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Alternative Models of Equal Protection Analysis: *Plyler v. Doe*[1] — The power to control immigration is vested in the federal government.[2] Pursuant to this power, Congress has enacted a complex legislative scheme which governs admission to and status within the country's borders.[3] Nevertheless, a large number of undocumented, and hence illegal, aliens enter the country each year.[4] Efforts by the federal government to control illegal immigration have inversely corresponded to the United States' ability to absorb and profit from the effective utilization of undocumented workers.[5] During periods of economic growth, American employers have actively recruited Mexican labor;[6] in recent years, however, the declining economy and rising demands on state and federal government services have caused increasing public pressure in the federal government to control illegal immigration.[7] The government, however, has been accused of being either unwilling or unable to deal with problem.[8] In light of the perceived federal abdication, several states have enacted legislation aimed at minimizing the effects of the undocumented alien population on their economies.[9]

In 1975 the Texas legislature amended Section 21.031 of the Texas Education Code[10] to limit the availability of the state's education fund to citizens of the United States and legally admitted aliens.[11] Although the statute did not forbid the local school districts to enroll illegal alien children, such children would only be able to attend public schools if either their parents or the local school districts were able and willing to absorb the costs ordinarily borne by the

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[1] 457 U.S. 202 (1982).

[2] U.S. CONST. art. I, § 8.

[3] *See* Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.* (1976 & Supp. V 1981).

[4] *See* Kane & Velardez-Munoz, *Undocumented Aliens and the Constitution: Limitations on State Action Denying Undocumented Children Access to Public Education*, 5 HASTINGS CONST. L.Q. 461, 461 (1978).

[5] *Id.* at 468. *See generally* Lopez, *Undocumented Mexican Immigration: In Search of a Just Immigration Law and Policy*, 28 U.C.L.A. L. REV. 615, 641-72 (1981) (historical account of federal attempts to control Mexican immigration).

[6] Lopez, *supra* note 5, at 641, 652, 664. Undocumented aliens are especially vulnerable to exploitation and abuse because they are afraid to assert their legal rights. *See* Ortega, *Plight of the Mexican Wetback*, 58 A.B.A. J. 251, 252-53 (1972). Thus many undocumented aliens work for below the minimum wage and in unsafe working conditions. *Id.* at 252. *See also* Kane & Velardez-Munoz, *supra* note 4, at 468.

[7] Kane & Velardez-Munoz, *supra* note 4, at 462.

[8] Brief for the Appellants at 5-6, Plyler v. Doe, 457 U.S. 202 (1982).

[9] Kane & Velardez-Munoz, *supra* note 4, at 462. *See, e.g.*, CAL. LAB. CODE § 2805 (West Supp. 1982) (prohibiting employment of illegal aliens); KAN. STAT. ANN. § 21-4409 (1981) (same).

[10] TEXAS EDUC. CODE ANN. § 21.031 (Vernon Supp. 1982).

[11] The statute provides, in relevant part:

> (a) All children who are citizens of the United States or *legally admitted aliens* and who are over the age of five years and under the age of 21 years on the first day of

state.[12] For the two years following the amendment of Section 21.031, the Tyler Independent School District (ISD) continued to enroll illegal alien school children free of charge.[13] In July of 1977, however, the school board adopted a policy requiring undocumented[14] children to pay a $1000 yearly tuition fee in order to enroll.[15] In response to the new policy, a group of undocumented Mexican children who had been denied enrollment filed suit in the United States District Court for the Eastern District of Texas, challenging the constitutionality of the statute as implemented by the Tyler ISD.[16] The plaintiffs specifically alleged that their exclusion from the public schools deprived them of the equal protection of the laws as guaranteed by the fourteenth amendment.[17]

The district court, after certifying a class of all undocumented school children of Mexican origin residing within the Tyler ISD,[18] found the Texas statute and the local school district policy implementing it unconstitutional.[19] The district court noted that although there were many factors suggesting that a heightened level of scrutiny might be appropriate, there was no explicit precedential ground for subjecting the statute to strict scrutiny.[20] Nevertheless, the court determined that because Texas had failed to demonstrate even a rational basis for the statute, it could not withstand even minimal scrutiny under

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> September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) Every child in this state who is a citizen of the United States *or a legally admitted alien* and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.
>
> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or *legally admitted aliens* and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

Id. (emphasis added).

