

Journal of Civil Rights and Economic Development

Volume 11
Issue 1 *Volume 11, Fall 1995, Issue 1*

Article 8

September 1995

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Recommended Citation

Bunker, John R. (1995) "Check-Out Time at the Hotel California: "The Last Resort of Constitutional Arguments" and Proposition 187 Considered," *Journal of Civil Rights and Economic Development*. Vol. 11 : Iss. 1 , Article 8.

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CHECK-OUT TIME AT THE HOTEL CALIFORNIA:¹ "THE LAST RESORT OF CONSTITUTIONAL ARGUMENTS"² AND PROPOSITION 187 CONSIDERED

The United States Constitution confers a number of powers exclusively upon the federal government.³ The powers not granted to the federal government are reserved to the states and the people

¹ THE EAGLES, *Hotel California*, on HOTEL CALIFORNIA (Elektra/Asylum Records 1976).

² *Buck v. Bell*, 200 U.S. 205, 208 (1927). Carrie Buck was a "feeble minded white woman," the daughter of a feeble minded mother and herself the mother of an illegitimate feeble minded child. *Id.* at 205. In an opinion holding that Carrie's state-ordered sterilization did not offend either the Due Process or Equal Protection Clauses of the Fourteenth Amendment, Justice Holmes wrote, "It is the usual last resort of constitutional arguments to point out shortcomings of this sort." *Id.* at 208.

That another of the most famous quotes in American law also comes from this same opinion—a mere five paragraphs long—is a remarkable coincidence: "Three generations of imbeciles are enough." *Id.* at 207.

³ U.S. CONST. art. I, § 8. Section 8 of Article I provides:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common defence and general Welfare of the United States . . . To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post roads;

To promote the Progress of Science and useful arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States . . .

To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States and the Acceptance of Congress, become the Seat of the Government of United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in

by the Tenth Amendment.⁴ This state authority, known as "police power,"⁵ while tremendously broad,⁶ is nevertheless circumscribed by the Equal Protection Clause of the Fourteenth Amendment.⁷

Control over education administration is one of a state's most important exercises of its police powers.⁸ Friction between the Constitution and the states' sovereign prerogatives to formulate education policy has given rise to some of this century's most sig-

which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings; And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Id.

⁴ U.S. CONST. amend. X. ("The powers not designated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")

⁵ See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 8.2, at 277 (4th ed. 1991) (providing overview of "police power").

⁶ See, e.g., N.Y. EXEC. LAW § 370 (Consol. 1995) (regulating building codes); CAL. HEALTH & SAFETY CODE § 13141 (West 1995) (regulating pesticide use); KY. REV. STAT. ANN. § 228.020 (Michie/Bobbs-Merill 1995) (regulating dry cleaners); MASS. GEN. LAWS ANN. ch. 119, § 1 (West 1993) (regulating child welfare); ILL. REV. STAT. ch. 410 para. 650.001 (Smith-Hurd 1993) (regulating food preparation in public eating facilities); GA. CODE ANN. § 68-101 (Harrison 1991) (regulating motor vehicle operation and licensing); HAW. REV. STAT. § 143-1 (1985) (regulating dog licensing); CAL. EDUC. CODE § 48200 (West 1995) (regulating education).

⁷ See U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides:

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

Id.

⁸ See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (limiting state's ability to compel school attendance of Amish children while recognizing validity of compulsory attendance statutes generally); see also NEWTON EDWARDS, *THE COURTS AND THE PUBLIC SCHOOLS* 12, 19, 74 (1955) (discussing Court's recognition of valid compulsory school attendance policy); JOHN C. HOGAN, *THE SCHOOLS, THE COURTS, AND THE PUBLIC INTEREST* 168 (1985) (discussing Court's recognition of valid compulsory school attendance policy).

nificant Supreme Court decisions.⁹ Today, education is again at the center of a constitutional controversy: Proposition 187.¹⁰

Proposition 187 represents California's attempt to lighten the fiscal burden brought on by its undocumented alien population.¹¹ While illegal immigration is, by constitutional definition, a national problem,¹² California leads a short list of states that receive a dramatically disproportionate share of this country's illegal immigrants.¹³ One of Proposition 187's most conspicuous measures denies the children of illegal aliens access to the state's system of free public education.¹⁴ An obstacle to this scheme is *Plyler v.*

⁹ See, e.g., *Brown v. Board of Educ. of Topeka*, 347 U.S. 483, 495 (1954) (invalidating "separate but equal" doctrine of school segregation as unconstitutional); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (holding Oregon statute prohibiting private education violated Fourteenth Amendment Due Process Clause); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (holding State law prohibiting teaching of foreign languages to children below eighth grade unconstitutional). For more recent education cases involving major Supreme Court decisions, see, e.g., *Acton v. Veronia School Dist.*, 115 S.Ct. 2386, 2396 (1995) (holding drug testing of high school students absent reasonable suspicion did not violate Fourth Amendment protections against unreasonable searches); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 296 n.36 (1978) (upholding ability of state to consider race of applicants in affirmative action program for admission to state university medical school); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding school ban on armbands worn by high school students in protest of Vietnam War violated students' First Amendment rights of free speech). See generally EDWARDS, supra note 8 (discussing significant issues in education law); HOGAN, supra note 8 (same); LAWRENCE KOTIN & WILLIAM F. AIKMAN, LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE (1980) (focusing on history and significance of compulsory school attendance in American law); ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW (1986) (considering federal policy issues of discrimination in education on bases of race, gender, language and handicap).

¹⁰ See *League of United Latin American Citizens (LULAC) v. Wilson*, 908 F.Supp. 755, 763 (C.D. Cal. 1995) (holding portions of Proposition 187 preempted by federal law).

¹¹ See Proposition 187, § 1. "The People of California . . . have suffered and are suffering economic hardship caused by the presence of illegal aliens in this state [and] have suffered and are suffering personal injury and damage caused by the criminal conduct of illegal aliens in this state." *Id.*

¹² See U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To establish a uniform Rule of Naturalization . . ."); see also *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) (holding that although power to regulate immigration is exclusively federal, California statute that made knowing employment of illegal aliens unlawful was not precluded by federal law).

¹³ See William Branigin, *Sharing Immigration's Burden; Fund Would Reimburse States for Illegal Aliens' Emergency Medical Care*, WASH. POST, Nov. 22, 1995, at A15 (noting that California, New York, Texas, Florida and Illinois are to be beneficiaries of proposed \$3.5 billion trust fund); Philip Dine, *Silent Guests; Little Noticed, Illegal Immigrants are Growing Presence Here*, ST. LOUIS POST-DISPATCH, Oct. 15, 1995, at 1B (acknowledging California, Texas and Florida as leaders in illegal immigration, but noting estimated 6,000 undocumented Mexican aliens in St. Louis); Steven A. Holmes, *Large Increase in Deportations Occurred in '95*, N.Y. TIMES, Dec. 28, 1995, at A1 (citing number of 1995 deportations, 51,600, was 15% increase from 1994 and 75% increase from 1990); Diane Targovnik, *INS Nabs Budget Hike for Agents; Texas may receive 681 New Personnel*, HOUSTON CHRON., Feb. 9, 1996, at A12 (noting INS plans to assign 1,260 new personnel to California and additional 681 new personnel to Texas).

¹⁴ CAL. EDUC. CODE § 48215 (West 1995). Section seven of Proposition 187 amended California's Education Code to prohibit any public elementary or secondary school to admit or

Doe,¹⁵ the controversial 1982 United States Supreme Court decision which held a similar measure violated the Equal Protection Clause of the Fourteenth Amendment. Much of the controversy surrounding *Plyler* turned on the Court's departure from traditional equal protection evaluation.¹⁶

This note proposes a number of ideas. First, that "fundamental rights" is a flawed basis for equal protection analysis. A more sound model looks to the existence of a "protection of the laws." The state creates a protection of the laws when it coerces individuals to act for the protection of society.¹⁷ An entitlement, on the other hand, is offered to, not forced upon, the individual. Put simply, when the state says, "you must," it creates a protection of the laws; when the state says, "you may," it offers an entitlement.

Unlike a protection of the laws, to refuse an entitlement brings about no legal sanction. One must qualify for an entitlement.¹⁸

permit the attendance of any child not lawfully present in the U.S. *Id.* § 42815(a). The statute called for each school district, beginning January 1, 1995, to verify the legal status of each child enrolling for the first time. *Id.* § 42815(b). By January 1, 1996, each district was to establish the lawful residency of each student currently attending public elementary or secondary schools. *Id.* § 42815(c). Children determined or reasonably suspected of unlawful presence would be allowed to continue to attend school for ninety days from the date of notification. *Id.* § 42815(e),(f). Furthermore, any child determined or reasonably suspected of unlawful presence in the U.S. is reported to the U.S. Immigration and Naturalization Service (INS) and the Attorney General of California. *Id.* § 48215(e). In addition to the provisions of the other sections of Proposition 187, subsection (d) of California's Education Code provides that: "By January 1, 1996, each school district shall also have verified the legal status of each parent or guardian of each child . . ." *Id.* § 42815(d). Determination or reasonable suspicion of a parent's unlawful status would result in the child's removal from school within ninety days unless legal status were established. *Id.* § 42815(e).

¹⁵ 457 U.S. 202 (1982).

¹⁶ See *Plyler*, 457 U.S. at 216-18. The Court explained that where fundamental rights or suspect classifications were involved, equal protection analysis required that the challenged legislation be "precisely tailored to serve a compelling governmental interest." *Id.* at 216-217. The Court then noted that on occasion, legislation, without being facially invidious, as with suspect classes or fundamental rights, "[gave] rise to recurring constitutional difficulties." *Id.* at 217. In those "limited circumstances," a five-justice majority of the Court felt that such legislation required that the legislation would call for an "intermediate" level of scrutiny. *Id.* at 217-18.

¹⁷ See, e.g., JOHN STUART MILL, ON LIBERTY 271 (Encyl. Britannica 1952) (1859). Mill stated that the object of his essay, *On Liberty*, was

to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.

Id.

¹⁸ See BLACK'S LAW DICTIONARY 532 (6th ed. 1990). "Entitle" is defined as: "To qualify for, to furnish with proper grounds for seeking or claiming." *Id.* But see Judith Lichtenberg,

By definition some people will not be eligible. The Fourteenth Amendment makes clear, however, that no person shall be denied the equal protection of the laws.¹⁹

The United States Supreme Court has held that a state is under no affirmative duty to protect its residents.²⁰ The protection/entitlement distinction is entirely consonant with this view. The state need not offer protective services, financial relief or other benefits to its residents. The state cannot, however, create or enforce laws that protect one class of persons while denying that protection to another class.

These themes will be explored below. Part One of this Note will detail the measures of Proposition 187. Part Two examines police powers, the source of California's jurisdiction to enact such laws. Part Three of the Note synthesizes a number of cases denying the existence of a state's affirmative duty to protect its residents. Borrowing elements of the Supreme Court's due process analysis, a construct based on the protection/entitlement distinction will be proposed. To whom both protections and entitlements must be extended will be demonstrated. A review of the Court's rationale in *Plyler* suggests that its method was flawed and that the protection/entitlement model would yield a clearer result. Finally, Part Four applies the model to Proposition 187 concluding that some, although not all, of its measures are unconstitutional.

I. PROPOSITION 187 AND THE ILLEGAL ALIEN PROBLEM

Both in California and nation-wide, estimates of the size of the illegal immigrant population vary by as much as 100 percent.²¹

Within the Pale: Aliens, Illegal Aliens and Equal Protection, 44 U. PITT. L. REV. 351, 364 (1983) (employing "entitlement" in different construction).

¹⁹ U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.")

²⁰ See *DeShaney v. Winnebago County*, 489 U.S. 187, 200 (1989) (holding state had no duty to protect four-year-old child ultimately brain damaged when released into care of abusive father, even though state authorities had knowledge of father's violent history).

