

Symposium on The New Judicial Federalism: A New Generation

Illegal Immigrants and Public Education: Is There a Right to the 3 R's?

Lora L. Grandrath

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Lora L. Grandrath, *Illegal Immigrants and Public Education: Is There a Right to the 3 R's?*, 30 Val. U. L. Rev. 749 (1996).

Available at: <https://scholar.valpo.edu/vulr/vol30/iss2/11>

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



ILLEGAL IMMIGRANTS AND PUBLIC EDUCATION: IS THERE A RIGHT TO THE 3 Rs?

To the shopworn cliché that the United States is a nation of immigrants must be added the observation that our nation is also becoming home to a second nation of illegal immigrants¹

Schools are falling apart at the seams because they have to cram so many students into them.²

1. EDWIN HARWOOD, *IN LIBERTY'S SHADOW* 1 (1986). Immigration is now at its highest point since the turn of the century. *THE UNIVERSAL ALMANAC* 302, 304 (John W. Wright ed., 1994) (including a chart of the "United States Immigration Rate by Decade, 1820-1992"); Larry Rohter, *Florida Seeks U.S. Aid for Illegal Immigrants*, N.Y. TIMES, Dec. 31, 1993, at A12. The United States accepts 320,000 legal immigrants a year, more than all other nations combined. BRENT A. NELSON, *AMERICA BALKANIZED* 104 (1994); David Hiller, *Immigration Policies of the Reagan Administration*, 44 U. PITT. L. REV. 495, 496 (1983); Bruce Herschensohn, *Immigration - Draw a Line in California*, WALL ST. J., Oct. 26, 1994, at A20.

According to the 1980 census, there were 2.047 million illegal immigrants in the United States. MILTON D. MORRIS, *IMMIGRATION - THE BELEAGUERED BUREAUCRACY* 52 (1985); DAVID WEISSBRODT, *IMMIGRATION LAW AND PROCEDURE* 21 (1989). By April 1994, the United States Census Bureau estimated that the illegal immigrant population ranged from 3.5 million to 4 million. Telephone Interview with Edward Fernandez, Population Division of the United States Bureau of Census (Mar. 6, 1995) [hereinafter Fernandez interview]. In October of 1992, the INS estimated that 3.4 million illegal immigrants resided in the United States. *Id.*

It is important to note that immigration data is often uneven, flawed, and delayed. MORRIS, *supra*, at 10. The same types of data collected by different agencies and studies often do not match one another. *Id.* This is particularly true with illegal immigration data because of the very nature of illegal immigration; illegal immigrants do not usually notify the authorities of their illegal status. *Id.* at 51. As a result, the data that does exist involves "self-serving" and "misleading guesses." *Id.* at 10. No one really knows how many illegal immigrants are currently in the country or how fast their population is growing. HARWOOD, *supra*, at 1; MORRIS, *supra*, at 51; Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*, 44 U. PITT. L. REV. 409, 409 n.1 (1983). Although many estimates have been made based on census data or the annual number of illegal alien apprehensions, the estimates greatly vary. MORRIS, *supra*, at 51. The data cited in this note are used with these caveats in mind.

With reference to immigrants, other synonyms for "illegal" are "undocumented" and "unsanctioned." Although some people prefer the latter two terms over "illegal," due to its negative connotation, the three shall be used interchangeably in this note. The same holds true for "aliens," "immigrants," and "workers." For an explanation of the different terms and their uses, see HARWOOD, *supra*, at preface n.2.

2. A California parent interviewed on *Eye On America* (CBS television news broadcast, Oct. 13, 1994) [hereinafter *Eye On America*]. See Karen Engberg, *Perspectives on Proposition 186*, L.A. TIMES, Oct. 10, 1994, at B7 (stating that public schools have overcrowded classrooms); Ross Farrow, *Business Park Home to New Private School*, SACRAMENTO BEE, Oct. 30, 1994, at N3 (classes are too large); Lorri Grube, *Urban Guerrillas: Re-inventing Our Cities*, CHIEF EXECUTIVE,

I. INTRODUCTION

In the United States, illegal immigration is a significant concern,³ and it has substantially afflicted public schools.⁴ Because of the 1982 United States Supreme Court decision of *Plyler v. Doe*,⁵ states are required to provide illegal immigrant students with a free public education.⁶ Thirteen years after this Court decision, public school systems in states with large illegal immigrant populations are going bankrupt.⁷ These states have stretched finite education

Oct. 1994, at 50 (the classrooms are overcrowded); Robert L. Hardesty, *A Grade-By-Grade Reform for Federal Education Aid*, L.A. TIMES, Dec. 4, 1988, § 5, at 3 (our classrooms are overcrowded); Brice W. Harris, *Measure A Means Better Education, Home Values, Jobs*, FRESNO BEE, Mar. 6, 1995, at B5 (overcrowded facilities lead to a lower quality of education); Carol Moseley-Braun, *Schools Still Need Federal Help*, CHI. TRIB., Mar. 9, 1995, § 1, at 22 (stating that American schools are "crumbling"); *Resident Opposes Boundary Change*, L.A. TIMES, May 12, 1985, § 9, at 2 (predicting that a Los Angeles county public school will soon be just as overcrowded as other Los Angeles public schools). With regard to school expenditures, California, the state with the largest illegal immigrant population, fell from the top of the list to the bottom of the list. *Eye On America*, supra; Fernandez interview, supra note 1. With 300,000 illegal immigrants in school, California pays \$1.5 billion per year. *Eye On America*, supra. See also infra § IV.B.

3. See *Plyler v. Doe*, 457 U.S. 202, 237 (1982) (Powell, J., concurring) (claiming that illegal immigration is a "problem of serious national proportions"); MORRIS, supra note 1, at 45 (stating that no issue in immigration policy, since the early 1970s, has generated as much concern or received as much attention as illegal immigration); Hiller, supra note 1, at 495 (stating that we have lost control of our borders). During the 1960s, the Immigration and Naturalization Service (INS) apprehended 1.6 million illegal immigrants. MORRIS, supra note 1, at 51. That number jumped to 8.3 million apprehensions from 1971-1980. *Id.* Experts estimate that more than 1.2 million people have annually entered the United States legally and illegally in recent years. Rohter, supra note 1, at A12. Cf. THE UNIVERSAL ALMANAC, supra note 1, at 302 (stating that over a half million new legal immigrants come to the United States each year).

4. See Farrow, supra note 2, at N3 (stating that students do not receive the individualized attention that they need because classrooms are too crowded); Karen Nelis, *Retooling Schools Drive to Reform Public Education Shifts into a New Gear in 1990s*, TIMES UNION, Sept. 15, 1994, at A1 (noting that the poor quality of American education has caused American students to perform low on academic performance tests); Diego Ribadeneira, *Some School Head Candidates Had Trouble with Local Boards*, BOSTON GLOBE, Mar. 27, 1991, at 26 (discussing the high dropout rates and the poor standardized test results in American public schools); Shannon Sands, *Letters Due Today on Homework Ban*, L.A. TIMES, Apr. 19, 1990, at B3 (explaining that public school teachers have ceased assigning homework to students because the school district is not paying the teachers enough money).

5. 457 U.S. 202 (1982) (holding that illegal immigrant students have a right to receive a free public education in the United States). See infra notes 178-243 and accompanying text.

6. *Plyler*, 457 U.S. at 230.

7. The Heritage Foundation estimated that it cost \$3.9 billion to educate illegal immigrants in the United States in 1992. William Booth, *Florida Plans to Sue U.S. Over Illegal Immigrants*, WASH. POST, Dec. 30, 1993, at A1. See Tom Gerety, *Children In the Labyrinth: The Complexities of Plyler v. Doe*, 44 U. PITT. L. REV. 379, 396 (1983) (in the case *Plyler v. Doe*, Texas stated that its educational services were "burdened to the point of collapse by the flow of illegal alien children"); George J. Church, *Send Back Your Tired, Your Poor . . .*, TIME, June 21, 1993, at 26 (quoting an aide to a California assemblyman, "The state is broke.") [hereinafter *Send Back Your*

resources beyond the limit.⁸ Furthermore, taxpayers are opposed to educating so many illegal immigrant students when doing so adversely affects the quality of public education that other students receive.⁹ In response, Texas and California have passed laws that prohibit illegal immigrants from receiving a free public education.¹⁰ Other states have also tried suing the federal

Tired]; Engberg, *supra* note 2, at B7 (explaining that limited budgets are adversely affecting public education); Harris, *supra* note 2, at B5 (stating that the public schools have leaky roofs, peeling paint, and antiquated heating and plumbing systems); Robert A. Jordan, *Needed: A New School Board*, BOSTON GLOBE, Aug. 12, 1989, at 17 (explaining that the Boston public school system was bankrupt); *Michigan Ends Property Taxes for Schools, Seeks Alternatives*, CHI. TRIB., July 29, 1993, at 8 (stating that one school district in Michigan ended the school year early because it had exhausted its budget). *But see* Booth, *supra*, at A1 (explaining that Congress set aside \$35 million for an "immigration emergency" in 1990). However, an INS spokesman doubts the money has ever been released because the President has not declared such an emergency, nor has it been defined. *Id.* "What's an emergency? Because we have overcrowded schools - is that an emergency?" *Id.* (quoting INS spokesman Richard Kenney).

Although many states have illegal immigrants among their populations, only a handful of states account for a majority of the illegal immigrant burden, namely the border states of California, Arizona, Texas, and Florida. Fernandez interview, *supra* note 1. See Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121, 121, 124 (1994) (explaining that immigrants do not usually spread evenly within countries and that the distribution distortion will be greater the larger the nation is). Other states with large illegal immigrant populations include Illinois, New York, and New Jersey. Tom Morganthau, *America: Still a Melting Pot?*, NEWSWEEK, Aug. 9, 1993, at 20-21; Adam Pertman, *Mexico's Economy May Jeopardize U.S. Immigration Gains*, BOSTON GLOBE, Jan. 14, 1995, at 3; Rohter, *supra* note 1, at A12; Fernandez interview, *supra* note 1. According to the most recent INS data, 1,625,000 illegal immigrants reside in California; 500,000 reside in New York; 400,000 in Texas; 200,000 in Florida; 125,000 in New Jersey; and 75,000 live in Arizona. Pertman, *supra*, at 3. See *Congressional Leaders to Push for Change in Employer Sanctions*, DAILY REP. FOR EXECUTIVES, Mar. 8, 1995, at A45 (noting Senator Dianne Feinstein's view that the inequities would be much less drastic if illegal immigrants were "spread out evenly over the country") [hereinafter *Change in Employer Sanctions*]. For additional data on the state immigrant populations, see THE UNIVERSAL ALMANAC, *supra* note 1, at 304-05 (including charts of the "Foreign-Born Population By State, 1990" and the "Five States With the Highest Percentage of Foreign-Born Population, 1990").

8. See Hiller, *supra* note 1, at 496-97 (stating that illegal immigrants place an additional pressure on society and the government). See *infra* § IV.B.

9. See *Change in Employer Sanctions*, *supra* note 7, at A45 (California Senator Dianne Feinstein explaining that California citizens are fed up with illegal immigration); Dorothy Hove, *Take Back Your Poor*, TIME, July 12, 1993, at 5 (claiming American taxpayers are tired of supporting illegal immigrants); *Send Back Your Tired*, *supra* note 7, at 26 (stating that Americans are angry that they have to pay to educate illegal immigrants who have no right to be in the country). "We want illegal immigrants deported, not supported." Hove, *supra*, at 5. "We take better care of them than of our own people." *Send Back Your Tired*, *supra* note 7, at 26. See also Bob Sipchen, *Addressing State of Education*, L.A. TIMES, Nov. 15, 1990, at E14 (explaining that middle-class parents are removing their children from public schools and enrolling them in private schools in search of a higher quality education). See *infra* notes 319-34 and accompanying text.

10. In November of 1994, California citizens overwhelmingly passed a referendum to exclude illegal immigrants from public schools, welfare payments, and non-emergency health care. David Cole, *A Miserable Year for Immigrants' Rights*, CONN. L. TRIB., Jan. 9, 1995, at 22. See Plyler v. Doe, 457 U.S. 202 (1982) (invalidating a Texas statute that prohibited illegal immigrant students

government to relieve themselves of this burden, but they have been unsuccessful.¹¹

Therefore, it is time for Congress to relieve these states from this financial burden.¹² Although the ideal solution would be to solve illegal immigration generally, it is unlikely that Congress will find such a solution in the near future.¹³ In the meantime, however, Congress needs to give relief to the public school systems.¹⁴ Thus, Congress should enable states to restrict illegal immigrant students from enrolling in and attending public schools.¹⁵

Currently, Congress prohibits illegal immigrants from receiving several types of benefits, including food stamps,¹⁶ Supplemental Security Income,¹⁷

from receiving a free public education). *See also infra* § IV.A. & C.

11. *See infra* § IV.B.1.

12. *See* Patrick T. Reardon, *Divided State Doles Out Unequal Education for All*, CHI. TRIB., Oct. 23, 1994, § 1, at 13 (noting that Illinois schools and school children have been burdened by inadequate financing). *But see* PARVIZ ASHEGHIAN, *INTERNATIONAL ECONOMICS* 457 (1995) (claiming that illegal immigrants pay more in taxes than they receive in benefits, and therefore are not a financial burden). Tax statistics have been used to support both sides of the illegal immigrant burden/benefit debate. However, the issue of taxes is beyond the scope of this note.

13. Illegal immigration is a phenomenon based on a variety of socioeconomic and demographic problems, commonly called "push-pull factors." ASHEGHIAN, *supra* note 12, at 450; JOHN A. JOANNES ET AL., *THE IMMIGRATION REFORM AND CONTROL HANDBOOK* 2 (1987); MORRIS, *supra* note 1, at 62-63; Hiller, *supra* note 1, at 498; John E. Huerta, *Immigration Policy and Employer Sanctions*, 44 U. PITT. L. REV. 507, 514-15 (1983); Spiro, *supra* note 7, at 124. Push factors are those forces that encourage people to leave one country and migrate to another. ASHEGHIAN, *supra* note 12, at 450; MORRIS, *supra* note 1, at 63; Leonel J. Castillo, *Remarks On Immigration Policy: A Time to Think Small*, 44 U. PITT. L. REV. 485, 490 (1983). They include civil disorder, high unemployment, war, rapid population growth, and a poor economy. ASHEGHIAN, *supra* note 12, at 450; JOANNES ET AL., *supra*, at 2; MORRIS, *supra* note 1, at 63-72; Castillo, *supra*, at 491; Huerta, *supra*, at 509, 514.

Pull factors are forces that attract immigrants to come to a country. ASHEGHIAN, *supra* note 12, at 450; MORRIS, *supra* note 1, at 63. These factors include a strong economy, employment opportunities, freedom of religion, political stability, and immigrant-supportive cultures. ASHEGHIAN, *supra* note 12, at 450; JOANNES ET AL., *supra*, at 2; MORRIS, *supra* note 1, at 63, 73-82; Huerta, *supra*, at 514-15. Because there are no quick solutions to weak economies and rapid population growth, there is no simple solution to illegal immigration. Huerta, *supra*, at 515, 520.

14. *See* Reardon, *supra* note 12, at 13 (explaining that inadequate school funds decrease the educational opportunities available to students); Sipchen, *supra* note 9, at E14 (noting the poor quality of American public education and the need for improved public school systems).

15. *See infra* § V.

16. 7 U.S.C. § 2015(f) (1988); Plyler v. Doe, 457 U.S. 202, 251 (1982); WEISSBRODT, *supra* note 1, at 315-17; Janet M. Calvo, *Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs*, 16 N.Y.U. REV. L. & SOC. CHANGE 395, 407 (1988); Hugh Dellios, *Immigration Issue Complicated by Many Immigrant Categories*, CHI. TRIB., Feb. 19, 1995, § 1, at 4. *See infra* note 299 and accompanying text.

Aid to Families with Dependent Children,¹⁸ and Medicaid.¹⁹ Furthermore, Congress has also enacted a law to prohibit employers from hiring illegal immigrants.²⁰ Congress has justified these exclusions because it believes that such assistance should: (1) be limited to aliens whose residence is validated by federal immigration law; and (2) not place undue burdens on states and localities.²¹ Because illegal immigrants currently receive free public education, and because the cost to educate illegal immigrants places a substantial economic burden on states and localities,²² Congress should consistently pursue its objectives and enable states to regulate illegal immigration as it affects public education.²³

Therefore, this Note asserts that Congress, under its power to regulate immigration, should pass a statute which enables states to prohibit illegal immigrant students from receiving a free public education, and proposes the congressional statute.²⁴ In addition, this Note proposes a model state statute to illustrate how a state may implement Congress' immigration regulation.²⁵ On the surface, the holding in *Plyler v. Doe* appears detrimental to this proposal because a state would be implementing immigration law.²⁶ However, procedurally, a state would be able to implement such regulation because Congress would have expressly given the states the authority to do so.²⁷ Additionally, the states' interests in protecting the financial stability of public

17. 42 U.S.C. §§ 1381-1383 (1988 & Supp.V); *Plyler*, 457 U.S. at 251; WEISSBRODT, *supra* note 1, at 316; Calvo, *supra* note 16, at 402, 416; Dellios, *supra* note 16, at 4. See *infra* note 301 and accompanying text.

18. 42 U.S.C. §§ 610-615 (1988); *Plyler*, 457 U.S. at 251; WEISSBRODT, *supra* note 1, at 315-17; Calvo, *supra* note 16, at 402, 420; Dellios, *supra* note 16, at 4. See *infra* note 302 and accompanying text.

19. 42 U.S.C. §§ 1396-1396s (1988 & Supp. V); *Plyler*, 457 U.S. at 251; WEISSBRODT, *supra* note 1, at 316-17; Calvo, *supra* note 16, at 402, 418-19; Dellios, *supra* note 16, at 4. See *infra* note 303 and accompanying text.

20. In 1986, Congress passed the Immigration Reform and Control Act (IRCA). For a discussion of IRCA, see *infra* § III.A.

21. Calvo, *supra* note 16, at 421.

22. In terms of educating illegal immigrant students, the states and localities are significantly affected because they pay for a substantial portion of public education. Sam Peltzman, *The Political Economy of the Decline of American Public Education*, 36 J.L. & ECON. 331, 346-47 (1993). See THE UNIVERSAL ALMANAC, *supra* note 1, at 235 (including a chart of "Public Education Expenditures, 1940-93"). The federal government, on the other hand, contributes only a small percentage. THE UNIVERSAL ALMANAC, *supra* note 1, at 235; Peltzman, *supra*, at 346-47.

23. See *infra* notes 298-315 and accompanying text.

24. See *infra* § VI.

25. Because states regulate education, a state is the proper entity to create a statute that sets forth public school enrollment and attendance policies. See *infra* § VI.

26. In *Plyler*, the Supreme Court held that states could not exclude illegal immigrant children from public schools. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

27. See *infra* § VI.

school systems are now significant enough to distinguish between lawful resident students and illegal immigrant students.²⁸

However, before one can understand illegal immigration's adverse effects on public schools, one must first understand the problem of illegal immigration. Therefore, Section II of this Note will briefly explain the history of immigration law,²⁹ the development of illegal immigration, and some of the problems the Immigration and Naturalization Service (INS) confronts when enforcing immigration law.³⁰ Section III will discuss illegal immigration by further explaining what the federal government has done in attempting to curb the problem,³¹ and will explain why such solutions have been ineffective.³² Section IV will discuss how illegal immigration has adversely affected the states and public education³³ and how the states have reacted to such adversity.³⁴ Then, Section V will explain why the federal government needs to act to relieve the states from their economic burdens and to protect public school systems from financial ruin.³⁵ Finally, Section VI will propose a federal statute that enables states to prohibit illegal immigrant students from receiving a free public education, and a state model statute to demonstrate how a state may implement and enforce the federal regulation.³⁶ These suggestions are meant to function as guidelines for Congress, the INS, the courts, the states, and school districts so that education can be limited to immigrants whose residence is validated by federal immigration law, thereby relieving states and localities from the burden of educating illegal immigrants.

II. THE BACKGROUND OF ILLEGAL IMMIGRATION

The history of the United States is based on immigrants traveling to America to work and make a better life for themselves and their families.³⁷

28. Due to changed circumstances in illegal immigration and overcrowding in public schools, states with large illegal immigrant populations have compelling interests to restrict illegal immigrant students from attending public schools. *See infra* notes 283, 290-97 and accompanying text.

29. This note, however, does not attempt to discuss the problem of refugees.

30. *See infra* notes 44-120 and accompanying text.

31. *See infra* notes 124-63 and accompanying text.

32. *See infra* notes 142-49, 162-63 and accompanying text. *See also Plyler v. Doe*, 457 U.S. 202, 237 (1982) (Powell, J., concurring) (stating that the federal government has provided ineffective leadership in terms of illegal immigration).

33. *See infra* notes 171-246 and accompanying text.

34. *See infra* notes 247-75 and accompanying text.

35. *See infra* notes 277-355 and accompanying text.

36. *See infra* notes 356-73 and accompanying text.

37. ALEJANDRO PORTES & RUBEN G. RUMBAUT, IMMIGRANT AMERICA at xvii (1990); THE PROBLEM OF IMMIGRATION 7 (Steven Anzovin ed., 1985).

For this reason, the United States has maintained a liberal immigration policy.³⁸ At one point, however, the United States began to retract some of its generosity by excluding particular "undesirable" immigrants, and limiting the number of immigrants from certain regions of the world.³⁹ Such restrictions did little to prevent the flow of immigrants, however, and a new phenomenon began: illegal immigration.⁴⁰ As economic and political conditions deteriorated in other countries, many immigrants could not afford to wait for the United States government to issue them a visa to lawfully enter the country.⁴¹ Thus, many immigrants have entered the United States illegally.⁴² In recent decades, illegal immigration has become a serious problem, and it is one that the federal government is unable to effectively control.⁴³

A. *The Federal Government's Plenary Power over Immigration*

During the American colonial period, federal legislation regarding immigration was essentially void for two reasons.⁴⁴ First, for approximately 100 years, it had not been determined whether the Constitution empowered the federal government to regulate immigration.⁴⁵ Second, the United States favored unrestricted immigration because of the unsettled frontier and the large demand for labor.⁴⁶ Although the states had their own individual immigration

38. STEPHEN H. LEGOMSKY, *IMMIGRATION LAW AND POLICY* 108 (1992). See George Will, *Illegal Immigrants Should Be a Local Concern*, PRESS-CITIZEN, Nov. 1, 1994, at A11 (explaining that when Congress ratified the Fourteenth Amendment, and for many decades thereafter, the United States had open borders). See also *infra* notes 44-46 and accompanying text.

39. See *infra* notes 64-72 and accompanying text.

40. WEISSBRODT, *supra* note 1, at 12. See *infra* note 71 and accompanying text.

41. WEISSBRODT, *supra* note 1, at 12. See *infra* note 72 and accompanying text.

42. See *supra* notes 1, 3 and accompanying text.

43. See *infra* §§ II.D. - III.B.

44. MORRIS, *supra* note 1, at 89 (stating that the federal government was inactive regarding immigration laws prior to 1876); WEISSBRODT, *supra* note 1, at 3; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626 (1992).

45. WEISSBRODT, *supra* note 1, at 3, 39. See LEGOMSKY, *supra* note 38, at 7 (explaining that there is no dispositive answer to where the federal government obtains the power to regulate immigration); Spiro, *supra* note 7, at 122 (discussing foreign relations as a basis for federal control of immigration).

