CONSTITUTION—EQUAL PROTECTION—AMERICAN BORN CHILDREN OF ALIEN PARENTS SHOULD NOT BE DENIED EDUCATION BASED ON RESIDENCE REQUIREMENT—*Martinez v. Bynum*, 103 S. Ct. 2382 (1982).

Although the United States Supreme Court has deemed that there is no fundamental right to an education in America,[1] it has nevertheless long recognized the vital role that education plays in our society.[2] Thus, in the 1982 case of *Plyler v. Doe*,[3] the Court held that a state statute which denied a free public education to undocumented alien school-age children violated the equal protection clause of the fourteenth amendment.[4] One year later, however, the Supreme Court undercut this position. In *Martinez v. Bynum*,[5] the Court upheld a Texas statute[6] which denies a child the right to a tuition-free educa-

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[1] San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 35 (1972).

[2] Brown v. Board of Educ., 347 U.S. 483, 493 (1954); *see also* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). Education is the primary means by which an individual becomes assimilated into civilized society, assumes public responsibility, and develops a political awareness. *See* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) ("[s]ome degree of education is necessary to prepare citizens effectively and intelligently in our open political system"); Reynolds v. Sims, 377 U.S. 533, 562 (1964) (right to adequate education is "preservative of other basic civil and political rights"); Abington School Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennen, J., concurring) ("public school education is a most vital civic institution for the preservation of a democratic system of government"); Illinois *ex rel* McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) ("the public school is at once the symbol of our democracy and the most persuasive means for promoting our common destiny").

[3] 102 S. Ct. 2382 (1982).

[4] *Id.* at 2388, 2402.

[5] 103 S. Ct. 1838 (1983).

[6] TEXAS EDUC. CODE ANN. § 21.031 (Vernon Cum. Supp. 1982) provides in pertinent part:

> (b) Every child in this state . . . 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 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.
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> (d) In order for a person under the age of 18 years to establish a residence for the purpose of attending the public free schools separate and apart from his parent, guardian, or other person having lawful control of him under an order of a court, it must be established that his presence in the school district is not for the primary purpose of attending the public free 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.

tion if the minor lives apart from a parent or guardian[7] and his main purpose for residing in the school district is to attend public school tuition-free.[8]

Roberto Morales, although born an American citizen in McAllen, Texas, resided in Mexico for the first eight years of his life with his parents, who were Mexican citizens.[9] In 1977, he moved back to McAllen, Texas in order to live with his sister, Oralia Martinez,[10] "for the primary purpose of attending school in The McAllen Independent School District."[11] Following the rejection of Morales' application for admission to school in the McAllen school district for failure to meet the requirements of the Texas Education Code,[12] his sister, as next friend, instituted an action in federal district court, naming as defendants the Texas Commissioner of Education, the Texas Education Agency, and four local school districts.[13] Initially, Martinez sought preliminary and injunctive relief, alleging that the statute violated the equal protection, due process, and privileges and immunities clauses of the fourteenth amendment.[14] The district court denied the petitioner preliminary relief, finding that the Texas School Board's liberal

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[7] TEXAS FAMILY CODE ANN. § 51.02(3) (Vernon 1984) defines "guardian" as "the person who, under court order is the guardian of the person of the child or the public or private agency with whom the child has been placed by the court."

[8] *Martinez*, 103 S. Ct. at 1840-41. The district court had noted that if the minor had any reason whatever for being in the school district other than attending school, the child would be granted admission. Arredondo v. Brockette, 482 F. Supp. 212, 216 (S.D. Tex. 1979), *aff'd*, 648 F.2d 425 (5th Cir. 1981), *aff'd sub nom.* Martinez v. Bynum, 103 S. Ct. 1838 (1983).

[9] *Martinez*, 103 S. Ct. at 1839-49.

[10] *Id.* at 1839. Although Roberto Morales lived with his sister, she was not his court-appointed guardian. Moreover, she had no intent in the future to apply for guardianship. *Id.* at 1840.

[11] *Id.*

[12] *Id.* Roberto Morales failed to meet the requirements of § 21.031(d) because he lived apart from his parent or legal guardian and was in the school district for the primary purpose of attending school. See *supra* note 6 for the text of TEX. EDUC. CODE ANN. § 21.031(d).

[13] Arredondo v. Brockette, 482 F. Supp. 212 (S.D. Tex. 1979), *aff'd*, 648 F.2d 425 (5th Cir. 1981), *aff'd sub nom.* Martinez v. Bynum, 103 S. Ct. 1838 (1983). Besides Morales, the plaintiffs included four adult custodians of school-age children who had also been denied tuition-free admission to public school for failing to meet the residence requirement of § 21.031(d). *See Martinez*, 103 S. Ct. at 1840-41. Only two plaintiffs appealed the decision of the district court. Arredondo v. Brockette, 648 F.2d 425 (5th Cir. 1981), *aff'd sub nom.* Martinez v. Bynum, 103 S. Ct. 1838 (1983). After the court of appeals affirmed, Martinez petitioned for and was granted certiorari. *Martinez*, 103 S. Ct. at 1841.

[14] *Martinez*, 103 S. Ct. at 1840. Martinez originally claimed that the statute was unconstitutional both on its face, and as applied by the defendants. *Id.* The plaintiff later amended the complaint, however, to limit her claim to a facial challenge. *Id.* at 1841. The petitioner also challenged the statute as violative of the privileges and immunities clause, but the Supreme Court did not discuss this claim in its opinion. *Id.* at 1840.

construction of the statute permitted free admittance to most children living apart from their parents.[15]

After a hearing on the merits, the district court found that Texas had asserted a legitimate interest in maintaining the quality of its schools and in protecting the rights of its residents to attend school tuition-free.[16] Therefore, the court held that the enactment of section 21.031(d) of the Texas statute was justified.[17] The Court of Appeals for the Fifth Circuit affirmed.[18] The Supreme Court granted Martinez's petition for certiorari, finding the issue significant because most states impose a residency requirement on those seeking tuition-free schooling.[19]

The vital role that education plays in preparing an individual to function effectively in a complicated and technical society has been recognized by Congress,[20] state legislatures,[21] and the Supreme Court.[22] In the 1954 decision of *Brown v. Board of Education*,[23] the

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[15] Arredondo v. Brockette, 482 F. Supp. 212, 216 (S.D. Tex. 1979), *aff'd*, 648 F.2d 425 (5th Cir. 1981), *aff'd sub nom.* Martinez v. Bynum, 103 S. Ct. 1838 (1983).

[16] *Id.* at 222. The court relied on Vlandis v. Kline, 412 U.S. 441, 452-53 (1973).

