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Illegal Aliens Have Right to Free Public Education, Plyler v. Doe, 102 S. Ct. 2382

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CASE COMMENTS

ILLEGAL ALIENS HAVE RIGHT TO FREE PUBLIC EDUCATION

Plyler v. Doe, 102 S. Ct. 2382 (1982)

In *Plyler v. Doe*[1] the United States Supreme Court extended the reach of the equal protection clause[2] by holding that a state may not deny undocumented alien[3] children access to a free public education.

In 1975, the Texas legislature amended section 21.031 of the State's education code to permit local public school boards to exclude undocumented alien children from district public schools.[4] Consequently, in 1977 the Board of Trustees for the Tyler Independent School District adopted a policy that barred undocumented aliens from the local schools unless the children paid full tuition.[5] Appellees, a group of undocumented Mexican children, filed a class action suit in federal court[6] on behalf of similarly situated undocumented alien children in Smith County, Texas. The suit sought injunctive and declaratory relief from appellees' exclusion from the Tyler Public Schools.[7]

The district court ruled that section 21.031 violated the equal protection clause and that Congress' exclusive authority in the field of immi-

1. 102 S. Ct. 2382 (1982).

2. U.S. CONST. amend. XIV, § 1.

3. This Comment uses the term "undocumented aliens" rather than the often used expression "illegal aliens" because the school district regulation in question defines a legally admitted alien as "one who has documentation that he or she is legally in the United States." Doe v. Plyler, 458 F. Supp. 569, 572 (E.D. Tex. 1978), *aff'd in part, rev'd in part,* 628 F.2d 448 (5th Cir. 1980), *aff'd,* 102 S. Ct. 2382 (1982). The term "undocumented alien" is more appropriate in a broader sense as well, because it affords the alien a presumption of innocence until the Immigration and Naturalization Service (INS) has determined through administrative proceedings that the alien's presence in the United States violates some statutory provision.

4. Before the 1975 amendment, section 21.031 read in relevant part: "*Every child* in this state . . . shall be permitted to attend the public free schools of the district in which he resides. . . ." TEX. EDUC. CODE ANN. § 21.031(b) (Vernon 1972) (emphasis added). After the amendment, the same section read: "Every child in the state *who is a citizen of the United States or a legally admitted alien* . . . shall be permitted to attend the public free schools of the district in which he resides . . . ." TEX. EDUC. CODE ANN. § 21.031(a) (Vernon Supp. 1982) (emphasis added).

5. 458 F. Supp. at 571. Tuition was $1000 per year. *Id.*

6. The suit was filed through the childrens' parents as guardians ad litum.

7. Section 21.031 had successfully withstood a state court challenge in 1977. The court held that the statute violated neither the equal protection clause nor the due process clause. Hernandez v. Houston Indep. School Dist., 558 S.W.2d 121 (Tex. Civ. App. 1977).

gration law preempted such legislation.[8] The Court of Appeals for the Fifth Circuit upheld the lower court with respect to the equal protection violation but reversed on the preemption question.[9] On writ of certiorari, the United States Supreme Court affirmed the Court of Appeals and *held*: denial of free public education to undocumented alien children violates the equal protection clause of the fourteenth amendment.[10]

Congress ratified the fourteenth amendment, which includes the equal protection clause, in 1868. Historical scholarship revealed that there was no general agreement about the scope of the equal protection clause at the time of its adoption.[11] Some of the clause's supporters perceived it as a means of eliminating all invidious legal classifications, regardless of whom they were directed against;[12] others believed it should apply to those problems peculiar to the freed slave race.[13]

The equal protection clause was first subject to judicial interpretation in *The Slaughterhouse Cases*.[14] At issue was a Louisiana law granting a

8. Doe v. Plyler, 458 F. Supp. 569 (E.D. Tex. 1978), *aff'd in part, rev'd in part,* 628 F.2d 448 (5th Cir. 1980), *aff'd,* 102 S. Ct. 2382 (1982). The court also entered a district-wide injunction against continued enforcement of section 21.031. *Id.* at 593.

9. Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980), *aff'd,* 102 S. Ct. 2382 (1982).

10. 102 S. Ct. at 2402. The Supreme Court did not rule on the preemption question, reasoning that its equal protection holding made any discussion of the preemption issue superfluous. *Id.* at 2391 n.8. *See infra* note 68.

At approximately the same time that the plaintiffs in *Plyler* filed suit in the Eastern District of Texas, several other suits challenging section 21.031 were filed in the other judicial districts in Texas. In 1979, the Judicial Panel of Multi-district Litigation consolidated into one suit all of the cases challenging the Texas statute except *Plyler. In re* Alien Children Educ. Litig., 482 F. Supp. 326 (per curiam) (J.P.M.D.L. 1979).

The trial court for the consolidated suit held that section 21.031 violated the equal protection clause and issued a statewide injunction against its continued enforcement. *In re* Alien Children Educ. Litig., 501 F. Supp. 544 (S.D. Tex. 1980), *aff'd sub nom.* Plyler v. Doe, 102 S. Ct. 2382 (1982). The Court of Appeals for the Fifth Circuit stayed the injunction without opinion. Subsequently, Justice Powell, acting as Circuit Justice, overturned the stay. Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas, 448 U.S. 1327 (Powell, Circuit Justice, 1980). The full Court then noted probable jurisdiction and consolidated the case with *Plyler*. Texas v. Certain Named and Unnamed Non-Citizen Children and Their Parents, 452 U.S. 937 (1981).