46. WEISSBRODT, *supra* note 1, at 4. Currently, Americans have a dilemma. On the one hand, the United States wants to keep immigration open, but on the other hand, Americans want to regulate the entry and residence of immigrants. HARWOOD, *supra* note 1, at 1; MORRIS, *supra* note 1, at 3, 89 (declaring that these conflicting immigration views have led to "the government's casual approach to enforcement, the fragmented character of the immigration bureaucracy, and the lack of clear and consistent enforcement objectives"); NELSON, *supra* note 1, at 114 (stating that Americans favor immigration control but lack the time to do anything about illegal immigration); Hull, *supra* note 1, at 410. In terms of illegal immigration, Brent Nelson claims that the "human flood" will continue to enter the United States as long as American citizens tolerate it. NELSON, *supra* note 1, at 10.

policies under the Articles of Confederation,⁴⁷ the Constitution delegated to the Congress broad power to regulate foreign commerce.⁴⁸ However, it was not until 1875 that the United States Supreme Court unanimously held that state regulation of immigration was unconstitutional because it infringed on Congress' power to control foreign commerce.⁴⁹ By the 1880s, the Court decided that Congress had the sole authority to control immigration,⁵⁰ a power that is inherent in national sovereignty.⁵¹ Since that decision, the Court has given

Now, however, Americans favor reducing immigration. *Send Back Your Tired*, *supra* note 7, at 26. In a 1992 poll, 70% of those Americans questioned said they want immigration reduced. *Id.*; Hiller, *supra* note 1, at 495 (91% of Americans want "an all-out effort" to stop illegal immigration). In addition to lost jobs and the high cost of providing illegal immigrants with benefits, terrorism has also affected America's demand for decreased immigration. George J. Church, *A Case of Dumb Luck*, TIME, Mar. 15, 1993, at 26. The bombing of the World Trade Center was at the hands of illegal immigrants, including Mohammed A. Salameh, an illegal alien from Jordan, who rented the van that carried the bomb. *Id.*; Doris Meissner, *Putting the "N" Back into INS: Comments on the Immigration and Naturalization Service*, 35 VA. J. INT'L L. 1, 2 (1994). *But see* Steven V. Roberts, *Behind the Wire, Dreams Won't Die*, U.S. NEWS & WORLD REP., Sept. 12, 1994, at 8 (claiming that United States immigration policy changes depending on the economy and political conditions in the United States).

47. WEISSBRODT, *supra* note 1, at 3-4.

48. *Id.* at 4; Gerety, *supra* note 7, at 382. See U.S. CONST. art. I, § 8, cl. 3 (providing that Congress shall "regulate Commerce with foreign Nations."); U.S. CONST. art. I, § 8, cl. 4 (stating that Congress shall "establish an uniform Rule of Naturalization"). For a complete list of the several sources from which Congress obtains the power to regulate immigration, see LEGOMSKY, *supra* note 38, at 7-22; WEISSBRODT, *supra* note 1, at 38-43.

49. *Henderson v. Mayor of New York*, 92 U.S. (2 Otto) 259 (1875); MORRIS, *supra* note 1, at 90; WEISSBRODT, *supra* note 1, at 4. Prior to its 1875 decision, the Supreme Court invalidated state immigration regulations in a series of decisions. LEGOMSKY, *supra* note 38, at 8. In the *Passenger Cases*, 48 U.S. (7 How.) 283 (1849), the Supreme Court struck down both a New York and a Massachusetts statute that imposed a head tax on specified categories of arriving immigrants. LEGOMSKY, *supra* note 38, at 8; WEISSBRODT, *supra* note 1, at 39; Motomura, *supra* note 44, at 1632. Four of the Justices reasoned that the state actions intruded upon the federal power to regulate foreign commerce. LEGOMSKY, *supra* note 38, at 8.

50. WEISSBRODT, *supra* note 1, at 7. In the *Head Money Cases*, 112 U.S. 580 (1884), the Supreme Court unanimously upheld a federal statute that regulated immigration. LEGOMSKY, *supra* note 38, at 9; WEISSBRODT, *supra* note 1, at 39; Motomura, *supra* note 44, at 1633. The Court reasoned that the statute was an authorized exercise of Congress to regulate foreign commerce. LEGOMSKY, *supra* note 38, at 9.

51. *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889); HARWOOD, *supra* note 1, at 2; LEGOMSKY, *supra* note 38, at 17-18; WEISSBRODT, *supra* note 1, at 39-40, 42; Hiller, *supra* note 1, at 500; Hull, *supra* note 1, at 431; Motomura, *supra* note 44, at 1633-34; M. Kate Curran, Note, *Illegal Aliens, The Social Compact and the Connecticut Constitution*, 13 BRIDGEPORT L. REV. 331, 333-34 (1993). For a historical view of the congressional and presidential roles in immigration policy, see MORRIS, *supra* note 1, at 33-43 (claiming that a partnership between the two branches has developed in regulating immigration).

great deference to Congress' plenary power over immigration.⁵² Thus far, there have been no successful challenges against federal laws excluding classes of immigrants or deported resident aliens.⁵³ Therefore, not only does Congress have plenary power over immigration,⁵⁴ it has also received little interference from the Supreme Court in controlling immigration.⁵⁵

B. Residual State Power

Because the Supreme Court has decided that the federal government may regulate immigration,⁵⁶ the question arises whether states may also legislate in this area. Generally, the states may not regulate immigration because federal law usually preempts state immigration laws under the Supremacy Clause.⁵⁷ However, no federal court, including the Supreme Court, has held that all state

52. *Plyler v. Doe*, 457 U.S. 202, 224-25 (1982); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *De Canas v. Bica*, 424 U.S. 351, 354 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 765-66 (1972). See *Graham v. Richardson*, 403 U.S. 365, 378 (1971) (stating that the regulation of aliens is "constitutionally entrusted to the Federal Government"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952), which stated:

[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference;

Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (holding that the federal government has "broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization"); *Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320, 325 (1909); WEISSBRODT, *supra* note 1, at 43-44, 49; *Motomura*, *supra* note 44, at 1626. *But see* MORRIS, *supra* note 1, at 44 (explaining that state and local governments are becoming more active participants in forming immigration policy because of their concern regarding the costs of immigrant public services); See generally *Increasing Costs of Illegal Immigration: Hearing Before the Senate Committee on Appropriations*, 103d Cong., 2d Sess. (1994) (illustrating the states' frustration with the federal government) [hereinafter *Increasing Costs Hearing*].

53. WEISSBRODT, *supra* note 1, at 43; *Hull*, *supra* note 1, at 430 n.86.

54. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); HARWOOD, *supra* note 1, at 21; *Hull*, *supra* note 1, at 431; *Motomura*, *supra* note 44, at 1626; *Curran*, *supra* note 51, at 333-34. See WEISSBRODT, *supra* note 1, at 42 (noting that the federal government's limitless authority over immigration stems from an "undefined and undefinable" source). However, according to Hiroshi *Motomura*, immigration law has reached a point where courts can no longer defer to Congress' plenary power. *Motomura*, *supra* note 44, at 1627.

55. WEISSBRODT, *supra* note 1, at 49-50; *Motomura*, *supra* note 44, at 1626.

56. See *supra* note 50 and accompanying text. See also WEISSBRODT, *supra* note 1, at 38, 42, 44, 49-50 (stating that the Supreme Court has generally upheld federal statutes regulating immigration).

57. U.S. CONST. art. VI, cl. 2; WEISSBRODT, *supra* note 1, at 38, 45-46 (states may not create legislation that "directly impinges" on congressional power). For example, in *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941), the Supreme Court held that the Federal Alien Registration Act preempted the Pennsylvania alien registration statute. *Gerety*, *supra* note 7, at 384.

law concerning immigration is preempted by federal law.⁵⁸ Whether federal law preempts state immigration law depends on the scope of both the federal and state action.⁵⁹ Under *De Canas v. Bica*,⁶⁰ states may fill in the gaps of federal immigration law so long as the state law does not conflict with federal policy.⁶¹ Therefore, Congress' plenary power over immigration is not so broad as to completely exclude states from regulating immigration.⁶² Thus, state statutes may withstand federal preemption if they do not conflict with congressional intent, and if they do not regulate an area already controlled by federal law.⁶³

C. Congress Begins to Restrict Immigration

In 1875, through its plenary power, Congress began to prohibit certain "undesirables" from immigrating to the United States, including convicts, prostitutes, diseased persons, paupers, polygamists, the insane, and anarchists.⁶⁴ In 1882, Congress also passed an Act that imposed a head tax on every immigrant coming to the United States.⁶⁵ The purpose of the tax was to

58. *De Canas v. Bica*, 424 U.S. 351, 355 (1976); WEISSBRODT, *supra* note 1, at 47; Curran, *supra* note 51, at 334.

59. LEGOMSKY, *supra* note 38, at 23. See *Plyler v. Doe*, 457 U.S. 202, 225-26 (1982) (explaining that states only have power to legislate with respect to illegal immigrants if the state furthers a legitimate state goal and if the state legislation conforms to federal objectives); *De Canas*, 424 U.S. at 351 (upholding a California statute that prohibited the employment of certain undocumented workers); Curran, *supra* note 51, at 370-71 (explaining that whether a state regulation of aliens is preempted depends on the state government's interests and the purpose served by the state's classification of the aliens).

60. 424 U.S. 351 (1976) (holding that a California statute prohibiting illegal aliens from working was not preempted by federal immigration law). Justice Brennan wrote the opinion of the Court, in which all members joined except Justice Stevens, who took no part in the case. *Id.*

61. *Id.* at 358; WEISSBRODT, *supra* note 1, at 48; Gerety, *supra* note 7, at 386.

62. WEISSBRODT, *supra* note 1, at 49. In fact, state and local governments are becoming more active participants in forming immigration policy because of their concern regarding the costs of immigrant public services. MORRIS, *supra* note 1, at 44. See generally *Increasing Costs Hearing*, *supra* note 52 (discussing the state costs of illegal immigrants). See *infra* § IV.B.

63. *De Canas*, 424 U.S. at 358; WEISSBRODT, *supra* note 1, at 49; Hull, *supra* note 1, at 422-23; Michael J. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections On, and Beyond, Plyler v. Doe*, 44 U. PITT. L. REV. 329, 334-35 (1983). See WEISSBRODT, *supra* note 1, at 23, 48 (explaining that the Immigration Reform and Control Act preempted all state criminal statutes concerning the employment of illegal aliens).

64. WEISSBRODT, *supra* note 1, at 6-8, 122; Hiller, *supra* note 1, at 498. Cf. MORRIS, *supra* note 1, at 55 (stating that the qualitative restrictions began around 1882). According to Edwin Harwood, illegal immigration did not exist until these restrictions were imposed. HARWOOD, *supra* note 1, at 2. For the current list of deportable immigrants, see 8 U.S.C. § 1251 (1994).

65. WEISSBRODT, *supra* note 1, at 7. Until the 1917 Immigration Act, however, Canadians and Mexicans did not have to pay the head tax upon entering the country. HARWOOD, *supra* note 1, at 3.

raise revenue to offset administrative costs.⁶⁶ However, Congress also did not want poor immigrants on the government relief rolls; therefore, the head tax had the effect of deterring the poor from immigrating.⁶⁷

After World War I, the United States favored an isolationist policy and was dissatisfied with the existing quality exclusions.⁶⁸ As a solution, Congress enacted the 1921 Quota Law,⁶⁹ a numerical control that dictated how many immigrants from different regions of the world could immigrate to the United States annually.⁷⁰ However, the new quota system created a new problem: illegal border crossings.⁷¹ Because the United States only admitted a limited number of immigrants each year, many aliens eager to enter the country chose to circumvent the government's approval and crossed the border illegally.⁷²

D. The Immigration and Naturalization Service

In 1952, Congress passed the Immigration and Nationality Act (INA),⁷³ the cornerstone of current immigration law.⁷⁴ In the INA, Congress has maintained the quota system, but has recalculated the numerical limits several

66. MORRIS, *supra* note 1, at 55; WEISSBRODT, *supra* note 1, at 7.

67. WEISSBRODT, *supra* note 1, at 7.

68. LEGOMSKY, *supra* note 38, at 110; WEISSBRODT, *supra* note 1, at 10-11.

69. LEGOMSKY, *supra* note 38, at 110.

70. *Id.*; MORRIS, *supra* note 1, at 95; WEISSBRODT, *supra* note 1, at 11; Lawrence H. Fuchs, *Immigration Policy and the Rule of Law*, 44 U. PITT. L. REV. 433, 433 (1983); Hiller, *supra* note 1, at 498. The quotas remain part of current immigration law. However, Congress has changed the numerical limits several times since it established the quotas. MORRIS, *supra* note 1, at 55, 83; WEISSBRODT, *supra* note 1, at 11-20. See MORRIS, *supra* note 1, at 53-54, 90 (stating that Congress has imposed the annual ceilings in an arbitrary manner, without basing them on the country's ability to absorb the new arrivals, and without considering if the INS was capable of carrying out the duties assigned to it); Hiller, *supra* note 1, at 499 (agreeing that the limits are arbitrary).

71. WEISSBRODT, *supra* note 1, at 12.

72. *Id.* See HARWOOD, *supra* note 1, at 7 (stating that it is no surprise that aliens enter the United States unlawfully because the demand for entry far exceeds the supply of available visas). Visas are an entry document. LEGOMSKY, *supra* note 38, at 4.

73. Pub. L. No. 82-414, 66 Stat. 166 (codified as amended at 8 U.S.C. §§ 1101-1557 (1994)). See generally IMMIGRATION AND NATIONALITY ACT (9th ed. 1992) (including notes and related laws). The INA has been heavily criticized as a complicated law composed of layer upon layer of complex rules, exceptions, and amendments. HARWOOD, *supra* note 1, at xv, 33-37; LEGOMSKY, *supra* note 38, at 1. See WEISSBRODT, *supra* note 1, at 414 (noting that the INA overwhelms the Immigration and Naturalization Service, the agency responsible for implementing the statute). The INA is particularly complicated due to the "barnacled layers of case law that have grown up around the statute over the years." HARWOOD, *supra* note 1, at 33. In 1952, the Immigration and Naturalization Service was faced with enforcing this new, complicated law, but Congress did not supplement the Act with additional personnel or funds. WEISSBRODT, *supra* note 1, at 16.

74. LEGOMSKY, *supra* note 38, at 112; WEISSBRODT, *supra* note 1, at 15; Fuchs, *supra* note 70, at 434.

times.⁷⁵ Congress has also continued the quality control exclusions.⁷⁶ Finally, the INA includes an entrance preference system, prioritizing who may lawfully enter the United States.⁷⁷

The agency charged with implementing and enforcing immigration law is the Immigration and Naturalization Service (INS).⁷⁸ As a bureau of the Department of Justice,⁷⁹ the INS has two objectives: (1) to provide statutorily eligible aliens with benefits and relief under the INA;⁸⁰ and (2) to enforce the civil and criminal provisions of the Act against alien and citizen violators.⁸¹ However, it has been difficult for the INS to achieve either of its goals for several years⁸² because the agency lacks both adequate funding⁸³ and

75. MORRIS, *supra* note 1, at 55; WEISSBRODT, *supra* note 1, at 15; Fuchs, *supra* note 70, at 434.

76. See 8 U.S.C. § 1251 (1994) (listing the types of deportable aliens).

77. MORRIS, *supra* note 1, at 95. The system lists the preferences as follows: unmarried children of United States citizens have first preference; spouses and unmarried children of permanent resident aliens receive second preference; workers with "exceptional ability" and professionals have third preference; other relatives of citizens and aliens are granted fourth and fifth preference; needed workers receive sixth preference; and refugees have seventh preference. WEISSBRODT, *supra* note 1, at 17-18.

78. 8 U.S.C. § 1551 (1994); WEISSBRODT, *supra* note 1, at 61; Hull, *supra* note 1, at 410. The INS was created in 1891. THE UNIVERSAL ALMANAC, *supra* note 1, at 111; HARWOOD, *supra* note 1, at xiv, 2. Prior to June 14, 1940, however, the INS was part of the Department of Labor. WEISSBRODT, *supra* note 1, at 13.

79. 8 U.S.C. § 1551 (1994); THE UNIVERSAL ALMANAC, *supra* note 1, at 111; LEGOMSKY, *supra* note 38, at 4; Gerety, *supra* note 7, at 383.

80. HARWOOD, *supra* note 1, at 26; THE UNIVERSAL ALMANAC, *supra* note 1, at 111. For a description of the services and benefits immigrants may receive under the INA, see HARWOOD, *supra* note 1, at 26-37. *But see* Meissner, *supra* note 46, at 3-5 (emphasizing the need to focus more on the naturalization aspect of the service).

81. HARWOOD, *supra* note 1, at 25; THE UNIVERSAL ALMANAC, *supra* note 1, at 111. See also *Implementation of the Immigration Reform and Control Act of 1986: Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House of Rep. Comm. on the Judiciary*, 99th Cong., 2d Sess. 53-54 (1986) (statement of Alan C. Nelson, Commissioner, INS) (emphasizing the enforcement aspect of the INA) [hereinafter *IRCA Hearing*]. For an explanation of the enforcement procedures under the INA, see HARWOOD, *supra* note 1, at 37-48.

82. The INS complained of increased responsibilities, coupled with insufficient funds, personnel, and facilities as early as the beginning of the 19th century. MORRIS, *supra* note 1, at 90. Seventy years later, little had changed. In 1977, the Chairman of the Subcommittee on Immigration, Naturalization, and International Law of the House Judiciary Committee, stated that the INS was completely incapable of administering and enforcing the provisions of the INA. *Id.* at 88. Other members of Congress and numerous General Accounting Office (GAO) reports have also complained that the INS is not properly equipped, overburdened with work, "deeply demoralized," and in a hopeless situation. *Id.*

83. See *IRCA Hearing*, *supra* note 81, at 56 (INS Commissioner Nelson asking Congress for financial assistance to implement IRCA); Castillo, *supra* note 13, at 487; Hiller, *supra* note 1, at 496, 501; Huerta, *supra* note 13, at 519; Hull, *supra* note 1, at 410; Anonymous Interview with INS Special Agent, in Valparaiso, IN, 9-11 (Jan. 26, 1995) (transcript available in Valparaiso University

personnel.⁸⁴

With more than a million immigrants entering the United States annually,⁸⁵ the INS process centers cannot provide INA benefits in a timely manner.⁸⁶ Instead, the centers have fallen behind, and have become completely backlogged.⁸⁷ In an effort to decrease the numerous back files, the new files are neglected, producing an unending paper chase.⁸⁸ The result is an inefficient agency, unable to adequately assist aliens lawfully in the country.⁸⁹

Likewise, the second objective of the INS has also become very difficult to pursue.⁹⁰ To enforce immigration law, the INS is responsible for detaining

Law Review office) [hereinafter INS Special Agent interview]. Consequently, Congress increased the INS budget by 25% last year. *GOP Will Push for Overhaul of Immigration Employer Sanctions*, DAILY REP. FOR EXECUTIVES, Jan. 31, 1995, at C20 [hereinafter *Overhaul*]. Furthermore, because both administration and Republican leaders favor increased funds for the INS, it is likely that Congress will spare the INS when Congress makes agency budget cuts. *Id.* But see MORRIS, *supra* note 1, at 9 (explaining that "the real test of the government's willingness to finance the immigration bureaucracy is not expressions of intent to increase funding or even generous budget authorizations, but the appropriation of funds earmarked for meeting critical needs.").

84. HARWOOD, *supra* note 1, at 135; MORRIS, *supra* note 1, at 5, 91, 108, 111, 130, 132, 138; Hiller, *supra* note 1, at 501; Huerta, *supra* note 13, at 519; Hull, *supra* note 1, at 410; Booth, *supra* note 7, at A1; Martin Van Der Werf, *Governors Vow Suit Over Costs of Illegal Aliens*, ARIZ. REPUBLIC, Feb. 1, 1994, at A1. According to Milton D. Morris, the gap between the INS' resources and its responsibilities is "striking." MORRIS, *supra* note 1, at 111.

85. Reena Shah Stamets, *The Debate Over Illegal Immigrants*, ST. PETERSBURG TIMES, Mar. 18, 1994, at A1.

86. HARWOOD, *supra* note 1, at 27; MORRIS, *supra* note 1, at 89. For example, the Bureau of Consular Affairs, the agency responsible for issuing visas, is understaffed and is unable to duly process requests for United States visas. HARWOOD, *supra* note 1, at 28-29; MORRIS, *supra* note 1, at 88. Between 1974 and 1982, the Bureau's personnel increased by only 22% while the workload increased 166%. *Id.* at 99. As a result, applicants must wait in long lines to apply for a visa and then must wait several weeks, even months, before the agency processes the application. HARWOOD, *supra* note 1, at 29; MORRIS, *supra* note 1, at 88; Huerta, *supra* note 13, at 519. See INS Special Agent interview, *supra* note 83, at 22 (explaining that immigrants who try to enter the United States legally, and who have the proper paper work, often have their priority date to get a visa pushed back because so many immigrants enter the country illegally).

87. *IRCA Hearing*, *supra* note 81, at 55 (statement of Alan C. Nelson, Commissioner, INS); HARWOOD, *supra* note 1, at 27; MORRIS, *supra* note 1, at 112; T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 253-56 (1983); Huerta, *supra* note 13, at 516-17, 519; Meissner, *supra* note 46, at 3. See also Rudolph W. Giuliani, *Immigration Law Violates Societal Rights*, N.Y.L.J., May 1, 1995, at S1 (stating that the INS is currently able to process less than five percent of the illegal immigrant names that New York City now submits).

88. HARWOOD, *supra* note 1, at 27; MORRIS, *supra* note 1, at 125.

89. MORRIS, *supra* note 1, at 124-26.

90. See HARWOOD, *supra* note 1, at 22 (stating that the INS is unable to enforce immigration law).

and deporting those immigrants who unlawfully enter the United States.⁹¹ While many immigrants become illegal by lawfully entering the country with a visa and overstaying their visas,⁹² others try to enter the United States illegally.⁹³ The Border Patrol⁹⁴ was assembled to prevent unlawful entries from Canada and, more importantly, Mexico.⁹⁵ However, trying to catch every alien illegally crossing almost 3,000 miles of America's southern border⁹⁶ is an impossible task.⁹⁷ Congress has increased Border Patrol personnel several times over the years, but it has never been completely effective;⁹⁸ the number of Border Patrol agents is simply too small compared to the large number of illegal aliens crossing the border.⁹⁹

91. See WEISSBRODT, *supra* note 1, at 128-40 (describing the prehearing procedure for deportation).

92. HARWOOD, *supra* note 1, at 9, 29, 192 n.2; Hiller, *supra* note 1, at 496; Gerald Rosberg, *Discrimination Against the "Nonresident" Alien*, 44 U. PITT. L. REV. 399, 406-07 (1983). The INS calls these immigrants "visa abusers." HARWOOD, *supra* note 1, at 9.

93. See Hiller, *supra* note 1, at 496 (stating that between one and two million people either cross our borders unlawfully or overstay their visas annually). Immigrants who cross the border illegally are called "entrants without inspection" (EWIs). HARWOOD, *supra* note 1, at 2.

94. The Bureau of Immigration, the predecessor to the INS, created the Border Patrol in 1924 to guard the country's 8,000 miles of land and sea borders. MORRIS, *supra* note 1, at 107-08; WEISSBRODT, *supra* note 1, at 12.

95. HARWOOD, *supra* note 1, at 8-10, 49, 74; MORRIS, *supra* note 1, at 107. The Border Patrol apprehends about 1.25 million illegal aliens each year. Booth, *supra* note 7, at A1. See ASHÉGHIAN, *supra* note 12, at 452 (including a graph of the INS border apprehensions from 1960-1993).

96. The northern border is also extensive, but the number of illegal crossings through Canada is relatively low compared to the numbers crossing via Mexico. HARWOOD, *supra* note 1, at 8-9, 74. About 40% of all illegal crossings occur at the San Diego-Tijuana border. Pertman, *supra* note 7, at 3. The INS detained 1.8 million illegal immigrants at the southern border in 1986, one million more than in 1985. NELSON, *supra* note 1, at 7 (citing Sol Sanders, *The Coming Troubles*, 32 ORBIS: A J. OF WORLD AFF. 55 (1988)). However, Mexicans enter the United States each year at a rate four times of that which the INS apprehends. *Id.* In fiscal year 1991, the INS apprehended 1,077,511 immigrants at the southern border. NELSON, *supra* note 1, at 8 (citing Tim Golden, *Mexicans Head North Despite Rules on Jobs*, N.Y. TIMES, Dec. 13, 1991, at A20). This number was up from 1,049,680 in 1990. *Id.*

97. See *Plyler v. Doe*, 457 U.S. 202, 237 (1982) (Powell, J., concurring) (stating that access from Mexico into the United States is "virtually uncontrollable"); MORRIS, *supra* note 1, at 106 (explaining that controlling the border is the INS' most difficult responsibility); Margot Hornblower, *Northern Exposures*, TIME, Mar. 6, 1995, at 42 (the border is a facade to many Mexicans, despite the Border Patrol, guard dogs, and chain-link fences). "They could plant land mines, and it would not stop people from crossing." *Id.* (quoting Sergio Gomez Montero, a Mexicali writer).