²¹ See Richard Sybert, *Population, Immigration and Growth in California*, 31 SAN DIEGO L. REV. 945 (1994). The author, the former Director of Planning and Research for the State of California, admits that no reliable figures for illegal immigration are available. *Id.* at 967. Census Bureau figures estimate 4 million illegal immigrants nationwide with approximately 2 million in California. *Id.* at 964. The author attributes another figure of 1.3 million illegal immigrants in California to the Demographic Research Unit of the California Department of Finance. *Id.* He later notes that Los Angeles accounts for more than half of California's illegal alien population with more than 700,000 (and growing by 66,000 a year). *Id.* at 976. [Note: However, allowing 750,000 in Los Angeles, and by extension 1.5 million in California, the national illegal alien population, reputed to be double that of

Accepting even the lowest figures, it is clear that California is home to a substantial number of illegal aliens.²² Notwithstanding the uncertain population figures, California's costs²³ to provide services to these undocumented aliens are, by nearly any measure, formidable.²⁴

California, would be only three million.] Compare, Mark Curriden, *No More Open Door*, ATLANTA J. AND CONST., Nov. 21, 1994, at H1 (citing federal estimate of 4 million illegal aliens nationally) with Joseph G. Nalven, *The Illegal Alien Numbers Game*, SAN DIEGO UNION-TRIB., Dec. 9, 1993, at B15 (exposing disparity of estimates for California's illegal alien population ranging from 2.3 million to 4 million; nationwide estimates range from 4.7 million to 8 million).

²² See Sybert, *supra* note 21, at 964 (citing figure of 1.3 million illegal aliens in California).

²³ See, e.g., *Anti-immigration Folly Initiative Would Crack Down on Schoolchildren*, SAN DIEGO UNION-TRIB., June 19, 1994, at G2 [hereinafter *Anti-immigration Folly*] (citing estimates of 375,000 illegal alien students in kindergarten through 12th grade at cost to California of \$2 billion annually); George J. Borjas, *Know the Flow; Economics of Immigration*, NAT'L REV., Apr. 17, 1995, at 44 (quoting estimate of \$1.7 billion to educate children of illegal aliens in California); Tony Perry, *Gingrich Offers To Fully Repay States on Immigrant Care*, L.A. TIMES, Oct. 21, 1995, at A1 (quoting California Governor Pete Wilson's estimate for fiscal year 1995-96 of \$382 million for emergency medical services to illegal immigrants, up from \$21 million in 1988-89); Angelica Quiroga, *Copycat Fever; Proposal to Ban Social Services for Illegal Immigrants*, HISPANIC, Apr. 1995, at 18 (citing increase of illegal alien health service costs in California from \$22 million in 1989, to \$400 million in 1995); Dan Walters, *Proposition 187 Decision Ironic*, SACRAMENTO BEE, Nov. 23, 1995, at A3 (citing estimate of illegal alien cost to California of \$3 billion); Nalven, *supra* note 21 (quoting estimates of illegal alien cost to San Diego County ranging from \$145 million to \$244 million).

Other data suggest that the costs of services to aliens are more than offset by their tax contributions. See, e.g., Note, *Unenforced Boundaries: Illegal Immigration and the Limits of Judicial Federalism*, 108 HARV. L. REV. 1643, 1645 (1995). Costs of providing illegal aliens with state medicaid (\$395 million); primary education (\$1.6 billion); and incarceration of adult felons (\$360 million) equal a total cost to the State of California of approximately \$2.35 billion. *Id.* The same source of these figures, the Government Accounting Office (GAO) also calculated the annual tax revenue generated by these aliens at \$2.4 billion, roughly equal to California's costs to provide them services. *Id.* The distribution of these revenues, however, appears less than equitable, with \$1.1 billion going to the State, but \$1.3 billion to the federal government. *Id.* at 1646.

²⁴ Yet, paradoxically, in another of California's "alien" cultures, Hollywood, some of these figures seem perhaps less formidable. See Judy Brennan, *Troubled Route to Pirate Epic "Cutthroat"*, L.A. TIMES, Dec. 21, 1995, at F1. Two motion pictures released in 1995, "Waterworld" and "Cutthroat Island," were produced at costs estimated at \$172 million-\$235 million and \$90 million-\$120 million, respectively. *Id.*; see also, Josh Young, *Glug, Glug; "Waterworld" and the Movie Industry's Media Manipulation*, NEW REPUBLIC, Aug. 14, 1995, at 10 (reporting estimated cost of "Waterworld" at \$175 million-\$200 million).

These two movies, however, are merely drops in a leaking bucket of Hollywood cash. See, e.g., Michael Hirsch, et al., *Goodbye, Mickey*, NEWSWEEK, Dec. 18, 1995, at 55 (noting downfall of Sony executive Mickey Schulhof largely as result of \$3.2 billion write-off of Sony's Hollywood assets); Gregg Kilday et al., *Cents and Sensibility*, ENT. WEEKLY, Dec. 22, 1995, at 22 (citing Sony's buyout of producers Jon Peters's and Peter Guber's Warner Bros. contract for \$500 million; five years later Guber's severance package was reported \$20 million plus \$200 million production company).

The Proposition 187 referendum passed in California with 59 percent of the vote in favor of the initiative.²⁵ Section One of Proposition 187 justifies the measures of the initiative by noting the damage caused to the people of California by illegal aliens.²⁶ In order to avert further injury, California voted to deny the following to illegal aliens: elementary and secondary education;²⁷ post-secondary education;²⁸ social services;²⁹ and publicly-funded non-

²⁵ See Paul Feldman and Patrick J. McDonnell, *Judge Holds Off Ruling On Legality of Prop. 187*, L.A. TIMES, Oct. 24, 1995, at A3 (noting margin of initiative's passage).

Some interesting sub-text is found in the margins of the Proposition 187 story. See, e.g., H.R. 1170, 104th Cong., 1st Sess. (1995). The bill, passed in the House of Representatives would require a three-judge panel to grant injunction against execution of a state law passed by referendum. See also Stephen Green, *House OK's Bill Halting One-Judge Referendum Rulings*, SAN DIEGO UNION-TRIB., Sept. 29, 1995, at A3. The United States House of Representatives passed a bill to prohibit blockage of ballot initiatives by injunctions issued by a single federal judge. *Id.* The bill, approved 266-159, represented the "maiden legislative effort" of Rep. Sonny Bono. *Id.* The bill would require any injunction against enforcement of a voter-approved initiative be ordered by a three-judge panel. *Id.* The normal mode of review for over 60 years, Congress abolished three-judge courts (except for reapportionment cases) in 1972 in an effort to clear federal case backlogs. *Id.*

Of additional interest is the reported public opinion about Proposition 187 and other immigration issues as broken down along ethnic lines. See, e.g., Tom Tancredo, *Make a Candidate Sweat — Ask About Illegal Aliens*, DENV. POST, Apr. 30, 1995, at E1. The author cites figures claiming 43% of Hispanic voters voted in favor of Proposition 187. *Id.*; see also *Anti-immigration Folly*, *supra* note 23, at G2. Blacks and Latinos are said to have opposed Proposition 187 by differing margins. *Id.*; Sybert, *supra* note 21, at 995-97. The author cites numerous poll data from 1993 that reflect popular opinion of immigration issues. *Id.*

²⁶ Proposition 187, § 1. "The People of California . . . have suffered and are suffering economic hardship caused by the presence of illegal aliens in this state [and] have suffered and are suffering personal injury and damage caused by the criminal conduct of illegal aliens in this state." *Id.*

²⁷ CAL. EDUC. CODE § 48215 (West 1995). Section seven of Proposition 187 amended California's Education Code to prohibit any public elementary or secondary school to admit or permit the attendance of any child not lawfully present in the U.S. *Id.* § 48215(a). The statute called for each school district, beginning January 1, 1995, to verify the legal status of each child enrolling for the first time. *Id.* § 48215(b). By January 1, 1996, each district was to establish the lawful residency of each student currently attending public elementary or secondary schools. *Id.* § 48215(c). Children determined or reasonably suspected of unlawful presence would be allowed to continue to attend school for ninety days from the date of notification. *Id.* § 48215(e)(f). Furthermore, any child determined or reasonably suspected of unlawful presence in the U.S. is reported to the U.S. Immigration and Naturalization Service (INS) and the Attorney General of California. *Id.* § 48215(e). In addition to the provisions of the other sections of Proposition 187, subsection (d) of California's Education Code provides that: "By January 1, 1996, each school district shall also have verified the legal status of each parent or guardian of each child . . ." *Id.* § 48215(d). Determination or reasonable suspicion of a parent's unlawful status would result in the child's removal from school within ninety days unless legal status was established. *Id.* § 48215(e).

²⁸ CAL. EDUC. CODE § 66010.8 (West 1995). Section eight of Proposition 187 added § 66010.8 to the California Education Code, prohibiting any public institution of postsecondary education from admitting, enrolling or permitting the attendance of any person unlawfully in the United States. *Id.* § 66010.8(a). As with the other measures of Proposition 187, § 66010.8 also provides for INS and Attorney General notification. *Id.* § 66010.8(c).

²⁹ CAL. WELF. & INST. CODE § 10001.5 (West 1995). Section five of Proposition 187 added to the California Welfare and Institutions Code to deny "the benefits of public social services" to aliens unable to establish their lawful presence in the U.S. *Id.* § 10001.5(a)(b). As

emergency medical care.³⁰ In addition, Proposition 187 requires that state service providers to notify the United States Immigration and Naturalization Service ("INS") of anyone seeking the prohibited services who is reasonably suspected of unlawful presence in this country.³¹

Proposition 187's reach is not limited to illegal aliens.³² For example, not only must children seeking public education verify their own lawful presence in the United States,³³ but their parents must further demonstrate their own legal residency.³⁴ Every child born in this country, regardless of the alienage of her parents, is a United States citizen.³⁵ In Los Angeles County alone there are an estimated 250,000 citizen children born to illegal

with other Sections of Proposition 187, the alien's status is reported to the INS and the California Attorney General upon a determination, or reasonable suspicion, of the alien's illegal presence in California. *Id.* § 10001.5(c)(1-3).

³⁰ CAL. HEALTH & SAFETY CODE ch. 1.3, § 130 (West 1995). Section six of Proposition 187 amended the California Health and Safety Code to extend non-emergency publicly-funded health care only to citizens of the United States and lawfully admitted aliens. *Id.* § 130(a)(b). The statute provides in pertinent part:

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

- (1) A citizen of the United States.
- (2) An alien lawfully admitted as a permanent resident.
- (3) An alien lawfully admitted for a temporary period of time.

Id. Furthermore, as with other sections of Proposition 187, any person determined or reasonably suspected of unlawful presence in the U.S. is: (1) denied services; (2) notified of his or her illegal status; (3) reported to the Immigration and Naturalization Service (INS) and the Attorney General of California. *Id.* § 130(c) (1-3).

³¹ CAL. EDUC. CODE §§ 48215, 66010.8 (West 1995) (requiring INS notification); CAL. WELF. & INST. CODE § 10001.5 (West 1995) (same); CAL. HEALTH & SAFETY CODE ch. 1.3, § 130 (West 1995) (same).

³² CAL. EDUC. CODE § 48215 (West 1995) (requiring proof of parents' legal residence beyond legal resident status of child).

³³ CAL. EDUC. CODE § 48215 (b)(c) (West 1995) (requiring proof of legal residence for current students as well as students enrolling for first time).

³⁴ CAL. EDUC. CODE § 48215 (d)(West 1995) (requiring proof of parents' legal residence).

³⁵ U.S. CONST. amend. XIV. § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

The certainty of this statement is somewhat less secure today as Congress considers a constitutional amendment to end automatic citizenship for any child born in the U.S. See Gil Klein, *What Makes a Citizen of the U.S.?*, TAMPA TRIB., Dec. 30, 1995, at 6 (citing General Accounting office estimate of \$479 million paid in welfare benefits to citizen children of illegal immigrants in 1992); Neil A. Lewis, *Bill Seeks to End Automatic Citizenship for All Born in the U.S.*, N.Y. TIMES, Dec. 14, 1995, at A26 (noting that not only Republicans, but also some Democrats in Congress, especially those from California, have shown support for measure); Joan Lowy, *A. U.S. Birthright Under Scrutiny*, ROCKY MOUNTAIN NEWS, July 23, 1995, at 3A (citing California Dept. of Health Services estimates of 96,000 babies born to illegal immigrants in 1992 with medical costs to state of \$230 million).

alien parents.³⁶ Section six of Proposition 187, which prohibits extending non-emergency medical care to illegal aliens,³⁷ creates a de facto denial of services to these same citizen children. Faced with discovery and deportation, the illegal alien parent of an American citizen child has a decided disincentive to seek medical care for an ill child.³⁸

Proposition 187 is currently wending its way toward an expected review by the United States Supreme Court.³⁹ Judge Mariana R. Pfaelzer⁴⁰ of the United States District Court for the Central District of California has already granted partial summary judgment in an early assault on Proposition 187,⁴¹ finding several measures of Proposition 187 preempted by federal law.⁴²

Of the various elements of Proposition 187, this Note will focus on restrictions affecting primary and secondary education. Before addressing the constitutionality of denying children access to public education, one first must determine whether public education is an entitlement or a protection of the laws. As discussed below,

³⁶ See Robert B. Gunnison, *Wilson Gains Support On Funds for Immigrants*, S.F. CHRON., Feb. 1, 1993, at A1 (commenting on reach of Proposition 187 beyond illegal aliens).