11. *See* Brown v. Board of Educ., 347 U.S. 483, 489 (1954). The Supreme Court requested that the parties in *Brown* examine the debates surrounding the adoption of the fourteenth amendment in an effort to discern the framers' actual intent with regard to the scope of the equal protection clause. The Court, after evaluating the evidence, determined that the Congressional debates were "inconclusive." *Id.*

12. *Id.*

13. *Id.*

14. 83 U.S. (16 Wall.) 36 (1873).

twenty-five year monopoly to one company to operate a slaughterhouse business in the New Orleans area. The other slaughterhouse companies in the area brought suit, claiming *inter alia* that the law violated the equal protection clause. Rejecting the excluded companies' equal protection argument, the majority held that the clause was intended solely to prevent discrimination against blacks.[15]

Thus narrowly defined,[16] the equal protection clause remained largely dormant[17] as a source of constitutional litigation for several decades.[18] The Supreme Court, however, gradually rejected the initial narrow construction of the clause. Currently, legislative classifications based on gender,[19] alienage,[20] and illegitimacy,[21] as well as laws impinging on access to the ballot,[22] access to the judicial system,[23] and the right of interstate travel,[24] are evaluated under the equal protection clause.

In modern equal protection jurisprudence the Supreme Court applies one of three standards of review.[25] Legislative distinctions involv-

15. Justice Miller's majority opinion doubted whether any "action of a state not directed against Negroes as a class, or on account of their race, will ever be held to come within the purview of [the equal protection clause]." *Id.* at 81.

16. The equal protection clause was occasionally used during this period to strike down classifications based on race. *See, e.g.,* Nixon v. Herndon, 273 U.S. 536, 541 (1927) (white primary election law violates the equal protection clause); Strauder v. West Virginia, 100 U.S. 303, 310 (1880) (law limiting eligibility for jury service to whites violates the equal protection clause). *But see* Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896) (law requiring separate but equal facilities on railroad cars for whites and blacks does not violate the equal protection clause).

17. The Supreme Court, however, did expand the scope of the equal protection clause in two significant ways in 1886. *See* Santa Clara County v. Southern Pac. R.R. Co., 118 U.S. 394, 396 (1886) (equal protection clause applies to corporations); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (equal protection clause applies to aliens).

18. Justice Holmes was moved to remark in 1927 that the equal protection clause had become "the usual last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927).

19. *See, e.g.,* Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982); Kirchberg v. Feenstra, 450 U.S. 455 (1981); Craig v. Boren, 429 U.S. 190 (1976).

20. *See, e.g.,* Cabell v. Chavez-Salido, 102 S. Ct. 735 (1982); Ambach v. Norwick, 441 U.S 68 (1979); Foley v. Connelie, 435 U.S. 291 (1978); Graham v. Richardson, 403 U.S. 365 (1971).

21. *See, e.g.,* Trimble v. Gordon, 430 U.S. 762 (1977); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

22. *See, e.g.,* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

23. *See, e.g.,* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

24. *See, e.g.,* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969).

25. The multi-tier analytical framework was developed in an ad hoc fashion. *See Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969). The Supreme Court eventu-

ing a suspect classification[26] or impinging on a fundamental right[27] are subject to "strict scrutiny." Under this standard the classification must be necessary to further a compelling state interest.[28] Courts almost inevitably strike classifications evaluated under the "strict scrutiny" standard.[29] Most other classifications, including those based on social and commercial distinctions, are subject to a "rational basis" standard of review.[30] To satisfy this standard, the classification must bear only a

ally embraced the multi-tier concept. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). Some Justices have criticized the multi-tier approach. *See* Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring) (asserts that the Court actually applies "a single standard in a reasonably consistent fashion"); Vlandis v. Kline, 412 U.S. 441, 458 (1973) (White, J., concurring) (argues that the Court actually applies many standards); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (Marshall, J., dissenting) (argues that the court applies a "spectrum of standards").

26. There are three major indicia of "suspectness." First, "suspect" classes tend to suffer prejudicial treatment because of some "immutable characteristic determined solely by the accident of birth [which bears] no relation to ability to perform or contribute to society." Frontiero v. Richardson, 411 U.S. 677, 686 (1973). Second, "suspect" classes often have suffered from historic discrimination. *Id.* at 684-85. Third, "suspect" classes seldom have the ability to seek redress through the normal political process. *Id.* at 686 n.17. This final point is directly traceable to Justice Stone's famous footnote in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). In *Carolene Products*, Justice Stone suggested that special judicial solicitude for "discrete and insular" minorities is appropriate because of their inability to gain influence through normal political channels. *Id. See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (wealth is not a suspect classification): Graham v. Richardson, 403 U.S. 365, 371-72 (1972) (some alienage classifications are suspect); Korematsu v. United States, 323 U.S. 214, 216 (1944) (race is a suspect classification).