98. See MORRIS, *supra* note 1, at 107 (stating that the Border Patrol has never been able to do its job effectively); INS Special Agent interview, *supra* note 83, at 7, 18 (noting that the border is not secure and it probably never will be secure).

99. HARWOOD, *supra* note 1, at 2-3 (stating that the border is not well protected in most places); MORRIS, *supra* note 1, at 9, 106-07; George J. Church, *Mexico's Troubles Are Our Troubles*, TIME, Mar. 6, 1995, at 35 (each year 150,000 to two million legal and illegal aliens cross the "porous" border) [hereinafter *Mexico's Troubles*]; Hiller, *supra* note 1, at 500; Scott Pendleton, *Texas Weighs Cost of Illegals*, CHRISTIAN SCI. MONITOR, Apr. 26, 1994, at 3 (quoting Elena

In addition, once inside the United States, aliens can quickly and easily blend in with the different ethnic communities already established.¹⁰⁰ Therefore, if illegal immigrants are not detained upon their entry to the United States, it becomes much more difficult for the INS to locate them once they enter the country.¹⁰¹ The same is true for the immigrants who overstay their visas.¹⁰² Although the INS has the names of visa abusers, there are too many violators for the INS to locate each one for deportation.¹⁰³

Moreover, each time an illegal alien is detained, an INS agent must process the alien by completing various forms.¹⁰⁴ When immigrants unlawfully enter the United States, the INS drives them back to the border and drops them off.¹⁰⁵ In the case of the Mexican border, however, those aliens may be back

Thompson, who stated that "the border is pretty porous."); *Send Back Your Tired*, *supra* note 7, at 26 (explaining that far more illegal aliens cross the Mexican border than the Border Patrol can possibly catch).

Congress has recently allocated more money to place additional Border Patrol agents along the border for the fiscal years of 1995-1999, and to increase the number of agents by 6,000 full-time equivalent agent positions (and necessary support personnel positions) beyond the number of such positions authorized for the Border Patrol as of October 1, 1993. H.R. 3860, 103d Cong., 2d Sess. § 102 (1994). See Meissner, *supra* note 46, at 2 (discussing the increase in the Border Patrol). *But see* Patrice Armstrong, *Cisneros: U.S. Must Look South*, ALBUQUERQUE J., Feb. 1, 1986, at B2 (arguing that there is no way to protect the border).

100. MORRIS, *supra* note 1, at 80-82. The large population of Cubans in Miami is a prime example of a community where illegal aliens can easily blend in with the population. Miami, however, is just one of many cities where illegal immigrants reside. After completing a comprehensive survey, James P. Allen and Eugene J. Turner, two California State University geographers, determined that 90% of illegal immigrants live in metropolitan areas. NELSON, *supra* note 1, at 13 (citing Randolph E. Schmid, *Most Immigrants Still Settle in Urban Areas*, *Survey Shows*, WASH. POST, Aug. 29, 1988, at A13). See THE UNIVERSAL ALMANAC, *supra* note 1, at 303 (including a chart of the "Top 20 Metropolitan Areas of Intended Residence For U.S. Immigrants, 1992"); Spiro, *supra* note 7, at 124 (noting that once an immigrant community is established, family ties and cultural preferences tend to dictate migration patterns).

101. NELSON, *supra* note 1, at 8.

102. HARWOOD, *supra* note 1, at 29; MORRIS, *supra* note 1, at 112-14.

103. MORRIS, *supra* note 1, at 112-14. See HARWOOD, *supra* note 1, at xvi (stating that the INS does not have sufficient resources to investigate a fraction of aliens detained, let alone all immigrants unlawfully within the country). Due to the lack of resources, the INS has had to prioritize the different types of immigration violations. For example, the INS views EWIs and visa abusers as less serious violator groups than immigrants who use fraudulent documents to enter the United States, who smuggle aliens or drugs into the country, who counterfeit documents, or who are caught committing other crimes. *Id.* at 9, 129-30. See also INS Special Agent interview, *supra* note 83, at 14-15 (explaining that if illegal immigrants are not involved in any criminal activity, such as selling drugs, weapon possession, or murder, the INS basically lets them go. It does not matter that the illegal alien broke the law to come to the United States.).

104. *IRCA Hearing*, *supra* note 81, at 46-47; Edward R. F. Sheehan, *The Open Border*, N.Y. REV. BOOKS, Mar. 15, 1990, at 34-35.

105. Pendleton, *supra* note 99, at 3.

in the United States within a half hour.¹⁰⁶ It is common for aliens entering from Mexico to attempt to cross the border several times a day, until they are successful.¹⁰⁷ Yet, whenever they are caught, they must be processed again,¹⁰⁸ entangling the Border Patrol in endless paperwork while other illegal immigrants enter uninhibited.¹⁰⁹

Finally, and perhaps most importantly, the INS usually enforces immigration law with great leniency.¹¹⁰ Although criminal sanctions exist under immigration law, the sanctions are rarely enforced.¹¹¹ The civil punishment of deportation is used in a small number of cases compared to the large number of deportable aliens.¹¹² Thus, the sanctions available under immigration law exist more in theory than in practice.¹¹³

In conclusion, the INS is unable to accomplish either of its objectives because there are too few agents and too few funds chasing too many

106. HARWOOD, *supra* note 1, at 41, 57 (stating that Mexicans know they can easily re-enter). See INS Special Agent interview, *supra* note 83, at 7 (admitting that often, if the INS sends an illegal immigrant back to Mexico, the alien will return to the United States by the following week).

107. HARWOOD, *supra* note 1, at 52 (stating that the "determined" alien will always get through); Booth, *supra* note 7, at A1 (stating that many immigrants who cross the border illegally are repeat offenders); Hornblower, *supra* note 97, at 42 (stating that the border is only a minor inconvenience to those crossing it); *Mexico's Troubles*, *supra* note 99, at 35; Pendleton, *supra* note 99, at 3 (quoting an Austin refugee services director who said that after illegal immigrants are bused to Mexico, they soon make another attempt to get back into the United States).

108. HARWOOD, *supra* note 1, at 118-19, 124 (performing all the required administrative procedures is an obstacle to the critical enforcement goal—the permanent removal of deportable aliens).

109. INS Special Agent interview, *supra* note 83, at 19. See *Send Back Your Tired*, *supra* note 7, at 26 (explaining that two or three illegal aliens get away for each one who is caught). As a result, INS officers commonly complain that they are "wheel spinning." HARWOOD, *supra* note 1, at 124.

110. HARWOOD, *supra* note 1, at xvi, 110-18; MORRIS, *supra* note 1, at 93 (claiming that some illegal entries have been permitted, even encouraged); Hiller, *supra* note 1, at 500, 504; Huerta, *supra* note 13, at 510, 518; Hull, *supra* note 1, at 432; Rosberg, *supra* note 92, at 406.

111. See HARWOOD, *supra* note 1, at xvi, 122-23, 175-77 (discussing how a second raid on a group of stores was called off due to the bad publicity and complaints from the first raid the previous week); MORRIS, *supra* note 1, at 89, 93; WEISSBRODT, *supra* note 1, at 330 (explaining that the prosecution of immigration misdemeanors is a low priority for prosecutors and thus rarely occurs); Huerta, *supra* note 13, at 508; *Overhaul*, *supra* note 83, at C20 (Representative Lamar Smith arguing that the INS should more strictly enforce employer sanctions); INS Special Agent interview, *supra* note 83, at 9-10 (stating that agents are restricted on how many criminal illegal immigrants they can arrest because the INS does not have the money to put them in jail, and that eventually, lack of funds could lead to no arrests).

112. HARWOOD, *supra* note 1, at xvi.

113. *Id.*

immigrants.¹¹⁴ INS officials claim that if Congress gave the agency sufficient resources, including more personnel and equipment, illegal immigration could be significantly reduced.¹¹⁵ Without adequate resources, however, the major executive agency¹¹⁶ responsible for enforcing immigration law is largely ineffective.¹¹⁷ As a result, millions of aliens are now unlawfully residing in the United States.¹¹⁸ In 1986, Congress passed a bill specifically designed to combat the growing illegal immigrant problem.¹¹⁹ However, it too has been ineffective in controlling illegal immigration.¹²⁰

III. ATTEMPTED CONGRESSIONAL SOLUTIONS TO ILLEGAL IMMIGRATION

The federal government has twice tried to decrease illegal immigration in the United States through legislation. First, with the Immigration Reform and Control Act of 1986 (IRCA), Congress directly addressed the problem by restricting employment to illegal aliens, the principal force behind illegal immigration.¹²¹ Second, Congress hoped to indirectly decrease illegal

114. See MORRIS, *supra* note 1, at 91, 108, 111, 130-31 (blaming Congress and the executive branch because they have shown little interest in solving the administrative problems that have adversely affected the INS and other immigration agencies); NELSON, *supra* note 1, at 114 (claiming that real immigration control entails effective border management and a decrease in the annual quota to 200,000 at the most); WEISSBRODT, *supra* note 1, at 22 (stating that the INS has struggled to combat illegal immigration with inadequate resources).

115. MORRIS, *supra* note 1, at 109. See INS Special Agent interview, *supra* note 83, at 10-11 (explaining that the INS still identifies people strictly by name and date of birth while the FBI and the Justice Department identify people using finger prints and eye retina scans). See also NELSON, *supra* note 1, at 106 (stating that the American people must convince Congress that controlling immigration and effectively patrolling the borders are essential for the good of the United States in both the long and short run).

116. Another agency involved with immigration is the Executive Office for Immigration Review. LEGOMSKY, *supra* note 38, at 5; WEISSBRODT, *supra* note 1, at 63. This agency has several sub-agencies, including the Office of the Chief Immigration Judge and the Board of Immigration Appeals (BIA). LEGOMSKY, *supra* note 38, at 5; Gerety, *supra* note 7, at 383. Within the Office of the Chief Immigration Judge, immigration judges hold formal evidentiary hearings for several types of disputes, including exclusion hearings, where immigrants challenge denials of admission at ports of entry. LEGOMSKY, *supra* note 38, at 5. The BIA hears a variety of cases, including appeals from the decisions of the immigration judges. *Id.* An alien may also seek judicial review of the BIA decision in the Court of Appeals. *Id.* at 6.

117. See HARWOOD, *supra* note 1, at 1 (explaining that Americans believe the United States is unable to control immigration because we are unable to control our borders); MORRIS, *supra* note 1, at 85; INS Special Agent interview, *supra* note 83, at 8 (stating that the INS is doing poorly at combatting illegal immigration).

118. MORRIS, *supra* note 1, at 88-89 (explaining that the large illegal immigrant population is evidence of the inadequacies of the INS). See Stamets, *supra* note 85, at A1 (stating that seven million illegal immigrants now reside in this country).

119. See *infra* § III.A. (discussing the Immigration Reform and Control Act of 1986).

120. See *infra* notes 142-49 and accompanying text.

121. See *supra* note 13 and *infra* note 128 and accompanying text.

immigration from Mexico when it enacted the North American Free Trade Agreement (NAFTA).¹²² While it is too early to determine if NAFTA will decrease illegal immigration, immigration officials have concluded that IRCA is a failure.¹²³

A. *The Immigration Reform and Control Act of 1986*

Americans became very concerned about illegal immigration during the 1970s, when the number of immigrants grew rapidly.¹²⁴ The public's fears stimulated governmental interest,¹²⁵ and the House Judiciary Subcommittee started a series of hearings to discuss the control of illegal immigration in 1971.¹²⁶ The committee issued a report in 1975 recommending employer sanctions as a means of combating the uncontrolled flow of illegal immigrants.¹²⁷ The committee opined that sanctions would remove the economic incentive of employing illegal aliens, which was the major cause of illegal entries from other countries.¹²⁸ However, the Simpson-Mazzoli Immigration Reform Bill was not introduced in Congress until 1982.¹²⁹ The bill then came under attack from numerous groups, including the business community,¹³⁰ immigrant groups,¹³¹ and other members of Congress.¹³² After much

122. See *infra* notes 150-61 and accompanying text.

123. See *infra* notes 142-49 and accompanying text.

124. JOANNES ET AL., *supra* note 13, at 1-2; William Arp, III, *The Failure of IRCA to Achieve its Goals: Legalization, Policy, Process, and Minority Participation* 46 (1989) (unpublished Ph.D. dissertation, Arizona State University (Tempe)) (discussing how the influx of refugees from Cuba and Haiti, and the increasing number of undocumented Mexican workers adversely affected the public opinion regarding immigration). See Scott David Livingston, *Plyler v. Doe: Illegal Aliens and the Misguided Search for Equal Protection*, 11 HASTINGS CONST. L.Q. 599, 617-18 (1984) (stating that the number of deportable immigrants in the U.S. increased twentyfold between 1967 and 1978).

125. Arp, *supra* note 124, at 46 (quoting P.R. EHRLICH, *THE GOLDEN DOOR: INTERNATIONAL MIGRATION, MEXICO, AND THE UNITED STATES* (1979)).

126. *Id.* at 47; See Fuchs, *supra* note 70, at 436-46 (discussing the role of the Select Commission on Immigration and Refugee Policy in forming IRCA).

127. ASHEGHIAN, *supra* note 12, at 450; Huerta, *supra* note 13, at 507; Arp, *supra* note 124, at 47.

128. ASHEGHIAN, *supra* note 12, at 450; Huerta, *supra* note 13, at 507; Arp, *supra* note 124, at 47. *But see Overhaul*, *supra* note 83, at C20 (quoting Representative Lamar Smith who stated that both jobs and benefits are "twin magnets" for immigrants and until they are dealt with, illegal immigration will not cease).

129. Arp, *supra* note 124, at 51.

130. MORRIS, *supra* note 1, at 31-32.

131. Members of immigrant groups see "themselves as beneficiaries of laws that promote immigration and they have sought to preserve the same benefits for their fellow nationals who might wish to immigrate." MORRIS, *supra* note 1, at 29. For a discussion of the interest groups commonly involved with immigration legislation, see *id.* at 27-33.

132. Arp, *supra* note 124, at 52.

compromising, stalling, and voting in Congress, the bill passed.¹³³ President Ronald Reagan finally signed the Immigration Reform and Control Act¹³⁴ into law on November 6, 1986,¹³⁵ fifteen years after Congress began hearings on the matter.¹³⁶

The most important aspect of IRCA is employer sanctions,¹³⁷ which make it illegal for employers to knowingly hire, recruit, or refer undocumented workers for a fee.¹³⁸ The law requires employers to issue a signed statement that they have checked a potential employee's documents of identification¹³⁹

133. *Id.* at 52-54. For example, after the opposition added 300 amendments to the bill, the House version of the Immigration Reform and Control Act was still not considered. *Id.* at 52. See WEISSBRODT, *supra* note 1, at 22 (noting that IRCA was not easily adopted); Castillo, *supra* note 13, at 485-93 (discussing the delays in the passage of IRCA and some possible solutions).

134. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

135. *IRCA Hearing, supra* note 81, at 44; Jeri Ann H. Flynn, *Immigration Reform and Control Act of 1986: Employment Provisions*, 34 LA. B.J. 350, 350 (1987); Arp, *supra* note 124, at 54.

136. The number of years it took to pass IRCA is significant because it is proof of how slowly immigration legislation moves through Congress. In the meantime, the illegal immigrant population greatly increases each year that the corresponding legislation is delayed in Congress. See Fuchs, *supra* note 70, at 433 (stating that overhauling immigration reform occurs infrequently because Americans have such strong emotions regarding the issue). Prior to IRCA, it had been 34 years since Congress had enacted major immigration reform. WEISSBRODT, *supra* note 1, at 22.

137. IRCA also contained two other important provisions. First, it was to give permanent resident status, or "amnesty," to undocumented aliens who could prove that they resided within the United States since January 1, 1978. ASHEGHIAN, *supra* note 12, at 455-56; JOANNES ET AL., *supra* note 13, at xiii-xiv, 61-78; WEISSBRODT, *supra* note 1, at 24-26; Huerta, *supra* note 13, at 517-18; Arp, *supra* note 124, at 52. The purpose of the amnesty program was to remove a large number of illegal aliens from the illegal population by granting them legal status. *Id.* at 53. Second, the measure offered an expanded program for needed agricultural workers. JOANNES ET AL., *supra* note 13, at xiv; WEISSBRODT, *supra* note 1, at 27-28; Arp, *supra* note 124, at 52.

Consequently, the amnesty program proved to be a failure at decreasing the illegal population. WEISSBRODT, *supra* note 1, at 30-31. When the program began in May 1987, immigration officials predicted that between two million and four million people would register by the May 1988 deadline. *Id.*; Jason DeParle, *Why Amnesty Failed*, WASH. MONTHLY, Apr. 1988, at 11-16. By March 1988, however, only one million people had come forward, and officials continually deflated their final prediction to 1.35 million as of April, 1988. WEISSBRODT, *supra* note 1, at 30. The amnesty program was unsuccessful because: (1) many illegal immigrants eligible for legalization were unaware that such an opportunity existed; (2) those immigrants that did know of the program did not trust the INS and feared deportation if they applied for legalization; (3) potential applicants feared that their family members who arrived after the cutoff date would be deported; (4) eligible immigrants who spent so many years avoiding paper trails prior to IRCA could not suddenly obtain documentation proving that they had lived here for the required amount of time; (5) confusion about qualification existed; and (6) the application was cost-prohibitive. Arp, *supra* note 124, at 63-65, 75, 87-90, 93-96; DeParle, *supra*, at 11.

138. ASHEGHIAN, *supra* note 12, at 455; JOANNES ET AL., *supra* note 13, at 1-3; WEISSBRODT, *supra* note 1, at 23, 355-56; Hiller, *supra* note 1, at 502; Huerta, *supra* note 13, at 507; Arp, *supra* note 124, at 55.

139. Acceptable documents include birth certificates, passports, social security cards, and certificates of citizenship. Huerta, *supra* note 13, at 507; Arp, *supra* note 124, at 55, 87.

before hiring them.¹⁴⁰ Employers who disobey the law may be subject to fines and imprisonment for up to six months.¹⁴¹ Many employers resented the new law and the added burden of seeking out illegal aliens for the INS by checking every potential employee's papers.¹⁴² As a result, many employers either have not thoroughly checked employee credentials,¹⁴³ or have disregarded the law

140. *Overhaul*, *supra* note 83, at C20; *Arp*, *supra* note 124, at 55. Currently, however, the Republican leaders of Congress are pushing to reform the procedures that employers use to verify potential employees' work status. *Change in Employer Sanctions*, *supra* note 7, at A45; *Overhaul*, *supra* note 83, at C20. Instead of employers reviewing a variety of documents to determine an employee's work eligibility, Senator Alan Simpson introduced an immigration control bill that included a new verification system. *Change in Employer Sanctions*, *supra* note 7, at A45; *Overhaul*, *supra* note 83, at C20. This system would use data from the Social Security Administration and the INS to verify an employee's status, thus relieving employers of their responsibilities. *Change in Employer Sanctions*, *supra* note 7, at A45; *Overhaul*, *supra* note 83, at C20.

Because cost estimates of the new verification system range from \$3 billion to \$6 billion, opponents of the system claim that it is cost-prohibitive. *Overhaul*, *supra* note 83, at C20. However, Representative Lamar Smith, the new chairman of the House Judiciary Subcommittee on Immigration and Claims, stated that the cost of the system is only a fraction of the cost of illegal immigrants. *Id.*

141. ASHEGHIAN, *supra* note 12, at 455; WEISSBRODT, *supra* note 1, at 23; *Arp*, *supra* note 124, at 55. See JOANNES ET AL., *supra* note 13, at 10 (explaining how the fines are imposed).

142. Susan H. Welin, Note, *The Effect of Employer Sanctions on Employment Discrimination and Illegal Immigration*, 9 B.C. THIRD WORLD L.J. 249, 249-50 (1989); *Arp*, *supra* note 124, at 59-60 (quoting M.S. Zatz, Class, Ethnicity, and Immigration: An Analysis of the 1984 House Debate on the Simpson-Mazzoli Bill, Presentation at the Annual Meeting of the Law and Society Association (1986)). See HARWOOD, *supra* note 1, at 186 (predicting that employers would have difficulty properly implementing IRCA); Castillo, *supra* note 13, at 486 (anticipating that the employer sanctions would be unenforceable); Huerta, *supra* note 13, at 508 (stating that employer sanctions will not reduce illegal immigration).

143. HARWOOD, *supra* note 1, at 186 (stating that the INS cannot expect employers to be able to detect fraudulent documents); Huerta, *supra* note 13, at 511.

A second problem that emerges when employers review documents is discrimination. HARWOOD, *supra* note 1, at 186; WEISSBRODT, *supra* note 1, at 23-24, 30; Huerta, *supra* note 13, at 508, 512-13. Hispanic and other civil rights organizations complained that the IRCA sanctions would discriminate against foreign-looking job applicants. *Arp*, *supra* note 124, at 53. *But see IRCA Hearing*, *supra* note 81, at 47 (INS Commissioner Nelson recommending that employers not fire current employees or decline to hire new ones because they appear foreign); Hiller, *supra* note 1, at 502 (stating that the sanctions do not allow employers to discriminate). Nevertheless, the AFL-CIO has denounced the sanctions because it claims that they have in fact caused employers to discriminate against people who look foreign. *Overhaul*, *supra* note 83, at C20.

The United States Commission for Immigration Reform believes that the new proposed verification system would eliminate such discrimination against employees who are really citizens or authorized aliens but appear foreign or have foreign sounding names. *Id.* See also WEISSBRODT, *supra* note 1, at 30. *But see Change in Employer Sanctions*, *supra* note 7, at A45 (noting that Representative Bill Richardson opposes the new registry because he claims it will lead to more discrimination).

altogether.¹⁴⁴

A second problem with IRCA's employer sanctions is that it is very easy for illegal aliens to obtain false documentation.¹⁴⁵ With a large black market for fraudulent documents,¹⁴⁶ many illegal aliens can continue to live and work in the United States without their employers or the INS knowing of their illegal status.¹⁴⁷ Thus, Congress' attempt to combat illegal immigration, by drying up the employment pool that attracts illegal immigrants to the United States, has ultimately proved ineffective.¹⁴⁸ Therefore, numerous opportunities still exist for illegal aliens to work, and unlawful entries into the United States

144. ASHEGHIAN, *supra* note 12, at 456-57; WEISSBRODT, *supra* note 1, at 30; Huerta, *supra* note 13, at 511; *Underclass Status*, CQ RESEARCHER, Apr. 24, 1992, at 374. See also HARWOOD, *supra* note 1, at 17 (many groups benefit financially from illegal immigration, including ranchers, landscaping and construction contractors, garment manufacturers, and restaurant owners, because illegal immigrants are cheap labor and are reliable workers); Arp, *supra* note 124, at 50 (seeking out undocumented workers was counterproductive for growers or clothing manufacturers, who were enjoying a surplus of foreign labor, because it disturbed an existing relationship which profited them); Huerta, *supra* note 13, at 509-10 (particular business sectors are highly dependent on illegal alien labor); Hull, *supra* note 1, at 410.