[17] Arredondo v. Brockette, 482 F. Supp. 212, 222 (S.D. Tex. 1979), *aff'd*, 648 F.2d 425 (5th Cir. 1981), *aff'd sub nom.* Martinez v. Bynum, 103 S. Ct. 1838 (1983).

[18] Arredondo v. Brockette, 648 F.2d 425 (5th Cir. 1981), *aff'd sub nom.* Martinez v. Bynum, 103 S. Ct. 1838 (1983). The appellate court essentially adopted the reasoning of the district court in its entirety.

[19] *Martinez*, 103 S. Ct. at 1841 & n.4; *see, e.g.*, IND. CODE § 20-8.1-6.1-1(c) (Supp. 1982); ME. REV. STAT. ANN. tit. 20, § 859 (3)(B)(2) (Supp. 1982); MASS. GEN. LAWS ANN. ch. 76, § 6 (West 1982); MICH. COMP. LAWS § 380.1148 (Supp. 1981); OR. REV. STAT. § 332.595(5) (1981).

[20] Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-1710 (1974) (to extend Elementary and Secondary Education Act of 1965 in order to promote "[t]his new national commitment to upgrading the education of the poor and to identifying the educationally deprived"); Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 236-246 (Supp. 1982); Pub. L. No. 93-380, 1974 U.S. CODE CONG. & AD. NEWS 4093, 4097; H.R. 2362, 89th Cong., 1st Sess. (1969) (purpose of bill is "to strengthen and improve educational quality and educational opportunity in the Nation's elementary and secondary school").

[21] All states except Mississippi have compulsory school attendance laws. *See, e.g.*, ALA. CODE § 297 (1958); CAL. EDUC. CODE § 12101 (West Supp. 1973); FLA. STAT. ANN. § 232.01 (West Cum. Supp. 1973); MASS. ANN. LAWS ch. 76, § 2 (Michie/Law. Co-op. Cum. Supp. 1972); N.J. STAT. ANN. § 18A:38-25 (West 1968); WIS. STAT. ANN. § 40.77 (West 1966). For a complete listing see Gard, San Antonio Independent School District v. Rodriguez: *On Our Way to Where?*, 8 VAL. U.L. REV. 1, 12 n.48 (1973).

[22] *See, e.g.*, *Plyler*, 102 S. Ct. 2397 (nation will bear significant social costs if particular class of children are denied education, their only "means to absorb the values and skills upon which our social order rests"); Ambach v. Norwick, 441 U.S. 68, 76 (1979) (role of public education in shaping our youth is so vitally important, citizenship requirement for teachers, employed in public school system, is legitimate state interest); Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (given crucial role education plays in preparing individual to function in society, "[t]he separate but equal doctrine has no place in the field of public education"); *see also* Healy v. James, 408 U.S. 169 (1972); Weber v. Aetna Supply & Casualty Co. 407 U.S. 164 (1972); Illinois *ex rel* McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring).

[23] 347 U.S. 483 (1954).

Court noted that both "compulsory school attendance laws and the great expenditures for education demonstrate our recognition of the importance of education to our democratic society."[24] Chief Justice Warren, writing for the Court in *Brown*, stated that education is one of the most crucial functions performed by state and local government.[25]

Traditionally, it has been the responsibility of each state to provide its citizens with a free public education.[26] A majority of states, in fact, provide tuition-free schooling for their citizens by constitutional mandate.[27] In addition, numerous Supreme Court decisions have recognized the states' interest in providing their citizens with such education.[28]

In 1973, the Supreme Court in *San Antonio School District v. Rodriguez*[29] turned aside an equal protection challenge to a Texas public school financing scheme that was primarily based on local property taxes.[30] The plaintiffs, who resided in a school district with a low property tax base,[31] alleged that the funding plan violated the fourteenth amendment because school districts with a higher property tax base received a greater proportion of the local fund, thereby allowing for higher per-pupil expenditures.[32] The plaintiffs contended, therefore, that the students in such districts were receiving a better education than students in districts having lower tax bases.[33]

While recognizing the importance of obtaining an education, the *Rodriguez* Court refused to view the right to education as fundamental.[34] Justice Powell, writing for the majority, reasoned that the great

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[24] *Id.* at 493.

[25] *Id.*

[26] *See* H.C. VOORHEES, THE LAW OF THE PUBLIC SCHOOL SYSTEM OF THE UNITED STATES (1916). In numerous decisions throughout the 20th century, the Supreme Court has recognized the state's authority and interest in providing its citizens with a free public education. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("providing public schools ranks at the very apex of the function of a State"); *Brown*, 347 U.S. at 483 (providing public education is state's most important function); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (state has valid interest in educating its citizens).

[27] *See, e.g.*, MINN. CONST. art. XIII, § 1; N.J. CONST. art. VIII, § 4, para. 1.

[28] *See supra* note 26.

[29] 411 U.S. 1 (1973).

[30] *Id.* at 4-6.

[31] *Id.* at 4, 5. The plaintiffs were the parents of Mexican-American children who attended public schools in an urban school district in San Antonio, Texas. *Id.*

[32] *Id.* at 23.

[33] *Id.*

[34] *Id.* at 33-35. If a state law infringes on a fundamental right, it will be upheld only upon a showing that the law furthers some compelling state interest. *Id.* at 31-36.

social significance of education is not in itself determinative of whether the right to attain one is fundamental.[35] Rather, the Court stated that a right is deemed fundamental only when it is explicitly or implicitly guaranteed in the Constitution, which education is not.[36] Further, Justice Powell found that "where wealth is involved, the equal protection clause does not require absolute equality or precisely equal advantages."[37] Thus, finding neither a suspect class nor a fundamental right to be impinged upon, the *Rodriguez* Court upheld the Texas school funding scheme.[38]

The Court had examined the education issue in a different context in the 1982 case of *Plyler v. Doe*.[39] The Court in *Plyler* struck down a Texas statutory provision that denied a tuition-free education to alien children who had illegally entered the United States.[40] As in *Rodriguez*, the majority in *Plyler* refrained from classifying the right

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A number of rights have been recognized by the Court as fundamental. *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (voting); United States v. Guest, 383 U.S. 745 (1966) (interstate travel); NAACP v. Alabama, 357 U.S. 449 (1958) (freedom of association).

[35] *Rodriguez*, 411 U.S. at 32. The Court relied on its reasoning in Lindsey v. Normet, 405 U.S. 56 (1972). There the Court noted the social importance of providing decent, safe, and sanitary housing for tenants, but found that without a constitutional mandate, the right to a (certain) quality of housing is not fundamental. *Id.* at 73.