27. In order for a right to be "fundamental," it must be "explicitly or implicitly guaranteed by the Constitution." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). *See* Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969) (right of interstate travel deemed fundamental); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (right to vote is fundamental); Douglas v. California, 372 U.S. 353 (1963) (access to the courts is a fundamental right). *But see* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (education is not a fundamental right); Lindsey v. Normet, 405 U.S. 56, 73-74 (1972) (housing is not a fundamental interest); Dandridge v. Williams, 397 U.S. 471, 484-85 (1970) (court refused to find that welfare benefits are a fundamental right). Justice Harlan criticized this strain of equal protection jurisprudence, arguing that it would fit more neatly into a substantive due process framework. Shapiro v. Thompson, 394 U.S. 618, 655-77 (1969) (Harlan, J., dissenting).

28. *See, e.g.,* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627-28 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Loving v. Virginia, 388 U.S. 1, 11 (1967).

29. One commentator has suggested that the scrutiny on this level is "strict in theory and fatal in fact." Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972). At least once, however, the Supreme Court did uphold a law under this rigorous standard. Korematsu v. United States, 323 U.S. 214, 216, 223-24 (1944) (exclusion of all persons of Japanese ancestry from certain areas in World War II).

30. *See, e.g.,* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (upheld state law

rational relationship to a permissible state objective.[31] Courts usually uphold classifications evaluated under this less rigorous standard.[32] Finally, certain classifications, typically those based on gender, are subject to an intermediate standard of review.[33] This standard requires that the classification bear a substantial relationship to the achievement of an important governmental objective.[34]

In 1973, in *San Antonio Independent School District v. Rodriguez,*[35] the Supreme Court considered the constitutionality of Texas' property tax-based school financing system that resulted in smaller per-pupil expenditures in relatively poor school districts.[36] Appellees contended that education was a fundamental right guaranteed by the United

banning sale of milk in nonreturnable containers); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam) (upheld state mandatory retirement age for police officers); Dandridge v. Williams, 397 U.S. 471 (1970) (upheld law restricting eligibility for welfare benefits); McGowan v. Maryland, 366 U.S. 420 (1961) (upheld law exempting certain businesses from Sunday closing laws); Railway Express Agency v. New York, 336 U.S. 106 (1949) (upheld law prohibiting certain forms of advertising).

31. *E.g.,* Parham v. Hughes, 441 U.S. 347, 351 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (per curiam); New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807-09 (1969).

32. The only case striking an economic classification using "rational basis" scrutiny in the last fifty years, Morey v. Doud, 354 U.S. 457 (1957), was overruled nineteen years later in New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam).

33. *See, e.g.,* Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331, 3336 (1982) (court struck down a law limiting admission into a state-run nursing school to women); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980) (gender-based distinction in Missouri workmen's compensation law governing death benefits for widows and widowers violates the equal protection clause); Orr v. Orr, 440 U.S. 268, 279 (1979) (law mandating that husbands but not wives may be required to pay alimony violates the equal protection clause); Califano v. Webster, 430 U.S. 313, 316-17 (1977) (per curiam) (gender-based distinction in computing old-age benfits under the Social Security Act does not violate the equal protection clause); Craig v. Boren, 429 U.S. 190, 197 (1976) (Court struck down a state law that permitted 18-20 year old females to buy beer but not males of the same age). Moreover, a recent illegitimacy classification case used this standard of review. Lalli v. Lalli, 439 U.S., 259, 265 (1978) (upholding law that required illegitimate children who would inherit from their fathers by intestate succession to provide a particular proof of paternity). Additionally, four members of the Burger court thought benign racial classifications should be judged on this standard. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 359 (1978) (Brennan, J., concurring in part, dissenting in part) ("racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of these objectives' ") (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)) (citation omitted).

34. *See supra* note 33.

35. 411 U.S. 1 (1973).

36. The Court compared two school districts in San Antonio. In the 1967-68 school year, the property tax scheme yielded an expenditure of $333 per pupil in the wealthier district and only $26 per pupil in the poorer district. *Id.* at 11-13.

States Constitution and was therefore subject to strict scrutiny under the equal protection clause.[37] The Court, however, rejected this contention,[38] holding that laws impinging on public education are subject to rational basis scrutiny.[39]

In spite of its *Rodriguez* holding, however, the Court has repeatedly emphasized the importance of public education.[40] The Court has asserted that not only is public education vital to an individual's development,[41] but it is also instrumental in the preservation of the nation's basic political and social values.[42]

The Supreme Court has also used equal protection analysis to evaluate the constitutionality of laws that classify on the basis of illegitimacy.[43] In *Levy v. Louisiana,*[44] for example, the Court struck down a state law that prevented unacknowledged illegitimate children from recovering in a wrongful death action on behalf of a deceased parent. Several subsequent cases similarly invalidated classifications based on illegitimacy.[45] The Court, however, has failed to articulate precisely

37. *Id.* at 29. Appellees maintained that education is a fundamental right because it is inextricably linked with constitutionally protected rights such as freedom of speech and the right to vote. *Id.* at 35-36.

38. *Id.* at 34-40. The Court rejected appellee's argument, *see supra* note 37, by noting that citizens were not guaranteed "the most *effective* speech or the most *informed* electoral choice." *Id.* at 36 (emphasis in original).

39. *Id.* at 40.