³⁷ CAL. HEALTH & SAFETY CODE ch. 1.3, § 130 (West 1995) The statute provides in pertinent part:

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

- (1) A citizen of the United States.
- (2) An alien lawfully admitted as a permanent resident.
- (3) An alien lawfully admitted for a temporary period of time.

Id.

³⁸ See, e.g., Paul Feldman, *Lawyers Weigh Options in Prop. 187 Battle*, L.A. TIMES, Nov. 22, 1995, at A3 (attributing 40% decline in women seeking prenatal care in clinic where half of 1400 annual births are to undocumented parents, even before enactment of law); Quiroga, *supra* note 23, at 18 (noting chilling effect of Proposition 187 on undocumented aliens in need of medical care for children).

³⁹ See Paul Feldman, *Judge Hints That Prop. 187 May Be Unconstitutional*, L.A. TIMES, July 27, 1995, at A3 (noting expectations that Supreme Court review is likely); Paul Feldman & Patrick J. McDonnell, *Judge Holds Off Ruling On Legality of Prop. 187*, L.A. TIMES, Oct. 24, 1995, at A3 (same).

⁴⁰ Judge Pfaelzer is no stranger to high-profile cases. See Paul Feldman, *Prop. 187 Ruling Frustrating for Voters*, L.A. TIMES, Nov. 22, 1995, at A1. President Jimmy Carter appointed Judge Pfaelzer to the federal bench in 1978, making her the first female federal trial judge in California history. *Id.* Since that time she has sentenced Charles H. Keating for his role in the Lincoln Savings & Loan scandal. *Id.* She also sentenced notorious computer outlaw Kevin Mitnick to a rehab center for his "addiction" to computer hacking. *Id.* In addition, it was Judge Pfaelzer who ordered a freeze on the worldwide assets of exiled Philippine President Ferdinand Marcos. *Id.*

⁴¹ League of United Latin American Citizens (LULAC) v. Wilson, 908 F. Supp. 755, 776 (C.D. Cal. 1995) (holding §§ 4-9 of Proposition 187 preempted by Congressional power to regulate immigration, while §§ 2,3 were not preempted).

⁴² *Id.*

the United States Supreme Court has ruled that there is not a fundamental right to an education,⁴³ yet every state has some sort of compulsory school attendance law.⁴⁴ Limiting the reach of compulsory school attendance laws, therefore, raises the question of whether a state can exclude an entire class of persons from receiving the protective benefits of public education without running afoul of the Fourteenth Amendment.⁴⁵ An examination of the source of the state's authority to administer its own education policy may provide some answers.

II. STATES' RIGHTS AND POLICE POWERS

The Tenth Amendment vests in the states and the people those powers not delegated to the federal government by the Constitution.⁴⁶ Police powers exist to enable the state to restrict the freedoms of individuals for the protection of society as a whole.⁴⁷

⁴³ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding Texas' state public school financing scheme did not violate Equal Protection Clause of Fourteenth Amendment).

⁴⁴ See ALA. CODE § 16-28-3 (1995); ALASKA STAT. § 14.30.010 (1992); ARIZ. REV. STAT. ANN. § 15-802 (1991); ARK. CODE ANN. § 6-18-201 (Michie 1993); CAL EDUC. CODE § 48200 (Deering 1987); COLO. REV. STAT. § 22-33-104 (1995); CONN. GEN. STAT. ANN. § 10-184 (1986); DEL. CODE ANN. tit. 14, § 2702 (1993); D.C. CODE ANN. § 31-402 (1993); FLA. STAT. ANN. § 232.01 (West 1989); GA. CODE ANN. § 32-21 (Harrison 1987); HAW. REV. STAT. § 298-9 (1985); IDAHO CODE § 33-202 (1995); ILL. REV. STAT. ch. 105, para. 26-1 (Smith-Hurd 1993); IND. CODE § 20-8.1-3-17 (Burns 1991); IOWA CODE ANN. § 299.1 (West 1988); KAN. STAT. ANN. § 72-111 (1992); KY. REV. STAT. ANN. § 159.010 (Michie/Bobbs-Merrill 1992); LA. REV. STAT. ANN. § 17-221 (West 1982); ME. REV. STAT. ANN. tit. 20, § 5001-A (West 1993); MD. CODE ANN., EDUC. § 7-301 (1992); MASS. GEN. L. ch. 76, § 1 (Law Co-op. 1991); MICH. STAT. ANN. § 15-41561 (Callaghan 1987); MINN. STAT. ANN. § 120.101 (West 1993); MISS. CODE ANN. § 37-13-91 (1990); MO. ANN. STAT. § 167.031 (Vernon 1991); MONT. CODE ANN. § 20-5-102 (1995); NEB. REV. STAT. § 79-201 (1994); NEV. REV. STAT. ANN. § 392.040 (Michie 1991); N.H. REV. STAT. ANN. § 189.1-a (1989); N.J. REV. STAT. ANN. § 18A:38-25 (West 1989); N.M. STAT. ANN. § 22-12-1 (Michie 1992); N.Y. EDUC. LAW § 3205 (Consol. 1985); N.C. GEN. STAT. § 115C-378 (1994); N.D. CENT. CODE § 15-34.1-01 (1981); OHIO REV. CODE ANN. § 3321.03 (Anderson 1994); OKLA. STAT. ANN. tit. 70, § 105 (West 1989); OR. REV. STAT. § 339.010 (1995); PA. STAT. ANN. tit. 24, § 13-1327 (1992); P.R. LAWS ANN. tit. 18, § 2 (1994); R.I. GEN. LAWS § 16-19-1 (1988); S.C. CODE ANN. § 59-65-10 (Law Co-op. 1990); S.D. CODIFIED LAWS ANN. § 13-27-1 (1982); TENN. CODE ANN. § 49-6-3005 (1990); TEX. EDUC. CODE ANN. § 21.032 (West 1987); UTAH CODE ANN. § 53A-11-101 (1994); VT. STAT. ANN. tit. 16, § 1121 (1989); VA. CODE ANN. § 22.1-254 (Michie 1993); WASH. REV. CODE ANN. § 28A.27.010 (West 1982); W. VA. CODE § 18-8-1 (1994); WIS. STAT. ANN. § 118.15 (West 1991); WYO. STAT. § 21-4-101 (1995).

⁴⁵ See U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.")

⁴⁶ U.S. CONST. amend. X. ("The powers not designated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")

⁴⁷ See BLACK'S LAW DICTIONARY 1156 (6th ed. 1990) Police power is defined as: "[t]he power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity." *Id.*

Although the term "police power" is not specifically mentioned in the Constitution, the concept was first recognized⁴⁸ in *Gibbons v. Ogden*.⁴⁹ In *Gibbons*, Chief Justice Marshall acknowledged the states' authority to legislate any activities not controlled by the federal government.⁵⁰ Today, the breadth of the states' police power seems at times to be almost limitless.⁵¹

A. *Parens Patriae*

The state has even broader authority under its police power where the interests of children are concerned.⁵² The concept of *parens patriae*⁵³ predates the Fourteenth Amendment by centu-

See also *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 139 (1837). Ironically, *Miln* was a case involving an anti-immigration statute passed by New York in 1824 "with a view to prevent her citizens from being oppressed by the . . . evil of thousands of foreign emigrants . . . and the consequent danger of her citizens being subjected to a heavy charge in the maintenance of those who are poor." *Id.* at 141. Among other things, the statute provided that ship masters could be required to post surety bonds of up to \$300 for each non-citizen passenger. *Id.* at 154. It required that persons "deemed likely to become chargeable to the city," were to be removed to their places of last settlement at the expense of the ship master or owner. *Id.* Furthermore, the statute imposed a penalty of \$100 for any person entering New York City with the intention of residing there who failed to make a report to the proper authorities. *Id.* *Miln* came about as the result of a ship master failing to make a report of the passengers on board within twenty-four hours of arriving at the port of New York. *Id.* at 131.

Unlike challenges facing Proposition 187, the focus of *Miln* was whether New York's statute was an impermissible interference with the Commerce Clause of the United States Constitution. *Id.* at 145. What makes the case interesting is the Court's recognition of the breadth of the states' police powers. Even Justice Story, who thought the statute violated the Commerce Clause, acknowledged in his dissent the near-absolute powers of the states, limited only by constitutional boundaries. *Id.* at 156 (Story, J., dissenting).

⁴⁸ *See* NOWAK & ROTUNDA, *supra* note 5, at 277 (providing overview of origin of police powers).

⁴⁹ 22 U.S. (9 Wheat.) 1 (1824).

⁵⁰ *Id.* at 198-99, 210-11.

⁵¹ *See, e.g.*, N.Y. EXEC. LAW § 370 (Consol. 1995) (regulating building codes); CAL. HEALTH & SAFETY CODE § 13141 (West 1995) (regulating pesticide use); KY. REV. STAT. ANN. § 228.020 (Michie/Bobbs-Merill 1995) (regulating dry cleaners); MASS. GEN. LAWS ANN. ch. 119, § 1 (West 1993) (regulating child welfare); ILL. REV. STAT. ch. 410 para. 650.001 (Smith-Hurd 1993) (regulating food preparation in public eating facilities); GA. CODE ANN. § 68-101 (Harrison 1991) (regulating motor vehicle operation and licensing); HAW. REV. STAT. § 143-1 (1985) (regulating dog licensing); CAL. EDUC. CODE § 48200 (West 1995) (regulating education); *see also* Michael J. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of the Constitutional Theory: Reflections On, and Beyond*, Plyer v. Doe, 44 U. PITT. L. REV. 329, 340 (1983) (noting examples of states' police power to illustrate classification in context of rational relation principle).

⁵² *See* *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (holding state prohibition on minors selling newspapers or merchandise not violative of Fourteenth Amendment, even where appellant child and parent were distributing religious literature); *accord* *Ginsberg v. State of New York*, 390 U.S. 629, 638-39 (1968) (upholding New York law prohibiting sale of obscene matter to minors).

⁵³ *See* BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). Literally, "parent of the country." *Id.* "It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents." *Id.*

ries.⁵⁴ Exactly when the term first appeared in English law is somewhat unclear.⁵⁵ Under this doctrine, the care of "charities, infants, idiots and lunatics" was undertaken by the Crown as parent of the state.⁵⁶ United States jurisprudence adopted *parens patriae* following the American Revolution.⁵⁷ As early as 1819, the principle was considered so well-established that Chief Justice Marshall considered listing the bases of its authority to be a "waste of time."⁵⁸

The role of *parens patriae* in the exercise of police powers by a state is manifested in legislation protecting the health and welfare of children.⁵⁹ Compulsory school attendance laws are examples of this type of regulation.⁶⁰ It is urged that this protection, created under color of state law, rather than any fundamental

⁵⁴ See, e.g., *Latter Day Saints v. United States*, 136 U.S. 1, 52-53 (1889) (tracing concept back to Pandects of Justinian).