[36] *Rodriguez*, 411 U.S. at 33. The Court specifically stated that "it is not the province of this court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *Id.* But see Griswold v. Connecticut, 381 U.S. 479 (1965), where the Supreme Court found that a person has a fundamental right to privacy even though there is no specific provision which guarantees this right in the Constitution. Justice Powell rejected the plaintiffs' argument that because the right to an education is so closely related to the exercise of other fundamental rights, such as the right to vote and the right to exchange information, it should be deemed fundamental. *Rodriguez*, 411 U.S. at 35. But see *In Re* Alien Children Educ. Litig., 501 F. Supp. 544 (S.D. Tex. 1980), where a federal district court recognized that there is a direct and substantial relationship between education and the right to exchange information. *Id.* at 564. For a discussion of the nexus between education and other fundamental rights see Preovolas, Rodriguez *Revisited: Federalism, Meaningful Access and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75, 87-100 (1973).

[37] *Rodriguez*, 411 U.S. at 24.

[38] *Id.* at 54-55. As with fundamental rights, if a state law treats members of a "suspect class" differently from other persons, the law will be upheld only if the state demonstrates a compelling interest. The Supreme Court has found these classes suspect: alienage, Graham v. Richardson, 403 U.S. 365 (1971); race, Korematsu v. United States, 323 U.S. 214 (1944); and national origin, Hiraboyashi v. United States, 320 U.S. 81 (1943). If the state law does not infringe upon a fundamental right or discriminate against a suspect class, the state must only show a rational relationship to some legitimate state purpose for the statute to be upheld. Jefferson v. Hackney Comm'n of Public Welfare, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1969).

[39] 102 S. Ct. 2382 (1982).

[40] *Plyler*, 102 S. Ct. at 2402. The Court took special notice of the fact that the plaintiffs were children who could "affect neither their parents' conduct nor their own status." *Id.* at 2396 (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977) (state cannot burden illegitimate children as means of deterring undesirable conduct by parents)).

to an education as fundamental[41] and thus declined to review the Texas statute with strict judicial scrutiny.[42] The Court, however, noting the severe effects that an absolute deprivation of education would have on a child, found that the rational relationship test was also inappropriate.[43] Thus, the Court utilized an intermediate level of review, requiring the state to assert a "substantial" interest.[44] Finding that the state's interest in conserving state resources and discouraging the illegal immigration of aliens did not justify the exclusion of this group of children, the Court found the statute unconstitutional.[45]

Rather than perceiving education as a fundamental right, the Supreme Court has viewed education as being within the realm of social and economic benefits traditionally provided by states.[46] The Court has long recognized that states may limit the receipt of these benefits[47] by showing a mere "rational basis" for the restriction.[48] One restriction commonly imposed is that a recipient of a state's benefits and services must be a bona fide resident of that state.[49]

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[41] *Id.* at 2397; *see supra* notes 34-36 and accompanying text.

[42] *See Plyler*, 102 S. Ct. at 2398.

[43] *Id.* But see *Rodriguez*, 411 U.S. at 35, where the Court reviewed the Texas education funding scheme with minimal scrutiny because education is not a fundamental right. *See supra* notes 34-36 and accompanying text. The *Rodriguez* Court's analysis, however, is distinguishable. There the Court was presented with the question of whether there is a right to an equal education, while the *Plyler* Court dealt with the absolute deprivation of education.

[44] *Plyler*, 102 S. Ct. at 2398. Although the Court has not expressly articulated an intermediate level of review, when it uses a substantial state interest test, more than a rational basis and less than a compelling interest is required. *See* Lalli v. Lalli, 439 U.S. 259 (1978); Craig v. Boren, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

[45] *Plyler*, 102 S. Ct. at 2400-02; see *In re* Alien Children Educ. Litig., 501 F. Supp. 544 (S.D. Tex. 1980), which also involved a challenge to the citizenship requirement of TEX. EDUC. CODE ANN. § 21.031. This case was consolidated with Plyler v. Doe for briefing and argument before the Supreme Court. *Plyler*, 102 S. Ct. at 2391. The district court's finding in *In re Alien Children* that TEX. EDUC. CODE ANN. §§ 21.031(a) and (b) violated the equal protection clause was based partly on the fact that the group of children in question were completely denied access to an education. *In re Alien Children*, 501 F. Supp. at 564.

[46] *Rodriguez*, 411 U.S. at 1. But see *Plyler*, 102 S. Ct. at 2397, where the Court held that providing an education to its citizens is a state function distinguishable from other forms of social welfare legislation. Other state functions typically classified as "social" are providing assistance to families with low income, Dandridge v. Williams, 397 U.S. 471 (1969), and the distribution of welfare benefits, Jefferson v. Hackney, 406 U.S. 535 (1972).

[47] *See* Jefferson v. Hackney, 406 U.S. 535, 546 (1972) ("[i]n the area of economic and social welfare, a state does not violate the fourteenth amendment merely because the classification is imperfect"); Dandridge v. Williams, 397 U.S. 471 (1969) (same); Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) (state legislation which regulates business will not be struck unless it is not rational).

[48] *See supra* note 38.

[49] A bona fide residence requirement is an "appropriately defined and uniformly applied" test which conditions receipt of a state benefit on residence in the state. Dunn v. Blumstein, 405 U.S. 330, 342 n.13 (1972); *see* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 255 (1973).

The Supreme Court has approved a bona fide residence requirement as a prerequisite for voting in a state election,[50] for the receipt of welfare benefits,[51] for employment by the state or city,[52] for the right to attend a state funded university at a preferred tuition rate,[53] and for the right to institute a divorce action in a state court.[54] Nevertheless, the Court frequently has struck down residence requirements which were durational in nature[55] and those which were unreasonably vague or arbitrary.[56]

Because the Court has articulated no further guidelines for the imposition of residence requirements, the legal meaning of "residence" does not become clear until it is examined in the specific context in which it appears.[57] For example, although the term "resi-

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[50] Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Pope v. Williams, 193 U.S. 621 (1904).

[51] Shapiro v. Thompson, 394 U.S. 618 (1969).

[52] McCarthy v. Philadelphia Civil Service, 424 U.S. 645 (1975).

[53] Vlandis v. Kline, 412 U.S. 441 (1973); Johnson v. Redeker, 406 F.2d 878 (8th Cir. 1969); Sturgis v. State of Washington, 368 F. Supp. 38 (W.D. Wash. 1973); Starns v. Malkerson, 326 F. Supp. 324 (D. Minn. 1970), *aff'd mem.* 401 U.S. 985 (1971).

[54] Sosna v. Iowa, 419 U.S. 393 (1974) (residency requirement for privilege of instituting divorce action in state court is valid state interest in light of another state's ability to render divorce decree null if original court lacked proper jurisdiction).