40. "Today, education is perhaps the most important function of state and local governments." Brown v. Board of Educ., 347 U.S. 483, 493 (1954). *See also* Ambach v. Norwick, 441 U.S. 68, 76 (1979) (education "fulfills a most fundamental obligation of government to its constitency") (quoting Foley v. Connelie, 435 U.S. 294, 297 (1978)); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("The American people have always regarded education and the acquisition of knowledge as matters of supreme importance").

41. "[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

42. The Court has repeatedly emphasized public education's role in the maintenance of democracy. "Americans regard the public schools as a most vital civil institution for the preservation of a democratic system of government." Abington School Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring). *See also* Ambach v. Norwick, 441 U.S. 68, 76 (1971) (education is very important for transmitting "the values on which our society rests"); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) ("education prepares individuals to be self-reliant and self-sufficient participants in society").

43. *See generally* Perry, *Modern Equal Protection: A Conceptualization and Appraisal,* 79 COLUM. L. REV. 1023, 1056-60 (1979); Stenger, *Expanding Constitutional Rights of Illegitimate Children, 1968-1980,* 19 J. FAM. L. 407, 407-44 (1981).

44. 319 U.S. 68 (1968).

45. *See, e.g.,* Trimble v. Gordon, 430 U.S. 762 (1977) (striking law that barred illegitimate children from inheriting intestate from their fathers); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (invalidating New Jersey welfare program restricting benefits to legitimate

the proper standard of review for illegitimacy cases.[46] While the Court has never found the classification to be suspect,[47] neither has it applied the lenient rational basis standards to such cases.[48] The Court typically justifies heightened scrutiny in this area by noting that illegitimacy, like race or gender, is a trait beyond the individual's control.[49]

Moreover, the equal protection clause is used to evaluate classifications that distinguish between citizens and lawfully[50] admitted aliens.[51]

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children); Gomez v. Perez, 409 U.S. 535 (1973) (striking law that gave legitimate children an enforceable right of support from their fathers but gave no similar right to illegitimate children); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972) (striking law that prohibited illegitimate children from recovering under Louisiana workmen's compensation program). *But see* Lalli v. Lalli, 439 U.S. 259 (1978) (upholding law that required illegitimate children who would inherit intestate from their fathers to provide a particular proof of paternity); Matthews v. Lucas, 427 U.S. 495 (1976) (sustaining Social Security provision that disadvantaged illegitimate children); Labine v. Vincent, 401 U.S. 532 (1971) (upholding law that narrowly defined when an illegitimate child might take by intestate succession).

46. Professor Gunther has written, "The Court's course in reviewing classifications based on illegitimacy has been (to put it mildly) a wavering one. In no area of classifications triggering occasional heightened scrutiny have the Court's actions been more unpredictable—and more inarticulate in explaining what degree of heightened scrutiny is warranted, and why." G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 896-97 (10th ed. 1980). *Compare* Labine v. Vincent, 401 U.S. 532, (1971) (absent "a specific constitutional guarantee, it is for [the] legislature, not [this] Court, to select from possible laws") *with* Lalli v. Lalli, 439 U.S. 259, 265 (1978) (illegitimacy classifications are invalid "if they are not substantially related to permissible state interests").

47. In *Matthews v. Lucas,* the Court articulated its reason for refusing to apply strict scrutiny to illegitimacy classifications:

> [P]erhaps in part because the roots of the discrimination rest in the conduct of the parents rather than the child, and perhaps in part because illegitimacy does not carry an obvious badge, as race or sex do, this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes.

Matthews v. Lucas, 427 U.S. 495, 506 (1976).

48. In no case, with the possible exception of Labine v. Vincent, 401 U.S. 532 (1971), has the Court applied the rational basis standard of review to an illegitimacy classification.

49. The Court has elsewhere suggested that heightened scrutiny is appropriate when a classification is based on some "immutable characteristic determined solely by the accident of birth [which bears] no relation to ability to perform or contribute to society." Frontiero v. Richardson, 411 U.S. 677, 686 (1973). Certainly, it is difficult to comprehend how an individual's illegitimacy will have any bearing on his ability to make a social contribution.

50. The Supreme Court initially concerned itself only with the rights of those aliens who were *legally* present in the United States. *See, e.g.,* Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971). The Court first considered the constitutional rights of *undocumented* aliens in Plyler v. Doe, 102 S. Ct. 2382 (1982). *See infra* notes 58-64 and accompanying text.

51. Some commentators have urged that laws classifying on the basis of alienage should be evaluated under the preemption doctrine rather than the equal protection clause. *See generally* Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?,* 31 STAN. L. REV. 1069

In *Graham v. Richardson,*[52] for instance, the Supreme Court struck down a state law that restricted welfare benefits to citizens. In reaching its holding, the *Graham* Court asserted that aliens constitute a suspect class, and accordingly, classifications based on alienage should be subjected to strict scrutiny.[53] Two years later, however, the Court retreated somewhat from the *Graham* holding, suggesting that a lower level of scrutiny is appropriate when states exclude aliens from consideration for government jobs that are essential to the preservation of representative government.[54] Subsequent cases have upheld laws requiring dep-

(1979); Note, *State Burdens on Resident Aliens: A New Preemption Analysis,* 89 YALE L.J. 940 (1980).