In addition to American employers disregarding IRCA, undocumented aliens were also skeptical of the law. "There is a growing sense of apathy toward the law as undocumented immigrants see that other 'illegals' continue to get jobs." NELSON, *supra* note 1, at 7 (quoting A.S. Ross, *New Law Fails to Stem Flow of Aliens*, S.F. EXAMINER, May 1, 1988, at A1). But see JOANNES ET AL., *supra* note 13, at 168 (warning employers not to ignore IRCA because the INS will eventually detect them).

145. See *IRCA Hearing*, *supra* note 81, at 53 (INS Commissioner Nelson discussing the concern regarding fraudulent documents); JOANNES ET AL., *supra* note 13, at 15-16 (instructing employers on how to handle false documents); Arp, *supra* note 124, at 57 (explaining that one of the reasons why groups opposed the passage of IRCA was because it would create a demand for fraudulent documents); *Overhaul*, *supra* note 83, at C20 (noting a widespread use of fraudulent documents to secure jobs); INS Special Agent interview, *supra* note 83, at 20-21. For the criminal sanction regarding fraud, see 18 U.S.C. § 1546 (1994).

146. The INS estimates that 50% of illegal immigrants use fraudulent documents to obtain jobs or federal benefits. *Overhaul*, *supra* note 83, at C20; Interview with INS Special Agent, *supra* note 83, at 20-21. For a discussion of immigration fraud, see HARWOOD, *supra* note 1, at 143-67.

147. See *Change in Employer Sanctions*, *supra* note 7, at A45 (explaining that the forgeries appear so real that employers cannot distinguish between legitimate documents and fraudulent ones). But see *IRCA Hearing*, *supra* note 81, at 49 (INS Commissioner Nelson warning potential legalization applicants not to attempt to prove residence by using false documents). "Documentation will be checked closely. Fraud could result in penalties, including ineligibility to legalize, deportation, fines and imprisonment." *Id.*

148. ASHEGHIAN, *supra* note 12, at 456; Huerta, *supra* note 13, at 508; *Overhaul*, *supra* note 83, at C20 ("The current employer sanctions system has not worked.") (quoting Representative Lamar Smith, the new chairman of the House Judiciary Subcommittee on Immigration and Claims). For further discussion of the problems involved with IRCA, see HARWOOD, *supra* note 1, at 185-92.

continue.¹⁴⁹

B. The North American Free Trade Agreement

Although illegal immigration was not the principal reason Congress passed the North American Free Trade Agreement,¹⁵⁰ it was a factor nonetheless.¹⁵¹ Mexico is the largest source of illegal immigrants in the United States,¹⁵² partly because of its close proximity,¹⁵³ but more importantly because Mexico is, in many respects, a developing country.¹⁵⁴ However, under the economic

149. See ASHEGHIAN, *supra* note 12, at 457 (stating that illegal immigration has increased in California); HARWOOD, *supra* note 1, at 189 (declaring that instead of decreasing illegal immigration, IRCA would further complicate the INS' "enforcement crisis").

150. NAFTA is a trade agreement between Canada, the United States, and Mexico. ASHEGHIAN, *supra* note 12, at 9, 199-203; DENNIS R. APPELYARD & ALFRED J. FIELD, JR., INTERNATIONAL ECONOMICS 463 (1992). The passage of NAFTA created the largest free trade union in the world, including a combined population of more than 350 million people and an annual GNP of six trillion dollars. ASHEGHIAN, *supra* note 12, at 200; APPELYARD & FIELD, *supra*, at 463.

151. President's Message to the Congress Transmitting the NAFTA Legislation, 29 WEEKLY COMP. PRES. DOCS. 2255 (Nov. 3, 1993) [hereinafter President's Message]; ASHEGHIAN, *supra* note 12, at 450; MORRIS, *supra* note 1, at 84-85 (stating that analysts have suggested that the United States address the economic problems in countries like Mexico because it is these problems that cause so many migrants to come to the United States); Frances Lee Ansley, *North American Free Trade Agreement: The Public Debate*, 22 GA. J. INT'L & COMP. L. 329, 467-68 (1992) (explaining that an economic negotiation between the United States and Mexico could not realistically avoid the sensitive issue of illegal immigration); Helene Cooper, *They're Still Coming*, WALL ST. J., Oct. 28, 1994, at R11; Kyle McCullough, *All About NAFTA*, TIME, Dec. 6, 1993, at 8. *Contra Send Back Your Tired*, *supra* note 7, at 26 (stating that NAFTA does not address immigration).

152. HARWOOD, *supra* note 1, at 7; MORRIS, *supra* note 1, at 78; THE UNIVERSAL ALMANAC, *supra* note 1, at 302-03. See MORRIS, *supra* note 1, at 33 (stating that illegal immigration has been a "continuous source of tension" between the United States and Mexico).

153. See MORRIS, *supra* note 1, at 80 (explaining that five of the top ten source countries for lawful immigration and nine of the top ten for unlawful immigration to the United States are nearby countries).

154. Mexico resembles a developing nation for several reasons. First, it has a booming population. NELSON, *supra* note 1, at 9; Hiller, *supra* note 1, at 497. Second, Mexico's capital is the largest city in the world. THE UNIVERSAL ALMANAC, *supra* note 1, at 334. In 1990, Mexico City had a population of 20.2 million people. *Id.* Third, the Mexican government cannot manage its unemployment rate. NELSON, *supra* note 1, at 9; Hiller, *supra* note 1, at 497. See MORRIS, *supra* note 1, at 66 (explaining that developing nations usually have rapid population growth, high unemployment rates, and low wages, all which increase migration pressure). Mexico must create jobs for its citizens at a rate two-and-one-half times greater than that of the United States. NELSON, *supra* note 1, at 9; Hiller, *supra* note 1, at 497. Therefore, the Mexican government benefits when so many of its nationals go to the United States to find work because there are fewer Mexican citizens for whom the Mexican government must create jobs. See MORRIS, *supra* note 1, at 33 (explaining that Mexico commands the United States Congress to acknowledge and react to the complicated economic problems that cause Mexicans to migrate to the United States).

theory of free trade,¹⁵⁵ illegal immigration from Mexico would decrease.¹⁵⁶ This theory is based on the premise that when free trade occurs between two countries, the countries' costs of labor will eventually equalize.¹⁵⁷ Currently, there is a large disparity between minimum wage in the United States and Mexico.¹⁵⁸ Following this economic theory, American wages would fall as Mexican wages rise.¹⁵⁹ In that case, Mexican workers would no longer have an incentive to come to the United States illegally to find jobs and better salaries.¹⁶⁰ Instead, they could stay in Mexico, earn decent wages, and illegal immigration would decrease.¹⁶¹

However, even assuming this theory of economic equalization will materialize, it will take several more years before Congress can determine if free trade has decreased illegal immigration.¹⁶² In the meantime, as long as the Mexican economy remains weak and unemployment remains high, Mexican immigrants will continue to come to the United States illegally to find work and better salaries, thereby perpetuating the problem of illegal immigration.¹⁶³

155. The economic theory of free trade is called the Heckscher-Ohlin Theorem. APPELYARD & FIELD, *supra* note 150, at 161-75.

156. Ansley, *supra* note 151, at 467-68. See Cooper, *supra* note 151, at R11 (explaining that NAFTA may decrease Mexican immigration in the long run, but not in the short run).

157. ASHEGHIAN, *supra* note 12, at 453. Labor equalization is a part of the Factor Price Equalization Theorem. See APPELYARD & FIELD, *supra* note 150, at 169-73.

158. See NELSON, *supra* note 1, at 8. Mexican wages are one-tenth of American wages. Huerta, *supra* note 13, at 511.

159. See APPELYARD & FIELD, *supra* note 150, at 172-74 (describing how factor prices, including wages, equalize); ASHEGHIAN, *supra* note 12, at 453 (explaining that the wages will rise in Mexico and fall in the United States until the differential is eliminated).

160. ASHEGHIAN, *supra* note 12, at 450. See Pertman, *supra* note 7, at 3. "When people lose their jobs and can't support their families, they look for other options . . . and very often that means they look to the United States." *Id.* (quoting Tom Saenz, an attorney with the Mexican American Legal Defense Education Fund in Los Angeles).

161. ASHEGHIAN, *supra* note 12, at 450; Ansley, *supra* note 151, at 467-68; *Avoid Knee-Jerk Responses to Immigration Problems*, USA TODAY, Aug. 20, 1993, at 12A [hereinafter *Knee-Jerk Responses*]; Cooper, *supra* note 151, at R11. See also George J. Church, *It's Just That Close*, TIME, Nov. 15, 1993, at 38 (explaining that NAFTA would discourage illegal aliens from flooding into states like California and Texas); *Mexico's Troubles*, *supra* note 99, at 35 (stating that the number of Mexicans immigrating to the United States varies, depending on the ability to obtain work in Mexico).

162. NELSON, *supra* note 1, at 29. See Cooper, *supra* note 151, at R11 (noting that it is far too soon to determine if NAFTA has affected migration patterns); Tim Golden, *Mexicans Head North Despite Rules on Jobs*, N.Y. TIMES, Dec. 13, 1991, at A20 (stating that it takes 10 to 20 years for free trade to visibly affect immigration).

163. Cooper, *supra* note 151, at R11. When the Mexican peso fell in December 1994, American immigration officials feared that illegal immigration to the United States would increase. See Pertman, *supra* note 7, at 3. In reaction to Mexico's economic crisis, the United States is helping to provide its neighbor with a \$50 billion rescue package. Michael Elliott, *Why the Mexican Crisis Matters*, NEWSWEEK, Feb. 13, 1995, at 28. See *Mexico's Troubles*, *supra* note 99, at 34

In conclusion, illegal immigration has worsened,¹⁶⁴ despite the recent efforts of the INS and Congress to curb the problem.¹⁶⁵ As a result, there are an estimated seven million illegal aliens currently residing in the United States,¹⁶⁶ and they have begun to adversely affect state economies.¹⁶⁷ Although immigration is a federal issue and the federal government is affected by illegal immigration, it is the states that incur a substantial financial burden from illegal immigration, because the states must pay to educate illegal immigrant students, provide illegal aliens with health care, and incarcerate them if they commit a crime.¹⁶⁸ However, the states with particularly large illegal immigrant populations are affected the most.¹⁶⁹ Since the 1970s, these states have independently tried to relieve themselves of this heavy economic burden, placed on them by an ineffective federal government, by excluding illegal immigrants from public benefits.¹⁷⁰

IV. FINANCIALLY BURDENED STATES SEARCH FOR RELIEF

As illegal immigration has increased and the federal government has been unable to effectively combat the problem, some states have alternatively tried to solve the problem by themselves.¹⁷¹ In the mid-1970s, Texas passed a law

(explaining that the \$20 billion from the United States, combined with aid from other countries and the International Monetary Fund, will bring the total to \$52 billion). However, in exchange for the loan, the United States wants cooperation from the Mexican government regarding illegal immigration. Elliot, *supra*, at 29. See *No Fair-Weather Amigos Wanted Here*, CHI. TRIB., Jan. 15, 1995, § 4, at 2 (noting that if the United States does nothing to help Mexico, more Mexicans will immigrate illegally to the United States). But see *Mexico's Troubles*, *supra* note 99, at 34 (claiming that this loan will only lead to further the Mexican recession with increasing unemployment and more illegal immigration to the United States).

164. See Stamets, *supra* note 85, at A1 (noting that IRCA's amnesty program did not work to decrease the illegal immigrant population, and now four million more immigrants reside in the United States illegally); Welin, *supra* note 142, at 250 (explaining that provisions of IRCA encourage illegal immigration).

165. *Send Back Your Tired*, *supra* note 7, at 26.

166. Stamets, *supra* note 85, at A1.

167. States with large illegal immigrant populations have spent millions of dollars for illegal immigrant benefits and are now suing the federal government for reimbursement of these costs. See *infra* § IV.B.1.

168. See *generally Increasing Costs Hearing*, *supra* note 52 (discussing these expenditures). See also Livingston, *supra* note 124, at 618 (stating that it is primarily the states that must bear the burden of illegal immigration and its significant socioeconomic costs); Spiro, *supra* note 7, at 121 (noting that immigration is now mostly a state concern).

169. See *infra* § IV.

170. See *infra* § IV.

171. Spiro, *supra* note 7, at 123. See *infra* notes 178-273 and accompanying text.

that required illegal immigrants to pay tuition upon enrolling in public schools.¹⁷² However, the Supreme Court struck down the statute as a violation of the Equal Protection Clause.¹⁷³ As a result, the Supreme Court has required the states to educate illegal immigrant students.¹⁷⁴ In addition, states must also provide illegal aliens with public health care and detain them if they commit a crime.¹⁷⁵ Very recently, however, states with large illegal immigrant populations claimed that they could no longer bear such costly services, and they have sued the federal government for reimbursement.¹⁷⁶ Furthermore, California passed a referendum to restrict illegal aliens from receiving these benefits.¹⁷⁷

A. *Plyler v. Doe*

In 1975, Texas passed a statute prohibiting illegal immigrant students from receiving a free public education.¹⁷⁸ Two years later, a class action was

172. *Plyler v. Doe*, 457 U.S. 202, 205-06 (1982). The tuition was implemented due to an increased "awareness" of illegal immigrants and the fear that the Tyler school district, a defendant in the case, would become a "haven" for illegal aliens, even though Tyler was not a border town. *Doe v. Plyler*, 458 F. Supp. 569, 572 (E.D. Tex. 1978); Ilene Durst, Note, *The Rights of Undocumented Aliens: Balancing Equal Protection and Federalism*, 28 N.Y.L. SCH. L. REV. 431, 436 n.21 (1983). By imposing the tuition, Tyler hoped to prevent a drain of local educational funds should Tyler become a "haven" for illegal immigrants. *Plyler*, 458 F. Supp. at 575; Durst, *supra*, at 436 n.21. See also *infra* note 178.

173. *Plyler*, 457 U.S. at 230. See also *infra* notes 178-243 and accompanying text.

174. *Plyler*, 457 U.S. at 230.

175. See *infra* note 257 and accompanying text.

176. See *infra* notes 249-59 and accompanying text (discussing the states' lawsuits).

177. See *infra* notes 260-73 and accompanying text (discussing Proposition 187).

178. *Plyler v. Doe*, 457 U.S. 202, 205 (1982); Hull, *supra* note 1, at 413; Livingston, *supra* note 124, at 599; Perry, *supra* note 63, at 330; John F. Casey, Comment, *Plyler v. Doe: The Quasi Fundamental Right Emerges in Equal Protection Analysis*, 19 NEW ENG. L. REV. 151, 159 (1983); Durst, *supra* note 172, at 433. The Texas statute provided in pertinent part:

(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

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

TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981), cited in *Plyler v. Doe*, 457 U.S. 202, 205

brought against the state on behalf of illegal immigrant school-age children living in Texas.¹⁷⁹ The United States District Court for the Eastern District of Texas held that the statute violated the Equal Protection Clause of the Fourteenth Amendment, and alternatively, that the Texas law was preempted by federal law.¹⁸⁰ The Fifth Circuit Court of Appeals affirmed the district court's decision that the statute violated the Equal Protection Clause, but did not agree with the lower court's alternative holding that the statute was preempted.¹⁸¹ In 1981,¹⁸² the case reached the Supreme Court,¹⁸³ which also held that the

(1982).

179. *Plyler*, 457 U.S. at 206; Hull, *supra* note 1, at 414; Casey, *supra* note 178, at 160; Durst, *supra* note 172, at 434. The Supreme Court extended the right to due process of law under the Fifth Amendment to illegal aliens in *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). Consequently, none of the schoolchildren involved in *Plyler*, nor their parents, were in the process of obtaining lawful permanent residence. *Doe v. Plyler*, 458 F. Supp. 569, 575 n.6 (E.D. Tex. 1978); Durst, *supra* note 172, at 434 n.14.

180. *Plyler*, 458 F. Supp. at 592-93; Hull, *supra* note 1, at 414; Casey, *supra* note 178, at 160-61; Durst, *supra* note 172, at 436, 438. The Fourteenth Amendment provides, in pertinent part, "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Congress enacted the Fourteenth Amendment after the Civil War to secure the freedom and equal protection of former slaves. GERALD GUNTHER, *CONSTITUTIONAL LAW* 676 (10th ed. 1980); WILLIAM B. LOCKHART ET AL., *CONSTITUTIONAL LAW* 342 (7th ed. 1991). See also *Slaughter-House Cases*, 83 U.S. 36, 81 (1872) (explaining that the primary purpose of the Fourteenth Amendment was to protect blacks from discriminatory state laws). However, the Supreme Court has interpreted the Equal Protection Clause to be a general restraint on intentional discriminatory classifications, including race, gender, and alienage. GUNTHER, *supra*, at 676; LOCKHART ET AL., *supra*, at 1221-1359; Jack A. Kramer, Note, *Vouching for Federal Educational Choice: If You Pay Them, They Will Come*, 29 VAL. U. L. REV. 1005, 1040 (1995). See *Mississippi Univ. For Women v. Hogan*, 458 U.S. 718, 724 (1982) (invalidating a state university policy that limited enrollment in its nursing program to women only); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (invalidating a state welfare law which excluded legal aliens from receiving benefits); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that race classifications are subjected to the strictest scrutiny).

"While the Equal Protection Clause of the Fourteenth Amendment only applies to the states," the Supreme Court held that the Due Process Clause of the Fifth Amendment has an equal protection element that applies to the federal government. Kramer, *supra*, at 1040 n.233. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that the Due Process Clause of the Fifth Amendment prohibits the federal government from discriminating between individuals or groups). In spite of such interpretation, under its equal protection analysis, the Supreme Court has given Congress deference in some areas, particularly immigration. See *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) (concluding that Congress may exclude illegal immigrants from receiving federal medical insurance because Congress has plenary power to regulate immigration).

181. *Doe v. Plyler*, 628 F.2d 448, 450, 461 (1980); Casey, *supra* note 178, at 161; Durst, *supra* note 172, at 439.

182. The dates are significant because even though the Court decided the case in 1982, the case was first argued in the district court in 1977. Between 1977 and 1995, the illegal immigration problem has grown significantly enough that circumstances have changed. See *infra* notes 290-97 and accompanying text.

Texas statute violated the Equal Protection Clause of the Fourteenth Amendment.¹⁸⁴

1. The Majority Opinion

Writing the majority opinion, Justice Brennan first addressed the issue of whether illegal immigrants have an Equal Protection right to receive a free public education under the Fourteenth Amendment.¹⁸⁵ The Court rejected the argument that illegal immigrants are not "persons" of the state because they are in the United States unlawfully.¹⁸⁶ Instead, the Court concluded that regardless of a person's status under immigration law, an illegal alien is still a person, and is guaranteed Equal Protection under the Fourteenth Amendment.¹⁸⁷ The Court also rejected the state's argument that people who entered the United States unlawfully are not "within the jurisdiction" of a state.¹⁸⁸ By examining the legislative history of Section One of the Fourteenth Amendment, the Court concluded that Congress intended the jurisdictional phrase to be broad.¹⁸⁹ The

183. On appeal to the Supreme Court, *In re Alien Children Litigation*, 501 F.Supp. 544 (S.D. Tex. 1980) and *Plyler v. Doe* were consolidated. *Plyler v. Doe*, 457 U.S. 202, 209 (1982); *Casey*, *supra* note 178, at 161; *Durst*, *supra* note 172, at 442.

184. *Plyler*, 457 U.S. at 230; FRANK R. KEMERER & JIM WALSH, *THE EDUCATOR'S GUIDE TO TEXAS SCHOOL LAW* 36 (3d ed. 1994); Judith Lichtenberg, *Within the Pale: Aliens, Illegal Aliens, and Equal Protection*, 44 U. PITT. L. REV. 351, 351 (1983); Livingston, *supra* note 124, at 599; David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 203 (1983). See *Durst*, *supra* note 172, at 431 (stating that *Plyler* was the Court's first express recognition of illegal immigrants' right to equal protection). The Supreme Court did not, however, decide whether federal law preempted the Texas state law. See *Durst*, *supra* note 172, at 442-43 (stating that the Court "refused" to decide the preemption issue).

185. *Plyler*, 457 U.S. at 210. The state argued that because illegal immigrants are in the United States unlawfully, they are not "persons within the jurisdiction" of the state of Texas. *Id.* Therefore, appellants stated that they have no equal protection right under Texas law. *Id.*

186. *Plyler*, 457 U.S. at 210; Hull, *supra* note 1, at 417-18; Perry, *supra* note 63, at 330-31.

187. *Plyler*, 457 U.S. at 210; Hull, *supra* note 1, at 409, 417-18; Lichtenberg, *supra* note 124, at 370; *Casey*, *supra* note 178, at 163; *Durst*, *supra* note 172, at 443, 470. During the congressional debates of the Fourteenth Amendment, the framers expressly stated that the "equal protection of the laws" was to apply to "all persons, whether citizens or others" present in the United States. CONG. GLOBE, 39th Cong., 1st Sess., 2766 (1866) (remarks of Sen. Howard). See also *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (stating that even transients are entitled to the protection of the Fifth and Fourteenth Amendments); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that the Equal Protection Clause protects all persons physically present within the territory of any state). But see Livingston, *supra* note 124, at 624 (arguing that equal protection alone does not protect illegal immigrants from their poor judgment to immigrate illegally; instead, a fundamental right or a suspect class must exist to protect immigrants).

188. *Plyler v. Doe*, 457 U.S. 202, 211 (1982).

189. *Id.* at 214 (stating that Congress meant for the Equal Protection Clause to apply to immigrants). The Court explained that the Fourteenth Amendment protects citizen and "stranger" alike in "every corner of a State's territory." *Id.* at 215. Therefore, the Court reasoned that as soon

Court reasoned that because the phrase was broad, illegal aliens are within a state's jurisdiction, and the Fourteenth Amendment is applicable to them.¹⁹⁰

Next, the Court analyzed which standard of review would be appropriate to examine the Texas statute.¹⁹¹ Generally, when reviewing an alien classification statute, the proper standard of review depends on three factors: (1) the creator of the classification; (2) the governmental interests; and (3) the purpose of the classification.¹⁹² Because Congress has plenary power over immigration,¹⁹³ the Court uses a rational basis test¹⁹⁴ with federal alien classifications.¹⁹⁵ However, in *Plyler*, Texas created the classification, not Congress. Thus, based on the first factor, the Court reviewed the Texas statute more strictly than a federal statute because states have no express constitutional power to create immigration law.¹⁹⁶

When reviewing a state classification, the Supreme Court has reserved strict scrutiny for cases involving a fundamental right or a suspect class.¹⁹⁷ Absent

as a person entered a state, lawfully or unlawfully, that person is entitled to the equal protection of the laws. *Id.*

190. *Id.* But see Pete Wilson, *Crack Down On Illegals*, USA TODAY, Aug. 20, 1993, at A12 (stating that the Fourteenth Amendment was not meant to reward illegal aliens) [hereinafter *Crack Down*].

191. *Plyler*, 457 U.S. at 215-24; Hull, *supra* note 1, at 423; Durst, *supra* note 172, at 470. Prior to *Plyler*, the Court had not established a uniform standard to be applied to all alien classifications. Rosberg, *supra* note 92, at 401; Curran, *supra* note 51, at 370.

192. WEISSBRODT, *supra* note 1, at 276; Curran, *supra* note 51, at 370.

193. See *supra* notes 50-55 and accompanying text.

194. Under the rational basis test, a statute will be held constitutional if the challenged classification is reasonably related to a legitimate state interest. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 574-75 (4th ed. 1991); Hull, *supra* note 1, at 418; Lichtenberg, *supra* note 184, at 352, 353; Livingston, *supra* note 124, at 613-14. For a more thorough explanation of this deferential standard of judicial review, see LOCKHART ET AL., *supra* note 180, at 1203-20.

195. Curran, *supra* note 51, at 370. The Supreme Court has also applied the rational basis test to those state classifications created to protect the political community. *Id.*; *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982). On the other hand, the Court applies strict scrutiny to state classifications used to distribute economic benefits. *Graham v. Richardson*, 403 U.S. 365, 372-74 (1971); Curran, *supra* note 51, at 371.