⁵⁵ See, e.g., Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 898 (1975). Professor Areen cites the first appearance of the term in *Falkland v. Bertie*, 23 Eng. Rep. 814 (Ch. 1696). *Id.*; see also George Rossman, *Parens Patriae*, 4 OR. L. REV. 233, 236-37 (1925). Lord Reddesdale, in *Wellesley v. Wellesley*, 2 Bligh, N.S. 218, 4 Eng. Rep. 1078 (1810), acknowledged the sovereign duty of *parens patriae* as having been recognized for "150 years past." *Id.* [Note: *Wellesley* would date the origin back to 1660. The 1660 date is also consistent with the history of *parens patriae* as reviewed in *Ex Parte Daedler*, 229 P. 467 (Cal. 1924) quoted in Rossman, *supra*, at 237.] But see *Baptist Ass'n v. Hart's Executors*, 17 U.S. (4 Wheat.) 1, 48 (1819). In *Baptist Ass'n*, Chief Justice Marshall asked whether charitable trusts could be established "enforcing the prerogative of the King as *parens patriae* before the 43 [sic] Elizabeth?" *Id.* at 43. The regnal year for the Statute of 43d Elizabeth was 1601. This would suggest the term *parens patriae* was in use nearly a century before *Falkland v. Bertie* in 1696. Furthermore, while conceding that the Statute of 43d Elizabeth was not technically operative, Justice McLean noted in 1854 that the principles were nonetheless followed.

See *Fontain v. Ravenel*, 58 U.S. (17 How.) 369, 386 (1854) (discussing doctrine of *parens patriae* with respect to charities).

⁵⁶ See *Baptist Ass'n*, 17 U.S. at 13 (providing history of *parens patriae*); *Latter Day Saints*, 136 U.S. at 56-58 (same); see also Areen, *supra* note 55, at 898, citing *Falkland*, 23 Eng. Rep. at 818 (same); Rossman, *supra* note 55, at 238, quoting *Daedler*, 229 P. at 467 (same).

⁵⁷ See 2 WILLIAM BLACKSTONE, COMMENTARIES 1175 n.1 (Thos. Cooley 4th ed.) (discussing parental rights and duties); see also *Fontain*, 58 U.S. at 384. "The State, as a sovereign, is the *parens patriae*." *Id.*; *Latter Day Saints*, 136 U.S. at 57. "This prerogative of *parens patriae* is inherent in the supreme power of every state . . . exercised . . . for the prevention of injury to those who cannot protect themselves." *Id.*; THEODORE J. STEIN, CHILD WELFARE AND THE LAW 27 (1991). The author cites *parens patriae* as the historical authority for the state to remove a child from the home. *Id.* The first American case to acknowledge the state authority to remove children from the home was *Ex Parte Crouse*, 4 Wheat. (Pa.) 9 (1839). *Id.* at 27.

⁵⁸ *Latter Day Saints*, 136 U.S. at n.5. "Instances . . . in which the Legislature clearly acts as *parens patriae*, may be found almost without number." *Id.*

⁵⁹ See BLACK'S LAW DICTIONARY *supra* note 53, at 1114 (defining *parens patriae*).

⁶⁰ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (recognizing authority of state as *parens patriae*, but limiting authority of state to determine religious future of children through enforcement of compulsory school attendance statute).

right, is what brings education within the scope of the Equal Protection Clause.

B. Compulsory School Attendance & The Protection of the Laws

Educating children has been called "the highest exercise of the police power of the state."⁶¹ Although education policy is administered solely by the states, it must nonetheless conform to federal requirements concerning state action.⁶² Some 50,000 court cases affecting the organization, administration and programs of American schools were decided between 1789 and 1984.⁶³ The validity of compulsory school attendance as an exercise of state police power has never been questioned by the courts.⁶⁴

In *The Philosophy of Right*,⁶⁵ Hegel recognized that the "faddish dislike[s]" of parents were a threat to society's prevailing interest in the education of all its children.⁶⁶ Consistent with the principle of *parens patriae*, education has historically been considered so important in this country that every state has enacted compulsory school attendance laws.⁶⁷ These laws have been justified as valid exercises of the state's police power to ensure not only that children are protected from the hazards of ignorance, but that society as a whole is protected from the burden of an illiterate underclass of individuals.⁶⁸ The first compulsory school attendance law in Colonial America was enacted by the Massachusetts Bay Colony in

⁶¹ *Leeper v. State*, 53 S.W. 962, 968 (1899) (holding Tennessee statute providing for uniform textbooks in public schools not unconstitutional monopoly).

⁶² *Cooper v. Aaron*, 358 U.S. 1, 19 (1958) (holding Arkansas forced to integrate its schools without delay); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.").

⁶³ See HOGAN, *supra* note 8, at 10. The total number of estimated cases breaks down as follows: 45,470 state court cases and 6,697 federal court cases, for a total of 52,167. *Id.*

⁶⁴ JOHN FREDERICK BENDER, *FUNCTIONS OF THE COURTS IN ENFORCING SCHOOL ATTENDANCE LAWS* 95 (1927) (noting treatment of compulsory school attendance laws by courts).

⁶⁵ G. W. F. HEGEL, *THE PHILOSOPHY OF RIGHT (ADDITIONS)* ¶ 147 (T.M. Knox trans., *Encycl. Britannica* 1952) (1821) (discussing rights and responsibilities of parents).

⁶⁶ *Id.*; see also *Meyer*, 262 U.S. at 400 (noting that parental responsibility to see their children are educated is considered so important that education is made compulsory by law).

⁶⁷ See KOTIN & AIKMAN, *supra* note 9, at 74. Note, however, that the authors provide no such statute for Mississippi. Mississippi's compulsory school attendance statute became effective July 1, 1987; the authors' book was published in 1980. *Id.*; see also *supra* note 44. This footnote lists the compulsory school attendance statutes for the 50 states, District of Columbia and Puerto Rico. *Id.*

⁶⁸ See *Fogg v. Board of Educ.*, 82 Atl. 173, 175 (N.H. 1912) In *Fogg*, the Supreme Court of New Hampshire held: "While most people regard the public schools as the means of great personal advantage to the pupils, the fact is too often overlooked that they are governmental means of protecting the state from the consequences of an ignorant and incompetent

1642.⁶⁹ The first such law in the United States, also in Massachusetts, was enacted in 1852.⁷⁰ Today, of the fifty states, the District of Columbia, and Puerto Rico, each has a compulsory school attendance law.⁷¹

Ironically, some of the most significant Supreme Court cases recognizing the state's authority to compel school attendance involved limitations on that authority. The constitutional issue in *Meyer v. Nebraska*⁷² concerned a due process challenge based on Fourteenth Amendment liberty interests.⁷³ Nebraska had enacted a statute in 1919 which forbade the teaching of any language other than English to children in any school below the eighth grade.⁷⁴ A parochial school teacher was arrested for teaching German to a ten year-old.⁷⁵ The Court in *Meyer* expressly recognized the ability of the state to develop its own curriculum, including the

citizenship." *Id.*; see also *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). This case noted the special importance of education to American people. *Id.*

Another case examining the importance of compulsory school attendance was *New York v. Chelsea Jute Mills*, 43 Misc. Rep. 266, 88 N.Y.S. 1085 (N.Y.C. Mun. Ct. N.Y. County 1904). *Chelsea Jute Mills* is particularly interesting because of the authority on which it relied. Beyond citing several cases mentioned in this Note as recognizing compulsory education as a valid exercise of police power, the opinion by Justice Roesch cited on nearly every page the New York Court of Appeals holding in *People v. Lochner*, 177 N.Y. 145, 69 N.E. 373 (1904), which upheld the validity of a New York law imposing limitations on hours bakery employees could work. See *Chelsea Jute Mills*, 88 N.Y.S. at 1086-89. As of the time of the opinion in *Chelsea Jute Mills*, *Lochner* was held up as a paragon of valid state police power. See also *Chelsea Jute Mills*, 88 N.Y.S. at 1087. The next year, in one of its most memorable decisions, the U.S. Supreme Court reversed the New York Court of Appeals in *Lochner v. New York*, 198 U.S. 45 (1905). Perhaps more memorable than the facts of *Lochner* was the famous dissent of Justice Holmes:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agree with that theory, I should desire to study it further and long before making up my mind. . . . The 14th Amendment does not enact Mr. Herbert Spencer's *Social Statics*.

Id. at 75. Compare the *Lochner* dissent with that of Chief Justice Burger in *Plyler*. "Were it our business to set the nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including children of illegal aliens—of an elementary education." *Plyler v. Doe*, 457 U.S. 202, 242 (Burger, C.J., dissenting). For an enlightening perspective on the import of the Holmes dissent, see RICHARD A. POSNER, *LAW AND LITERATURE* 281-88 (1988). For a discussion of *Chelsea Jute Mills*, see BENDER, *supra* note 64, at 82-84.

⁶⁹ See KOTIN & AIKMAN, *supra* note 9, at 11 (discussing history of compulsory school attendance in America); 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 238 (1832) (O.W. Holmes ed., 12th ed. 1873) (same).

⁷⁰ KOTIN & AIKMAN, *supra* note 9, at 25.

⁷¹ See *supra* note 44 (listing compulsory school attendance statutes for 50 states, District of Columbia and Puerto Rico).

⁷² 262 U.S. 390 (1923).

⁷³ See *id.* at 402 (discussing due process considerations). See generally EDWARDS, *supra* note 8, at 17, 43 (discussing *Meyer*); KOTIN & AIKMAN, *supra* note 9, at 278-79 (same); SALOMONE, *supra* note 9, at 81 (same).

⁷⁴ See *Meyer*, 262 U.S. at 397.

⁷⁵ See *id.* at 396.

teaching of the English language, as well as the power to compel school attendance.⁷⁶ It held, however, that in its ban on teaching foreign languages, the state had exceeded the authority of its police powers.⁷⁷

Another Supreme Court case, *Pierce v. Society of Sisters*,⁷⁸ decided in 1925, involved a due process challenge to an Oregon compulsory school attendance statute.⁷⁹ The statute not only required that each child between the ages of eight and sixteen years attend school, but also that the child must attend an Oregon public school.⁸⁰ Parents failing to comply could be jailed for up to thirty days and fined up to \$100.⁸¹ The statute was challenged by two private schools operating as corporations, a Catholic parochial school and a military academy.⁸² The Court in *Pierce* held that in foreclosing the option of families to choose adequate private education, the law violated their due process rights.⁸³

In *Wisconsin v. Yoder*,⁸⁴ members of the Amish religion successfully challenged Wisconsin's compulsory education law which required all children to receive either public or private education until the age of sixteen.⁸⁵ According to the tenets of the Old Order Amish community, the attendance of Amish children in high school, public or private, was considered contrary to the Amish way of life.⁸⁶ The Court recognized that education in the Amish lifestyle was inseparable from the exercise of the religion as a

⁷⁶ *Id.* at 402. "The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned." *Id.*

⁷⁷ *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

⁷⁸ 268 U.S. 510 (1925).

⁷⁹ *See id.* at 531-33. *See generally* BENDER, *supra* note 64, at 56-60 (discussing *Pierce*); EDWARDS, *supra* note 8, at 18, 42 (same); HOGAN, *supra* note 8, at 135 (same); KOTIN & AIKMAN, *supra* note 9, at 242-45, 250-56 (same); NOWAK & ROTUNDA, *supra* note 5, §§ 14.26, 17.7 (same); SALOMONE, *supra* note 9, at 81 (same).

⁸⁰ *See Pierce*, 268 U.S. at 530.

⁸¹ *See id.*

⁸² *See id.* at 531-33.

⁸³ *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). The Court in *Pierce* also held that the due process rights of the school owners were violated. *Id.* at 535-36. The Court conceded that the corporations could not claim the liberty protected by the Fourteenth Amendment. *Id.* at 535. It held, however, that the business and property interests of the corporations were entitled to equal protection. *Id.*

⁸⁴ 406 U.S. 205 (1972).

⁸⁵ *See id.* at 207. *See generally*, HOGAN, *supra* note 8, at 135 (discussing *Yoder*); KOTIN & AIKMAN, *supra* note 9, at 245-54 (same); NOWAK & ROTUNDA, *supra* note 5, §§ 17.6, 17.8 (same).