[55] Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1973) (invalidation of one year residence requirement as prerequisite to receiving nonemergency medical treatment); Dunn v. Blumstein, 405 U.S. 330 (1972) (unconstitutional to condition right to vote in state election on one year residency); Shapiro v. Thompson, 394 U.S. 618 (1969) (statute requiring one year residence to be eligible for welfare benefits held invalid). The statutes in the above cases were invalidated on the basis that they interfered with an individual's fundamental right to interstate travel. *But see* Matthews v. Diaz, 426 U.S. 67 (1975) (federal statute which conditioned federal medical insurance benefits on five year period of residency in country is valid); Sosna v. Iowa, 419 U.S. 393 (1974) (statute which conditioned right of an individual to institute divorce proceeding in that state on one year residence is unconstitutional); Starns v. Malkerson, 326 F. Supp. 324 (D. Minn. 1970), *aff'd mem.* 401 U.S. 985 (1971) (one year residence requirement for preferred tuition status is valid);

[56] *See* Vlandis v. Kline, 412 U.S. 441 (1973). The Court invalidated a Connecticut residence statute because it created an irrebuttable presumption that a student who resided outside the state prior to enrollment at the university remains a nonresident as long as he is a student there. *Id.* at 450. Finding that under the terms of the statute an individual is not given the opportunity to show she is a bona fide resident, the Court concluded that a statute which creates such a conclusive irrebuttable presumption is so arbitrary and unreasonable that it is violative of the due process clause. *Id.* at 448-54; *see also* Carrington v. Rash, 380 U.S. 81, 93-95 (1963) (statute which contained irrebuttable presumption that all military men stationed in Texas were not residents for voting purposes without allowing them opportunity to present proof that they were bona fide residents is invalid).

[57] *See* 1 RESTATEMENT (SECOND) OF CONFLICTS OF LAW 11, comment K (1971) ("residence is an ambiguous word whose meaning in a legal phrase must be determined in each case"); *see also* Virgin Islands *ex rel.* Bodin v. Brathwaite, 459 F.2d 543, 544 (3d Cir. 1972) (term residence has no precise meaning since it varies with statutory usage); United States v. Stabler, 169 F.2d 995, 998 (3d Cir. 1948) (residence is term of "broad content" with no exact legal meaning). *See generally* Reese & Green, *That Elusive Word "Residence"*, 6 VAND. L. REV. 561 (1953).

dence" usually denotes physical presence in a given place,[58] while the term "domicile" requires physical presence coupled with an intent to remain at such place indefinitely,[59] the terms have been used synonymously in certain contexts, such as for purposes of service of process by publication.[60] To confuse the issue even further, in still other areas, such as divorce proceedings, the term residence has been interpreted to require more than a showing of domicile. Some residence requirements compel the individual to reside in the state for a prescribed period of time.[61]

In any event, the term residence has been given its traditional construction[62] when appearing in statutes prescribing the necessary qualifications for a primary education.[63] Generally, a child is entitled to a free public school education in the district where his parents (or

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[58] *See* K.K. KENNAN, A TREATISE ON RESIDENCE AND DOMICILE (1934). Residence usually requires more than a visit or temporary stay in a place. *See* Dwyer v. Matson, 163 F.2d 299, 303 (10th Cir. 1947). *See generally* Reese & Green, *supra* note 57, at 563; McClean, *The Meaning of Residence*, 11 INT'L & COMP. L.Q. 1153, 1154 (1962).

[59] *See* Texas v. Florida, 306 U.S. 398, 424 (1938) (residence plus intent to make place one's home constitute domicile). Generally, domicile refers to the state with which an individual has the closest connections. *See* Williams v. North Carolina, 325 U.S. 226, 229 (1945) (domicile implies nexus between person and place of such permanence as to control creation of legal relations and responsibilities); Williamson v. Osenton, 232 U.S. 619, 625 (1913) ("[t]he very meaning of domicile is the technically preeminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined").

[60] *See* Johnson v. First Nat'l Bank, 223 F.2d 31, 34 (10th Cir. 1955); Capitol Light & Supply Co. v. Gunny Elec. Co., 24 Conn. Supp. 324, 190 A.2d 495 (Super. Ct. 1963); United Bank v. Dohn, 115 Ill. App. 3d 286, 289, 450 N.E. 2d 974, 977 (App. Ct. 1983); *see also* Charisse v. Eldred, 252 Ark. 101, 477 S.W.2d 480 (1972) (statutes according resident right to vote in state election usually require showing of domicile); *In re* Estate of Phillips, 4 Kan. App. 2d 256, 261, 604 P.2d 747, 752 (Ct. App. 1980) (term "residence" as used in statutes authorizing state court to probate will has been interpreted as equivalent to domicile).

[61] *See* Sosna v. Iowa, 419 U.S. 393 (1974); *see also supra* note 55. In the area of higher education, the courts have also recognized the state's power to require one year's residence in order to qualify for preferred tuition rates. Sturgis v. Washington, 368 F. Supp. 38 (W.D. Wash. 1973) (upheld statute which required one year residence to qualify for lower tuition); Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.* 401 U.S. 985 (1971) (statute which conditioned resident status for tuition purposes on one year residency period in state was valid). In most other contexts, the Court has invalidated residence laws which require that an individual live in the state for a prescribed period of time before attaining resident status. *See* Dunn v. Blumstein, 405 U.S. 330 (1972); *supra* note 55; Shapiro v. Thompson, 394 U.S. 618 (1969).

[62] The term "residence" is commonly defined as "the act or fact of abiding or dwelling in a place for some time; an act of making one's home in a place." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1931 (unabridged 1971).

[63] *See* Spriggs v. The Altheimer, 385 F.2d 254 (8th Cir. 1967) (for educational purposes "residence" generally differs from "domicile"); Cline v. Knight, 111 Colo. 8, 11, 137 P.2d 680, 683 (1943) ("The terms domicile and residence are not synonymous in statutes setting forth residence requirements for school purposes.").

legal guardian) reside.[64] Some state courts have further recognized that children residing with relatives who are acting *in loco parentis* are residents of that school district, and therefore are entitled to free public education.[65] Courts often interpret residency more liberally in the area of education than in other contents because of the state's strong interest in educating all persons within its jurisdiction.[66] Almost all state courts agree, however, that children who live in a given district for the sole purpose of qualifying for a tuition-free public education will be denied resident status.[67]

Texas, like most states, requires that children who attend its public schools tuition-free be bona fide residents of the school district where they attend.[68] Prior to 1977 the Texas Education Code[69] did not contain a definition of residence, leaving to the Texas judiciary the job of providing guidance in this area. Such guidance was forthcoming in two separate decisions. In 1973, the Texas Court of Civil Appeals, in *Brownsville Independent School District v. Gamboa*,[70] held that a child residing with a legal guardian is a resident while a child living apart from a parent or legal guardian is not.[71] The *Brownsville* court,

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[64] *See* Connelly v. Gibbs, 112 Ill. App. 3d 257, 260, 455 N.E.2d 477, 480 (App. Ct. 1983); Cook County v. Illinois Office of Educ., 54 Ill. App. 3d 587, 590, 370 N.E.2d 22, 25 (App. Ct. 1977); Luoma v. Union School Dist., 106 N.H. 488, 214 A.2d 120 (1965).