In the leading preemption case in the immigration area, De Canas v. Bica, 424 U.S. 351 (1976), the Supreme Court held that Congress had never so completely occupied the field of immigration as to render all state legislation creating alienage-based classifications automatically invalid through the preemption doctrine. *Id.* at 355. States may enact legislation dealing with undocumented aliens if such legislation complements a federal objective. *Id.* at 363.

The Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1503 (1976 & Supp. V 1981), is the principal federal statute regulating immigration. This act makes unlawful entry into this country a crime punishable by fine, imprisonment, or deportation. *Id.* §§ 1251-52, 1325. A major overhaul of the act was nearly passed by the 97th Congress. The bill's most notable feature was its extension of amnesty to most aliens who had unlawfully entered the United States before January 1, 1980. *See* S. 2222, 97th Cong., 2d Sess. (1982).

52. 403 U.S. 365 (1971).

53. "[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." *Id.* at 372 (citation omitted). Aliens seem to meet some but not all of the traditional indicia of "suspectness." *See supra* note 26. Because an alien who is willing to go through the proper procedures may become a naturalized American citizen, alienage is not an immutable characteristic. *See* Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1421-59 (1976 & Supp. V 1981). There has been some debate about whether equal protection is the proper framework within which to evaluate alienage-based classifications. Some commentators maintain that these issues should be viewed in a federal-state regulation context. *See supra* note 51.

54. In Sugarman v. Dougall, 413 U.S. 634 (1973), Justice Blackmun outlined the contours of this exception to the *Graham* strict scrutiny rule:

> [O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a state's constitutional prerogatives. This is no more than a recognition of a state's historical power to exclude aliens from participation in its democratic political institutions, and a recognition of a state's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriate designated class of public office holders. . . . A restriction on the employment of noncitizens, narrowly confined, could have particular relevance to this important state responsibility for alienage itself is a factor that reasonably could be employed in defining 'political community.'

Id. at 648-49 (citations omitted).

The result of the *Dougall* exception is an equal protection anomaly. Alienage-based classifications are sometimes—but not always—suspect. This double-standard is best understood in the

uty probation officers,[55] schoolteachers,[56] and police officers[57] to be American citizens.

The question of what constitutional rights an undocumented alien enjoys[58] while in the United States has not been extensively litigated.[59] In *Wong Wing v. United States,*[60] the Supreme Court held that undocumented aliens are entitled to due process guarantees.[61] Moreover, lower court decisions indicate that undocumented aliens have a right of access to the judicial system.[62] Lower courts that have considered the issue of whether the equal protection clause applies to undocumented aliens have generally concluded that the aliens are entitled to equal protection.[63] Until 1982, the Supreme Court had never addressed the

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context of federal-state relations. Some alienage-based classifications reflect on functions so central to a state's sovereignty that the federal government will not intervene.

55. Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

56. Ambach v. Norwick, 441 U.S. 68 (1979).

57. Foley v. Connelie, 435 U.S. 291 (1978).

58. *See generally* Comment, *The Legal Status of Undocumented Aliens: In Search of a Consistent Theory,* 16 HOUS. L. REV. 667 (1979).

59. Undocumented aliens are understandably reluctant to file lawsuits in which their undocumented status is an issue. *See* Doe v. Plyler, 458 F. Supp. 569, 579 n.12 (E.D. Tex. 1978), *aff'd in part, rev'd in part,* 628 F.2d 448 (5th Cir. 1980), *aff'd,* 102 S. Ct. 2382 (1982).

60. 163 U.S. 228 (1896).

61. Subsequent cases have reaffirmed *Wong Wing. See* Mathews v. Diaz, 426 U.S. 67, 77 (1976); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953).

62. *See, e.g.,* United States v. Barbera, 514 F.2d 294, 296 n.3 (2d Cir. 1975) (undocumented alien may assert an illegal search claim); Bolanos v. Kiley, 509 F.2d 1023, 1025-26 (2d Cir. 1975) (undocumented alien may seek an injunction against deportation); Hagl v. Jacob Stern & Sons, 396 F. Supp. 779, 784 (E.D. Pa. 1975) (undocumented alien may bring a personal injury suit); Williams v. Williams, 328 F. Supp. 1380, 1383 (D.V.I. 1971) (undocumented alien may bring a divorce action).

63. All three federal courts that ruled directly on the validity of the Texas undocumented alien schoolchildren statute concluded that the equal protection clause applied to undocumented aliens. Doe v. Plyler, 628 F.2d 448, 455 (5th Cir. 1980), *aff'd,* 102 S. Ct. 2382 (1982); *In re* Alien Children Educ. Litig., 501 F. Supp. 544, 567 (S.D. Tex. 1980), *aff'd sub nom.* Plyler v. Doe, 102 S. Ct. 2382 (1982); Doe v. Plyler, 458 F. Supp. 569, 579 (E.D. Tex. 1978), *aff'd in part, rev'd in part,* 628 F.2d 448 (5th Cir. 1980), *aff'd,* 102 S. Ct. 2382 (1982). *See also* Bolanos v. Kiley, 509 F.2d 1023, 1025 (2d Cir. 1975) ("We can readily agree that the due process and equal protection clauses . . . [apply to] aliens whose presence here is illegal"); Williams v. Williams, 328 F. Supp. 1380, 1383 (D.V. I. 1971) ("To deny an alien access to our divorce courts on the sole ground that he may be in violation of an immigration law would be to deny . . . the equal protection of the laws."). *But see* United States v. Tsuda Maru, 479 F. Supp. 519, 521 (D. Alaska 1979) ("the underlying rationale of the [equal protection] doctrine limits its applicability to persons who have been admitted for permanent residence under immigration laws").