⁸⁶ *See Yoder*, 406 U.S. at 208-09.

whole.⁸⁷ The Court found further that education's goal of preparing a child for life was not compromised; conventional education was adequately substituted by the vocational training received by Amish children.⁸⁸ The Court thus limited Wisconsin's power to compel the school attendance of ninth and tenth grade Amish children.⁸⁹

Meyer, *Pierce* and *Yoder* imposed significant limitations on the authority of the states to control their respective education programs. In each case, however, the Supreme Court expressly held that the state's authority to compel the attendance of children in some school, public or private, was valid.⁹⁰

Supreme Court decisions addressing a "right" to an education have mentioned compulsory education, although the nexus has not been clearly defined.⁹¹ One of the most significant opinions in American history, *Brown v. Board of Education*⁹² remarked upon compulsory school attendance as being indicative of education's importance to society.⁹³ Later decisions have relied on *Brown's*

⁸⁷ *Id.* at 218-19.

⁸⁸ *Id.* at 235-36. In reaching its holding, the Court considered that the Amish had been an identifiable religious sect for three centuries. *Id.* The Court drew a sharp distinction between the established educational precepts of the Amish and "a group claiming to have recently discovered some 'progressive' or enlightened process for rearing children for modern life." *Id.*

⁸⁹ *Wisconsin v. Yoder*, 406 U.S. 205, 225 (1972).

⁹⁰ *Meyer v. Nebraska* 262 U.S. 390, 402 (1923) ("The power of the state to compel attendance at some school . . . is not questioned."); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925) ("No question is raised concerning the power of the State . . . to require that all children of proper age attend some school . . ."); *Yoder*, 406 U.S. at 222 ("No one can question the State's duty to protect children from ignorance . . .").

⁹¹ See, e.g., KOTIN & AIKMAN, *supra* note 9, at 241. The authors analyze cases involving compulsory school attendance, and divide them into three categories: First, those cases challenging the validity of compulsory attendance provisions per se; second, those cases addressing a "right to an education," and third, cases involving substantive rights of students where the compulsory element of public school education is a factor. *Id.*

⁹² 347 U.S. 483, 494-95 (1954) (holding segregation in public schools violated Equal Protection Clause and expressly destroying doctrine of "separate but equal" formulated in *Plessy v. Ferguson*, 163 U.S. 537 (1896)). For discussions of *Brown* and its impact, see EDWARDS, *supra* note 8, at 548-49 (discussing impact of *Brown*); HOGAN, *supra* note 8, at 3-4, 20-21, 29-31 (same); KOTIN & AIKMAN, *supra* note 9, at 34, 260-62 (same); NOWAK & ROTUNDA, *supra* note 5, §§ 12.2, 14.9, 15.2 (same); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 144-46, 302-309 (1990) (same); RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 354-56, 379 (1981) (same); SALOMONE, *supra* note 9, at 42-45, 56-58 (same); Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 655 (1983) (same); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1129-29, 1133, 1137-39, 1150-54, 1184-1186 (1969) (same).

⁹³ *Brown*, 347 U.S. at 493.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even

message, but the values the *Brown* Court attached to education, while inspiring, lacked the force of law to permit later courts to elevate education to the level of a fundamental right.⁹⁴

The definitive case involving a right to education was *San Antonio Independent School District v. Rodriguez*,⁹⁵ decided in 1973. *Rodriguez* involved a challenge to the Texas public school financing scheme.⁹⁶ The petitioners argued that the plan's inherent inequalities based on distribution of wealth resulted in inequitable funding of school districts within the state.⁹⁷ The Court in *Rodriguez* found no constitutional basis, implicit or express, for finding education to be a fundamental right.⁹⁸

The Court in *Rodriguez*, as in its subsequent holding in *Plyler*, may have stumbled by addressing the wrong issue.⁹⁹ The word "right" appears nowhere in the Equal Protection Clause.¹⁰⁰ As Justice Rehnquist noted, the Equal Protection Clause does not concern rights, but "protection of the laws."¹⁰¹

Compulsory school attendance should be considered one such protection of the laws. The state action compelling students to attend school is the mechanism which raises education above the

service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id.

⁹⁴ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding Texas' denial of access to public schools by illegal aliens violated Fourteenth Amendment); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding no fundamental right to education).

⁹⁵ 411 U.S. 1 (1973).

⁹⁶ *Id.* at 6.

⁹⁷ *Id.* at 11-14.

⁹⁸ *Id.* at 35; accord *Plyler*, 457 U.S. at 223 (following *Rodriguez*).

⁹⁹ See *Plyler v. Doe*, 457 U.S. 202, 233 (1982) (Blackmun, J., concurring) ("It is arguable, of course, that the Court never should have applied fundamental rights doctrine in the fashion [of *Plyler*].").

¹⁰⁰ U.S. CONST. amend. XIV. § 1. Equal Protection Clause provides:

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

Id.

¹⁰¹ *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 180 (1972) (Rehnquist, J., dissenting) (holding failure to extend workmen's compensation benefits to illegitimate children of decedent violated Equal Protection Clause).

level of statutory entitlement to that of a "protection."¹⁰² Compulsory school attendance not only protects children from ignorance, it protects society as a whole from the hardship of caring for an ever-expanding illiterate underclass.¹⁰³ Furthermore, protecting the welfare of the whole of society justifies endowing a state with police powers in the first place.¹⁰⁴ Rights and duties are not synonymous;¹⁰⁵ parents have no more "right" to educate their children than they have to pay taxes. Education of children is a legal duty imposed upon parents by the state as *parens patriae*.¹⁰⁶ Unlike a right, a duty is not exercised by choice.¹⁰⁷

¹⁰² See MILL, *supra* note 17, at 271 (proposing that protection alone justifies governmental restriction of individual liberties).

¹⁰³ *Fogg v. Board of Educ.*, 82 Atl. 173, 175 (N.H. 1912) (upholding validity of compulsory school attendance); see also MILL, *supra* note 17, at 271-72. Writing of restraining the individual, Mill reasoned

[t]o justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one [sic] else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. *We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury.*

Id. (emphasis added).

¹⁰⁴ See *Fogg*, 82 Atl. at 175. Although not a duty imposed by its constitution, the state assumes the duty to educate its children not only because of its public utility, but because of the "great public necessity for the protection and welfare of the state itself." *Id.*; see also *State v. Bailey*, 61 N.E. 730, 732 (Ind. 1901). "Compulsory school attendance statutes have been upheld not only as within the power of the legislature, but as necessary to carry out the express purposes of the state constitution itself." *Id.*; BENDER, *supra* note 64, at 84. Bender confirms that the validity of compulsory school attendance laws has never been successfully challenged. *Id.*; EDWARDS, *supra* note 8, at 24. "The primary function of the public school, in legal theory at least, is not to confer benefits upon the individual as such, the school exists as a state institution because the very existence of civil society demands it." *Id.* (citations omitted). Compulsory school attendance statutes do not exist to confer benefits on either parents or children; rather, they provide what the "well-being and the safety of the state requires." *Id.* (citations omitted); KOTIN & AIKMAN, *supra* note 9, at 84. The authors posit that the concept of parental "rights" to education of children is absent in compulsory attendance statutes due to the fact that the statutes are themselves "predicated upon the public interest in the education of children." *Id.*; MILL, *supra* note 17, at 271. Each of the authorities above is consistent with Mill's concept of limiting individual liberties only where demanded by the need to protect the public. *Id.*

¹⁰⁵ See BLACK'S LAW DICTIONARY, *supra* note 53, at 1324. "Rights are defined generally as 'powers of free action.'" *Id.*; cf. BLACK'S LAW DICTIONARY *supra* note 53, at 893. A legal duty has been defined as: "An obligation recognized by law which requires an actor to conform to a certain standard of conduct for the protection of others against unreasonable risk." *Id.* (emphasis added).

¹⁰⁶ See, e.g., BLACK'S LAW DICTIONARY, *supra* note 53, at 1114 (defining *parens patriae* as government's care for those unable to care for themselves).

¹⁰⁷ See BLACK'S LAW DICTIONARY, *supra* note 53, at 893, 1324. This confusion of rights and duties speaks to another criticism of equal protection analysis: the comparison of education with rights such as voting. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 222 n.20 (1982). The

If compulsory school attendance is a "protection of the laws," this fact alone is sufficient to engage the prohibitions on state action found in the Equal Protection Clause.¹⁰⁸ The Equal Protection Clause itself does not suggest that a "protection" must attach itself to a right.¹⁰⁹ To whom the state must extend such protections is considered below.

III. ESTABLISHING PROTECTION OF THE LAWS

A. *Is There An Affirmative Duty To Protect?*

Whether the state is under an affirmative duty to provide benefits, services, or protections is a fertile field of constitutional debate.¹¹⁰ Although scholars have labored to find such duties in the

Court addressed and disagreed with Texas' contention that since non-citizens could be denied the franchise, denial of education was of less significance. *Id.* However, by even considering the two interests as comparable, the Court obscured a fundamental difference between the two—namely, that when one declines to exercise her right to vote, she faces no legal sanction. Not so for withholding one's child from school. Furthermore, the Fourteenth Amendment does not extend to non-citizens the privileges or immunities enjoyed by U.S. citizens. See U.S. CONST. amend. XIV. The Equal Protection Clause prohibits the denial of equal protection of the laws. *Id.* But see NOWAK & ROTUNDA, *supra* note 5, at 568. The authors point out that "the privileges or immunities clause of the Fourteenth Amendment has never been a meaningful vehicle for the judicial review of state actions . . ." *Id.*

The Court invoked voting in another unfortunate context in San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35-36 (1973). The Court in *Rodriguez* addressed the contention that education is inseparable from an informed electorate. See *id.* One might disagree with the Court's declaration that the right to vote is not, *per se*, constitutionally protected. See, e.g., U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); *id.* at amend. XVII [1] ("The Senate of the United States shall be . . . elected by the people thereof . . ."); *id.* at amend. XIX [1] ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); *id.* at amend. XXIV § 1 ("The right of citizens of the United States to vote in any . . . election for President or Vice President . . . Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."); *id.* at amend. XXVI § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."). If not absolute, the right to vote is certainly protected by a number of constitutional prohibitions. See also Katzenbach v. Morgan, 384 U.S. 641, 647 (1964) ("The Equal Protection Clause itself has been held to forbid some state laws that restrict the right to vote." (citations omitted)).

¹⁰⁸ See U.S. CONST. amend. XIV. § 1 (prohibiting denial of "protection of the laws.").

¹⁰⁹ See U.S. CONST. amend. XIV. § 1.

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

Id.

¹¹⁰ See generally Betsy Levin, *Education as a Constitutional Entitlement: A Proposed Judicial Standard for Determining How Much is Enough*, 1979 WASH. U. L.Q. 703 (sug-

Constitution, the weight of authority holds that the Constitution makes no such guarantees.¹¹¹ Furthermore, the courts have held that even when a state undertakes to offer its protections to its residents, negligent provision of those protections are not actionable as denials of due process or equal protection.¹¹² A common thread runs through these cases in that the failure to protect never coincided with a restriction of the individual's liberty.¹¹³ Because this state coercion is the fulcrum of this Note's argument, a closer examination of the cases may be in order.

When an automobile skidded off a road and caught fire, a Joliet, Illinois policeman arriving on the scene two minutes later began directing traffic around the burning car.¹¹⁴ Although the car's lights were on and the car's wheels were still spinning,¹¹⁵ the officer made no attempt to determine if anyone was still inside.¹¹⁶

gesting courts can recognize states' duties to provide education without legislating as to qualitative levels of education provided); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (speculating that rights to satisfaction of basic needs may be found in Constitution); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 (arguing existence of welfare rights within Constitution). *But see* David P. Currie, *Positive and Negative Constitutional Rights*, 52 U. CHI. L. REV. 864 (1986) (concluding that government restrictions articulated in Bill of Rights do not necessarily create positive rights to government entitlements); Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695 (disputing Professor Michelman's position of Constitution-based welfare rights).

¹¹¹ See *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989) ("[T]he Due Process Clauses generally confer no affirmative right to governmental aid. . . ."); *Archie v. City of Racine*, 847 F.2d 1211, 1220 (7th Cir. 1988) ("How could there be a 'duty to rescue' in a Constitution that does not require the government to educate or provide minimal social welfare services for its residents?"); *Jackson v. City of Joliet*, 715 F.2d 1200, 1204 (7th Cir. 1983) ("It is enough to note that, as currently understood, the concept of liberty in the Fourteenth Amendment does not include a right to basic services, whether competently provided or otherwise.").