[65] *See, e.g.*, Spriggs v. The Altheimer, 385 F.2d 254 (8th Cir. 1967) (children residing with relatives or friends *in loco parentis* on permanent basis are considered residents for school purposes); Hosier v. Evans, 314 F. Supp. 316, 319 (D. St. Croix 1970) (child becomes resident of district as soon as he acquires home there); Cline v. Knight, 111 Colo. 8, 11, 137 P.2d 680, 683 (1943) (child shall be permitted to attend school in district where he resides if under care, custody, or control of resident thereof).

[66] *See* Spriggs v. The Altheimer, 385 F.2d 254 (8th Cir. 1967) (residence laws for education purposes should be "interpreted liberally" to guarantee free education to large number of children); Hosier v. Evans, 314 F. Supp. 316 (D. St. Croix 1970) (same); Cline v. Knight, 111 Colo. 8, 11, 137 P.2d 680, 683 (1943) (same).

[67] *See* Spriggs v. The Altheimer, 385 F.2d 254 (8th Cir. 1967); Luoma v. Union School Dist., 106 N.H. 488, 214 A.2d 120 (1965); Connelly v. Gibbs, 112 Ill. App. 3d 257, 260, 445 N.E.2d 477, 480 (App. Ct. 1983); *see also* Annot., 83 A.L.R. 2d 497 (1962).

[68] *See supra* note 6. Under the terms of the Texas statute, if a child resides in the school district with a person other than his legal parents or legal guardian, the child will have to satisfy the requirements of § 21.031(d) which requires the child to present evidence that his presence in the school district is not for the sole purpose of getting a free education. If the child fails to meet this requirement, he will be required to pay a tuition fee in order to attend public school. *See* TEX. EDUC. CODE ANN. § 21.031(c)-(d) (Vernon 1977).

In addition, the Texas Education Code §§ 21.031 (a) and (b) require that the child be a citizen or legally admitted alien in order to gain tuition-free admission to public school. In *Plyler*, 102 S. Ct. at 2382, the Court found that this subsection of the statute was violative of equal protection. *See supra* notes 39-46 and accompanying text.

[69] TEX. EDUC. CODE ANN. § 21.031 (Vernon 1975).

[70] 498 S.W.2d 448 (Tex. Civ. App. 1973).

[71] *Id.* at 450, 451.

however, did not state that the reason for excluding the child was that she lived apart from her parent or guardian. Four years later, in *DeLeon v. Harlingen Consolidated Independent School*,[72] the Texas Court of Appeals, noting that a child's residence is generally that of his parents or legal guardian,[73] held that "mere presence" of a child in a district did not constitute residence for the purpose of satisfying the requirements of the statute.[74] Further, the *DeLeon* court found that in order to establish a residence separate from his parents, a child must show that his presence in the school district is for a reason other than attending school.[75]

In 1982, the Texas Legislature codified the *DeLeon* holding by amending section 21.031 to impose this additional burden on children living apart from a parent or legal guardian.[76] It was under the authority of this subsection that Roberto Morales was denied tuition-free admission to the McAllen Independent School District.[77] His constitutional challenge to the validity of section 21.031(d) reached the Supreme Court in *Martinez v. Bynum*.[78]

Writing for the *Martinez* majority, Justice Powell reviewed the Court's historical treatment of residence requirements.[79] He pointed out that the Court has always distinguished durational residence requirements from bona fide residence requirements,[80] and has often found durational requirements invalid.[81] Noting its prior approval of bona fide residency requirements in the area of public education,[82] the Court held that a state has a legitimate interest in excluding nonresidents from free public school.[83] The majority determined that as

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[72] 552 S.W.2d 922 (Tex. Civ. App. 1977).

[73] *Id.* at 925.

[74] *Id.* at 924.

[75] *Id.* at 925.

[76] *See supra* note 6.

[77] *Martinez*, 103 S. Ct. at 1840.

[78] *Id.* at 1838.

[79] *Id.* at 1841.

[80] *Id.* The Court relied on Shapiro v. Thompson, 394 U.S. 618 (1969), where it had stressed the difference between bona fide residence requirements and durational residence requirements, finding only the former acceptable. *Id.* at 627-33.

[81] *Martinez*, 103 S. Ct. at 1841; Dunn v. Blumstein, 405 U.S. 330 (1972); *see* Shapiro v. Thompson, 394 U.S. 618 (1964); *see also* supra note 56.

[82] *Martinez*, 103 S. Ct. at 1842. The Court noted that although in *Plyler* it had invalidated a subsection of Texas Education Code § 21.031, that case had "recognized the school district's right 'to apply . . . established criteria for determining residence.' " *Id.* (quoting *Plyler*, 102 S. Ct. at 2387).

[83] *Id.* (citing Vlandis v. Kline, 412 U.S. 441 (1974)). In *Vlandis*, the Court specifically recognized that a state university may charge students who are bona fide residents less tuition than nonresidents. *Vlandis*, 412 U.S. at 452-54.

long as a bona fide residence requirement is "appropriately defined and uniformly applied,"[84] it is not violative of the equal protection clause because it advances the state interest of limiting state services and benefits to state residents.[85]

The *Martinez* majority also relied upon the "deeply rooted" tradition of locally controlled education to justify local residence requirements.[86] The Court recognized that the furnishing of primary and secondary education is among the most important functions of local government.[87] Justice Powell concluded that maintaining local control of education through the imposition of residence requirements, because it involves protecting "the quality of local public schools"[88] is a "substantial state interest."

The Court next examined the Texas statute to determine whether it contained a bona fide residence requirement,[89] noting that the minimum requirement for establishing residence usually includes both "physical presence and an intention to remain."[90] Justice Powell reasoned that Texas' residence criterion is "far more generous than the traditional standard"[91] because it allows a child who plans to live in the district temporarily to attend school for free.[92] The only children excluded from attending school under the terms of the statute, the Court noted, are those who reside in the district for the sole purpose of

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[84] *Martinez*, 103 S. Ct. at 1842. Other courts have also utilized this language when reviewing the constitutionality of bona fide residence requirements. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 342 (1972); Pope v. Williams, 193 U.S. 621 (1904).