196. See *supra* notes 56-63 and accompanying text.

197. *Plyler v. Doe*, 457 U.S. 202, 239 n.2 (1982) (Powell, J., concurring); LOCKHART ET AL., *supra* note 180, at 411; NOWAK & ROTUNDA, *supra* note 194, at 575; Hull, *supra* note 1, at 426; Lichtenberg, *supra* note 184, at 351; Livingston, *supra* note 124, at 601-02; Durst, *supra* note 172, at 453-54, 458.

Under strict scrutiny, a state must have a compelling interest before the Court will find a state statute to be constitutional. *Cleburne*, 473 U.S. at 440; *Washington v. Davis*, 426 U.S. 229, 242 (1976); NOWAK & ROTUNDA, *supra* note 194, at 569, 575-76; Hull, *supra* note 1, at 419; Lichtenberg, *supra* note 184, at 351; Casey, *supra* note 178, at 151; Durst, *supra* note 172, at 454.

either, the general rule is that the Court uses a rational basis standard to review a classification.¹⁹⁸ Because education is not a fundamental right,¹⁹⁹ and illegal immigrants are not a suspect class,²⁰⁰ the Court did not use a strict standard of review in *Plyler*.²⁰¹ However, the Court did not use the rational basis standard either because the Court believed it was an inappropriate standard based on the facts of the case.²⁰² Instead, the majority diverted from the general rule, and created a new intermediate level of scrutiny.²⁰³ Under this standard, to be constitutional, a classification must rationally further a substantial interest.²⁰⁴ The Court's justification for using the new standard was based on

A fundamental right is a right that is essential to maintain life, liberty, and property. NOWAK & ROTUNDA, *supra* note 194, at 388. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 34 n.74 (1973) (stating that fundamental rights are those rights expressly granted by the Constitution or those fundamental guarantees implicitly protected by the Constitution).

Suspect classifications arise when a statute classifies by race, gender, alienage, or national origin. *Cleburne*, 473 U.S. at 440; *Lichtenberg*, *supra* note 184, at 363.

198. *Cleburne*, 473 U.S. at 440; *Dukes*, 427 U.S. at 303; NOWAK & ROTUNDA, *supra* note 194, at 574-75; *Lichtenberg*, *supra* note 184, at 352; *Perry*, *supra* note 63, at 337; *Casey*, *supra* note 178, at 151; *Durst*, *supra* note 172, at 455.

199. *Plyler*, 457 U.S. at 221, 223; *Rodriguez*, 411 U.S. at 35; WEISSBRODT, *supra* note 1, at 313; *Gerety*, *supra* note 7, at 395; *Rosberg*, *supra* note 92, at 402. *But see Plyler*, 457 U.S. at 231-32 (Blackmun, J., concurring) (expressing the opinion that equal protection does not involve fundamental interests); *Perry*, *supra* note 63, at 336 (stating that fundamental rights are not part of equal protection analysis).

200. *Plyler*, 457 U.S. at 219 n.19, 223 (explaining that illegal aliens are not a suspect class because their unlawful presence in the United States is not a "constitutional irrelevancy"); WEISSBRODT, *supra* note 1, at 313; *Gerety*, *supra* note 7, at 395; *Hull*, *supra* note 1, at 420; *Lichtenberg*, *supra* note 184, at 363; *Livingston*, *supra* note 124, at 602; *Perry*, *supra* note 63, at 335; *Rosberg*, *supra* note 92, at 402. *But see Graham v. Richardson*, 403 U.S. 365, 374-75 (1971) (holding that the Court would strictly scrutinize statutes which discriminated against lawful resident aliens).

201. *Plyler*, 457 U.S. at 223; *Lichtenberg*, *supra* note 184, at 351; *Perry*, *supra* note 63, at 335; *Durst*, *supra* note 172, at 470.

202. *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (stating that the Court would be unfaithful to its "obligations under the Fourteenth Amendment" if it applied the relaxed standard). See *Durst*, *supra* note 172, at 470 (stating that the majority "refused" to use the rational basis test).

203. *Plyler*, 457 U.S. at 218 n.16, 224; *Hull*, *supra* note 1, at 423; *Livingston*, *supra* note 124, at 599; *Stanley Mailman, California's Proposition 187 and Its Lessons*, N.Y.L.J., Jan. 3, 1995, at 3 n.14; *Perry*, *supra* note 63, at 337 (stating that the Court "changed the rules" in *Plyler*); *Rosberg*, *supra* note 92, at 402; *Casey*, *supra* note 178, at 151, 157, 165; *Durst*, *supra* note 172, at 471. See *Gerety*, *supra* note 7, at 398 (suggesting that there are several standards between rationality and suspect classification); *Lichtenberg*, *supra* note 184, at 370 (supporting the intermediate standard because there are more than two standards to equal protection); *Livingston*, *supra* note 124, at 602 (explaining that gender based classifications usually receive intermediate judicial scrutiny). *But see id.* at 602 (stating that the suspect characteristics test for heightened judicial scrutiny is very imprecise).

204. *Plyler*, 457 U.S. at 224; NOWAK & ROTUNDA, *supra* note 194, at 576; *Hull*, *supra* note 1, at 424, 426; *Lichtenberg*, *supra* note 184, at 370-71; *Livingston*, *supra* note 124, at 600, 617; *Perry*, *supra* note 63, at 337; *Rosberg*, *supra* note 92, at 402; *Casey*, *supra* note 178, at 152; *Durst*, *supra* note 172, at 471.

two factors.

First, Justice Brennan claimed that it was unfair to punish illegal immigrant children for the actions of their parents.²⁰⁵ To do so, reasoned the majority, would be to defy the "fundamental conceptions of justice."²⁰⁶ Second, the majority reasoned that although education is not a fundamental right, it is extremely important²⁰⁷ because a child would not succeed in life without an education.²⁰⁸ Therefore, the majority explained that if a state statute excludes illegal immigrant children from a free public education, but grants the same to other children within the state, the state must justify the classification by showing that the statute substantially furthers an important state interest.²⁰⁹ To determine whether the Texas statute withstood the intermediate scrutiny, the Court next examined the state's interests.²¹⁰ The state's primary justification for singling out illegal aliens was that distinguishing between legal and illegal immigrants was consistent with Congress' disapproval of illegal immigration in the United States and consistent with immigration law in general.²¹¹ Although the majority noted that states may make laws that conform to federal objectives, the Court could not find an explicit congressional statement excluding illegal

205. *Plyler*, 457 U.S. at 220 (stating that the children "can affect neither their parents' conduct nor their own status." (citing *Trimble v. Gordon*, 430 U.S. 762, 770 (1977))); *KEMERER & WALSH*, *supra* note 184, at 36; *WEISSBRODT*, *supra* note 1, at 313; *Hull*, *supra* note 1, at 420; *Lichtenberg*, *supra* note 184, at 374-75; *Livingston*, *supra* note 124, at 600; *Perry*, *supra* note 63, at 340, 342; *Casey*, *supra* note 178, at 166; *Durst*, *supra* note 172, at 471; Peter H. King, *They Kept Coming*, L.A. TIMES, Nov. 9, 1994, at A3 (explaining that some Californians voted against Proposition 187 claiming students should not suffer because their parents brought them here); *Will*, *supra* note 38, at A11. *But see Plyler*, 457 U.S. at 245 (dissenting opinion) (stating that "the Equal Protection Clause does not preclude legislators from classifying among persons on the basis of factors and characteristics over which individuals may be said to lack 'control.'"); *Perry*, *supra* note 63, at 340 (arguing that Texas can view the illegal entry into the United States as something contrary to the state's attempt to fulfill the demands of the citizens of the state community).

206. *Plyler*, 457 U.S. at 220.

207. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (citing *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)); *Hull*, *supra* note 1, at 421; *Livingston*, *supra* note 124, at 600; *Perry*, *supra* note 63, at 340; *Casey*, *supra* note 178, at 166. *But see Livingston*, *supra* note 124, at 605 (stating that even though the majority held that education is not a fundamental right, its use of intermediate scrutiny "belied its rhetoric.").

208. *Plyler*, 457 U.S. at 223 (citing *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)); *Gerety*, *supra* note 7, at 379; *Hull*, *supra* note 1, at 421; *Lichtenberg*, *supra* note 184, at 371, 373; *Casey*, *supra* note 178, at 166; *Durst*, *supra* note 172, at 471. *But see Livingston*, *supra* note 124, at 605-06 (explaining that because illegal aliens are not a suspect class, the majority had to give education "fundamental" status to justify its heightened scrutiny); *Id.* at 607 (stating that "fundamental rights are far too important to the individual to be premised on a reasonless foundation").

209. *Plyler*, 457 U.S. at 224.

210. *Id.* at 224-30.

211. *Id.* at 224-26; *Hull*, *supra* note 1, at 422; *Lichtenberg*, *supra* note 184, at 357; *Durst*, *supra* note 172, at 436, 471.

immigrant children from American schools.²¹² Thus, the Court rejected the state's first justification.²¹³

Second, the state argued that it had a substantial interest in preserving the state's limited resources for educating its lawful residents.²¹⁴ However, the Court stated that such a concern, by itself, was insufficient to justify Texas' classification.²¹⁵ Likewise, the Court rejected the state's justification that it had an interest in protecting itself from an influx of illegal immigrants.²¹⁶ The Court explained that no evidence existed in the record to show that illegal immigration placed a burden on the Texas economy.²¹⁷ In addition, the majority reasoned that because illegal immigrants do not come to the United States for a free public education, the statute was a poor attempt to combat illegal immigration, especially compared to the alternative solution of excluding illegal aliens from employment.²¹⁸

Finally, Texas argued that excluding illegal immigrant children was appropriate because they prohibit the state from providing its lawful residents

212. *Plyler v. Doe*, 457 U.S. 202, 224-25 (1982); Hull, *supra* note 1, at 423, 426. See Gerety, *supra* note 7, at 383 (explaining that the Reagan Administration stated it had no interest in the Texas statute); Hull, *supra* note 1, at 416 (revealing that the Reagan Administration "abandoned" President Carter's support of the statute because although it did not want to offend the growing Mexican-American constituency, it also could not reject political allies who supported the Texas Law). Recently, however, a bill was introduced by a U.S. Representative from California in response to the majority's statement. *Bill Would Allow States to End Education of Illegal Immigrants*, CAL. SPECIAL EDUC. ALERT, May 1995, available in LEXIS, Nexis Library, Curnws File. The bill, H.R. 1377, would permit states to deny free public education to illegal immigrants. *Id.* The U.S. Representative stated, "It is my intention to take Justice Brennan up on his invitation to enact the congressional policy." *Id.*

213. *Plyler*, 457 U.S. at 225; Hull, *supra* note 1, at 423.

214. *Plyler*, 457 U.S. at 227; Gerety, *supra* note 7, at 395-96; Hull, *supra* note 1, at 424; Lichtenberg, *supra* note 184, at 353, 357; Livingston, *supra* note 124, at 614; Perry, *supra* note 63, at 343. See Durst, *supra* note 172, at 435 (expressing Texas' contention that the special educational needs of the illegal immigrant students caused "severe hardships for the already overburdened school system").

215. *Plyler*, 457 U.S. at 227; KEMERER & WALSH, *supra* note 184, at 36; Lichtenberg, *supra* note 184, at 353-54.

216. *Plyler*, 457 U.S. at 228; KEMERER & WALSH, *supra* note 184, at 36; Durst, *supra* note 172, at 472.

217. *Plyler v. Doe*, 457 U.S. 202, 228 (1982).

218. *Id.* at 228-29; Hull, *supra* note 1, at 425; Durst, *supra* note 172, at 472. *But see* Livingston, *supra* note 124, at 620 (noting that the *Plyler* majority incorrectly presumed that the intermediate standard requires a state to choose the best means of regulating illegal immigration). Livingston further argued that the *Plyler* majority was wrong in presuming that restricting illegal aliens from employment would better reduce illegal immigration than prohibition of free education because employer sanctions are unenforceable. *Id.* at 621 n.127.

with a high-quality education.²¹⁹ Again, the majority stated that it could find no evidence in the record to support the claim that the overall quality of a Texas education would improve if illegal immigrants were excluded from Texas schools.²²⁰ Justice Brennan explained that even if excluding a number of students from the schools would result in an improved quality of education, a state would have to show why the targeted group was the proper one for exclusion.²²¹ According to the majority, however, illegal immigrant children were not an appropriate target because they were no different than legal resident children in terms of educational cost and need.²²² In conclusion, the majority held that the Texas statute violated the Equal Protection Clause of the Fourteenth Amendment because the alien classification did not further a substantial state interest.²²³

2. The Dissenting Opinion

Chief Justice Burger, joined by Justices White, Rehnquist, and O'Connor, dissented from the majority's holding.²²⁴ Even though the Chief Justice agreed with the notion that children should receive an elementary education, he argued that the majority had exceeded its authority in its decision.²²⁵ The dissent explained that the Constitution vests in Congress the power to make policy, and stated that the majority violated the Separation of Powers Doctrine when it ruled

219. *Plyler*, 457 U.S. at 229; Livingston, *supra* note 124, at 614. In 1975, the Region One Education Center in Edinburg, Texas researched the effect of increased Mexican migration in the border area school districts. *Doe v. Plyler*, 458 F. Supp. 569, 576 (E.D. Tex. 1978); Durst, *supra* note 172, at 435 n.21. The organization found serious overcrowding in the classrooms of these schools. *Plyler*, 458 F. Supp. at 576; Durst, *supra* note 172, at 435 n.21. It concluded that the Mexican children's poverty, inability to speak English, and the poor quality of their prior education augmented the overcrowding problem. *Plyler*, 458 F. Supp. at 576; Durst, *supra* note 172, at 435 n.21.

220. *Plyler*, 457 U.S. at 229.

221. *Id.*

222. *Plyler v. Doe*, 457 U.S. 202, 229 (1982) (citing *Doe v. Plyler*, 458 F. Supp. 569, 589 (E.D. Tex. 1978)); Hull, *supra* note 1, at 424.

223. *Plyler*, 457 U.S. at 230; Livingston, *supra* note 124, at 600.

224. *Plyler*, 457 U.S. at 242. See Hull, *supra* note 1, at 417 (stating that the dissent assaulted the majority's opinion with "uncommon vehemence"); Durst, *supra* note 172, at 443 (explaining that the four separate opinions and the five contradictory interpretations of equal protection in *Plyler* decrease the precedential value of the case).

225. *Plyler*, 457 U.S. at 242 (stating that the majority does not try to hide the fact that it was attempting to make up for Congress' ineffective leadership in illegal immigration); Hull, *supra* note 1, at 427; Will, *supra* note 38, at A11. See Perry, *supra* note 63, at 329, 340-41 (explaining that the Court's decision was unjustified and definitely activist in nature); Hull, *supra* note 1, at 430 (claiming that the Court took an activist role in deciding *Plyler*).

that illegal immigrant children must receive a free public education.²²⁶ The Chief Justice explained that the Court does not have the power to strike down a statute simply because the statute does not comport with the majority's vision of a desirable social policy.²²⁷ He charged Congress, rather than the Supreme Court, with addressing the problems that result from illegal immigration.²²⁸

In addition, the Chief Justice criticized the majority for "creating" an intermediate standard of review to evaluate the Texas statute.²²⁹ The dissent emphasized that the Court could not use a higher standard because education is not a fundamental right²³⁰ and illegal immigrants are not a suspect class.²³¹ Furthermore, the Chief Justice stated that the majority abused the Fourteenth Amendment when it adjusted the level of judicial review to fit its view of the

226. *Plyler*, 457 U.S. at 242 (explaining that the Court "trespassed" on the authority of Congress and the President when it assumed a policymaking role "as the Court does today."). See Will, *supra* note 38, at A11 (explaining that "imperial judges" turn courts into legislatures whenever they label unconstitutional what they view as unfair or unwise).

227. *Plyler v. Doe*, 457 U.S. 202, 242 (1982) (stating that the Constitution did not grant the Court the authority to invalidate laws because they do not meet the Court's "standards of desirable social policy, 'wisdom,' or 'common sense.'" (citing *TVA v. Hill*, 437 U.S. 153, 194-95 (1978))); Hull, *supra* note 1, at 427; Perry, *supra* note 63, at 344. See Will, *supra* note 38, at A11 (claiming that Justice Brennan "always thought he had a right to impose social policies he considered correct"). The dissent further argued that "it is not the function of the Judiciary to provide 'effective leadership' simply because the political branches of government fail to do so." *Plyler*, 457 U.S. at 243; Perry, *supra* note 63, at 344. See Livingston, *supra* note 124, at 601 (stating that even after the Court made this policy decision, the Court still failed to resolve the socioeconomic problems that result from illegal immigration).

228. *Plyler*, 457 U.S. at 253; Hull, *supra* note 1, at 427, 428; Livingston, *supra* note 124, at 601. See *Plyler*, at 225 (majority opinion) (stating that the Court has learned to defer to Congress' judgment regarding immigration policy (citing *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)); *Id.* at 238 n.1 (Powell, J., concurring) (stating that "[t]he Court has traditionally shown great deference to federal authority over immigration . . ."); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (emphasizing the importance of the limited scope of judicial review of immigration legislation); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (explaining that policies involving aliens are largely immune from judicial interference because they are exclusively entrusted to the political branches). The *Plyler* dissent further stated that instead of the Court trying to do Congress' job, the Court should defer to Congress, "unpalatable as that may be to some." *Plyler*, 457 U.S. at 254.

229. *Plyler*, 457 U.S. at 244-48. See Livingston, *supra* note 124, at 601 (explaining that the majority only created more confusion in equal protection analysis when it created the intermediate standard); Perry, *supra* note 63, at 329, 339 (stating that *Plyler* added confusion to earlier equal protection cases when it added a fourth standard of review); Durst, *supra* note 172, at 432 (criticizing the Court's inconsistent and limited view of equal protection).

230. *Plyler*, 457 U.S. at 247. "The importance of education is beyond dispute. Yet we have held repeatedly that the importance of a governmental service does not elevate it to the status of a 'fundamental right' for purposes of equal protection analysis." *Id.* See Livingston, *supra* note 124, at 606-07 (noting that a right is either fundamental or it is not, and if it is not, heightened scrutiny should not be used).

231. *Plyler*, 457 U.S. at 244 (majority opinion) (explaining that illegal aliens are not a suspect class because their unlawful presence in the United States is not a "constitutional irrelevancy").

important social interest.²³² Justice Brennan believed a special level of review was appropriate due to the children's lack of control over their immigration status.²³³ However, Chief Justice Burger refuted the majority's rationalization by explaining that the Equal Protection Clause does not prevent state legislatures from creating classifications based on factors beyond a person's control.²³⁴ Moreover, the dissent argued that although education is important, it should not affect the level of scrutiny that the Court uses.²³⁵ Chief Justice Burger stated that the majority should have reviewed the statute under the rational basis standard.²³⁶ Under a rational basis standard, the Court needed only to determine whether the legislative classification was rationally related to a legitimate state interest.²³⁷

The dissent then concluded that the Texas classification was in fact related

232. *Plyler v. Doe*, 457 U.S. 202, 243-44 (1982) (criticizing the majority's opinion as a perfect example of an "unabashedly result-oriented approach"). See Perry, *supra* note 63, at 338 (stating that it would be "naive" to think the majority would have created the new intermediate standard if it could have reached the same result with the rational basis test). "[B]y patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of [this case]." *Plyler*, 457 U.S. at 244. See Hull, *supra* note 1, at 429 (arguing that the Chief Justice was correct in stating that the majority's opinion was result-oriented). Because the majority opinion was so fact specific, the dissent stated that the opinion would be inapplicable to future cases. *Plyler*, 457 U.S. at 243; Gerety, *supra* note 7, at 398; Hull, *supra* note 1, at 409, 429.

233. *Plyler*, 457 U.S. at 220.

234. *Id.* at 245 n.5 (arguing that illegal immigrants lack control over their illegal residence in the United States just as lawfully resident children have no control over the school district in which their parents reside); Livingston, *supra* note 124, at 600. The dissent further explained that the purpose of the Equal Protection Clause is to protect people from "arbitrary and irrational classifications," and "invidious discrimination stemming from prejudice and hostility; it is not an all-encompassing 'equalizer' designed to eradicate every distinction for which persons are not 'responsible.'" *Plyler*, 457 U.S. at 245.

235. *Plyler*, 457 U.S. at 244, 247 n.8 (By stringing together quotations from various cases addressing a variety of issues, the Court turned education into a "quasi-fundamental right"). "The Equal Protection Clause guarantees similar treatment of similarly situated persons, but it does not mandate a constitutional hierarchy of governmental services." *Id.* at 248. "[T]o the extent this Court raises or lowers the degree of 'judicial scrutiny' in equal protection cases according to a transient Court majority's view of the societal importance of the interest affected, we '[assume] a legislative role and one for which the Court lacks both authority and competence.'" *Id.* (citing Justice Powell in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)); Livingston, *supra* note 124, at 600. See Perry, *supra* note 63, at 336 (claiming that the Texas statute was not problematic on the basis of classification or the interest in education).

236. *Plyler*, 457 U.S. at 248; Hull, *supra* note 1, at 427; Livingston, *supra* note 124, at 600, 601 (adding that the statute should have been upheld under the majority's intermediate scrutiny); Perry, *supra* note 63, at 338. See also *San Antonio Indep. Sch. Dist.*, 411 U.S. at 1 (expressly rejecting the notion that state legislation regarding public education is subject to special scrutiny under the Equal Protection Clause).

237. *Plyler v. Doe*, 457 U.S. 202, 248 (1982). See *supra* note 194 and accompanying text.

to an important state interest.²³⁸ First, the Chief Justice argued that conserving a limited state budget was a legitimate objective.²³⁹ He explained that public education is very expensive, and as a result of the majority's holding, the states and local school districts would incur a large financial burden.²⁴⁰ Second, Texas' classification was consistent not only with Congress' regulation of illegal immigration, but also with the fact that Congress itself had excluded illegal immigrants from several social benefit programs.²⁴¹ Finally, the dissent argued that states do not have the same obligation to provide benefits for people unlawfully within a state as they do for people residing lawfully within a state.²⁴² Therefore, the dissent concluded that because the Constitution does not require states to educate illegal immigrant students, a state may rationally exclude illegal immigrant students from a free public education, so that the state may spend its limited funds on its own lawful residents.²⁴³

B. The Impact of an Ineffective Federal Government and Plyler v. Doe on the States

The Supreme Court's decision in *Plyler v. Doe*, coupled with a rising population of illegal immigrants, have placed a substantial economic burden on some states.²⁴⁴ In addition to providing illegal immigrants with a free public education, states must also provide them with public health care and incarcerate

238. *Plyler*, 457 U.S. at 252-53. See *Perry*, *supra* note 63, at 338 (arguing that the state interest was legitimate).

239. *Plyler*, 457 U.S. at 249; *Livingston*, *supra* note 124, at 600, 614; *Durst*, *supra* note 172, at 474.

240. *Plyler*, 457 U.S. at 252; *Hull*, *supra* note 1, at 427.

241. *Plyler v. Doe*, 457 U.S. 202, 251 (1982); *Hull*, *supra* note 1, at 427-28.

242. *Plyler*, 457 U.S. at 250-51 (stating that the majority gave no explanation as to why a state should not consider the factor of unlawful residence in the United States when allocating its resources to its residents); *Lichtenberg*, *supra* note 184, at 371-72. See *Vlandis v. Kline*, 412 U.S. 441, 452-54 (1973) (concluding that a state has a legitimate interest in maintaining the quality of its schools and the right of its own lawful residents to attend the schools); Bruce Fein, *Curbing Immigration Plugs the Dollar Drain*, N.J.L.J., Dec. 5, 1994, at 24 ("The billions born outside the United States enjoy no moral entitlement to [a free public education] here, based on their craftiness in evading criminal prohibitions on illegal entry.").

243. *Plyler*, 457 U.S. at 244, 252; *Livingston*, *supra* note 124, at 600. See Fein, *supra* note 242, at 21 (stating that the *Plyler* decision was "ill-reasoned and ripe for overruling").