The fourteenth amendment due process clause applies to "any person." The equal protection clause, on the other hand, applies to "any person within its jurisdiction." The state of Texas, in opposing the extension of equal protection guarantees to undocumented aliens, argued that this

issue.[64]

In 1982, in *Plyler v. Doe,*[65] the Supreme Court ruled that the equal protection clause does indeed apply to undocumented aliens,[66] and that the Texas statute denying undocumented alien schoolchildren access to free public education violated the equal protection clause.[67] Writing for a majority of five, Justice Brennan first confronted the threshold issue of whether undocumented aliens are entitled to equal protection.[68] In concluding affirmatively,[69] the majority rejected the proposition that the equal protection clause was intended to apply to a more limited set of persons than the due process clause.[70]

The majority next dealt with the question of which equal protection standard of review to apply in evaluating section 21.031. Although undocumented aliens are not members of a suspect class[71] and education is not a fundamental right,[72] Justice Brennan nevertheless concluded that some form of heightened scrutiny was appropriate.[73]

Even though education is not a fundamental right, Justice Brennan

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difference in language means that the equal protection clause applies to a narrower class of people than the due process clause. *See* Brief for Appellant at 14-18, Plyler v. Doe, 102 S. Ct. 2382 (1982).

64. Certain Named and Unnamed Noncitizen Children and Their Parents v. Texas, 448 U.S. 1327, 1329 (Powell, Circuit Justice, 1980) ("no precedent of this Court directly supports [the lower court ruling that the equal protection clause applies to undocumented aliens]").

65. 102 S. Ct. 2382 (1982).

66. *Id.* at 2394.

67. *Id.* at 2402.

68. The Court summarily disposed of the preemption issue, reasoning that the disposition of the equal protection question rendered the preemption argument irrelevant. *Id.* at 2391 n.8.

69. *Id.*

70. The Court argued that the "within its jurisdiction" language of the equal protection clause, *see supra* note 63, actually supports the conclusion that everyone who is physically present within a state's territory enjoys equal protection guarantees:

> That a person's initial entry into a state, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the state's territorial perimeter. . . . And until he leaves the jurisdiction—either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States—he is entitled to the equal protection of the laws that a state may choose to establish.

Id. at 2394.

71. The Court noted that an alien's undocumented status is not immutable and is in fact attributable to a voluntary choice. *Id.* at 2396.n.19. Thus one of the indicia of suspectness is not present here. *See supra* note 26.

72. *See supra* notes 35-42 and accompanying text.

73. 102 S. Ct. at 2398. The absence of a suspect classification or fundamental right usually indicates that the classification should be evaluated on the rational basis standard. *See supra* notes 25-34 and accompanying text.

reasoned, it is vital to the maintenance of the nation's basic political institutions[74] and is indispensible to the individual child's future well-being.[75] Moreover, Justice Brennan, citing a leading case on illegitimacy classifications,[76] noted that because undocumented children seldom enter the United States of their own volition, section 21.031 punishes them for the transgressions of their parents.[77] Consequently, in order for section 21.031 to survive equal protection scrutiny, the state of Texas must show that it had a substantial state interest at stake.[78]

Justice Brennan then examined the possible state interests behind section 21.031. He rejected Texas' major contention that appellees status as undocumented aliens *vel non* provided a rational basis for their exclusion from the free public schools.[79] In addition, he summarily dismissed each of the remaining asserted state interests: (1) preservation of scarce resources for the state's lawful residents;[80] (2) deterrence of illegal entry into the United States;[81] (3) prevention of special burdens placed on local school districts,[82] and (4) prevention of the waste of funds spent on individuals who are likely to leave the United States

74. *Id.* at 2397. *See supra* note 42.

75. *Id.* at 2397. *See supra* note 41.

76. *See* Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972). Justice Brennan quoted from *Weber*:

> [V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent.

Id. at 2396 (citation and footnote omitted).

77. *Id.*

78. 102 S. Ct. at 2398. *See infra* note 103 and accompanying text.

79. 102 S. Ct. at 2400. The Court argued that if a state classifies on the basis of undocumented alienage, that classification must mirror some federal objective. *See supra* note 51. The Court could find no evidence that Congress ever intended to deprive undocumented aliens of the opportunity to attend free public schools.

80. 102 S. Ct. at 2400. Justice Brennan remarked that "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Id.*

81. *Id.* at 2400-01. The *Plyler* Court noted that the bulk of undocumented aliens enter the United States for economic, not educational purposes. Thus, if the state sought to deter illegal entry, section 21.031 was a singularly ineffective way to do so.