[85] *Martinez*, 103 S. Ct. at 1842-43.

[86] *Id.* at 1843.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 1842-43. The Court rejected the plaintiff's argument that the statute violated the 14th amendment because it creates an irrebuttable presumption of nonresidence. *Id.* at 1843 n.10; *see also* Vlandis v. Kline, 412 U.S. 441 (1973). The Court also rejected the plaintiff's contention that the statute imposed an unconstitutional burden on an individual's freedom to choose a nontraditional living arrangement. *Id.*; *see* Moore v. City of East Cleveland, 431 U.S. 494 (1977).

[90] *Martinez*, 103 S. Ct. at 1844. The Court also differentiated this two-prong standard of residence from the concept of domicile, which usually denotes "a true fixed and permanent home." *Id.* Although the Court in Vlandis v. Kline, 412 U.S. 441 (1973), had adopted a domicile test to determine the resident status of college students, Justice Powell explained that this standard could not be applied to school-age children. *Martinez*, 103 S. Ct. at 1844.

[91] *Martinez*, 103 S. Ct. at 1844.

[92] *Id.* at 1845. The Court explained that Texas Education Code § 21.031 classifies as residents those who satisfy the traditional requirements of residency, but goes a step further in allowing a child who does not intend to stay in the school district indefinitely to establish residency also. *Id.* Accordingly, the Court noted that if a child moved into the district with a parent who was assigned to work there temporarily, that child would be entitled to a free education. *Id.*

obtaining a free education.[93] The *Martinez* majority concluded that the Texas statute was constitutional as it granted the advantages of residency not only to all who satisfied the traditional residence standard, but even to some who did not.[94]

Justice Brennan, in a brief concurrence, stressed that the action involved only a facial challenge to the Texas statute.[95] He pointed out that the Court had not addressed the issue of whether the statute was constitutional as applied to the plaintiff.[96] The Justice concluded that if the Court were presented with the issue of the constitutionality of the statute as it applied to the plaintiff in particular, "a different set of considerations would be implicated" which could significantly alter the Court's analysis.[97]

Justice Marshall, dissenting, viewed the majority decision as a "misinterpretation of the Texas statute, a misunderstanding of the concept of residence, and a misapplication of the Court's past decisions concerning the constitutionality of residence requirements."[98] In addition, he found that the statute itself was unconstitutional on its face under the equal protection clause.[99] In reviewing the terms of the statute, the dissent observed that any child who lives in Texas may attend school in the school district in which he resides.[100] Justice Marshall noted, however, that section (d) of the statute creates an exception to this rule by excluding from the district schools children who reside in a given school district with one other than a parent, legal guardian, or other person having lawful control, and whose "presence in the school district is for the primary purpose of attending the public free school."[101]

Criticizing the majority's interpretation of the statute, Justice Marshall noted that, as construed by the Court, the provision operates to exclude only one group of children: those who both reside in a

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[93] *Id.* The Court considered an interpretation of the statute which would operate to exclude a child from free public school if the child moves to a school district with the intent of making his home there solely based on his desire to obtain tuition-free schooling in that district. The Court found, however, that the plaintiff did not have standing to raise this issue because the record showed that he did not intend to make McAllen, Texas his home. *Id.* at 1845 n.15.

[94] *Id.* at 1845.

[95] *Id.* (Brennan, J., concurring)

[96] *Id.*

[97] *Id.*

[98] *Id.* at 1846 (Marshall, J., dissenting).

[99] *Id.*

[100] *Id.*

[101] *Id.*

district solely to attend school tuition-free,[102] and intend to leave the district upon completion of their education.[103] The Justice found this construction erroneous because under the terms of the statute, *any* child whose primary purpose for residing in the district is to attend school should be excluded.[104] Noting that no Texas court had adopted this narrow approach, the dissent observed that the majority, in essence, had given a new interpretation to the statute.[105] The Justice therefore contended that since the Texas courts had never considered the constitutionality of the statute as interpreted by the Supreme Court, the court should either have dismissed the writ of certiorari or remanded the case for further proceedings.[106]

Justice Marshall also maintained that the majority had erred in utilizing an intent to remain standard to determine residence status.[107] The intent to remain standard is commonly considered an element in establishing domicile in a particular state.[108] Justice Marshall observed that while a state may make free access to its educational facilities conditional upon residence, domiciliary status never has been considered a prerequisite.[109] Moreover, Justice Marshall explained, even if such a standard was appropriate for determining residence status, the Texas statute did not apply the test uniformly.[110] Under the terms of the statute as interpreted by the majority, only children who do not

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[102] *Id.* Justice Marshall found that the majority's reading of the statute excluded only a portion of the children actually targeted for exclusion by subsection (d) of the statute. He attributed this inconsistency to the fact that the majority's approach does not deny admission to children who intend to remain in the district indefinitely, although these children are there for the sole purpose of receiving an education. *Id.*

[103] *Id.*

[104] *Id.* The statute makes no distinction between children who intend to leave and those who intend to remain in the district upon completion of their education. *Id.*

[105] *Id.* at 1846-47 (Marshall, J., dissenting).

[106] *Id.* at 1847 (Marshall, J., dissenting); *see* Toll v. Moreno, 441 U.S. 458 (1979); The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959).

[107] *Martinez*, 103 S. Ct. at 1847 (Marshall, J., dissenting). Justice Marshall criticized the majority's reliance on Inhabitants of Warren v. Inhabitants of Thomaston, 43 Me. 406 (1857), to support the adoption of an "intent to remain indefinitely" standard to determine residence. *Martinez*, 103 S. Ct. at 1848 n.5 (Marshall, J., dissenting). He found that the Maine court did not utilize the "intent to remain" standard at all, but in fact had stated "[t]o reside is to dwell permanently or for a length of time." *Inhabitants*, 43 Me. at 417. In addition, Justice Marshall disagreed with the Court's reliance on state cases which had examined standards for domicile. *Martinez*, 103 S. Ct. at 1848 n.5 (Marshall, J., dissenting).

[108] *Martinez*, 103 S. Ct. at 1848-49 (Marshall, J., dissenting). Distinguishing the concepts of residence and domicile, Justice Marshall characterized the former as "well settled connection" with the state; while the latter usually connotes a more permanent connection evidenced by "the absence of any intention to live elsewhere." *Id.*

[109] *Id.* at 1849 (Marshall, J., dissenting).