244. See *Gerety*, *supra* note 7, at 387 (stating that illegal immigrants have a substantial impact on Florida, California, New York, and Texas in terms of education); *Will*, *supra* note 38, at A11 (discussing the damage Justice Brennan and the Supreme Court have done to the states). See also *Livingston*, *supra* note 124, at 619 (explaining that Congress has failed to act because the few affected states are foreclosed from taking legislative action when they are outnumbered by the northern states, which have little incentive to spend funds to prevent illegal immigration because it is not their problem).

them if they commit a crime.²⁴⁵ Now, however, states with large illegal immigrant populations can no longer afford to give these benefits to so many illegal aliens.²⁴⁶ Thus, they are asking the federal government to reimburse them for the costs of providing illegal immigrants with these benefits.²⁴⁷ In addition, California citizens have passed an initiative to end the illegal immigrants' benefits.²⁴⁸

1. States Sue the Federal Government

The states of California,²⁴⁹ Arizona,²⁵⁰ New York,²⁵¹ Texas,²⁵² and

245. See generally *Increasing Costs Hearing*, *supra* note 52 (discussing the high costs of benefits for illegal immigrants).

246. See *infra* notes 249-59 and accompanying text. But see INS Special Agent interview, *supra* note 83, at 30-31 (explaining that eventually, other states will be similarly afflicted with high illegal immigrant costs if illegal immigration goes unchecked).

247. Jenifer M. Bosco, Note, *Undocumented Immigrants, Economic Justice, and Welfare Reform in California*, 8 GEO. IMMIGR. L.J. 71, 73 (1994). See Livingston, *supra* note 124, at 619-20 (arguing that states should be able to tell Congress that they cannot afford to and will no longer pay for Congress' legislative inaction).

248. See Will, *supra* note 38, at A11 (noting that there would probably be no Proposition 187 if officials in Sacramento were not corrupted by the judicial activism used in *Plyler v. Doe*). See also *infra* notes 260-73 and accompanying text (discussing Proposition 187).

249. California pays more than \$3.5 billion a year to provide illegal immigrants with public services. Jim Specht, *Wilson: California Will Sue U.S. Over Illegal Immigrants*, GANNETT NEWS SERVICE, Mar. 17, 1994. Governor Pete Wilson has filed suit against the federal government, seeking \$377 million to offset the 1994 cost of imprisoning 16,700 illegal aliens convicted of felonies in California. Glenn Urges White House to Clarify Stance on Unfunded Federal Mandates, DAILY REP. FOR EXECUTIVES, Apr. 29, 1994, at A81 [hereinafter *Glenn Urges White House*]. In anticipation of California's lawsuit, President Clinton requested from Congress a \$350 million amendment to the 1995 budget to help states pay for imprisoning illegal immigrants. *Id.* "It is terribly, intolerably unfair" that Washington forces states to pay for services to illegal immigrants "that we can't afford to provide to our own legal residents." *Border Governors: Illegal Alien Problem Getting Desperate*, LEGAL INTELLIGENCER, June 24, 1994, at 7 (quoting Pete Wilson at a Senate Appropriations Committee Hearing) [hereinafter *Border Governors*]. See also Steve Albert, *Wilson's Immigration Suit is Given Little Chance*, RECORDER, Apr. 26, 1994, at 3 [hereinafter *Wilson's Immigration Suit*]. But see Bosco, *supra* note 247, at 73 (stating that Governor Wilson was receiving more publicity than results when he directly approached the federal government).

250. According to Arizona Governor Fife Symington, illegal immigrants cost Arizona \$100 million a year. Van Der Werf, *supra* note 84, at A1; Pendleton, *supra* note 99, at 3.

251. Initially, New York was reluctant to sue the federal government for the costs of illegal immigrants. Deborah Sontag, *New York Officials Welcome Immigrants, Legal or Illegal*, N.Y. TIMES, June 10, 1994, at A1. However, Governor Mario Cuomo sought the federal government's assistance because it could no longer afford to pay such a large share of the costs of illegal immigration. *Increasing Costs Hearing*, *supra* note 52, at 7; Gayle Hanson, *Illegal Aliens Strain an Ailing U.S. System*, WASH. TIMES, Apr. 12, 1994, at A5.

252. In *Texas v. United States*, No. B94-228, Attorney General Dan Morales sought \$5 billion from Congress to reimburse Texas for six years of illegal immigrant health care, education and correctional services. Robert Elder Jr. & Gordon Hunter, *El Paso Escalates War with AG*, TEX. LAW., Aug. 15, 1994, at 1. Morales claimed the services given to illegal aliens in 1993 alone cost

Florida²⁵³ are currently suing the federal government for the costs of illegal immigration in their states.²⁵⁴ These states argue that it is the federal government's responsibility to make and enforce immigration law.²⁵⁵ However, with so many illegal aliens in the United States, the states claim that it is obvious the federal government is not fulfilling its obligation.²⁵⁶ The states argue that if the federal government were doing its job properly, there would not be so many illegal aliens; and the states would not have to spend the taxpayers' money to educate them, give them health care, and incarcerate

\$1.34 billion. *Id.* Cf. Pendleton, *supra* note 99, at 3 (stating that Texas spends \$166 million each year on its 550,000 illegal immigrants).

In terms of education, "Hispanic Texans who live along the border are angry that their ever-mounting property taxes pay to educate illegal immigrants. . . ." *Id.* (quoting state Representative Henry Cuellar who represents the border City of Laredo). In Brownsville, "[W]e see the cars cross [the border] daily, drop off their kids at school, and then go back. . . ." *Id.* (quoting Joe Garcia, chief of staff for state Senator Eddie Lucio). "[Garcia] estimates that the 40,000-student Brownsville school district pays \$20 million annually to educate children who don't live there or who live there illegally." *Id.* "It's depriving their [own] children of an education." *Id.* (quoting Senator Lucio's administrative assistant, Paul Cowen).

253. Each year, 340,000 illegal immigrants enter Florida each year. Stamets, *supra* note 85, at A1. In *Chiles v. United States*, No. 94-0676CV, Florida Governor Lawton Chiles requested \$1.5 billion from the federal government to pay for illegal immigration costs in his state. N.Y.L.J., Dec. 21, 1994, at 1. See also *Wilson's Immigration Suit*, *supra* note 249, at 3; Booth, *supra* note 7, at A1; Elder & Hunter, *supra* note 252, at 1; Glenn Urges White House, *supra* note 249, at A81; Pendleton, *supra* note 99, at 3; Rohrer, *supra* note 1, at A12.

254. See Mailman, *supra* note 203, at 3 (claiming that the United States should strictly enforce immigration law); Rorie Sherman, *Immigration Suits Gain Critical Mass*, NAT'L L.J., June 13, 1994, at A6. Providing services for illegal immigrants costs the United States almost six billion dollars. Specht, *supra* note 249; *Eye On America*, *supra* note 2.

However, on December 20, 1994, U.S. District Judge Edward B. Davis dismissed the Florida suit against the federal government. N.Y.L.J., Dec. 21, 1994, at 1. The judge reasoned that he did not have the power to order the federal government to pay Florida. *Id.* Although he sympathized with Florida's "tremendous financial burden," he added that the conflict was political, not legal. *Id.* Nevertheless, Governor Chiles promised that he would go to the United States Supreme Court if necessary. *Here are Highlights from 1994*, MED. & HEALTH, Jan. 2, 1995, at 32 [hereinafter *Highlights From 1994*].

On February 13, 1995, the California suit was also dismissed. Richard C. Reuben, *The New Federalism*, 81 A.B.A. J. April, 1995 at 76. However, the state is appealing the decision. *Id.*

255. Specht, *supra* note 249.

256. Booth, *supra* note 7, at A1; Pendleton, *supra* note 99, at 3; Specht, *supra* note 249; Van Der Werf, *supra* note 84, at A1. See Hull, *supra* note 1, at 415-16 (quoting the Texas State's Attorney General). "[I]t was the 'height of hypocrisy' for Congress to refuse to finance the education of undocumented children, who were here in the first place because the federal government was unable or unwilling to enforce its immigration laws." *Id.* See also Livingston, *supra* note 124, at 617 (stating that an inactive Congress has failed to effectively enforce federal immigration law).

them.²⁵⁷ Instead, these states believe that they have a greater obligation to allocate such services to American citizens and to immigrants residing in the United States legally.²⁵⁸ Therefore, the states claim that the federal government should compensate them because these expenses are a result of the federal government's ineffectiveness.²⁵⁹

2. Proposition 187

In addition to suing the federal government, California citizens have decided to independently restrict illegal immigrants from receiving these costly public benefits.²⁶⁰ On November 8, 1994, California voted in favor of

257. See *Knee-Jerk Responses*, *supra* note 161, at A12 (criticizing Congress for imposing immigrant-related mandates on the states and not paying for them); Booth, *supra* note 7, at A1 (claiming that Florida citizens should not have to subsidize illegal immigration or tolerate the continued failure of the federal government to enforce the law) (quoting Governor Lawton Chiles). Rohter, *supra* note 1, at A12 (declaring that if the federal government wishes to continue a humanitarian foreign policy that encourages immigration and refugee admissions, then it must financially support the immigrant population that arrives) (quoting the Governors of Florida, New York, Texas, California, and Illinois in a letter written to President Clinton in January 1993). Daniel M. Weintraub, *Wilson to Sue U.S. on Inmate Immigrants*, L.A. TIMES, Apr. 26, 1994, at A3. "If the federal government were held accountable, they would quickly discover that the cost of ignoring the real and explosively growing problem of illegal immigration is far greater than the cost of fixing it. . . ." *Id.*

258. See Specht, *supra* note 249 ("That's billions of dollars that we can't spend improving our schools, putting more police on our streets or providing better health care for our citizens.") (quoting Governor Pete Wilson discussing California's cost of illegal immigrants); *Prop 187 II*, HEALTH LEGIS. & REG., Jan. 4, 1995 ("[I]f they're not citizens, why should they be our responsibility?") (quoting an aide to Representative Clay Shaw, chair of the Ways & Means Human Resources Subcommittee). *But see generally* Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law Into the Breach Once More*, 21 N.M. L. REV. 219 (1991) (arguing that states should offer public assistance to illegal immigrants because the federal government does not).

259. See Booth, *supra* note 7, at A1 ("If the United States federal government chooses to selectively enforce the law, it has a corresponding obligation to incur the costs associated with this selective enforcement.") (quoting Governor Lawton Chiles); Specht, *supra* note 249 ("Because the federal government let the illegal immigrants in, and the services provided are required by Congress or federal court decisions, the federal government should be forced to pay for them. . . .").

260. See *Send Back Your Tired*, *supra* note 7, at 26 (California Assemblyman Richard Mountjoy explaining that because California cannot stop illegal immigrants from coming, the benefits of coming here must be stopped). An estimated 1.7 million illegal immigrants live in California, which is 52% of all illegal aliens in the United States. Booth, *supra* note 7, at A1; Herschensohn, *supra* note 1, at A20. Illegal immigrants enter the state about 2000 times a night. *Id.*

A California family of four has to pay \$400 a year for illegal immigrants' benefits. *Border Governors*, *supra* note 249, at 7. For California as a whole, illegal immigrants cost three billion dollars a year. Booth, *supra* note 7, at A1. *Cf.* Van Der Werf, *supra* note 84, at A1 (stating that California taxpayers pay \$2.3 billion per year to provide illegal aliens with public services). As a result, some legal California residents receive no services so that illegal residents can be served. *Id.*

Proposition 187.²⁶¹ Also known as "Save Our State,"²⁶² this initiative: (1) makes it illegal to produce or use fraudulent documents to obtain a job or welfare benefits;²⁶³ (2) requires that every person who has been arrested for a crime to reveal his legal status;²⁶⁴ (3) prohibits publicly-funded health care facilities from providing free services for illegal aliens,²⁶⁵ except for

261. Cole, *supra* note 10, at 22.

262. George Raine, *Feinstein Decides Against Prop. 187*, S.F. EXAMINER, Oct. 22, 1994, at A1.

263. Proposition 187 §§ 2, 3, Nov. 8, 1994 (California) [hereinafter Proposition 187].

264. *Id.* § 4. California taxpayers spend \$475 million annually to incarcerate convicted illegal aliens, who compose one-sixth of California's prison population. Herschensohn, *supra* note 1, at A20.

265. Proposition 187, *supra* note 263, § 6. Such benefits cost the California taxpayers over \$900 million in 1993, an increase of 1800% over the previous five years. SAVE OUR STATE, PROPOSITION 187: THE FICTION AND THE FACTS 3 (1994). In 1993 alone, 322,000 illegal immigrants received free public health care in California. *Id.* Moreover, 70% of all births in Los Angeles county public hospitals are to illegal immigrant mothers. Herschensohn, *supra* note 1, at A20; *Border Governors*, *supra* note 249, at 7 (stating that two-thirds of all babies born in Los Angeles County public hospitals belong to illegal immigrant mothers); *Crack Down*, *supra* note 190, at A12. See also NELSON, *supra* note 1, at 5 (stating that 80% of the population increase in Los Angeles is among Latinos and Asians). Cf. Van Der Werf, *supra* note 84, at A1 (stating that at least 300 babies are born each month to illegal immigrant parents in Arizona). See also THE UNIVERSAL ALMANAC, *supra* note 1, at 302 (stating that immigration will likely add more to the United States population than will natural increases); MORRIS, *supra* note 1, at 28-29 (discussing how the group Zero Population Growth believes that illegal immigration will cause developed nations to experience population growth similar to that of less developed nations).

Consequently, Governor Pete Wilson suggested that an amendment be added to the U.S. Constitution to prevent illegal alien mothers from crossing the border to give birth to a child who then is a U.S. citizen because he or she is born on U.S. territory. Bosco, *supra* note 247, at 74; Note, *The Birthright Citizenship Amendment: A Threat to Equality*, 107 HARV. L. REV. 1026, 1026 (1994) [hereinafter *Birthright Citizenship Amendment*]; Booth, *supra* note 7, at A1; Rohter, *supra* note 1, at A12; *Crack Down*, *supra* note 190, at A12; INS Special Agent interview, *supra* note 83, at 5-6 (stating that such an amendment is a good idea because it takes care of several of the Proposition 187 issues - specifically that non-U.S. citizens are not entitled to the benefits). But see *Knee-Jerk Responses*, *supra* note 161, at A12 (claiming that Governor Pete Wilson is blaming illegal immigrants because they are an easy target). Even some Hispanic Texans support the Amendment. Pendleton, *supra* note 99, at 3. See U.S. CONST. amend. XIV, § 1.

When a child turns 18, he or she may legally bring to the United States those immediate family members who were originally illegal immigrants. Peter J. Riga, *Illegal Immigration Needs a Constitutional Fix*, NAT'L L.J., Nov. 21, 1994, at A20. Before the child reaches 18, the parent(s) may be deported but the child may not. NELSON, *supra* note 1, at 8. However, action leading to the parent's deportation usually does not occur. *Id.*

The United States is the only country in the world that permits citizenship by territory; other nations have always defined citizenship exclusively by the status of one's parents. Riga, *supra*, at A20. The reason a territorial citizenship was incorporated into the Fourteenth Amendment was so that former slaves could become U.S. citizens, a concern which is no longer relevant. *Id.*

Representative Elton Gallegly of California and 12 other Congress members sponsored a constitutional amendment that would repeal the current Citizenship Clause and replace it with the language of: "All persons born in the United States . . . of mothers who are citizens or legal residents of the United States . . . are citizens of the United States . . ." H.R.J. Res. 129,

emergency care, as required by federal law;²⁶⁶ (4) permits only citizens and legal residents of California to receive a public education and requires all students enrolling in school to show identification;²⁶⁷ and (5) prohibits welfare payments to illegal aliens.²⁶⁸ Furthermore, as public officials implement these restrictions, Proposition 187 requires them to notify the INS whenever they discover illegal aliens.²⁶⁹

The day after the initiative passed by a vote of 59.2% to 40.2%,²⁷⁰ the implementation of Proposition 187 was blocked by temporary restraining orders, lawsuits, and an executive order.²⁷¹ Opponents of Proposition 187 claim that federal law preempts the California law because only Congress has the authority to create immigration law, and the states do not have such authority.²⁷² Furthermore, Proposition 187 critics claim that Section Seven is unconstitutional because it violates the 1982 Supreme Court decision in *Plyler v. Doe*.²⁷³

103d Cong., 1st Sess. (1993). *But see generally Birthright Citizenship Amendment, supra* (stating that such an amendment would compromise American ideals and equality).

266. 42 U.S.C. § 1396b(v)(3) (1994); Calvo, *supra* note 16, at 424-25.

267. Proposition 187, *supra* note 263, §§ 7-8. Any student who cannot show legal status will have 90 days to make a transition back to his or her home country. *Id.* § 7(f). Educating illegal immigrants costs California taxpayers \$1.5 billion each year. Herschensohn, *supra* note 1, at A20. Because of such high costs, California had to cut back on the quality of public education for its legal residents. *Id.* "Since 1980, the state's public education system has fallen from the top 10 states to the bottom 10." *Id.* Cf. Reardon, *supra* note 12, at 12.

268. Proposition 187, *supra* note 263, § 5.

269. *Id.* §§ 4(b)3, 5(c)(3), 6(c)(3), 7(e), 8(c). On November 20, 1995, U.S. District Judge Mariana R. Pfaelzer invalidated the provisions of the initiative which permitted local law enforcement agencies to investigate reports of illegal immigrants. Pamela Martineau, *Lungren Urges Congress to Implement Tenets of Proposition 187*, CAPITAL NEWS SERVICE, Nov. 24, 1995, at 9.

270. *California Votes to Deny Health Care to Illegal Immigrants*, DAILY REP. FOR EXECUTIVES, Nov. 10, 1994, at A216.

271. *Id.* A California state court in San Francisco enjoined the provision of Proposition 187 that prohibited school attendance by illegal immigrant children. Cole, *supra* note 10, at 22. Likewise, a U.S. district court judge in California enjoined the major Proposition 187 provisions. Mailman, *supra* note 203, at 3; *Federal Judge Blocks Most of Calif.'s Proposition 187*, LEGAL INTELLIGENCER, Dec. 16, 1994, at 3. On November 20, 1995, U.S. District Judge Mariana R. Pfaelzer ruled Proposition's education ban was unconstitutional. Martineau, *supra* note 269, at 9. *See generally* Riana McLoughlin, *Pro Bono*, AM. LAW., Jan./Feb. 1996, at 106 (stating that Judge Pfaelzer quashed many of the Proposition's provisions). However, California Attorney General Dan Lungren promises to appeal the judge's ruling. *State to Appeal Aliens Ruling*, NAT'L L.J., Dec. 4, 1995, at A8.

272. *See supra* notes 44-63 and accompanying text. *But see Proposition 187 Copycats*, NAT'L L.J., June 19, 1995, at A24 (stating that bills and ballot initiatives that shadow Proposition 187 are "snowballing" in many states).

273. 457 U.S. 202 (1982). *See Martineau, supra* note 269, at 9 (stating that the U.S. District Judge invalidated the initiative's education ban because it was inconsistent with *Plyler*). However, it has been acknowledged that the purpose of Proposition 187's education provision was to directly appeal to the U.S. Supreme Court to revisit the *Plyler* decision. *Id.* *See also* Mark S. Pulliam, *Special Interests Continue Legal Assault Against Prop 187*, LEGAL OPINION LETTER, Feb. 2, 1996

As illegal immigration has become more problematic for states with large illegal alien populations, these states have been forced to proceed with their own agendas.²⁷⁴ States such as California and Texas can no longer afford to pay for the federal government's ineffective enforcement of immigration law.²⁷⁵ The ideal solution, of course, would be to end illegal immigration. However, due to the socioeconomic forces behind illegal immigration, such a solution is difficult to achieve.²⁷⁶ In the meantime, however, Congress needs to relieve the states and the public school systems from their substantial economic burden.

V. CONGRESSIONAL RELIEF FOR THE STATES AND PUBLIC SCHOOLS

Although *Plyler v. Doe* requires states to educate illegal immigrants, the Supreme Court has upheld statutes that prohibit illegal aliens from receiving other public benefits.²⁷⁷ In *Mathews v. Diaz*,²⁷⁸ the Court examined the issue of whether Congress may discriminate in favor of citizens and against immigrants when it provides federal medical insurance.²⁷⁹ The Court held that depriving illegal aliens from the insurance was not a deprivation of liberty or property without due process of law, and thus was constitutional.²⁸⁰ The Court reasoned that even though all aliens are protected by the Due Process Clause, all aliens are not entitled to receive each and every benefit that citizens receive.²⁸¹ The Court stated that "certainly" an illegal alien does not have a

(explaining how the district court judge's ruling is "seriously flawed").

274. See Will, *supra* note 38, at A11 (explaining that California citizens are trying to reclaim a right of self-determination).

275. Pete Wilson, *How Federal Mandates are Bankrupting the States*, WASH. TIMES, Mar. 18, 1994, at A25 [hereinafter *Federal Mandates*].

276. See *supra* note 13 and accompanying text.

277. See *infra* notes 298-303 and accompanying text.

278. 426 U.S. 67 (1976).

279. *Id.* at 74. The insurance program is the Medicare Part B supplemental medical insurance program, established by the Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620. The appellees challenged 42 U.S.C. § 1395o (2) (1970), which grants federal medical insurance to resident citizens who are 65 or older but denies eligibility to similar immigrants, unless they received permanent resident status and have also resided in the United States for at least five years. *Mathews*, 426 U.S. at 70. Appellees argued that Congress deprived them of liberty and property without due process of law. *Id.* at 71.

280. *Id.* at 87.

281. *Id.* at 78-79. For example, the protection of privileges and immunities only applies to citizens. U.S. CONST. art. IV, § 2, cl. 1; U.S. CONST. amend. XIV, § 1; Gerety, *supra* note 7, at 392. Only citizens have the right to vote. U.S. CONST. amend. XV, XIX, XXIV, XXVI; Gerety, *supra* note 7, at 392. Representatives of Congress must be citizens for seven years. U.S. CONST. art. I, § 2, cl. 2; Gerety, *supra* note 7, at 392. Senators must be citizens for nine years. U.S. CONST. art. I, § 3, cl. 3; Gerety, *supra* note 7, at 392. Furthermore, the President must be a "natural born citizen." U.S. CONST. art. II, § 1, cl. 5; Gerety, *supra* note 7, at 392.

The Court further explained that Congress has no constitutional obligation to provide all immigrants with the same benefits given to citizens. *Mathews*, 426 U.S. at 82.

constitutional right to welfare benefits that a sovereign government conscientiously offers to its own citizens and "some of its guests."²⁸² Finally, the Court explained that because the political branches need flexibility to react to changing political and economic circumstances, the Court should not interfere with such political decisions.²⁸³

Therefore, according to *Mathews*, Congress may likewise enable the states to decide that illegal immigrant students should not be entitled to receive the same benefits that citizens and lawful resident students receive, namely a free public education.²⁸⁴ Moreover, Congress needs flexibility to respond to the changing political and economic circumstances of illegal immigration.²⁸⁵ Because illegal immigrant students are overcrowding classrooms and affecting the quality of education, Congress should respond to the economic burden on the states and public school systems that has emerged from the changing circumstances of illegal immigration.²⁸⁶ Thus, *Mathews* supports such a proposal.

A. Congress Should Relieve the States and Public Schools of their Financial Burden

The majority in *Plyler* stated that in terms of illegal immigration, Congress has never legislated in the area of public education.²⁸⁷ However, Congress should legislate in this area because *Plyler* has exacerbated, rather than resolved, the problems that stem from illegal immigration.²⁸⁸ Furthermore, such regulation is justified when: (1) changed circumstances exist because illegal

282. *Mathews v. Diaz*, 426 U.S. 67, 80 (1976). Furthermore, the Court stated that even if the resident requirements were removed from the medical insurance, Congress would certainly require that the immigrants at least be lawfully within the United States. *Id.* at 82. See Hull, *supra* note 1, at 412 (explaining that a state is also not obligated to grant benefits to illegal aliens); Rosberg, *supra* note 92, at 406 (stating that illegal aliens, by definition, should be excluded from public benefits because they are not lawfully within the United States).

