated primarily on "the impact and number of documented Mexican children."[82] The studies indicated that the border districts were affected by the increased number of pupils, by the inability to finance new construction, and by the difficulty in obtaining sufficient, qualified personnel. Acknowledging the existence of these problems, the court found them to have resulted from the addition of documented aliens as well as undocumented children.[83]

Reviewing the Criterion Study[84] relied on by the state, the court negated the findings in several instances. The major fault was the assumption that a child not enrolled in school was an undocumented alien when he or she might just as easily have been a documented child. This was supported by evidence which showed there had been

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[79] *See* Lalli v. Lalli, 439 U.S. 259, 265 (1979) (state had rational interest in classifying children as illegitimates).

[80] MDL No. 398, slip op. at 44.

[81] *Id.* at 45.

[82] *Id.* at 45-46. Experts concurred there was no conclusive estimate of the number of undocumented aliens, including children, in the United States. *Id.* at 48.

[83] *Id.* at 47.

[84] The Criterion Study calculated the number of Hispanic children in all schools and among school dropouts. It then subtracted the documented Hispanic school age population from the census figure for all five to seventeen year old Hispanics in Texas. The remaining number was the " 'potential undocumented Hispanic school age population.' " *Id.* at 48-49. (quoting Criterion Study).

no increase in the number of nonenrolled children following adherence to the statute.[85] In addition, the study used two different data bases, the Texas Education Association study (TEA) and the 1970 census count, which reflected different numbers thereby creating questionable reliability.[86] Furthermore, there were four general problem areas: designating school drop-outs as "potential undocumented children" when by definition they would not re-enroll; excluding documented five and six year olds not yet in school which would reduce the "potentially undocumented" by one-half; utilizing a census figure which overcounted Hispanic children; and basing conclusions on an estimate of children not in school.[87]

The *In re Alien Children* court rejected the state's argument that the availability of free education would encourage emigration of undocumented aliens. The court found this to be a clear indication of the state's true purpose of reducing the flow of illegal immigration which was unacceptable and at variance with the federal prerogative to regulate immigration.[88]

The state argued that the increased cost would result in a decline in the quality of education or that better use could be made of the money, but the evidence showed there were sufficient funds available to meet the increased enrollment.[89] The court suggested a more accurate measurement of the number involved was needed to assess necessary expenditures.

Admitting that genuine problems existed in a number of school districts ranging from inadequate school buildings to insufficient reimbursement for appropriate salary levels, the court found, nevertheless, the state's solution in excluding children to be excessively harsh. Dismissing the state's claim that inclusion of undocumented children would affect bilingual programs and segregation plans, the court asserted that bilingual education was funded primarily by the federal

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[85] *Id.*

[86] *Id.* at 50.

[87] *Id.* at 51-52. The court accepted a study conducted by Dr. Jorge Bustamante, a noted expert in the area of Mexican immigration, which determined that there are approximately 20,000 undocumented children in Texas. *Id.* at 52-53.

[88] *Id.* at 53. Judge Seals concurred with the general belief that the major reason for immigration was job opportunities, not the availability of educational or social services. *Id.* at 54.

[89] *Id.* at 55. Examination of appropriations for educational financing revealed funding from the following sources: consumer taxes, notably sales taxes, the General Revenue Fund, the Omnibus Tax Clearance Fund, the Highway Motor Fund, and the Permanent Escrow Fund. Each have a surplus adequate to cover the required costs. *Id.* at 56-57. Petitioners contributed to these funds through payments of taxes. *Id.* at 40.

government and that the claimed effect upon desegregation was without supporting evidence.[90]

While accepting the state's argument that fiscal integrity is an important and legitimate state interest, the court held "that absolute deprivation of education should trigger strict scrutiny, particularly when the absolute deprivation is the result of complete inability to pay for the desired benefit."[91] A policy based solely on state fiscal integrity was not a compelling state interest. Furthermore, no evidence showed that the exclusion of children would improve the quality of education or that the classification advanced the state's interest. In essence, it was based on federal immigration status, not as a result of the state's announced policy, since "[n]othing about their immigration status by itself distinguishes them from other children in terms of their educational needs."[92]

The argument based on federal preemption centered on interpretation of Title I of the Elementary and Secondary Education Act of 1965 (Title I) and the Title I Migrant Program (Migrant Program).[93] The court did not regard the purpose of Title I as preventing states form involvement in this field since the education of a disadvantaged group had not been exclusively reserved to the federal government.[94] Without benefit of the legislative history of section 21.031, a legitimate purpose was assumed, and the court recognized that "[e]ducation [was] a matter of state and local concern under the police powers."[95] Additionally, the court examined the Migrant Program and its relevancy to this category of individuals, noting that "[n]othing in the law or its regulations distinguishes between documented and undocumented children."[96]