[110] *Id.* at 1850 (Marshall, J., dissenting).

reside with a parent or legal guardian are required to satisfy the intent to remain requirement.[111] Since the requirement creates a classification which burdens only one group of children, Justice Marshall found that the statute could not be characterized as imposing a bona fide residence requirement.[112]

Subjecting this classification to an equal protection analysis, the dissent determined that strict scrutiny was the proper standard of examination.[113] Justice Marshall reasoned that in addition to its failure to impose a bona fide residence requirement,[114] the Texas statute impinged upon an individual's access to education, which he regarded as a fundamental right.[115] The dissent further found that Texas' alleged interest in conserving its financial resources for those most closely connected to the state was not furthered by creating a classification based on an individual's motive for residence.[116] The Justice reasoned that since motive was the determining factor, the statute operated to exclude from free public school children who actually were residents, while admitting children—including transients—who were present in the district for any reason other than to obtain an education.[117] Accordingly, Justice Marshall concluded that in actuality, the statute was not reserving funds for those most closely connected with the state.[118]

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[111] *Id.* at 1851 (Marshall, J., dissenting). Justice Marshall observed that in Brownsville Independent School Dist. v. Gamboa, 498 S.W.2d 448, 450 (Tex. Civ. App. 1973), the Texas Civil Court of Appeals held that under § 21.031, admission to the public schools was not limited to residents who intend to remain indefinitely in Texas. *Martinez*, 103 S. Ct. at 1850-51 (Marshall, J., dissenting). He noted, however, that in 1977 § 21.031 was amended to exclude children who did not reside with a parent or legal guardian, unless the child could show that his presence in the district was not for the reason of obtaining a free public education. *Id.* at 1850 n.11 (Marshall, J., dissenting).

[112] *Martinez*, 103 S. Ct. at 1851 (Marshall, J., dissenting). Justice Marshall noted that the Court has a history of "striking down state statutes which create a presumption that particular classes of individuals are not residents because of either where they live in the State, Evans v. Cornman, 398 U.S. 419 (1970), or what jobs they hold." *Id.; see* Carrington v. Rash, 380 U.S. 89 (1965).

[113] *See Martinez*, 103 S. Ct. at 1852 (Marshall, J., dissenting).

[114] *Id.* Justice Marshall explained that the statute denies a free education to those who could be classified as residents under traditional tests of residence. *Id.*

[115] *Id.* Justice Marshall pointed out that this was the position he had adopted in his dissenting opinion in *Rodriguez*, 411 U.S. at 99 (Marshall, J., dissenting), and Dandridge v. Williams, 397 U.S. 471, 520-21 (1970). *Martinez*, 103 S. Ct. at 1852 (Marshall, J., dissenting).

[116] *Martinez*, 103 S. Ct. at 1853 (Marshall, J., dissenting).

[117] *Id.* Justice Marshall found that the child can reside in the state "for *any other reason*, no matter how ephemeral" and receive a free education as long as the sole motivation is not to receive this education. *Id.* (emphasis in original).

[118] *Id.* He pointed out, for example, that under the Texas statute, the state would allocate funds for educating a child who is only in the district for six months for health reasons but will not fund the education of a child who plans to remain until his education is complete. *Id.*

Finally, Justice Marshall found that the classification did not advance the state's asserted interest in preserving the quality of education by ensuring a stable student population.[119] Finding no substantial evidence of any existing administrative problems caused by the migration of school children, the Justice objected to the state's reliance on a "vague [and] unsubstantiated fear."[120] The dissent also reasoned that the state could not justify the statute as a means of controlling interdistrict migration since the statute was not enacted to discourage this type of movement.[121]

With its decision in *Martinez v. Bynum*,[122] the Supreme Court has retreated from the enlightened position on education it took in *Plyler v. Doe*,[123] wherein the Court acknowledged the necessity of educating all persons within United States borders.[124] In *Plyler*, the Court invalidated a section of the same Texas statute at issue in *Martinez* because it absolutely deprived a group of children the right to receive a primary education.[125] In making this determination, the Court relied on the fact that the group burdened by the statute was "sensitive,"[126] and the interest denied was "special."[127] Although the same group and the same interest were at issue in *Martinez*, the Court failed to consider them.

In both *Plyler* and *Martinez* the Court was presented with a classification which burdened an innocent group of children.[128] The

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[119] *Id.*

[120] *Id.*

[121] *Id.* at 1853-54 (Marshall, J., dissenting). In considering the issue of interstate movement, Justice Marshall noted that the state had presented no evidence that this type of movement caused troublesome fluctuations in the student population. *Id.* at 1854 (Marshall, J., dissenting).

[122] *Id.* at 1838.

[123] *Plyler*, 102 S. Ct. at 2382.

[124] *Id.* at 2402. Although the Court refused to term the right to education fundamental, it did maintain that "[i]f the State is 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." *Id.* The Court manifested its heightened regard for education by adopting an intermediate level of scrutiny to review the statute instead of the low level scrutiny utilized in *Rodriguez*.

[125] *Id.* at 2304. In *Plyler*, the Court invalidated §§ 21.031(a) and (b), which required that a child be an American citizen or legally admitted alien in order to qualify for free public education. *Id.*

[126] *Id.* at 2396. The Court noted that children are a group who " 'can affect neither their parents' conduct nor their own status.' " *Id.* (citing Trimble v. Gordon, 430 U.S. 762, 770 (1977)).

[127] *Id.* at 2397. The Court observed that while education is not a fundamental right, it is different from some mere government benefit. *Id.*

[128] In *Plyler*, the group of innocent children who were burdened by the terms of the statute were the children of aliens who had illegally entered the United States. *Id.* at 2389. In *Martinez*, the group of children who were burdened by the terms of the statute were American-born citizens whose parents were Mexican citizens still residing in Mexico. *Martinez*, 103 S. Ct. at 1839-40.

Plyler Court viewed the exclusion from free public school of the children of illegal aliens as a penalty imposed upon the children because of their presence in the country.[129] Recognizing that a child's presence in this country could be attributed solely to his parents' illegal entry,[130] the *Plyler* Court concluded that "[placing] the onus of a parent's misconduct . . . [on] . . . his children does not comport with fundamental conceptions of justice."[131]

The *Martinez* Court, however, did not even acknowledge that subsection (d) of the statute had its primary effect on an innocent group of children. This subsection excludes a student from tuition-free public school if his parents reside outside the school district and he is within the district "for the primary purpose of attending the public free schools."[132] It is apparent that the effect of the statute is to penalize children who are natural-born American citizens and whose parents are citizens and residents of Mexico. As American citizens these children have the right to attend school in the United States tuition-free, although their parents do not possess the same right.[133] By excluding such children from school, the state in effect penalizes them for their parents' decision to remain citizens and residents of Mexico.