82. Id. at 2401. Justice Brennan relied on the district court's determination that the exclusion of undocumented aliens would have no appreciable effect on the quality of education that the other pupils receive. *See In re* Alien Children Educ. Litig., 501 F. Supp. 544, 583 (S.D. Tex. 1980), *aff'd sub nom.* Plyler v. Doe, 102 S. Ct. 2382 (1982).

eventually.[83]

Justices Marshall, Blackmun, and Powell provided separate concurring opinions. Justice Marshall emphasized his belief that education should be regarded as a fundamental right.[84] In addition, he reiterated his criticism of the multi-tier approach to equal protection analysis.[85] Justice Blackmun, in contrast, agreed with the majority that education is not a fundamental right, but argued that laws that completely deny a class of people access to an education should be subjected to some form of heightened scrutiny.[86] Finally, Justice Powell elaborated on the majority's analogy to the illegitimacy cases[87] and chastised the federal government for its inability to halt the influx of undocumented aliens.[88]

Chief Justice Burger, joined by Justices White, Rehnquist, and O'Connor, wrote a sharp dissent. The Chief Justice asserted that any form of heightened scrutiny was improper because, as the majority noted, the Texas law implicated neither a suspect class nor a fundamental right.[89] Moreover, he believed that the state's asserted interest in limiting expenditures was permissible and that section 21.031 bore a rational relationship to this interest.[90] Chief Justice Burger concluded

83. 102 S. Ct. at 2401-02. The Court pointed out that many undocumented aliens are never deported and continue to live in the United States indefinitely.

84. 102 S. Ct. at 2402 (Marshall, J., concurring). Justice Marshall first maintained that education should be considered a fundamental right in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 110-17 (1973) (Marshall, J., dissenting). Justice Marshall believes that the special relationship between education and the preservation of basic first amendment values renders education a fundamental right. *Id.*

85. 102 S. Ct. at 2402 (Marshall, J., concurring). Justice Marshall asserted that the Court has actually applied a spectrum of standards in equal protection cases. *Id.* at 2498-99. *See supra* note 25.

86. Justice Blackmun argued by analogy to the equal protection-voting cases. *See supra* note 22. While neither voting nor education are explicitly protected by the Constitution, he argued that both should be subject to the equal protection clause because they are extraordinary rights. He asserted that "[D]enial of an education is the analogue of denial of the right to vote: the former relegates the individual to second-class social status, the latter places him at a permanent political disadvantage." 102 S. Ct. at 2404 (Blackmun, J., concurring).

87. [T]he state of Texas effectively denies to the school age children of illegal aliens the opportunity to attend the free public schools that the state makes available to all residents. They are excluded only because of a status resulting from the violation by parents or guardians of our immigration laws and the fact that they remain in our country unlawfully. The respondent children are innocent in this respect.

Id. at 2406 (Powell, J., concurring). *See supra* notes 43-49 and accompanying text.

88. Justice Powell suggested that the federal government might help the states defray the cost of educating undocumented aliens. *Id.* at 2406 (Powell, J., concurring).

89. *See supra* notes 25-34 and accompanying text. The Chief Justice accused the majority "of an unabashedly result-oriented approach." *Id.* at 2409 (Burger, C.J., dissenting).

90. 102 S. Ct. at 2412 (Burger, C.J., dissenting). The Chief Justice admitted that the state

that the legislature should ultimately decide whether undocumented alien children should receive a free public education.[91]

Plyler v. Doe was correctly decided. Justice Brennan, however, takes a somewhat tortuous path to reach the correct result. Although the majority summarily dismisses the preemption issue as irrelevant,[92] the issue is thinly disguised and raised again later in the opinion. In rejecting Texas' argument that the aliens' undocumented status *vel non* provided a rational basis for the law, Justice Brennan remarked that states may legislate with respect to undocumented aliens only if the state law mirrors some federal goal.[93] He argued further that there was no evidence that Congress had ever intended to deny a free public education to undocumented aliens.[94] If Justice Brennan perceived a conflict between the objectives of the Texas statute and a federal policy, he should have resolved the issue by explicit reference to the preemption doctrine.[95]

By subsuming under the equal protection framework the question of exactly how a state may legislate with respect to undocumented aliens, the Court diminished the relevance of its holding for both preemption and equal protection jurisprudence. At one point in the opinion, for instance, Justice Brennan seems to imply that Congress might be able to prohibit the use of federal funds for the education of undocumented alien children.[96] This, combined with *Plyler's* ultimate holding, gives rise to the inference that the equal protection clause may occasionally

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goal of preservation of resources would not be a permissible reason for denying benefits arbitrarily to some group. He felt, however, that there was no arbitrary denial here because undocumented aliens have no right to be in this country.

91. The Chief Justice concluded his opinion by asserting that "[t]he solution to this seemingly intractable problem is to defer to the political processes, unpalatable as that may be to some." *Id.* at 2414 (Burger, C.J., dissenting).

92. *See supra* notes 10 & 68.

93. 102 S. Ct. at 2399. The Court here cites the leading preemption decision in the field of immigration, DeCanas v. Bica, 424 U.S. 351 (1976).

94. *See supra* note 79.

95. Some commentators have argued that the preemption doctrine is a preferential framework within which to evaluate alienage-based classifications. *See supra* notes 51 & 53. The same can be said about undocumented alienage classifications. The Court was obviously sensitive to federalism questions in *Plyler* and should have been more explicit about the role those questions played in the final disposition of the case.