283. *Mathews*, 426 U.S. at 81. The Court also stated that it is not "political hypocrisy" to conclude that the Fourteenth Amendment's limits on state authority is different from the Amendment's reach over Congress' power to regulate immigration. *Id.* at 86-87.

284. See *id.* at 83 (holding that Congress may reasonably distinguish between lawful residents and illegal aliens when providing benefits); Rosberg, *supra* note 92, at 400 (explaining that the federal government can exclude aliens from almost any benefit it chooses).

285. See *Mathews*, 426 U.S. at 81.

286. See *infra* notes 290-97 and accompanying text.

287. *Plyler v. Doe*, 457 U.S. 202, 226 (1982). See also Gerety, *supra* note 7, at 387 (stating that Congress has never governed the enrollment of aliens in public or private elementary schools).

288. See Hull, *supra* note 1, at 430 (stating that the holding in *Plyler* does not preclude, and in fact invites, congressional action that would "effectively resurrect" the Texas statute). "The Court suggested throughout *Plyler* that Congress could either forbid undocumented children from attending public schools, or authorize states to exclude them at will." *Id.*

immigration has reached a critical level; (2) illegal immigrants have already been restricted from several public benefits; and (3) society's interest in receiving a high quality public education outweighs illegal immigrant students' interest in receiving a free public education in the United States.²⁸⁹

1. Changed Circumstances

Illegal immigration is a much greater problem now than it was in the 1970s.²⁹⁰ When the *Plyler* suit was initiated in 1977, an estimated 3.5 million illegal immigrants lived in the United States.²⁹¹ Eighteen years later, an estimated seven million illegal aliens resided in the United States.²⁹² An estimated 120,000 illegal immigrants were attending Texas public schools in 1980.²⁹³ However, 400,000 illegal immigrant students currently attend California public schools.²⁹⁴ This number is thirty times greater than the number of illegal immigrant students that were attending Texas schools in 1975.²⁹⁵ Because of the tremendous illegal immigrant population now present in the United States, a handful of states must spend a substantial amount of money to educate illegal immigrant students.²⁹⁶ Therefore, under *Mathews*, Congress should relieve the states and public school systems from their undue financial burden resulting from changed circumstances in illegal immigration.²⁹⁷

289. See *infra* notes 290-338 and accompanying text.

290. During the 1970s, INS apprehensions of illegal aliens never exceeded one million in any given year. ASHEGHIAN, *supra* note 12, at 452. After 1980, however, the number of INS apprehensions never dropped below one million. *Id.*

291. Arthur F. Corwin, *The Numbers Game: Estimates of Illegal Aliens In the United States, 1970-1981*, 45 *LAW & CONTEMP. PROBS.* 223, 247 (1982).

292. Stamets, *supra* note 85, at A1.

293. Hull, *supra* note 1, at 413-14; John Crewdson, *Access to Free Education for Illegal Alien Children*, N.Y. TIMES, Aug. 26, 1980, at B10. In *Plyler*, Texas stated that the number of Mexican nationals enrolled in Texas public schools increased from 44,799 in the 1975-76 school year to 51,348 the following school year. *Doe v. Plyler*, 458 F. Supp. 569, 585 (E.D. Tex. 1978); Durst, *supra* note 172, at 435 n.21.

294. See Raine, *supra* note 262, at A1 (stating that there are an estimated 400,000 illegal immigrant children in California); Paul Feldman, *Texas Case Looms over Prop. 187's Legal Future*, L.A. TIMES, Oct. 23, 1994, at A21 (noting that more than 300,000 students would be expelled).

295. Feldman, *supra* note 294, at A21. See Dan Stein, *Yes: The Supreme Court Must Re-Evaluate Existing Law*, 81 A.B.A. J. 42 (Feb. 1995) (stating that "it is not inconceivable that, based on present circumstances in California and the addition of new federal measures to enforce immigration laws . . . the current Court might reach a different conclusion [than the *Plyler* Court did]).

296. For example, Illinois spent \$101.9 million to educate illegal immigrant students in 1992. *Increasing Costs Hearing*, *supra* note 52, at 5. See *supra* notes 249-54, 267 and accompanying text.

297. See *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991) (stating that an agency must be free to adapt its rules and policies to the demands of changing circumstances); *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983) (recognizing that agencies must

2. Illegal Immigrants Are Already Excluded from a Variety of Benefits

Congress has already determined that American citizens and lawful alien residents are the proper recipients for several federal benefits, while illegal aliens are not.²⁹⁸ Congress currently prohibits illegal aliens from receiving food stamps,²⁹⁹ legal services,³⁰⁰ Supplemental Security Income (SSI),³⁰¹ Aid to Families with Dependent Children (AFDC),³⁰² and Medicaid.³⁰³ Furthermore, Congress enacted IRCA to prohibit employers from hiring illegal immigrants.³⁰⁴ Congress created these restrictions because it believed that: “(1) assistance should be limited to aliens whose residence is authorized by federal immigration law;³⁰⁵ and (2) assistance to aliens should avoid undue

be given “ample latitude to ‘adapt their rules and policies to the demands of changing circumstances.’” (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)); *Munn v. Illinois*, 94 U.S. 113, 134 (1876) (holding that the purpose of statutes is to remedy flaws in the common law as they develop, and to adjust the law to the changes of time and circumstances); *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994) (explaining that agencies have significant freedom to “refine, reformulate, and even reverse” their decisions when changing circumstances exist); *Yepes-Prado v. INS*, 10 F.3d 1363, 1370 (9th Cir. 1993) (stating that agencies have substantial latitude in shaping their practices to meet changed circumstances); *NLRB v. Kostel Corp.*, 440 F.2d 347, 350 (7th Cir. 1971) (holding that the doctrine of *stare decisis* does not obligate the NLRB to follow old policies and standards that do not meet changing conditions).

298. See *Plyler v. Doe*, 457 U.S. 202, 250 (1982) (Burger, C.J., dissenting) (emphasizing the fact that the federal government has already justified the exclusion of illegal immigrants from several welfare programs); Hull, *supra* note 1, at 410 (stating that the United States restricts illegal aliens from almost every public benefit that it provides lawful residents). See also Rosberg, *supra* note 92, at 406 (arguing that, like Congress, states should also be able to exclude illegal aliens from benefits so long as the state bases the classification on residence and not on citizenship).

299. 7 C.F.R. § 273.4(a) (1988); *Plyler*, 457 U.S. at 251 (Burger, C.J., dissenting); WEISSBRODT, *supra* note 1, at 315-16; Calvo, *supra* note 16, at 407; Dellios, *supra* note 16, at 4.

300. 42 U.S.C. §§ 1404a-1440 (1988 & Supp. V 1993); Calvo, *supra* note 16, at 410.

301. 42 U.S.C. §§ 1381-1385 (1988 & Supp. V 1993); *Plyler*, 457 U.S. at 251 (Burger, C.J., dissenting); WEISSBRODT, *supra* note 1, at 315-16; Calvo, *supra* note 16, at 402, 416; Dellios, *supra* note 16, at 4.

302. 42 U.S.C. §§ 610-615 (1988); *Plyler v. Doe*, 457 U.S. 202, 251 (1982) (Burger, C.J., dissenting); WEISSBRODT, *supra* note 1, at 315-16; Calvo, *supra* note 16, at 402, 420; Dellios, *supra* note 16, at 4; Will, *supra* note 38, at A11.

303. 42 U.S.C. §§ 1396-1396s (1988 & Supp. V 1993); *Plyler*, 457 U.S. at 251 (Burger, C.J., dissenting); WEISSBRODT, *supra* note 1, at 315-16; Calvo, *supra* note 16, at 402, 418-19; Dellios, *supra* note 16, at 4. A provision in IRCA requires states to pay for AFDC and Medicaid. *IRCA Hearing*, *supra* note 81, at xx; Van Der Werf, *supra* note 84, at A1; Will, *supra* note 38, at A11.

304. See discussion of IRCA *supra* notes 124-49 and accompanying text.

305. Calvo, *supra* note 16, at 421. See H.R. REP. No. 727, 99th Cong., 2d Sess. 111 (1986) (explaining that Congress did not intend to reward illegal immigrants with those benefits given to citizens and lawful residents); Fein, *supra* note 242 (stating that excluding illegal immigrants from benefits is consistent with the national interest of combatting illegal immigration).

burdens on states and localities.”³⁰⁶ In terms of the latter objective, the federal government realized that it has exclusive jurisdiction over immigration law³⁰⁷ and that the states cannot alter that law.³⁰⁸ Nevertheless, the states must bear the economic and social costs of the federal law if the federal government does not help them preserve the health and welfare of their residents.³⁰⁹ To conform to these federal objectives, Congress should enable states to regulate illegal immigrant students in public schools. Although a public education is not an assistance program like food stamps and SSI, education is a benefit nonetheless.³¹⁰ Despite the fact that illegal immigrants may primarily come to the United States for employment,³¹¹ the sheer number of illegal immigrant students in public schools is evidence enough that their parents value a free public education.³¹² Although denying an illegal immigrant student an

306. Calvo, *supra* note 16, at 421, 424. See WEISSBRODT, *supra* note 1, at 27 (explaining that IRCA disqualified newly legalized aliens from federal welfare benefits for five years to avoid imposing adverse economic effects on the states). The states are affected financially because they must administer the benefits under federally funded plans. *Id.* at 316.

307. See *supra* notes 50-55 and accompanying text.

308. Calvo, *supra* note 16, at 424.

309. *Id.* In fact, there is a provision in IRCA that permits states to exclude illegal immigrants from financial and medical public assistance programs so long as the state restrictions mirror the federal restrictions established by IRCA. 8 U.S.C. § 1255a(h)(1)(B) (1994). See *supra* § IV.B.

310. See Plyler v. Doe, 457 U.S. 202, 233 n.2 (1982) (Blackmun, J., concurring) (claiming that education is a benefit); *Id.* at 237 (Powell, J., concurring) (stating that immigrants may come to the United States illegally because they are attracted to other benefits, in addition to employment); *Id.* at 249 n.10 (Burger, J., dissenting) who argued:

It blinks reality to maintain that the availability of governmental services such as education plays no role in an alien family's decision to enter, or remain in, this country; certainly, the availability of a free bilingual public education might well influence an alien to bring his children rather than travel alone for better job opportunities.

See Fein, *supra* note 242, at 24 (“Only a handful of stone-hearted parents would smuggle their children into the United States to be greeted by government viciousness.”); Livingston, *supra* note 124, at 623 (noting that a free education is an incentive to immigrate illegally). If a state could deny free education to illegal alien students, that state would be marginally less attractive to potential immigrants. *Id.*; INS Special Agent interview, *supra* note 83, at 15-16 (noting that a free education is a benefit). In August of 1993, Governor Pete Wilson sent an open letter to President Clinton asking to end “the insanity” of encouraging illegal immigration in the form of educational and social services. Booth, *supra* note 7, at A1.

311. See *supra* note 128 and accompanying text. See also Livingston, *supra* note 124, at 615 (arguing that a state legislature may deny free public education to illegal aliens and that it is irrelevant that a state law prohibiting employment of illegal immigrants would be more successful at combatting illegal immigration).

312. California, for example, educates 400,000 illegal immigrant students. Feldman, *supra* note 294, at A1; Raine, *supra* note 262, at A1. In Illinois, 16,821 illegal immigrant students attend public schools. *Increasing Costs Hearing*, *supra* note 52, at 5. See Livingston, *supra* note 124, at 615 (stating that the Plyler statute prohibiting illegal immigrants from receiving a free public education did have some negative effect on the immigration decision); Stein, *supra* note 295, at 42 (noting that the result in Plyler “has acted as a magnet reinforcing the flow of Mexican immigrants, packing inner-city schools); INS Special Agent interview, *supra* note 83, at 20 (explaining how

education may be detrimental to the student's future, it is no more drastic than denying a child's family food stamps or AFDC, which may be the only means of subsistence for a child.³¹³ Therefore, Congress' exclusion of illegal aliens from these essential welfare programs has a greater impact on the lives of illegal immigrant children than exclusion from public schools.³¹⁴ For this reason, Congress should permit states to conform to federal policy.³¹⁵ Because the federal mandate to educate illegal immigrant students imposes an undue burden on the states and localities, Congress should empower the states to regulate illegal immigrants in public schools based on the same justifications that Congress uses to exclude illegal immigrants from federal welfare benefits.

3. The Compelling State Interest Outweighs the Illegal Immigrant Students' Interest

It is true that excluding illegal immigrant students from public schools would, in effect, punish the students for the actions of their parents.³¹⁶ However, the competing policy interests of the states and the public school systems in relieving themselves of their heavy financial burden outweighs the illegal immigrant students' interest in receiving a free public education.³¹⁷ First, the states have a greater obligation to provide their own citizens and lawful resident students with a public education than they do to provide illegal

excluding illegal immigrant students from school would help decrease illegal immigration).

313. See William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 *CARDOZO L. REV.* 3, 21 (1988) (including appellees' brief from *Goldberg v. Kelly*, 397 U.S. 254 (1970), which found that the appellees' entitlement to AFDC was terminated).

After termination, Angela Valez and her four young children were evicted for non-payment of rent and forced to live in one small room of a relative's already crowded apartment. The children had little to eat during the four months it took for the Department to correct its error. Esther Lett and her four children live on the handouts of impoverished neighbors; within two weeks all five required hospital treatment because of the inadequacy of their diet. Soon after, Esther Lett fainted in a welfare center while seeking an emergency food payment of \$15 to feed herself and her children for three days. Pearl Frye and her eight children 'had gone hungry,' living on peanut butter and jelly sandwiches and rice supplied by friends who were also dependent on public assistance. . . .

Id.

314. *Plyler v. Doe*, 457 U.S. 202, 251 (1982) (Burger, C.J., dissenting).

315. See *id.* at 225 (explaining that states have power to legislate with respect to illegal immigrants if the state legislation conforms to federal objectives). See also *supra* note 63 and accompanying text.

316. See *supra* note 205 and accompanying text.

317. See Lichtenberg, *supra* note 184, at 354 (noting the widely held view that the claims of illegal immigrants have less weight than those of citizens or lawful residents); Will, *supra* note 38, at A11 (stating that the combination of federalism and popular government justify Californians' right to decide how to allocate their increasingly scarce resources).

immigrants with such a benefit.³¹⁸

Second, the children of the taxpayers are unfairly affected because the quality of their education decreases.³¹⁹ When schools must educate illegal immigrants, in addition to American citizens and lawful resident students, state education funds are diluted among a larger number of students.³²⁰ With more students, a state must hire additional teachers, particularly bilingual ones,³²¹

318. See Melita Marie Garza, *United Front Planned Against a Local Version of Proposition 187*, CHI. TRIB., Nov. 23, 1994, at 5 (discussing Representative Phil Crane's support for a Proposition 187 in Illinois). Representative Crane explained that it is not the taxpayers' responsibility to pay for benefits for illegal aliens. *Id.* See also Will, *supra* note 38, at A11 (explaining that Proposition 187 concerns how state policy should regard violators of the national law). See *supra* note 242 and accompanying text.

319. See William Sander, *Testing, Testing, 1-2-3*, CHI. TRIB., Mar. 8, 1995, § 1, at 15 (stating that the quality of public education in California has decreased); Jordan, *supra* note 7, at 17 (noting that the quality of Boston public schools is "miserable"). California ranks 49th in national fourth grade reading tests and 36th on its high school graduation rate. Sander, *supra*, at 15. Moreover, California SAT scores have decreased by more than 60 points over the past 20 years. *Id.* See also Daryl Kelley, *Student District-Hopping Costs Compton \$5 Million*, L.A. TIMES, Feb. 24, 1985, § 9, at 1 (explaining that students are transferring into different school districts by giving false addresses to receive a better education). "[P]arents will sell their souls for quality education." *Id.* (quoting Los Angeles school superintendent). Between 1981 and 1985, the Lynwood district enrollment jumped from 10,000 to 12,800, reflecting a rapid increase in the Latino population in Los Angeles. *Id.* See also Sipchen, *supra* note 9, at E14 (explaining that after more than 600,000 students drop out of American public schools each year, only 5% of those students who complete high school are prepared to do college work).

States with large illegal immigrant populations ranked poorly in the percentage of students who completed high school. See THE UNIVERSAL ALMANAC, *supra* note 1, at 237 (including the chart "Educational Attainment by State, 1992"). In 1992, California ranked 35th; Texas was 39th; Florida ranked 32d; New York was 36th; and Illinois ranked 28th. *Id.* In the Jersey City public school system, 55% of the students drop out before graduation. Grube, *supra* note 2, at 50. Of the 45% who remain in school, only about 40% pass a high school proficiency test required to graduate. *Id.* Thus, in Jersey City, only 16% of the students earn a diploma per year. *Id.*

320. Not by coincidence, states with the largest illegal immigrant populations are the same states with the highest enrollments in public schools. See THE UNIVERSAL ALMANAC, *supra* note 1, at 236 (including the chart "How the States Rank in Public Education, 1992-93"). Those states, however, are far from the top of the list in expenditures per pupil. *Id.* In the 1992-93 school year, California had the highest student enrollment in the country, but ranked 37th in expenditures per student. *Id.* Texas had the second highest enrollment, but ranked 38th in expenditures per student. *Id.* Florida was fourth in enrollment, but 27th in expenditures per student. *Id.* Illinois ranked fifth in enrollment, but was 31st in expenditures per student. *Id.* New York was an exception, however. It ranked third in enrollment and fourth in expenditures per student. *Id.*

However, in 1993, California ranked 28th in expenditures per student. Reardon, *supra* note 12, at 12. Florida ranked 23d; Illinois ranked 22d; Texas was 25th; and New York was third. *Id.*

321. Dade County, home of Miami, Florida, spends \$200 million to teach English as a second language. Booth, *supra* note 7, at A1. As of 1993, 60% of Dade county residents were Spanish speaking. *Send Back Your Tired*, *supra* note 7, at 26. See Livingston, *supra* note 124, at 616 n.97 (noting that without illegal alien students, the Phylar school system could save large sums of money by deleting costly special education programs such as bilingual classes). *But see* Mark Stevens,

because many illegal immigrant students speak little or no English.³²² School districts must also buy more textbooks, and pay for more school lunches.³²³ However, with limited state budgets, many school districts are forced to sacrifice these essential items.³²⁴ As a result, the burden shifts to the students because they are crammed into classrooms,³²⁵ they have a limited number of

Bilingual Burnout Rampant: Teachers Frustrated By Heavy Workload, DENV. POST, Nov. 14, 1994, at A1 (stating that the Latino Education Coalition in Denver link Hispanic students' low academic achievement to the poor quality of the bilingual program).

322. MORRIS, *supra* note 1, at 60-61; Stevens, *supra* note 321, at A1 (noting that a third of the Denver Hispanic student population receives core academic subjects in Spanish); Helen F. Zulas, *Need for English*, CHI. TRIB., Nov. 3, 1994, §1, at 30. See also NELSON, *supra* note 1, at 1; Lauren R. Januz, *One Language Only*, CHI. TRIB., Oct. 16, 1994, at C2; Charles S. Lee & Lester Sloan, *'It's Our Turn Now'*, NEWSWEEK, Nov. 21, 1994, at 57; John Leo, *Bilingualism: Qué Pasa?*, U.S. NEWS & WORLD REP., Nov. 7, 1994, at 22. But see *Lau v. Nichols*, 414 U.S. 563, 566 (1974) (concluding that students who do not understand English will "find their classroom experiences wholly incomprehensible and in no way meaningful."); Melita Marie Garza, *Study Offers New Look at Immigrants*, CHI. TRIB., Dec. 16, 1994, § 2, at 4.

In Denver, public schools pay a qualified bilingual teacher an extra \$500 after one year, and \$800 after two years of teaching bilingual classes. Stevens, *supra* note 321, at A1. However, other school districts in the United States pay bilingual teachers between \$2500 and \$5000 per year. *Id.* As a result, some bilingual teachers in Denver public schools are transferring to regular classrooms because they are tired of doing twice the work for minimal extra wages. *Id.*

The federal government mandated bilingual education in 1968 under Title VII. NELSON, *supra* note 1, at 16. By 1988, California's state superintendent of schools reported that 600,000 students were enrolled in bilingual education programs. *Id.* at 5. In the same year, the Select Committee on Education recommended to the Texas state legislature that Spanish become a required subject in public schools. *Id.* at 23. Likewise, an elementary school in Santa Monica, California required its students to learn Spanish even if English was their first language. *Id.*

According to Brent Nelson, however, if bilingualism is widely accepted, the United States may well face the problems of language division currently experienced in Canada. *Id.* at 16-17. See also MORRIS, *supra* note 1, at 12-13 (discussing how James Madison feared that immigrant groups who often "clung to their language" would contribute to cultural fragmentation (quoting WILLIAM S. BERNARD, *AMERICAN IMMIGRATION POLICY: A REAPPRAISAL* 61 (1950))). In reaction to the strong bilingual movement, 17 states have passed laws recognizing English as the state's official language. NELSON, *supra* note 1, at 20. However, Spanish has legal status in New Mexico. *Id.* at 21.

323. Livingston, *supra* note 124, at 618. In *Plyler*, Texas stated that the total cost of educating a "needy Mexican child" was \$1,740.41, approximately \$400 to \$500 more than the cost of educating an "average" student. *Doe v. Plyler*, 458 F. Supp. 569, 577 (E.D. Tex. 1978); Durst, *supra* note 172, at 435 n.21. This cost included free breakfast, lunch, clothing programs, and bilingual education. *Plyler*, 458 F. Supp. at 577; Durst, *supra* note 172, at 435 n.21, 437. The federal government spends an annual \$4.7 billion to feed 25 million school children at 92,000 schools. Carole Sugarman, *Let's Do School Lunch*, WASH. POST, Mar. 16, 1994, at E1. See generally Howard Godfrey & Richard M. Conboy, *Cost Control In North Carolina Public Schools*, GOV'T FIN. REV., Aug. 1994, at 27 (discussing the various costs of maintaining a public school).

324. Godfrey & Conboy, *supra* note 323, at 27; Farrow, *supra* note 2, at N3. See Reardon, *supra* note 12, at 13 (illustrating that teachers have to double as nurses in poor public schools).

325. Grube, *supra* note 2, at 50. See Hardesty, *supra* note 2, at 3 (stating that classrooms are overcrowded, teachers are overburdened, and test scores have decreased).

textbooks and supplies,³²⁶ and they do not receive the individual attention that they need and once had with fewer students.³²⁷ Thus, less funds spent per student generally leads to a lower quality of education.³²⁸

Furthermore, poor schools must also forego other items such as computers and lab equipment.³²⁹ Certainly, school systems need to protect their financial stability when so much technology is being introduced into society and into the wealthier schools.³³⁰ For example, Ohio Governor George Voinovich, is planning to wire every classroom in the state for two-way interactive classes, using personal computers equipped with CD-ROM information banks.³³¹ Such equipment is costly³³² and poor, overcrowded schools cannot compete with richer, well-equipped schools.³³³ Thus, it is more likely than not that the academic performance of the students in the overcrowded schools will decrease

326. Grube, *supra* note 2, at 50. See Alan Lupo, *Same Old 'BPS' at Boston Schools*, BOSTON GLOBE, Dec. 6, 1992, at 2 (explaining that teachers must frequently work with few supplies, if any). See also Livingston, *supra* note 124, at 616 n.98. The quality of education varies directly with the amount of money spent on it for basic expenses such as facilities, books, and the number of teachers. *Id.* However, even these expenses eventually reach a peak, at which point diminishing returns in educational quality are encountered. *Id.*

327. See Farrow, *supra* note 2, at N3 (explaining that small classes permit teachers to adapt instruction to a student's abilities); see also Reardon, *supra* note 12, at 13 (noting that students must often use classrooms in poor public schools for multiple purposes). For example, students may have to use a library as a classroom and a cafeteria. *Id.*

328. Farrow, *supra* note 2, at N3; Harris, *supra* note 2, at B5; Reardon, *supra* note 12, at 12. See Grube, *supra* note 2, at 50 (explaining that, in New York City, even if students do not have grades to advance to the next grade, only one student may be held back because the classrooms are overcrowded); Livingston, *supra* note 124, at 616 (noting that denying illegal alien students the right to a free public education might have a beneficial effect on the quality of public education). See *supra* note 2, 4 and accompanying text.