Significantly, both *Plyler* and *Martinez* involved statutes which operated to *absolutely* deny certain classes of children access to an

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[129] *Plyler*, 102 S. Ct. at 2396.

[130] *Id.*

[131] *Id.*; *see* Trimble v. Gordon, 430 U.S. 762, 770 (1977) (statute which discriminates against illegitimate children for wrongful acts of their parents is invalid); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) (imposing disabilities on child for acts committed by his parents "is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility and wrongdoing").

[132] TEX. EDUC. CODE ANN. § 21.031(d). For the text of the statute, see *supra* note 6.

[133] Podea v. Marshall, 83 F. Supp. 216 (D.C.N.Y. 1949) (child born in United States is citizen although his parents are aliens), *rev'd on other grounds*, 179 F.2d 306 (2d Cir. 1950); *In re* Gogal, 75 F. Supp. 268 (D.C. Pa. 1947) (by mandate of 14th amendment, person born in United States is citizen, regardless of citizenship of his parents); *Ex Parte* Hing, 22 F.2d 554 (D.C. Wash. 1927) (Congress is without authority to restrict effect of birth in the United States as making one a citizen).

As a citizen of the United States, the plaintiff is entitled to protection by the 14th amendment, which provides, in pertinent part, that:

> 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 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 to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. Denying the plaintiff the right to a tuition-free public education, while providing all other children in the state with an education, amounts to a violation of equal protection. *See Plyler*, 102 S. Ct. at 2382.

education.[134] Although the *Plyler* Court did not find the right to an education to be fundamental, the Court did note its importance in maintaining our basic institutions, and in preparing individuals to function effectively in society. Moreover, the *Plyler* Court recognized that a denial of education will impose "a lifetime of hardship"[135] on those so denied by branding them with "the stigma of illiteracy [which] will mark them for the rest of their lives."[136] For this reason, the Court refused to uphold a state law which would encourage the growth of a "subclass of illiterates, . . . surely adding to the problems and costs of unemployment, welfare and crime."[137] Clearly, the Court's underlying assumption was that although the children who would be denied an education were residing in the country illegally, they would probably remain here throughout their adulthood.[138]

The *Martinez* Court ignored the harsh implications of a statute which relieves a state of its obligation to educate all persons within its borders by focusing instead on the validity of the residence requirement contained in the statute.[139] By characterizing section 21.031(d)

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[134] In *Plyler*, §§ 21.031 (a), (b), and (c) of the Texas Education Code excluded any child who was not an American citizen or legally admitted alien from tuition-free public school.

In *Martinez*, § 21.031(d) operated to absolutely deprive a child, such as the plaintiff, of an education if the child resided in the school district with a person other than a parent or legal guardian, and resided in the district for the primary purpose of attending school there tuition-free.

[135] *Plyler*, 102 S. Ct. at 2398-99.

[136] *Id.* at 2398.

[137] *Id.* at 2402.

[138] *Id.* at 2399-400.

[139] In examining the validity of the residence requirement contained in the Texas statute, the Court applied what it referred to as the "minimum standard" for determining residence—physical presence and an intention to remain. *Martinez*, 103 S. Ct. at 1844. *But see* United States v. Scott, 472 F. Supp. 1073, 1079 (N.D. Ill. 1979) (residence may be established by mere physical presence.) More often, however, an intent to remain standard is utilized to determine an individual's domicile. *See* Texas v. Florida, 306 U.S. 398 (1938) (domicile is established by actual presence coupled with the intent to make one's home in the place); Williamson v. Osenton, 232 U.S. 619, 624 (1914) (domicile requires "the absence of any intention to live elsewhere").

In the context of primary level education, the state courts have not utilized a domicile test to determine a child's eligibility to receive a tuition-free education. Rather, most courts have adopted a residence standard which requires merely that the child or parent live in the school district. *See supra* notes 62-65 and accompanying text.

Moreover, the Court erred in adopting an intent to remain standard since the Texas residence requirement does not even refer to this standard. *See supra* note 2 and accompanying text. In fact, most states have not incorporated an intent to remain standard into their residence requirement for receiving a primary education. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-823 (1983); ARK. STAT. ANN. § 80-1501 (Supp. 1983); CAL. EDUC. CODE § 48200 (West 1982). The majority cited only two states which have included an intent to remain standard in their statutes which provide for a free primary school education, Colorado (COLO. REV. STAT. § 22-1-102 (2)(g) (1973) and Connecticut (CONN. GEN. STAT. 10-253(d) (Supp. 1981)).

as a bona fide residence requirement, the Court was able to establish the statute's validity without addressing its deleterious effects on an innocent group of children.

In the case of a child who resides in Texas with his parents or legal guardian, the statute operates fairly. Under the terms of section 21.031(b) the child, even though he may be a Mexican citizen illegally in the United States, will be entitled to attend public school tuition-free in the district where he resides with a parent or legal guardian. If this child moves to another school district to reside with a relative in order to gain admission to public school there, the statute operates to exclude him, since he does not reside with a parent or legal guardian and his primary purpose for residing there is to attend school.[140] The exclusion of the child from public school in this district may result in his returning to the district in which his parents reside, where he will be able to resume his education.

In the case of a child such as the petitioner in *Martinez*, however, expulsion from school for not satisfying the Texas residence requirement will result in an absolute denial of access to a primary education in the United States. Since the child's parents reside in Mexico, the child, even though an American citizen, will be entitled to a tuition-free public education only if he can establish a purpose for residing in the district other than to receive a free education.[141] Otherwise, the child will be forced to return to Mexico in order to resume his education. In effect, the statute operates to deprive children so situated of a free public school education. Thus, the disturbing effect of *Plyler* and *Martinez* is that although these decisions establish the right of aliens illegally residing in this country to receive a free public education, they deny a young American citizen the same right simply because his parents choose not to illegally migrate to the United States and take up residence here.[142]

In *Martinez*, the high regard for education the Court expressed in *Plyler v. Doe* has been diminished. Although a residence requirement remains a valid means of regulating the distribution of state benefits and services, it should never operate to absolutely deny a disadvantaged group of children the opportunity to obtain an education. After

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[140] *See supra* note 6.

[141] *Id.*

[142] The Court has recognized that all persons, citizens and aliens, are entitled to protection by the due process clause of the 14th amendment. *See* Matthews v. Diaz, 426 U.S. 67, 78 (1975); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

recognizing the obligation of a state to educate aliens who illegally reside in this country, it follows that the Court should recognize a related state obligation to educate American-born citizens who reside within its borders.

Jennine DiSomma