Consequently, Texas received money from the federal government to educate children excluded from school; however, Title I did

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[90] *Id.* at 56-59. *See* United States v. Texas, 46 U.S.L.W. 2470-71 (E.D. Tex., Jan. 12, 1981). In this decision, Texas' failure to provide bilingual education programs for Mexican-American children was found to violate the equal protection clause of the fourteenth amendment. *Id.*

[91] MDL No. 398, slip op. at 60.

[92] *Id.* at 61-62. Failure by the state to determine the impact before exclusion weighed heavily in the court's rationalization that strict security was warranted. *Id.*

[93] Title I, Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 2701 to 2854 (1976); Title I Migrant Program, 20 U.S.C. §§ 2761 to 2763 (1976).

[94] MDL No. 398, slip op. at 64.

[95] *Id.* at 65.

[96] *Id.* at 66. Under the Title I formula, the number of children five to seventeen in below poverty level families as determined in the 1980 census was multiplied by a percentage of per pupil expenditures, resulting in the amount returned to the state. The Migrant Program attempted to identify all migrant children in each state for inclusion in federal funds since funding was based on the actual number found in each state. *Id.* at 66-67.

not preempt the challenged statute because a state may regulate education. Compliance with both was possible since the state law did not specifically violate federal legislation. Furthermore, Title I was designed to provide supplemental funds to local programs because the formula identified "schools containing significant numbers of educationally deprived students, not specific children, and was a voluntary program which, by its very nature, cannot be preempted."[97]

Rejection of the statute was urged on the basis of its conflict with United States treaty obligations, specifically those articles dealing with education. The court found the treaties were not self-executing or intended by Congress to be domestic law but merely encouraged the development of education as a mutual goal.[98]

United States foreign policy and its recognized support of full development of human rights and human potential, including educational opportunity, was not of sufficient force to override state law.[99] Recognizing the inconsistency in permitting the existence of this statute, the court, nevertheless, examined the intent of the signers and supporters of various international documents and found it to be an attempt to achieve desired goals but without the force of law. The court considered it inappropriate to act in an area in which the federal government, the "one voice [entitled to speak] in our dealings with foreign governments and international organizations," had not acted.[100] The state's action did not conflict with federal policy.

The court quickly dismissed plaintiff's claim under customary international law. Asserting that education for all was a recognized international goal, nonetheless, it "has not acquired the status of international law."[101]

In concluding, the court stressed that the right to education was the central issue of this decision. "Absent sufficient justification, the Constitution does not permit the states to deny access to education to a discrete group of children within its borders when it has undertaken to provide public education."[102] Acknowledging the great social cost that exclusion produced both to these particular children and to society at large, Judge Seals held "that access to education [was] a fundamental right" which was unconstitutionally infringed upon by implementation of this statute.[103]

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[97] *Id.* at 68-70.
[98] *Id.* at 73-75.
[99] *Id.* at 75-83.
[100] *Id.* at 83.
[101] *Id.* at 84-85.
[102] *Id.* at 86.
[103] *Id.* at 86-87.

Faced with the prospect of extending the equal protection provision of the fourteenth amendment to illegal aliens, two courts chose to extensively evaluate past decisions and implications relative to this privilege and to recognize its applicability to this discrete class, while one court chose to avoid the challenge. The *Hernandez* court merely reiterated the general policy of the clause, while entertaining no analysis regarding the applicability of the fourteenth amendment to the classification at issue simply because the Supreme Court had not yet spoken on inclusion of illegal aliens.[104] Rather, it accepted the position of the district court without reviewing any decisions interpreting suspect classifications or fundamental rights. To compound the irrationality of its position, the court assumed that even if such protection were recognized, in this instance no right had been violated but the court did not engage in any effort to investigate the basis of the challenge.[105]

A crucial factor in the court's determination was the anticipated additional cost to the school system. Little evidence, however, was introduced to demonstrate the accuracy of this claim. It was based on an hypothesis that an increase in the assessment ratio of property values would be needed which, when voted upon by the local community, would not be approved. Thereupon, funds to provide education for undocumented children would have to come from the appropriations for existing services, resulting in a reduction of those services.[106] Unlike the other decisions, no investigation was conducted to determine if adequate funds were currently available and no estimate was made of the number of children within the class to show the actual costs that would be incurred. The justification for the denial of equal protection, concern that a presumed scenario would occur, is unwarranted since it provides no legal foundation for the holding. It could just as easily be presumed that a more favorable vote would be cast.