¹¹² See, e.g., *Bowers v. De Vito*, 686 F.2d 616, 617 (7th Cir. 1982). In *Bowers*, a man released from an Illinois mental hospital five years after killing a young woman with a knife, murdered Marguerite Anne Bowers a year after his release. *Id.* The estate of Bowers brought a civil rights action under U.S.C. § 1983. *Id.* After determining that it was not the state which placed Bowers in a position of danger, the court held, "the only duties of care that may be enforced in suits under section 1983 are duties founded on the Constitution or laws of the United States; and the duty to protect the public from dangerous madmen is not among them." *Id.* at 619. See also *Jackson*, 715 F.2d at 1205. "If the defendants deprived the plaintiffs' decedents of anything it was of some right to competent rescue services. But, as we have been at pains to stress, there is no such right in the Fourteenth Amendment." *Id.*

¹¹³ Which is not to say the victims in these cases are anything but sympathetic. See *DeShaney*, 489 U.S. at 192 (four-year-old boy beaten into a coma by his father); *Archie*, 847 F.2d at 1213-14 (woman killed by easily treatable bronchial attack); *Jackson*, 715 F.2d at 1201 (teenaged boy and pregnant teenaged girl burned to death in car accident).

¹¹⁴ See *Jackson*, 715 F.2d at 1201.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

The parents of the seventeen-year-old boy and the sixteen-year-old pregnant girl who were killed in the accident brought a civil rights action in *Jackson v. City of Joliet*.¹¹⁷ The claim alleged that but for the negligence of Joliet's police and fire departments, the victims would have been saved.¹¹⁸ The United States Court of Appeals for the Seventh Circuit held that a botched attempt at rescue by a state official did not give rise to an action for denial of Fourteenth Amendment rights.¹¹⁹ Noting that the Constitution is a charter of negative rather than positive liberties,¹²⁰ Judge Richard Posner, writing for the court, reasoned that the Fourteenth Amendment does not include any right to competently provided basic services.¹²¹

Archie v. City of Racine,¹²² also a Seventh Circuit case, involved a similar challenge based on the failure of a fire department dispatcher to send help to a victim of a bronchial attack.¹²³ Like *Jackson*, the court in *Archie* failed to find an affirmative duty on the part of the state to provide services to an individual.¹²⁴ In dicta, however, the court noted the significance of the "role of the state as the initiator."¹²⁵ The court argued that by "stripp[ing] away avenues of self-help," the state could be found to create its own affirmative obligations.¹²⁶

¹¹⁷ 715 F.2d 1200 (7th Cir. 1983).

¹¹⁸ *Id.* at 1202.

¹¹⁹ *Jackson*, 715 F.2d at 1205.

¹²⁰ *Id.*

¹²¹ *Id.* at 1203 (citing *Harris v. McRae*, 448 U.S. 297, 318 (1980); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982)); *Jackson*, 715 F.2d at 1203-04. Judge Posner cites *Rodriguez* as supporting this proposition. *Id.* Rejecting the idea that the Fourteenth Amendment guarantees "the provision of basic services," Judge Posner lumps together "education, poor relief and [] police protection." *Id.* at 1203.

If these three examples were to be considered "entitlements," such an interpretation would not be inconsistent with one premise of this note—that entitlements need not be granted to everyone. Judge Posner's three examples, however, are themselves sufficiently inconsonant to suggest an alternative position as advanced by this Note. Education (in the form of compulsory primary and secondary school attendance) is admittedly not a right; it is a legal duty imposing a burden of penal sanction for non-compliance. This Note argues that it is the protection afforded by this duty that may not be denied by the state within the meaning of the Equal Protection Clause.

¹²² 847 F.2d 1211 (7th Cir. 1988) (en banc).

¹²³ *Id.* at 1213-14.

¹²⁴ *Id.* at 1220.

¹²⁵ *Id.* at 1222. The Court employed this concept in the context of criminal cases, or as in the case of a state holding a legal monopoly on a certain activity such as divorce. *Id.* The construct suggested by this Note looks to this same role, albeit in a somewhat different light.

¹²⁶ *Archie v. City of Racine*, 847 F.2d 1211, 1222 (1988).

In *DeShaney v. Winnebago County Dep't of Social Services*,¹²⁷ the United States Supreme Court also rejected the argument that the Constitution creates affirmative duties upon the state to offer competent protections.¹²⁸ In that case, four-year-old Joshua DeShaney was beaten into a coma by his father and suffered irreversible brain damage.¹²⁹ County authorities were aware of the elder DeShaney's violent propensities, but failed to remove Joshua from his father's custody.¹³⁰ The Court's holding in *DeShaney* distilled the essence of an affirmative duty of the state. The Court based the creation of a state duty on the state's affirmative act of restraining the individual's freedom.¹³¹ The "deprivation of liberty," rather than a passive failure to act, is the mechanism that triggers constitutional protections.¹³²

The rationale of *DeShaney* was based in large part on two earlier landmark Supreme Court cases: *Estelle v. Gamble*¹³³ and *Youngberg v. Romeo*.¹³⁴ In both cases, the common denominator was a custodial relationship between the state and the plaintiffs.¹³⁵ In each case, the Court imposed on the states a duty of

¹²⁷ 489 U.S. 189 (1989).

¹²⁸ *Id.* at 196-98.

¹²⁹ *See id.* at 192-93.

¹³⁰ *See id.* at 192.

¹³¹ *See DeShaney*, 489 U.S. at 200.

In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf, through incarceration, institutionalization, or other similar restraint of personal liberty, which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id.

¹³² *See DeShaney v. Winnebago County Dep't of Social Servs*, 489 U.S. 189, 200 (1989).

¹³³ 429 U.S. 97 (1976).

¹³⁴ 457 U.S. 307 (1982).

¹³⁵ *See Estelle*, 429 U.S. at 98. Gamble was a prisoner in the Texas penal system. *Id.* After he was injured in a prison work-related accident, Gamble was treated by a doctor and given pain medication for his injury. *Id.* at 99-100. Prison authorities insisted that Gamble return to work; when he complained that he could not, he was placed in solitary confinement. *Id.* at 101. Four days later, after complaining of chest pains and "blank outs," Gamble was examined by a medical assistant and hospitalized. *Id.* at 101. The Court held that prison authorities acted with "deliberate indifference to [Gamble's] serious medical needs in violation of his constitutional rights under the Eighth and Fourteenth Amendments." *Id.* at 104-05.

See Youngberg, 457 U.S. at 324. Nicholas Romeo was a profoundly retarded 33 year-old man with an I.Q. of between 8 and 10. *Id.* at 309. In accordance with a Pennsylvania statute, Romeo was involuntarily committed to a state mental hospital facility. *Id.* at 310. During his stay at the facility, Romeo was injured on numerous occasions, both by his own violence, and by that of other hospital residents. *Id.* While being treated for a broken arm, Romeo was restrained for his own protection and for that of other patients in traction and undergoing intravenous treatment. *Id.* Part of Romeo's complaint alleged that his restraint was excessive. *Id.* The Court in *Youngberg* held, as the State conceded, that the State owed

care based on the custodial relationship between the state and the plaintiff. Cases since *DeShaney* involving the public schools have been decided in the Circuit Courts of Appeals with mixed results.¹³⁶ Some cases have held that the compulsory element of the public school environment created the type of special relationship contemplated by *DeShaney*;¹³⁷ other cases failed to find such a relationship.¹³⁸ In considering whether the state action was established, the cases focused on the presence of a custodial-type relationship.¹³⁹ Custody, however, flows from the state's authority to restrict the individual's liberty in the first instance. This Note urges that by exercising this power to coerce behavior, the state creates a "protection of the laws."

B. What Does The Equal Protection Clause Prohibit?

Statutes enacted by state legislatures carry with them a presumption of constitutionality.¹⁴⁰ When legislation is challenged under the Equal Protection Clause, the state need only show that

a duty to provide adequate food, shelter, clothing and medical care to Romeo. *Id.* at 324; see also NOWAK & ROTUNDA, *supra* note 5, at 500 n.18 (discussing *Youngberg*, *Estelle*, and role of custody in due process consideration).

¹³⁶ See, e.g., *Maldonado v. Josey*, 975 F.2d 727, 731 (10th Cir. 1992) (holding compulsory school attendance law did not give rise to due process claim); *D.R. by L.R. v. Middle Bucks Area Vo. Tech. Sch.*, 972 F.2d 1364, 1376 (3d Cir. 1992) (same); *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267, 273 (7th Cir. 1990) (same); *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137, 149 (5th Cir. 1992) (finding that compulsory attendance statute created an affirmative duty of protection); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 723 (3d Cir. 1989) (noting that finding of sufficient affirmative state action in form of compulsory school attendance statute to establish duty of care would not be inconsistent with *DeShaney*).

¹³⁷ See, e.g., *Maldonado*, 975 F.2d at 731 (holding compulsory school attendance law did not give rise to due process claim); *Middle Bucks*, 972 F.2d at 1376 (same); *Alton*, 909 F.2d at 273 (same).

¹³⁸ See *Taylor*, 975 F.2d at 149 (finding that compulsory attendance statute created an affirmative duty of protection); *Stoneking*, 882 F.2d at 723 (noting that finding of sufficient affirmative state action in form of compulsory school attendance statute to establish duty of care would not be inconsistent with *DeShaney*).

¹³⁹ See, e.g., *Maldonado*, 975 F.2d at 731 (holding compulsory school attendance law did not give rise to due process claim); *Middle Bucks*, 972 F.2d at 1376 (same); *Alton*, 909 F.2d at 273 (same); *Taylor*, 975 F.2d at 149 (finding that compulsory attendance statute created an affirmative duty of protection); *Stoneking*, 882 F.2d at 723 (noting that finding of sufficient affirmative state action in form of compulsory school attendance statute to establish duty of care would not be inconsistent with *DeShaney*).

¹⁴⁰ *E.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (holding city ordinance eliminating all but two pushcart food vendors from French Quarter of New Orleans did not violate Equal Protection Clause); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 47 (1973) (upholding Texas school district financing scheme as not violative of equal protection); *United States v. Carolene Products*, 304 U.S. 144, 152 (1938) (holding ban on interstate shipment of filled milk to be permissible exercise of Congressional commerce power and not violative of equal protection).

the statute bear a "rational relation" to a "legitimate government interest" in order to sustain the presumption.¹⁴¹ If, however, the law as enacted appears to encroach upon a "fundamental right,"¹⁴² the courts will examine the statute with a heightened level of review known as "strict scrutiny."¹⁴³ Likewise, if the statute provides for disparate treatment of an identifiable class of individuals the court considers "suspect,"¹⁴⁴ the courts will treat such classifications as "presumptively invidious"¹⁴⁵ and will also apply the more stringent strict scrutiny test.¹⁴⁶

The following proposal suggests a means of discerning which governmental benefits or services are "protections" from statutory entitlements which exist by grace of the legislature.

Consistent with *DeShaney*, where affirmative state action coerces individual behavior in exercising its power to protect society as a whole, such action would constitute a "protection of the

¹⁴¹ See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (declaring invalid Virginia anti-miscegenation statute); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (holding Oregon statute requiring compulsory school attendance exclusively at public schools violated due process); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (invalidating as arbitrary Virginia law taxing local corporations at different rate than foreign corporations doing business within state); see also NOWAK & ROTUNDA, *supra* note 5, § 14.3 (explaining rational relation test).

¹⁴² See *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173 (1972), which held that failure to extend workmen's compensation benefits to illegitimate children of decedent violated Equal Protection Clause. *But see id.* at 179 (Rehnquist, J., dissenting). Justice Rehnquist sharply criticized the Court's use of the fundamental right standard, calling it "a judicial superstructure, awkwardly engrafted upon the Constitution itself." *Id.* He also found the fundamental rights doctrine to be "devoid . . . of any historical or textual support in the language of the Equal Protection Clause . . ." *Id.* See generally NOWAK & ROTUNDA, *supra* note 5, § 14.3 (discussing fundamental rights considerations).