96 Justice Brennan remarked, "[b]ut in the area of special constitutional sensitivity presented by this case, *and in the absence of any contrary indication fairly discernible* in the present legislative record, we perceive no national policy that supports the state in denying these children an elementary education." 102 S. Ct. at 2400 (emphasis added).

place greater restrictions on states and their freedom to classify than it does on the federal government.[97] Case law directly contradicts this proposition.[98]

The Court's decision to apply a heightened level of scrutiny is sound. Justice Brennan's conclusion that undocumented aliens do not constitute a suspect class seems reasonable. An alien's undocumented status is certainly not immutable[99] nor is it always unrelated to a legitimate state purpose.[100] Moreover, the proposition that education is not a fundamental right is firmly established.[101] Yet, the Court properly creates a special niche for education. While education is not a fundamental right, neither is it an ordinary government benefit. The Court consistently recognizes its significant role in shaping and inculcating basic values.[102] Thus, a law impinging on one's ability to obtain an education should be subject to an intermediate standard of review.

The standard of review adopted by the *Plyler* Court, however, is unclear. The language used by Justice Brennan simultaneously suggests application of the rational basis standard and the intermediate standard.[103] Although the Court clearly is employing a heightened level of

97. Once again the preemption and equal protection issues are confused. Justice Brennan's argument is plausible on preemption grounds, but is dubious as an equal protection principle. The equal protection clause restricts all governments in the same fashion. Otherwise the principal of equality, which is the central tenet of equal protection, would seem to be violated.

98. The Supreme Court has repeatedly held that the due process clause of the fifth amendment constrains the federal government in the same manner as the equal protection clause of the fourteenth amendment constrains the states. *See, e.g.,* Davis v. Passman, 442 U.S. 228, 234 (1979); Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976); Buckley v. Valeo, 424 U.S. 1, 93 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

99. *See supra* note 26. The undocumented alien can always leave the United States. He may often be able to become a lawful resident. One expert testified in the district court that 50 to 60% of current legal aliens originally entered this country illegally. Doe v. Plyler, 458 F. Supp. 569, 577 (E.D. Tex. 1978), *aff'd in part, rev'd in part,* 628 F.2d 448 (5th Cir. 1980), *aff'd,* 102 S. Ct. 2382 (1982).

100. For example, a state's decision to ban undocumented aliens from voting or holding office seems entirely reasonable.

101. *See supra* notes 35-39 and accompanying text.

102. *See supra* notes 40-42 and accompanying text.

103. Justice Brennan described the standard as follows: "Section 21.031 can hardly be considered *rational* unless it furthers some substantial goal of the state." 102 S. Ct. at 2398 (emphasis added). The word "rational," of course, suggests "rational basis" review while the word "substantial" is normally associated with the *Craig v. Boren* formulation of the intermediate standard. *See supra* notes 25-34.

Moreover, the *Plyler* standard is unclear in another sense. Equal protection standards typically have two components: an end component and a means-end relationship component. For exam-

scrutiny, Justice Brennan fails to explain how this application of the intermediate standard differs from more traditional formulations or why the Court did not use those formulations.

The position of the dissenters, on the other hand, is unduly deferential. Undocumented aliens are a classic example of a "discrete and insular" minority.[104] They may not vote or hold office.[105] Moreover, an organized lobbying effort would subject to deportation all those undocumented alien participants who identify themselves as such. The judiciary should be especially sensitive to the possibility that the political process will not react favorably to the legitimate grievances of undocumented aliens.

Plyler will have a limited impact on subsequent decisions.[106] Fears that the case may lead to the invalidation of laws that exclude undocumented aliens from social welfare programs[107] are unfounded. The Court's focus on the unique character of education narrows the potential reach of the decision. Laws that classify on the basis of undocumented alienage with respect to ordinary government benefits will almost certainly be upheld.

The *Plyler* Court reached a just and humane result from the perspective of social policy.[108] As constitutional doctrine, however, the deci-

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ple, strict scrutiny requires the classification to be *necessary* (means-end component) to a compelling state interest (end component). The *Plyler* standard only addresses the ends component, mandating that the end be "substantial." The Court fails to articulate a means-end relationship requirement.

104. *See supra* note 53.

105. Indeed, it is difficult to conceive of a more politically powerless group than undocumented aliens. The formal barriers to political participation—prohibitions against voting and holding office—combine with more informal obstacles such as language and cultural differences to render undocumented aliens politically impotent.

106. Texas is the only state to pass a law banning undocumented aliens from the free public schools. Washington Post, June 16, 1982, at A1, col. 1.

107. *See* Washington Post, June 16, 1982, at A1, col. 1. Along with other social classifications, the Court usually evaluates laws bearing on welfare benefits and entitlement programs under the "rational basis" standard. A law restricting welfare benefits to those who are in the United States lawfully would probably satisfy this lower standard. *Cf.* Mathews v. Diaz, 426 U.S. 67, 80 (1976) (suggests Congress may withhold government benefits to lawfully admitted aliens).

108. Banning undocumented alien children from the free public schools would likely result in a permanent sub-class of individuals, barred from most types of employment by their lack of education.

sion is confusing and will probably have little permanent effect on equal protection jurisprudence.

D.A.W.