The *Plyler* court extensively assessed the essential issues, thereby providing the foundation for the *In re Alien Children* decision. Throughout the major portion of the decision, the *Plyler* court appeared to be leaning towards affirmance of strict scrutiny. Instead, without having clear cut Supreme Court precedent for the highest level of review in the four principal areas considered, the court relied on the state's failure to establish a rational basis for the statute.[107]

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[104] 558 S.W.2d at 123.
[105] *Id.*
[106] *Id.* at 125.
[107] 458 F. Supp. 569.

Both *In re Alien Children* and *Plyler* found a distinct class of poor, whose children were absolutely deprived of access to education. While agreeing that education could be viewed as social and economic legislation by the state, the *Plyler* court distinguished this service based on the absolute denial of a state-operated service. The court compared this denial with the relative deprivation found in decisions dealing with state benefits, but stopped short of establishing education as a fundamental right.[108] The failure to recognize access to education as a fundamental right is curious in view of the court's willingness to distinguish other decisions in the social/economic area, and the extensive attention accorded the *Rodriquez* opinion. This may, nevertheless, have targeted the pivotal area on which the *In re Alien Children* court later based the foundation of its holding.

The court's strongest argument was directed towards the state's failure to prohibit the employment of illegal aliens while at the same time imposing a burden on one segment of this group, present within the state due to the state's benign attitude toward illegal hiring practices.[109] Certainly this was a blatant example of abuse and exploitation, and at the very least, a clear demonstration of the inconsistency of the state's position.

Plyler also emphasized that the state's position that the use of state funds should be limited to the education of citizens and legally admitted aliens was merely a reaffirmation of the law but did not provide the rational basis needed for its enactment.[110] Because both documented and undocumented Mexican aliens demonstrated the same educational needs, any additional expenses would be equally incurred by both groups. The court suggested that the state's goal would be more adequately effectuated by excluding all Mexican immigrants.[111] Such a position would, without doubt, be unconstitutional. Should a rational relationship then be found merely because of one group's immigration status?

The fundamental issue for this court was the burden imposed on established residents, albeit residents in violation of federal immigration laws, by the legislation which conflicted with federal immigration laws. Reliance on the preemption argument seems misplaced at best since the federal government had already adopted the position that the statute was not invalid under the federal preemption doctrine.[112]

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[108] MDL No. 398, slip op. at 22, 39; 458 F. Supp. at 580-82. *See* 426 U.S. at 80; 411 U.S. at 18-44; 397 U.S. at 483-87.

[109] 458 F. Supp. at 584-85.

[110] *Id.* at 586.

[111] *Id.* at 589.

[112] *Id.* at 573, 590-91.

Nevertheless, the decision reflects an attempt to deal with a difficult problem in a manner that is both legally and morally correct.

In re Alien Children concurred with *Plyler* that illegal aliens were indeed persons within the state's jurisdiction and therefore, entitled to the full protection of the fourteenth amendment.[113] They took the further step of establishing a new fundamental right which had clearly been violated by this statute and, as such, warranted the highest level of judicial scrutiny.[114] Judge Seals concluded that undocumented aliens enjoyed the right to equal protection primarily on the basis of their established right to due process.[115] He appeared to have employed a two-step approach in view of no clear precedent for this position. First recognizing that illegal aliens were entitled to due process protection,[116] he then evaluated the legally admitted alien's right to equal protection.[117] From this he inferred that illegal aliens enjoyed that same right since their status was one of an alien despite the questionable manner of their entry into the state. In addition, he accepted the premise that the two branches of the fourteenth amendment co-exist and should be applied together.[118] This approach was neither unrealistic nor illogical even though unsupported by case law. Entitlement to rights belonged to an individual, regardless of the manner or form of how the individual came to be present within a specific area.[119]

Although giving credence to the illegal aliens' right to equal protection, the court's avoidance of viewing this group as a suspect class was reflective of a trend away from measuring legislative classifications of aliens with a strict scrutiny level of review.[120] Therefore, without a more significant justification the court probably could not have adopted the equal protection rationale. Only by linking that entitlement to a fundamental right could the statute be declared

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[113] MDL No. 398, slip op. at 38. See Comment, 16 HOUS. L. REV. 667 (1979) for a discussion of standards to be applied to illegal aliens.

[114] MDL No. 398, slip op. at 38.