¹⁴³ See *Graham v. Richardson*, 403 U.S. 365, 375 (1971) (holding Arizona plan to deny welfare benefits to resident aliens preempted by federal law); *Shapiro v. Thompson*, 394 U.S. 618, 660 (1969) (recognizing fundamental right to travel); *Griswold v. Connecticut*, 381 U.S. 479, 504 (1965) (recognizing fundamental right to privacy); *Skinner v. Oklahoma ex rel Williamson*, 316 U.S. 535, 541 (1942) (reversing Oklahoma Supreme Court, which ordered sterilization of "habitual criminals" convicted of two or more "felonies involving moral turpitude). See generally NOWAK & ROTUNDA, *supra* note 5, § 14.3 (discussing strict scrutiny considerations).

¹⁴⁴ See *Rodriguez*, 411 U.S. at 28. The Court in *Rodriguez*, noting that the plaintiffs could not be recognized as a "suspect class," relied on the "traditional indicia of suspectness." *Id.* The Court listed as indicia: being saddled with disabilities, subjected to a history of purposeful unequal treatment or relegated to a position of political powerlessness so as to require extraordinary protection from the majoritarian political process. *Id.* *But see* *Korematsu v. United States*, 323 U.S. 214, 216 (1944), which upheld the validity of Japanese internment during World War II.

¹⁴⁵ See *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (holding illegal aliens not suspect class, education not fundamental right, therefore, strict scrutiny was inappropriate).

¹⁴⁶ See *id.* (declining to employ strict scrutiny, but rather applying an "intermediate" level of scrutiny).

laws.”¹⁴⁷ Hypothetically, a state might declare that every child under three years of age riding in a car must ride in a special child safety seat. The child is thus benefited by the protection of the law restricting the parent’s freedom to drive without the safety seat.

In another example, a state could declare that, to protect the public health, all apartment buildings of six or more units must be cleared of asbestos without charge to the tenants. The tenants of the apartment buildings would benefit from the protection of the law resulting from the state action compelling the landlord to remove the asbestos.

In both of these examples, the benefit to the individual results from affirmative state action restricting a “liberty.” In neither case must the recipient meet any statutory eligibility requirement to receive the benefit. These benefits may fairly be labeled “active.”

Compare these examples with a hypothetical food stamps program. Under the rules of the program, any person meeting the statutorily defined eligibility requirements *may* receive food stamps. An eligible individual may elect not to receive the benefit of the program; doing so would result in no legal sanction.

Analogous to food stamps would be a state-supported law school. Presumably, the school and the state would be unable to offer such a “benefit” to all potential takers. Eligibility requirements could be based on any number of qualitative as well as quantitative factors. As with food stamps, even those eligible to enroll in the law school would be under no duty to do so. These benefits may be called “passive.”¹⁴⁸

¹⁴⁷ See, e.g., *Plyler*, 457 U.S. at 202. The Court in *Plyler*, citing *Rodriguez*, allowed that education was not a fundamental right, but declared it neither “some governmental ‘benefit’ indistinguishable from other forms of social legislation.” *Id.* at 221. The Court then offered a number of amorphous concepts of civic virtue to support its position. *Id.* The dissent, seizing upon this “opaque observation,” said that the Court’s opinion was unclear. *Id.* at 247 (Burger, C.J., dissenting). “Is the Court,” asked the dissent, “suggesting that education is more ‘fundamental’ than food, shelter, or medical care?” *Id.* at 248. Of particular concern to the dissent appeared to be the fact that the Court provided no mechanism for determining how education could be distinguished from other “governmental benefits.” *Id.* at 247 (Burger, C.J., dissenting).

¹⁴⁸ See, e.g., *Matthews v. Diaz*, 426 U.S. 67 (1976). *Matthews* involved a challenge by three Cuban resident aliens to a denial of medicaid benefits. *Id.* at 69-70. Although resident aliens were eligible for the benefits, § 1831 et seq. of the Social Security Act of 1935 required that resident aliens had been admitted for permanent residence and had lived in the U.S. for five years. *Id.* at 70. The Court, in denying the aliens’ claim, reasoned that because Congress had no constitutional duty to provide *all aliens* with the welfare benefits provided

In neither the passive nor active benefit examples above may the state decline to extend the benefits to anyone on discriminatory bases such as race or religion. But, unlike the passive benefit that may be received only upon a demonstration of eligibility, the active benefit, manufactured solely through the force of law, cannot be denied to anyone.

This model does not suggest that entitlements are not worthy of government protection. As noted above, the right to vote is secured by the Constitution.¹⁴⁹ Yet, state restrictions on voter eligibility are valid.¹⁵⁰ Under the model urged by this Note, the laws against discrimination in voting would qualify as protections. The vote itself, however, would nonetheless be an entitlement.

C. *Illegal Aliens Too?*

The term "any person," as found in the Equal Protection Clause, is not limited to United States citizens.¹⁵¹ The Supreme Court has

to citizens, the Congressional line drawing was not unreasonable. *Id.* at 82-83. The Court, however, also noted that even an alien in the United States unlawfully was still entitled to the protections of the Fifth and Fourteenth Amendments. *Id.* at 77.

¹⁴⁹ U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); *id.* at amend. XVII [1] ("The Senate of the United States shall be . . . elected by the people thereof . . ."); *id.* at amend. XIX [1] ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); *id.* at amend. XXIV, § 1 ("The right of citizens of the United States to vote in any . . . election for President or Vice President . . . Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."); *id.* at amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.")

¹⁵⁰ See, e.g., N.Y. ELEC. LAW § 5-106 (Consol. 1996) (denying eligibility to vote to convicted felons).

¹⁵¹ See *Yick Wo v. Hopkins*, 102 U.S. 356, 369 (1886) (holding enforcement of San Francisco ordinance discriminated against Chinese laundry owners in violation of Fourteenth Amendment); see also *Plyler v. Doe*, 457 U.S. 202, 211-12 (1982) (holding denial of access to free public education to children of illegal aliens unconstitutional); *Graham v. Richardson*, 403 U.S. 365, 371 (1971) (invalidating as violative of Equal Protection Clause Arizona law conditioning eligibility for welfare benefits on United States citizenship or residence for fifteen years); *Takahashi v. Fish & Game Comm.*, 334 U.S. 410, 419 (1948) (declaring invalid California statute restricting commercial fishing licenses to persons ineligible for citizenship); *Truax v. Raich*, 239 U.S. 33, 39 (1915) (invalidating Arizona statute forcing employers to hire required number of qualified voters or native born citizens); *Wong Wing v. United States*, 112 U.S. 228, 242-43 (1896) (invalidating sentence of Chinese alien to hard labor without judicial trial).

Yick Wo remains the standard for defining impermissible discriminatory application in the enforcement of a law under the Fourteenth Amendment. See *Yick Wo v. Hopkins*, 118 U.S. 356, 357 (1886). *Yick Wo* involved a San Francisco ordinance prohibiting wooden buildings to be used as laundries. *Id.* at 357. At that time there were approximately 320 laundries in San Francisco, all but 10 in wooden buildings. *Id.* at 359. Of the total number of laundries, about 240 were owned and operated by Chinese immigrants. *Id.* at 358-59.

reviewed the legislative history of the Fourteenth Amendment and established conclusively that "any person" means just that.¹⁵² The Fourteenth Amendment was enacted to protect freed slaves, not then citizens, from oppressive legislation by the states.¹⁵³ The seemingly ambiguous term "persons" was a deliberate attempt by the amendment's framers to include not only freed slaves, but any other non-citizens as well.¹⁵⁴ A number of cases have recognized aliens as persons within the meaning of the Amendment.¹⁵⁵

The 80 or so non-Chinese-owned laundries were given exemptions from the ordinance. *Id.* None of the more than 200 Chinese laundry owners was given an exemption. *Id.* The Court held that the discriminatory enforcement of the ordinance was a denial of the Equal Protection Clause and therefore invalid. *Id.* at 374.

¹⁵² See, e.g., *Plyler*, 457 U.S. at 210-215. In reviewing the Fourteenth Amendment's legislative history, the Court in *Plyler* considered debate from the draft resolution of the Joint Committee of Fifteen on Reconstruction in which was to become the Fourteenth Amendment. *Id.* at 214-15. Senator Howard, Floor Manager of the Bill in the Senate spoke of the Amendment's deliberate meaning to encompass not only citizens, but all persons within its protection. *Id.* at 215.

The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but *any person, whoever he may be*, of life liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. . . . It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who happen to be within their jurisdiction.

Id. (emphasis supplied by the Court)

¹⁵³ See *Jackson v. City of Joliet*, 715 F.2d 1200, 1204 (7th Cir. 1983), where Judge Posner explains the history of the Fourteenth Amendment; see also Westen, *supra* note 92, at 626 n.38. One of Professor Westen's articles on the meaning of equality yields some disillusioning nuggets of history. In revisiting the Lincoln-Douglas Debates of 1858, Professor Westen reveals that Abraham Lincoln, the Great Emancipator, was rather emphatically against negro citizenship.

I am not in favor of negro citizenship. . . . Now my opinion is that the different states have the power to make a negro a citizen under the Constitution of the United States if they choose. The Dred Scott decision decides that they have not that power. If the State of Illinois had that power I should be opposed to the exercise of it. That is all I have to say about it.

Id. (quoting *Speech of Abraham Lincoln at Charleston, Sept. 18, 1858*, in POLITICAL DEBATES BETWEEN HON. ABRAHAM LINCOLN AND HON. STEPHEN A. DOUGLAS 156 (1860)).

Lincoln's misgivings appear to have run deeper than mere extension of citizenship. "I am not, nor ever have been, in favor of bringing about in any way social and political equality of the white and black races—that I am not nor ever have been in favor of making voters . . . of Negroes . . ." Westen, *supra* note 92, at 626 n.38 (quoting *Speech of Abraham Lincoln at Charleston, Sept. 18, 1858*, in POLITICAL DEBATES BETWEEN HON. ABRAHAM LINCOLN AND HON. STEPHEN A. DOUGLAS 136 (1860)).

¹⁵⁴ See *Plyler*, 457 U.S. at 210-15 (discussing history of Fourteenth Amendment); *Jackson*, 715 F.2d at 1204 (same); Westen, *supra* note 92, at 626 (same).

¹⁵⁵ See, e.g., *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-20 (1948) (declaring invalid California statute restricting commercial fishing licenses to persons ineligible for citizenship); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (invalidating sentence of Chinese alien to hard labor without judicial trial); *Yick Wo*, 118 U.S. at 369 (holding discriminatory enforcement of San Francisco ordinance prohibiting wooden laundries violated Equal Protection Clause).

Although the question of equal protection and illegal aliens had never been addressed by the Court,¹⁵⁶ *Plyler v. Doe* specifically recognized that whatever his immigration status, an alien is entitled to equal protection of the laws.¹⁵⁷

D. *Plyler v. Doe*

In 1975, Texas passed a law designed to relieve the state of its costs to educate the children of illegal aliens residing in Texas.¹⁵⁸ A class action challenge to the statute resulted in the 1982 landmark Supreme Court decision, *Plyler v. Doe*.¹⁵⁹ In its 5-4 decision, the Court held that denying children of illegal aliens free public education violated the Equal Protection Clause of the Fourteenth Amendment.¹⁶⁰

Using traditional equal protection analysis, the Court considered whether the statute targeted a potentially suspect class.¹⁶¹

¹⁵⁶ See NOWAK & ROTUNDA, *supra* note 5, §14.3 (noting the scope of Equal Protection Clause extended for first time to give unlawfully resident aliens limited protection).

¹⁵⁷ *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a "person" in any ordinary sense of that term.").

¹⁵⁸ *Id.* at 205 n.1 (1982). The Texas legislature revised the state education code to withhold funds from school districts for the education of illegal aliens. *Id.* (citing TEX. EDUC. CODE ANN. §21.031 (Vernon Supp. 1981)). Although Texas enacted §21.031 in 1975, the Tyler Independent School District continued to enroll undocumented children until the 1977-78 school year. *Id.* at 206 n.2. In July of 1977, the School District adopted a policy allowing undocumented children to enroll in school upon payment of a "full tuition fee." *Id.* The United States District Court for the Eastern District of Texas issued a preliminary injunction in response to a class action brought by a group of children excluded by the School District from enrolling in school. *Id.* at 206. The District Court below held that the statute violated the Equal Protection Clause of the Fourteenth Amendment. *Id.*; *Doe v. Plyler*, 458 F.Supp. 569, 585 (E.D. Tex. 1978). The District Court also held that the statute was invalid as pre-empting federal law. *Id.* at 592. The Court of Appeals for the Fifth Circuit ruled that the District Court below erred in finding the statute pre-empted. *Id.*; *Plyler v. Doe*, 628 F.2d 448, 453 (5th Cir. 1980). The Court of Appeals affirmed, however, the lower court's finding of unconstitutionality based on violation of the Equal Protection Clause. *Id.* at 461.