[12] *Id.* § 21.031(a). Texas' public schools are financed through a combination of federal, state, and local funding. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 72 (1973) (Marshall, J., dissenting). For a detailed analysis of Texas' school financing system, see *id.* at 9-15; *id.* at 72-82 (Marshall, J., dissenting).

[13] Plyler v. Doe, 457 U.S. 202, 206 n.2 (1982).

[14] The Tyler Independent School District policy which implemented the statute defined legally admitted aliens as those with documentation sufficient to show their legal entry or presence. Plyler v. Doe, 457 U.S. 202, 206 n.2 (1982). Therefore, the term undocumented alien, rather than illegal alien, will be used throughout this article.

[15] Doe v. Plyler, 458 F. Supp. 569, 571-72 (E.D. Tex. 1978).

[16] *Id.* at 572.

[17] *Id.*

[18] *Id.* at 571 n.1.

[19] *Id.* at 593.

[20] *Id.* at 585.

the equal protection clause.[21] The United States Court of Appeals for the Fifth Circuit affirmed,[22] and the defendants appealed to the Supreme Court.[23]

In *Plyler v. Doe*,[24] the Supreme Court held that a state cannot deny to undocumented alien children the free public education it provides to other children residing within its borders, absent a showing that the denial furthers a "substantial state interest."[25] Justice Brennan, writing for a five member majority,[26] determined that strict scrutiny was not the appropriate standard of review because the statute did not disadvantage a suspect class or interfere with the exercise of a fundamental right.[27] Nevertheless, Justice Brennan stated that more than minimum rationality would be required to uphold the statute.[28] In light of the significant costs to both the individual and to society when children are denied a basic education, Justice Brennan concluded that the statute could only be considered rational if it furthered a "substantial goal" of the state.[29] Finding that the state had failed to demonstrate that any sufficient state interests were furthered by the statute, Justice Brennan held that the statute was unconstitutional.[30]

Three Justices filed concurring opinions. Justice Marshall filed a brief concurrence asserting his belief that education was a fundamental right, and repeating his criticism of the traditional two-tiered approach to equal protection analysis.[31] Justice Blackmun concurred separately emphasizing the absolute nature of the deprivation of education that was occasioned by the Texas statute.[32] Such a deprivation, Justice Blackmun claimed, placed children at a "permanent and insurmountable competitive disadvantage."[33] He concluded

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[21] *Id.* The district court also held that the Texas statute was preempted by the Immigration and Nationality Act. *Id.* at 592. The Court of Appeals reversed on the preemption issue, concluding that there was no pre-emptive conflict between the Texas statute and the federal law. Doe v. Plyler, 628 F.2d 448, 454 (5th Cir. 1980). The Supreme Court, in light of its disposition of the case on equal protection grounds, declined to consider the preemption issue. Plyler v. Doe, 457 U.S. 202, 210 n.8 (1982).

[22] Doe v. Plyler, 628 F.2d 448, 461 (5th Cir. 1980).

[23] Probable jurisdiction noted in 451 U.S. 968 (1981). The case was consolidated on appeal with *In re* Alien Children Litigation, 501 F. Supp. 544 (S.D. Tex. 1980) for briefing and argument. Plyler v. Doe, 457 U.S. 202, 210 (1982). *Alien Children* was a consolidation of numerous suits filed in the United States District Courts for the Southern, Western, and Northern Districts of Texas, challenging the constitutionality of § 21.031 and various local policies implementing it. *In re* Alien Children Litigation, 501 F. Supp. 544, 550 (S.D. Tex. 1980).

[24] 457 U.S. 202 (1982).

[25] *Id.* at 230.

[26] Justice Brennan's opinion was joined by Justices Marshall, Blackmun, Powell, and Stevens. Justices Marshall, Blackmun, and Powell filed separate concurring opinions. Chief Justice Burger filed a dissenting opinion, which was joined by Justices White, Rehnquist, and O'Connor.

[27] 457 U.S. at 223.

[28] *Id.* at 224.

[29] *Id.*

[30] *Id.* at 230.

[31] *Id.* at 230 (Marshall, J., concurring).

[32] *Id.* at 233-35 (Blackmun, J., concurring).