329. Grube, *supra* note 2, at 50. See Reardon, *supra* note 12, at 12 (noting that while students in wealthy school districts receive a "lavish" education, including word-processing classes, other districts barely have the essential items to teach); *Federal Mandates*, *supra* note 275, at A25 (noting that California could put a computer on every "fifth-grader's" desk with the more than \$1 billion California taxpayers spend to educate illegal immigrant students).

330. See Sipchen, *supra* note 9, at E14 (stating that the United States creates more jobs for "hamburger flippers than nuclear physicists"). See also Max Jennings, *High-Tech Plan a Plus for Ohio Schools*, DAYTON DAILY NEWS, June 12, 1994, at B8 (noting that personal computers are an indispensable tool in the education process); Reardon, *supra* note 12, at 13 (noting that the wealthier schools have high quality teachers, elaborate science labs, state-of-the-art computers, and better test scores).

331. Jennings, *supra* note 330, at B8.

332. The Voinovich plan costs \$50 million to wire the classrooms, \$45 million to place personal computers into the classrooms of the poorer school districts, and additional money to train the teachers to use the technology. *Id.*

333. Reardon, *supra* note 12, at 12. See Godfrey & Conboy, *supra* note 323, at 27 (noting that the costs for maintenance contracts and insurance coverage must also be considered when public schools purchase equipment).

because they have less access to such valuable learning tools.³³⁴

Because the quality of education is decreasing as a result of overcrowding and limited school budgets, Congress should pass an enabling statute that permits states to prohibit illegal immigrants from enrolling in and attending public schools.³³⁵ Although the states have the police power to regulate education,³³⁶ Congress has plenary power to regulate immigration.³³⁷ Through an enabling statute, Congress should delegate a portion of its immigration authority to the states, thus allowing the states to regulate illegal immigrants in public schools as each state sees fit.³³⁸ Therefore, the power to police education remains with the states. However they would have the additional approval from Congress to distinguish between legal and illegal immigrant students.

B. Constitutionality of Congressional Action

A federal statute enabling states to regulate illegal immigrants in public schools is constitutional for several reasons. First, Congress has plenary power to regulate immigration.³³⁹ Therefore, a federal court would give greater deference to a federal statute, as opposed to a state law.³⁴⁰ Second, the

334. Reardon, *supra* note 12, at 13. See Moseley-Braun, *supra* note 2, at 22 (explaining that on standardized achievement tests students in poor school facilities score 5.5 percentage points below those in schools in fair condition, and 11 percentage points below those in schools in excellent condition).

335. See Kelley, *supra* note 319, at 1 (“What we have to do is improve the quality of education”) (quoting the superintendent of the Los Angeles county Lynwood school district).

336. KEMERER & WALSH, *supra* note 184, at 1. Education is a state function because the Constitution does not specifically delegate to Congress the power to regulate education. *Id.* See U.S. CONST. amend. X, which states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

337. See *supra* notes 50-55 and accompanying text.

338. Although education is regulated by the states, the Tenth Amendment does not render Congress powerless to allow states to prohibit illegal immigrants from attending public schools. See *New York v. United States*, 505 U.S. 144 (1992). In *New York*, Congress enacted the Low-Level Radioactive Waste Policy Amendment Act of 1985, requiring states to either dispose of radioactive waste produced within their state, or take title to the waste. *Id.* at 2415. The Supreme Court invalidated the “take title” provision because Congress cannot require the states to legislate. *Id.* at 2417-18. The Court explained that if an interest exists that is compelling enough to cause Congress to legislate, Congress must do so directly; it may not force the states to legislate. *Id.* at 2418. Kramer, *supra* note 180, at 1026 n.125. Because a federal enabling statute permits, but does not require, states to restrict illegal immigrants from enrolling in public schools, such a statute complies with *New York*.

339. See *supra* notes 50-55 and accompanying text.

340. See *Livingston*, *supra* note 124, at 608, 627 (noting that the Supreme Court has deferred to Congress regarding immigration legislation). See also *supra* notes 52-55, 193-95, 228 and accompanying text.

political branches of the federal government have the authority to adapt regulations and policies to changing circumstances³⁴¹ which clearly exist within illegal immigration.³⁴² Therefore, a federal court should defer to Congress because the courts are ill-suited to examine such a difficult policy decision.³⁴³

Third, if a federal court should examine the federal statute despite the policy issue involved, the court should apply the rational basis test because it is a federal immigration statute.³⁴⁴ Under the rational basis test, the statute need only be rationally related to a legitimate government interest.³⁴⁵ The federal government, in fact, has a compelling interest in: (1) upholding immigration law; (2) combatting illegal immigration;³⁴⁶ (3) granting a free public education to those aliens whose residence is authorized by federal immigration law; and (4) relieving the states and public school systems from undue economic burdens caused by the federal government's own ineffectiveness. These interests substantially outweigh an illegal immigrant's interest in receiving a free public education. Furthermore, by allowing states to distinguish between legal and illegal immigrants, the federal statute is a rational means to pursue those government interests. Thus, a federal enabling statute has a rational basis and does not violate the Equal Protection Clause.

C. *Constitutionality of a State Statute*

After Congress delegates a portion of its immigration authority to the states to regulate illegal immigrants in public schools, a state may then legislate and implement a state statute that precludes illegal immigrant students from enrolling in and attending public schools. Although the *Plyler* holding appears detrimental to such a statute, procedurally a state could implement such a regulation because Congress would have expressly given the states the authority to do so.³⁴⁷ In *Plyler*, Texas argued that section 21.031 was consistent with Congress' disapproval of illegal immigrants residing in the United States and with immigration law in general.³⁴⁸ The Court stated that while it "must be

341. See *supra* notes 283, 297 and accompanying text.

342. See *supra* notes 290-95 and accompanying text.

343. See Livingston, *supra* note 124, at 601 (stating that judicial restraint is especially necessary because of the political, social, and economic elements involved).

344. See *supra* notes 52-55, 193-95 and accompanying text. See also Livingston, *supra* note 124, at 627 (explaining that when Congress expressly mandates a rule, it is presumed that the rule is rationally based).

345. See *supra* note 194 and accompanying text.

346. Livingston, *supra* note 124, at 630.

347. See *Plyler v. Doe*, 457 U.S. 202, 226 (1982) (noting that state authority regarding the regulation of illegal immigrants might be augmented if the undocumented status was "coupled with some articulable federal policy"); Livingston, *supra* note 124, at 601 n.20.

348. *Plyler*, 457 U.S. at 224.

attentive to congressional policy," it could find no congressional policy scheme that "might weigh significantly in arriving at an equal protection balance" regarding the states' authority to prohibit illegal immigrants from attending public schools.³⁴⁹ Enacting a federal enabling statute, however, would provide the necessary congressional policy scheme, and would give "significant weight" to validate a state immigration statute.³⁵⁰

Furthermore, due to changed circumstances in illegal immigration and the overcrowding in public schools, states with large illegal immigrant populations currently do have a substantial interest in relieving themselves of the significant economic burden that the federal government and *Plyler* have placed upon them. Thus, if a court were to examine a state statute that restricted illegal immigrant students from attending public schools after receiving the federal authority to do so, the state classification would withstand heightened judicial scrutiny.³⁵¹ States with large illegal immigrant populations have compelling interests in: (1) alleviating a substantial economic burden within public school systems; (2) granting a free public education to those aliens whose residence is authorized by federal immigration law; and (3) maintaining a high-quality public education. These interests substantially outweigh an illegal immigrant's interest in receiving a free public education. Therefore, such a statute does not violate the Equal Protection Clause and would survive heightened judicial scrutiny because the classification substantially furthers important state interests.³⁵²

D. Conclusion

If states are to provide a high quality education to students, it is essential that Congress consider the fact that illegal immigrant students are placing a substantial burden on public schools.³⁵³ In doing so, Congress needs to reflect upon the continual growth of the illegal immigrant population in the United States, and the effect that such growth has on public schools and the states, two

349. *Id.* at 224-25. See Will, *supra* note 38, at A11 (stating that Justice Brennan was inattentive).

350. See Livingston, *supra* note 124, at 626 (explaining that the *Plyler* Court noted that state regulation of illegal immigration coupled with express congressional authorization may receive a more deferential standard of review).

351. *But see* Livingston, *supra* note 124, at 603-13 (arguing that the intermediate standard of review is inappropriate for the following reasons: illegal aliens lack the requisite class characteristics; education is not a fundamental right; public schools are in the realm of state control and therefore are entitled to greater judicial deference; illegal aliens are not similarly situated with citizens; and, the innocence of illegal alien children does not require special judicial attention).

352. See also *Mathews v. Diaz*, 426 U.S. 67 (1976) (holding that it is permissible to distinguish between aliens and citizens).

353. See *supra* notes 2, 4, 319-34 and accompanying text.

entities which are currently incapable of regulating immigration.³⁵⁴ Realizing that the states and public schools are in dire need of relief, Congress should recognize that it is the only body capable of granting relief to the states.³⁵⁵ Therefore, Congress should empower the states to regulate illegal immigration with respect to education. The following section proposes a federal enabling statute so that Congress may delegate a portion of its immigration authority to the states. In addition, the section offers a model state statute to demonstrate how a state may implement Congress' delegation.

VI. PROPOSED FEDERAL ENABLING STATUTE AND STATE MODEL STATUTE

Thus far, no federal law has addressed the issue of illegal immigrant students attending public schools.³⁵⁶ Although various presidential administrations have taken different views of the Texas statute invalidated in *Plyler v. Doe*, Congress has permitted the Supreme Court decision to stand.³⁵⁷ Thirteen years after the Court's decision, however, illegal immigration continues to burden several states and public schools.³⁵⁸ Congress can no longer ignore the ill effects that illegal immigration and *Plyler* have on public school systems. Therefore, it is time for Congress to act.³⁵⁹

To release states from the economic burden of the federal education mandate, Congress should enact a federal statute that enables states to regulate the enrollment and attendance of illegal immigrant students in public schools. By implementing such a statute, Congress would grant authority to the states to restrict illegal immigrant students from receiving a free public education. Cloaked with this authority, a state may then create legislation to address any illegal immigration problem a state may have within its own schools.

As a state legislates to restrict illegal immigrant students from attending public schools, a state legislature must clearly establish who is entitled to enroll in public schools, and who is not; how a school official can distinguish between those students who may enroll and those who may not, in a non-discriminatory manner; and how such a restriction will be enforced. The proposed state statute recommends that states require proof of legal residency within the United States before students may enroll in school. If students cannot prove their legal status,

354. See *supra* note 57 and accompanying text.

355. See *supra* notes 50-55 and accompanying text.

356. See *supra* note 212 and accompanying text.

357. See *supra* note 212 and accompanying text.

358. See *supra* notes 2, 4, 249-73, 319-34 and accompanying text.

359. See *Federal Mandates, supra* note 275, at A25 (noting that Governor Pete Wilson argued that the states need "dramatic" congressional action that frees states from federal immigrant mandates).

this statute suggests that the school superintendent report undocumented students' names to the INS so that the INS can confirm or deny their illegal status, or indicate that the INS has given express permission for students to reside in the United States. Although a state cannot require the INS, a federal agency, to act, it is critical that a state require school districts to cooperate with the INS by reporting to the agency the names of undocumented students. If school officials only prohibit undocumented students from enrolling, but do not report their names to the INS, the students will be out of school, yet remain unlawfully in the country. A likely result would be an increase in gang activity and juvenile crime.³⁶⁰ Instead, school officials must complete the process and report the names to the INS so that the illegal immigrants may be deported, as the law requires.³⁶¹ Finally, to enforce the restriction, this statute suggests that the state withdraw a percentage of its annual education funds from school districts for each violation of the statute. Realizing that school officials may be reluctant to ask students for documentation or may be disheartened to turn away an undocumented student, the purpose of removing funds is to encourage school officials to comply with this statute.³⁶²

FEDERAL ENABLING STATUTE

Chapter 1: Definitions

As used in this statute, the following definitions apply:

(1) *Illegal immigrant*: Any person physically residing within the United States territory who:

(a) is not a citizen, national, or lawfully admitted permanent resident of the United States, or is unauthorized under federal law to be present in the United States; and

(b) has either lawfully entered the United States with a visa and violated the provisions of the visa, or unlawfully entered the United States.

(2) *Public School*: Any government funded educational institution, including, but not limited to, elementary schools, secondary schools, trade schools, apprentice programs, special education programs, and distributive

360. INS Special Agent interview, *supra* note 83, at 28 (explaining that students who are not in school are prime candidates to become gang members).

361. 8 U.S.C. § 1251 (1994).

362. *See* Livingston, *supra* note 124, at 623 (explaining that it is in the financial interest of local school districts to comply with such legislation or they will have less money to spend per student if they continue to freely educate illegal immigrant students).

education.

(3) *State*: The District of Columbia, Puerto Rico, Guam, and the Virgin Islands, in addition to the fifty (50) territories of the United States.

(4) *Student*: Any person who attends a public school.

Chapter 2: Empowering the States to Regulate Illegal Immigrant Students in Public Schools

The states of this Nation shall have the federal statutory authority to regulate the enrollment and attendance of, including the restriction or prohibition of, illegal immigrant students in public schools.

Comment: This statute recognizes that while states are unable to regulate immigration generally,³⁶³ the states and public school systems with large illegal immigrant populations are in dire need of federal relief from the adverse effects of illegal immigration.³⁶⁴ Although the Supreme Court held in *Plyler v. Doe* that illegal immigrant students have a right to receive a free public education, the economic and political circumstances have changed since the case began in 1977.³⁶⁵ The illegal immigration population in the United States has reached a critical level and it is adversely affecting the quality of public education.³⁶⁶ The unusually high cost of educating illegal immigrant students and the overcrowded classrooms are indications that the states, not the federal government, are the proper entities to regulate illegal immigrants in public schools.

STATE MODEL STATUTE GOVERNING ILLEGAL IMMIGRANTS IN PUBLIC SCHOOLS

Chapter 1: Definitions

As used in this statute, the following definitions apply:

(1) *Alien*: Any person not a citizen or national of the United States.

(2) *Certificate of Naturalization*: A document issued by the Immigration and Naturalization Service to naturalized United States citizens.

363. See *supra* notes 56-63 and accompanying text.

364. See *supra* notes 2, 4, 7, 249-73, 319-34 and accompanying text.

365. See *supra* notes 290-95 and accompanying text.

366. See *supra* notes 1, 4, 7, 319-34 and accompanying text.

- (3) *Certificate of United States Citizenship*: A document issued by the Immigration and Naturalization Service to individuals who derived citizenship through parental naturalization; acquired citizenship at birth abroad through a United States parent or parents; or who acquired citizenship through application by United States citizen adoptive parents.
- (4) *Citizen*: Any person who was born within the United States, born to an American citizen, or naturalized.
- (5) *Illegal Immigrant*: Any person physically within the United States territory who:
- (a) is not a citizen, national or lawfully admitted permanent resident of the United States, or is unauthorized under federal law to be present in the United States; and
 - (b) has either lawfully entered the United States with a visa and violated the provisions of the visa, or unlawfully entered the United States.
- (6) *Immigration and Naturalization Service*: The Department of Justice agency charged with enforcing immigration law, including the processing of lawful immigrants and the deportation of excludable immigrants.
- (7) *Lawfully Admitted Permanent Resident*: The status of having been lawfully accorded the privileges of residing permanently in the United States as an immigrant in accordance with the immigration laws.
- (8) *Public School*: Any government funded educational institution, including, but not limited to, elementary schools, secondary schools, trade schools, apprentice programs, special education programs, and distributive education programs.
- (9) *Student*: Any person who attends a public school.
- (10) *Superintendent*: The chief executive officer of a school system.
- (11) *Unlawful Entry*: Any entrance of an alien into the United States either through a port or across a border, from a foreign port or place, without a visa or express permission from the Immigration and Naturalization Service.
- (12) *Verification System*: The Immigration and Naturalization Service's computerized listing of aliens and their immigration status.

(13) *Visa*: A document issued by the Immigration and Naturalization Service that permits immigrants to reside in the United States for a temporary period of time.

*Chapter 2: Exclusion of Illegal Immigrants from Public Schools.*³⁶⁷

(1) No public school shall admit, enroll, or allow the attendance of any student who is not a:

- (a) United States citizen;
- (b) lawfully admitted permanent resident; or
- (c) person authorized under federal law to be present in the United States.

(2) Each school district shall require every public school within the district to verify the legal status of each student upon enrollment into the school.

(3) To verify legal status, every student must present a valid:

- (a) Original or certified copy of a birth certificate issued by a state, county, or municipal authority bearing an official seal; or
- (b) Certificate of Naturalization; or
- (c) Certificate of United States Citizenship; or
- (d) Green Card; or
- (e) Social Security card; or
- (f) Visa issued by the Immigration and Naturalization Service.

Comment: This chapter recognizes the ever-increasing number of illegal immigrant students in public schools,³⁶⁸ and their adverse effect on the quality of public education.³⁶⁹ While some states, such as North Dakota,³⁷⁰ may have no intention to restrict illegal immigrants from attending public schools because they do not have an illegal immigration problem, other states like California and Texas would likely prohibit illegal immigrants from enrolling in

367. See Debbie Graves, *Tuition Break OK'd for Mexican Citizens*, AUSTIN AM.-STATESMAN, May 31, 1987, at B2 (explaining that illegal immigrants receive in-state tuition). In addition to excluding illegal immigrant students from public schools, the author also suggests that illegal immigrants be barred from attending public colleges and universities in a similar fashion. However, discussion of such a proposition is beyond the scope of this note.

368. See *supra* notes 293-95 and accompanying text.

369. See *supra* notes 319-34 and accompanying text.

370. The United States Census Bureau estimates that there are zero illegal immigrants in North Dakota. Fernandez interview, *supra* note 1.

public schools.³⁷¹ This portion of the statute is illustrative of how a state, choosing to exclude illegal immigrant students, may clearly establish who is entitled to enroll in public schools, and who is restricted. Furthermore, this provision establishes how a school official may distinguish between those students who may enroll and those who may not. Because a school official could discriminate against students by asking only those students who “look” foreign or who “sound” foreign for documentation,³⁷² it is critical that a school official verify the legal status of every student who enrolls in school.

Chapter 3: The Immigration and Naturalization Service

(1) If any student cannot show, within ten (10) work days from the date of enrollment, that he or she meets one of the three criteria referred to in chapter 2, section (1) above, the superintendent of the school district shall report, by mail or fax, the student’s name to its Immigration and Naturalization Service district office within five (5) workdays from the student’s tenth (10th) and final verification day.

(2) Upon receiving a student’s name from a superintendent, the Immigration and Naturalization Service may verify the status of the student with the Immigration and Naturalization Service verification system.

(3) After verifying the student’s immigration status, the Immigration and Naturalization Service may notify the school superintendent of the student’s official status within ten (10) workdays of receiving the name.

(a) If the Immigration and Naturalization Service determines that a student meets one of the three requirements in chapter 2, section (1) above, the superintendent shall enroll the student in school.

(b) If the Immigration and Naturalization Service determines that a student does not meet one of the three requirements in chapter 2, section (1) above, the superintendent shall not admit, or allow the attendance of the student in school.

Comment: This chapter recognizes that students may forget to bring to school the proper documentation, or may be unaware that such documentation is required to enroll in school. Thus, the ten days permit students to return to school with the documents at a later date.

More importantly, this chapter realizes that schools must work in

371. California and Texas have already tried to regulate illegal immigrant students in public schools. See *supra* § IV.A. and B.2.

372. See *supra* note 143 and accompanying text.

conjunction with the Immigration and Naturalization Service (INS) to restrict students residing here unlawfully from receiving a free public education. If school officials simply preclude undocumented students from attending school, but do not notify the INS of their unlawful presence, many students will be out on the streets, vulnerable to gangs. On the other hand, if the INS is aware of these students' unlawful presence, the INS may deport them under federal immigration law.

Finally, this chapter permits those students who are undergoing a change in immigration status to enroll in school. Because such students may not have the proper documentation while the INS processes their applications, the INS may notify a school of such pending status after the agency examines its records.

Chapter 4: Notifying the Parent or Guardian

(1) If the Immigration and Naturalization Service verifies that a student does not comply with one of the three requirements in chapter 2, section (1) above, the superintendent shall notify, in writing, and in the appropriate language, the parent, guardian, or adult with whom the student lives, that the student may no longer attend a public school unless the immigration status of the student changes to comply with the requirements provided in chapter 2, section (1) above, within ninety (90) calendar days from the date of notice. The student may attend school during the ninety (90) days if, and only if, the student has applied for a change of status to comply with the requirement provided in chapter 2, section (1) above.

Comment: This chapter, recognizing that illegal immigrant students should be prohibited from attending public schools, requires schools to notify the adult responsible for the student so that the adult is aware of the student's restricted attendance. Further, this chapter realizes that illegal immigrant students may not be living with their parents, or even with guardians. Thus, the language is meant to be broad to encompass any adult who may be responsible for illegal alien students.

This chapter additionally emphasizes the distinction between who is entitled to enroll in public schools, and who is restricted. While illegal immigrant students may not enroll in or attend public schools, those students who have applied for a change of immigration status may attend school because they have begun the process of becoming a student who complies with chapter 2, section (1) above.

Chapter 5: Violation of this Statute

§ 1 (1) Any student who fails to prove his or her legal status upon enrolling in

public school shall be refused admittance by a superintendent for failing to obey this statute.

(2) Any school official who fails to request from an enrolling student documentation regarding a student's legal status, according to chapter 2, sections (2) and (3) of this statute, commits a violation of this statute.

(3) Any superintendent who fails to report to the Immigration and Naturalization Service a name of a student unable to prove his or her legal status, according to chapter 2, sections (1) and (3) and chapter 3, section (1) of this statute, commits a violation of this statute.

(4) Any superintendent who admits a student who is unable to prove his or her legal status, and whom the Immigration and Naturalization Service has verified as being an illegal immigrant, violates chapter 3, section (3)(b) of this statute.

§ 2 For each violation of this statute that a school commits per year, the state shall have the power to withdraw from the school one percent (1%) of its annual state education funds, not to exceed ten percent (10%) in one year.

Comment: This chapter encourages both students and school officials to comply with the state law. Recognizing that school officials may be reluctant to ask students for documents and unwilling to prohibit students from attending school,³⁷³ the withdrawal of funds is intended as an enforcement mechanism of this statute.

VII. CONCLUSION

Illegal immigration has become a serious problem in the United States because the federal government has been ineffective at enforcing immigration law. In the meantime, *Plyler v. Doe* has forced the states to pay for such ineffectiveness by requiring states to educate illegal immigrant students. However, states with large illegal immigrant populations can no longer afford to educate these students. More importantly, the quality of public education in these states is deteriorating. As a result, some states have independently tried to free themselves and the public school systems from this substantial economic burden, but their efforts have been frustrated. Thus, it is time for Congress to relieve these states and public school systems from economic ruin by enabling

373. See Gail Diane Cox, *California Law on Aliens Spurs Disobedience*, NAT'L L.J., Dec. 12, 1994, at A6 (explaining that school officials have no intention of complying with Proposition 187 by excluding students from school); INS Special Agent interview, *supra* note 83, at 16-17 (offering doubt that teachers would turn in the names of suspected illegal immigrant students).

the states to regulate the enrollment and attendance of illegal immigrant students in public schools. Through delegating a portion of its immigration power to the states, Congress can constitutionally grant the needed relief to these states and public school systems so that they may spend their limited funds to rebuild their schools and increase the quality of public education.

Lora L. Grandrath