See also *Plyler*, 457 U.S. at 209-10. Other similar challenges to the statute filed in other District Courts in Texas were ultimately consolidated by the Supreme Court. *Id.*

¹⁵⁹ 457 U.S. at 202. For comprehensive analyses of the *Plyler* decision, see generally Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*, 44 U. PITT. L. REV. 409 (1983) (discussing impact and rationale of *Plyler* decision); Lichtenberg, *supra* note 18, at 351 (same); Tom Gerety, *Children in the Labyrinth: The Complexities of Plyler v. Doe*, 44 U. PITT. L. REV. 379 (1983) (same); Perry, *supra* note 51, at 329 (same).

¹⁶⁰ *Plyler*, 457 U.S. at 230. The Court held that the State failed to demonstrate that the denial of access to public education to the children of illegal aliens furthered some substantial state interest. *Id.* The substantial interest consideration was pegged to the intermediate level of scrutiny the Court afforded the Texas statute. *Id.* at 217-18 n.16.

¹⁶¹ *Id.* at 219 n.19. "We reject the claim that 'illegal aliens' are a 'suspect class.'" *Id.*; see also Lichtenberg, *supra* note 18, at 351 (discussing Court's consideration of suspect classification in *Plyler*).

The Court held that illegal aliens were not a suspect class, reasoning that the illegal alien's status was the result of his own voluntary action, and as such did not rise to the level of the "traditional indicia of suspectness" based on a person's immutable characteristics.¹⁶²

The *Rodriguez* decision nine years earlier rejected education as a fundamental right, foreclosing the possibility of strict scrutiny evaluation in *Plyler*.¹⁶³ With both conventional means of justifying strict scrutiny of the statute closed, the default standard of review should have been the rational basis test.¹⁶⁴ The Court, however, considered education an interest too important to be left to the less exacting rational basis standard.¹⁶⁵ Basing its ability to do so on several fairly recent cases,¹⁶⁶ the Court fashioned an interme-

¹⁶² *Plyler v. Doe*, 457 U.S. 202, 219-20 (1982). The Court allowed that the arguments for denying the state's bounty to aliens unlawfully present lacked force when applied to the aliens' children. *Id.* The Court seemingly undermined its rationale of "voluntary action" as basis for denial of "suspect" classification. *Id.* at 220. Noting that while their parents could conform to the immigration laws, the children plaintiffs "[could] affect neither their parents' conduct nor their own status." *Id.* at 220 (citing *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)). The Court also raised questions of the ethics of "imposing [a] discriminatory burden on the basis of a legal characteristic over which children can have little control." *Id.* at 220. "Visiting . . . condemnation on the head of an infant is illogical and unjust. . . . [P]enalizing the . . . child is an ineffectual, as well as unjust, way of deterring the parent." *Id.* at 220 (citing *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

¹⁶³ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35-36 (1973) (holding no fundamental right to education); see also *supra* note 100 and accompanying text.

¹⁶⁴ See *Plyler*, 457 U.S. at 216. The Court noted that in most applications of equal protection analysis, the Court sought only a "fair relationship to a legitimate public purpose." *Id.*

The District Court below felt that the statute failed to meet even this lowest standard of review. See *Doe v. Plyler*, 458 F.Supp. 569, 585 (E.D. Tex. 1978); accord *Plyler v. Doe*, 628 F.2d 448, 458 (5th Cir. 1980). "Charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration . . ." *Plyler*, 458 F.Supp. at 585.

See also *Lichtenberg*, *supra* note 18, at 351-363, 371-374. Professor Lichtenberg considers the viability of the rationality standard and ultimately takes the position that the rationality test was an unsatisfactory method of analysis for the issues presented in *Plyler*. *Id.* at 372; *Gerety*, *supra* note 159, at 387-392 (discussing efficacy of rationality in equal protection analysis); *Perry*, *supra* note 159, at 339 (outlining arguments against Court's rationale in *Plyler*).

¹⁶⁵ *Plyler*, 457 U.S. at 216-18. The Court explained that where fundamental rights or suspect classifications were involved, equal protection analysis required that the challenged legislation be "precisely tailored to serve a compelling governmental interest." *Id.* at 216-217. The Court then noted that on occasion, legislation, "without being facially invidious—as with suspect classes or fundamental rights" [gave] rise to recurring constitutional difficulties. *Id.* at 217. In those "limited circumstances," a five-justice majority of the Court felt that such legislation required that the legislation would call for an "intermediate" level of scrutiny. *Id.* at 217-18.

¹⁶⁶ *Id.* at 218 n.16. The Court cited its own holdings in *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate level of scrutiny to classifications based on gender); *Lalli v. Lalli*, 439 U.S. 259, 275 (1978) (applying intermediate level of scrutiny to classifications of illegitimacy); *University of Cal. Regents v. Bakke*, 438 U.S. 265, 299 (1978) (upholding ability of state to consider race of applicants in affirmative action program for admission to

diate standard of review, less stringent than strict scrutiny, more stringent than the rational basis test.¹⁶⁷ Inasmuch as the dual-level test had been criticized in 1966 by Justice Harlan in *Katzenbach v. Morgan*,¹⁶⁸ creating additional layers of analysis was sure to evoke controversy.¹⁶⁹

The dissent in *Plyler*, led by Chief Justice Burger,¹⁷⁰ called the deprivation of education to any children—including illegal aliens—“senseless.”¹⁷¹ Nevertheless the dissenters found no legitimate authority for the Court to substitute its judgment for that of the Texas legislature.¹⁷² Although the Chief Justice’s distaste for the statute in *Plyler* was evident,¹⁷³ he questioned the Court’s

state university medical school); see also SALOMONE, *supra* note 9, at 117 (discussing impact of *Craig* in context of education).

¹⁶⁷ *Plyler v. Doe*, 457 U.S. 202, 218 n.16 (1982) (“This technique of ‘intermediate’ scrutiny permits us to evaluate the rationality of the legislative judgment with reference to well-settled constitutional principles.”).

¹⁶⁸ 384 U.S. 641, 661 (1966)(Harlan, J., dissenting). Justice Harlan discounted the authority of the Court to apply a stricter level of scrutiny where fundamental rights were involved, saying “no such dual-level test has ever been articulated by this Court, and I do not believe that any such approach is consistent with the purposes of the Equal Protection Clause.” *Id. But see*, *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 109 (1973) (Marshall, J., dissenting). Justice Marshall would have carried the notion of variable scrutiny further still, suggesting a continuum approach to review. *Id.* He noted that the Court seemed to have consistently adjusted its scrutiny with regard to the particular interest affected by the invidiousness of a particular classification. *Id.*

¹⁶⁹ See, e.g., *Plyler*, 457 U.S. at 248 (Burger, C.J., dissenting). The dissent in *Plyler* felt that by raising and lowering the degree of scrutiny afforded to a legislation based on the interest affected, the Court assumed a legislative function for which it “lacked competence.” *Id.* (citing *Rodriguez*, 411 U.S. at 31).

¹⁷⁰ *Plyler*, 457 U.S. at 242 (Burger, C.J., dissenting). The Chief Justice was joined in the dissent by Justices White, Rehnquist and O’Connor. *Id.* The significance of the dissent’s core is not lost on pundits today. See, e.g., Paul Feldman, *Major Portions of Prop. 187 Thrown Out by Federal Judge*, L.A. TIMES, Nov. 21, 1995, at A1 (reporting contention of Proposition 187 supporters that review by present Court, with its conservative makeup, could produce different result today).

Such predictions may expect too much from ideology. First, the Court, given the opportunity to overturn its most controversial decision of the past thirty years, elected not to do so. The Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 870 (1992), expressly reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973) in large measure because of the Court’s respect for stare decisis. See *Planned Parenthood*, 505 U.S. at 853. Second, the dissent in *Plyler*, appeared not to base its disagreement with the Court on the moral support for the Court’s holding; rather, its criticism focused on the method of analysis used by the Court in arriving at its result. See also Perry, *supra* note 159, at 341-42. Professor Perry agrees that the posture of the dissent is revealed in the opening lines of dissenting opinion. *Id.* Third, it is submitted that any suggestion that *Plyler* is vulnerable due to the ideological makeup of the current Court misses the mark; even a sympathetic supporter of *Plyler*’s result could rightly criticize *Plyler* based on nothing more than the tenuous foundation on which the intermediate standard of review was based.

¹⁷¹ *Plyler*, 457 U.S. at 242 (Burger, C.J., dissenting) (criticizing motivation of statute).

¹⁷² *Id.* at 243. The Chief Justice criticized the activist stance of the Court in attempting to fashion remedies for the failures of the political processes. *Id.*

¹⁷³ See *id.* at 252. “Denying a free education to illegal alien children is not a choice I would make were I a legislator.” *Id.*

ability to determine which benefits were entitled to priority classification and suggested that the problem was settled best through the political process.¹⁷⁴

IV. ANOTHER STANDARD OF REVIEW FOR PROPOSITION 187

Using the "protection of the laws" as a yardstick suggests different determinations of constitutionality for the various measures of the initiative.

Primary and secondary education would fall squarely into the scope of the protection of the laws category. Because the "benefit" is the precipitate of liberty-restricting state action,¹⁷⁵ such a benefit should not, consistent with the Equal Protection Clause, be denied to any person.¹⁷⁶

Similarly, the measures restricting access to non-emergency medical care to illegal alien children would appear to offend the Fourteenth Amendment. If child welfare laws impose duties on parents to secure adequate food, shelter and medical attention for their children,¹⁷⁷ to deny these children the "benefit" of the laws undermines the power of the Constitution.

Adults affected by Proposition 187 would meet with a different outcome. The state imposes no duty upon any adult—citizen or not—to seek post-secondary education for herself. Neither are adults under any state compulsion to receive medical attention for themselves. Unlike their children, the undocumented adult alien can leave the United States by himself. If a nineteen year-old undocumented alien wants to attend college, he can return to his native country. Because the benefits extended to the adult alien are not the result of the type of liberty-restricting state action outlined above, they do not rise to the level of "protection," and therefore would fall into the category of entitlement.

¹⁷⁴ *Plyler v. Doe*, 457 U.S. 202, 253 (1973) (Burger, C.J., dissenting).

¹⁷⁵ See *supra* note 70 (listing compulsory school attendance statutes of all fifty states, District of Columbia and Puerto Rico).

¹⁷⁶ See U.S. CONST. amend. XIV § 1 (prohibiting denial of equal protection of the laws).

¹⁷⁷ See, e.g., CAL. PENAL CODE § 270 (West 1988). In California, "[i]f a parent of a minor child willfully omits, without lawful excuse to furnish necessary clothing, food, shelter or medical attendance . . . for his or her child, he or she is guilty of a misdemeanor" and may be fined up to \$2000 or imprisoned in a county jail for up to one year or both. *Id.* If a parent fails to provide the above mentioned necessities after an adjudication in civil or criminal court, the parent may be sentenced to a "determinate term of one year and one day" in a state prison. *Id.*

CONCLUSION

Compulsory school attendance is a protection of the laws. Undocumented aliens are persons within the meaning of the Equal Protection Clause. The Fourteenth Amendment prohibits the denial of the equal protection of the laws to any person. Therefore, denying the children of illegal aliens the protection of compulsory school attendance laws appears to violate the Equal Protection Clause of the Fourteenth Amendment.

The model suggested by this Note ignores the ethical and moral dimensions of denying government benefits on the basis of a person's immigration status. What cannot be ignored is that a fundamental difference exists between providing a benefit and compelling someone to accept it. When the government uses the power of law to force people to act in a certain way for the protection of others, the result of this power should be recognized as a protection of the law. By using this idea as a starting point, future courts would be able to avoid the sort of value judgments spurned by Holmes over ninety years ago in *Lochner*.

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