[115] *Id.* at 34-35.

[116] *Id.* at 34. *See* notes 17 & 71 *supra.*

[117] *In re* Griffiths, 413 U.S. 717 (1973); Wong Wing v. United States, 163 U.S. 228 (1895); Bolanos v. Kiley, 509 F.2d 1023 (2d Cir. 1975).

[118] MDL No. 398, slip op. at 36, 38. "The due process and equal protection clauses of the Fourteenth Amendment apply to aliens within the United States, and even to aliens whose presence here is illegal." 509 F.2d at 1025. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1953) (equal protection and due process based on fundamental fairness and were not " 'mutually exclusive' ").

[119] MDL No. 398, slip op. at 20, 63.

[120] Hampton v. Wong, 426 U.S. 88 (1976).

unconstitutional and the equal protection analysis apply.[121] This suggests why the court designated access to education as the focal point of the decision, and why, unlike the *Plyler* holding, preemption by federal regulation alone was insufficient to strike down the statute in view of allowing some state regulation of aliens.[122]

It should be noted that this decision did not establish substantive rights through its recognition of the equal protection privilege but clearly stated that any rights claimed by illegal aliens will still be subject to evaluation under the fundamental rights analysis.[123] Moreover, it in no way suggests that all rights enjoyed by citizens will henceforth be applicable to all others. Judicial review will still be needed to assess the rights claimed.

The state's concern for fiscal integrity was not compelling or rational. However, the court did not disparage the genuine problems faced by the state's educational system, nor deny that some adverse financial impact had been created.[124] One of the most difficult obstacles for the state to overcome was the unreliable estimate of the number of children involved. The court rightfully made a thorough review of the studies used and concluded they should be viewed with disfavor. An unbiased, reliable data base was essential to the state's case, and failure to offer sufficient justification dispelled the claim of a compelling or rational interest.[125]

Nonetheless, the state raised many questions which remain unanswered. Admitting as true the statement that illegal aliens only enter this country for the economic opportunity, it is difficult to accept the claim that they have no interest in the other benefits available in this society.[126] Presumably, anyone migrating with a family comes for the total good of the family. They come to remain, hope for pardon of their illegal status, and desire to ultimately become part of this

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[121] *Cf.* United States v. Otherson, 480 F. Supp. 1369 (S.D. Cal. 1979) (civil rights protection afforded to illegal aliens under "inhabitants" language of the civil rights statute).

> The Fourteenth Amendment explicitly extends the equal protection and due process of law to all " 'persons' ". The law is well settled that these protections apply to all people within the jurisdiction of the United States, whether here legally or otherwise.

Id. at 1374.

[122] *See* Ambach v. Norwick, 441 U.S. 68 (1979) (citizenship requirement for public school teachers had rational relationship to legitimate state interest); Foley v. Connelie, 435 U.S. 291 (1977) (resident alien ineligible for appointment to state police force); Mathews v. Diaz, 426 U.S. 67 (1975) (classification between class of aliens not in violation of due process).

[123] MDL No. 398, slip op. at 16-17.

[124] *Id.* at 55-62.

[125] *Id.* at 48-53.

[126] *Id.* at 54.

society. It is difficult to believe that recognition of this benefit will not serve as an inducement for others desirous of improving the economic standard of living for all their family members to attempt illegal entry.

Additionally, although funds are currently available, will this continue to be the situation? If this decision encourages more family migration, will there come a time when funds are no longer available, unlike the present circumstances? Who then will pay? As Judge Seals noted, Texas ranks forty-second in expenditures per child for education. Perhaps an increase in this amount should be made to better improve the quality of education for those currently attending school rather than, even modestly, decreasing the amount presently being expended.

The problems presented in this challenge were primarily sociological rather than legal. The question of equal protection was of minimal significance since clearly this group comes within the language of the equal protection clause. Rather, it was the question of the irreparable harm caused to innocent victims versus the burden imposed upon the public school system to resolve one of the most complex problems faced by society today. Requiring the Texas school system to accept this burden in light of an existing state policy apparently unwilling to provide the necessary monetary support is not the answer. Fiscal responsibility to the total citizenry is also of equal importance, and the economic costs cannot be discounted. But basic rights essential to our way of life cannot be trammeled when other means exist to limit the scope of the problem. Discouraging employment opportunities, arranging penalties for employers who profit from the benefits of cheap labor, providing a more equalized share of state revenues to the school system along with increasing federal awareness and attention to the difficulties faced by the state, although not eradicating, should minimize the extent of the problem.

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