[33] *Id.* at 234.

that the state must justify such a deprivation by showing more than mere rational basis.[34] Justice Powell, in his concurrence, emphasized the unique nature of the plaintiff class.[35] Drawing an analogy to cases involving illegitimates, Justice Powell claimed that a heightened standard of review was appropriate in a case involving undocumented school children.[36] Undocumented children, he noted, like illegitimates, were not responsible for their legal status.[37] Under such circumstances, he concluded, the Court appropriately required that the classification bear a substantial relation to substantial state interests.[38]

Chief Justice Burger, in a dissenting opinion joined by Justices White, Rehnquist, and O'Connor, criticized the majority for departing from traditional equal protection analysis.[39] Although the Chief Justice agreed with the majority that strict scrutiny was inappropriate, he asserted that the Court's proper inquiry should therefore have been limited to determining whether the statutory classification bore a rational relationship to a legitimate state purpose.[40] He reasoned that because undocumented aliens by definition have no right to be in the country, it was therefore rational for the state to withhold governmental benefits in order to conserve its limited resources for lawful residents.[41]

In *Plyler v. Doe*, the Supreme Court held for the first time that undocumented aliens were persons entitled to equal protection under the fourteenth amendment.[42] Even more significant, however, was the analysis which the Court employed in concluding that the Texas statute violated the equal protection clause. The *Plyler* opinion indicates a strong shift away from a strict two-tiered equal protection analysis and toward the use of a balancing approach much like the approach consistently advocated by Justice Marshall.[43] Nevertheless, the proliferation of opinions and rationales which the *Plyler* Court produces indicates that the Court has not yet evolved a consistent and comprehensible equal protection doctrine.

This casenote begins by presenting an overview of equal protection doctrine at the time *Plyler* was decided.[44] It traces the development of a two-tiered approach to equal protection under the Warren Court, and the development of intermediate scrutiny in recent years. Then, the majority, concurring and dis-

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[34] *Id.* at 235.

[35] *Id.* at 236 (Powell, J., concurring).

[36] *Id.* at 238.

[37] *Id.*

[38] *Id.* at 238-39.

[39] *Id.* at 243 (Burger, C.J., dissenting).

[40] *Id.* at 248.

[41] *Id.* at 250.

[42] *Id.* at 215. The Court had previously held that illegal aliens were protected under the due process clause of the fifth and fourteenth amendments. Mathews v. Diaz, 426 U.S. 67, 77 (1976).

[43] *See infra* notes 202-03, 314-22 and accompanying text.

[44] *See infra* notes 49-205 and accompanying text.

senting opinions in *Plyler* are presented.[45] It is asserted that the majority opinion's analysis is best understood as a balancing of the competing interests of the state and the individual. This casenote examines some of the balancing models of equal protection analysis that have been proposed.[46] It suggests a five-factor balancing model as the most accurate description of the majority's analysis. The rationales of the majority and concurring opinions are analyzed in light of the proposed balancing model.[47] Finally, the merits of a balancing approach are discussed.[48]

I. Equal Protection Law: An Overview

The equal protection clause of the fourteenth amendment[49] is today a significant tool of constitutional adjudication. This has not always been the case. Prior to the "egalitarian revolution" of the Warren Court,[50] judicial intervention under the equal protection clause was limited to cases involving racial discrimination.[51] The evolution of the equal protection clause from what was once considered the "usual last resort" of constitutional argument[52] into what many regard as a primary tool for effecting social change has sparked controversy, criticism, and confusion among both legal commentators and the members of an often divided Supreme Court.

A review of the historical development of the two-tiered model of equal protection analysis and the more recent trend toward a multi-tiered approach is crucial to understanding the issues presented in *Plyler v. Doe* and the importance of the Court's treatment of those issues. This section begins by presenting the Court's early equal protection cases and the development of the rational basis standard of review. It then examines the development of the two-tiered model of equal protection under the Warren Court. Finally it analyzes the birth and development of an intermediate standard of review as the favored approach to equal protection cases.

A. *Early Equal Protection and the Rational Basis Standard*

The fourteenth amendment was adopted in 1868 primarily to insure that the Reconstruction measures enacted by Congress after the Civil War would

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[45] *See infra* notes 205-286 and accompanying text.

[46] *See infra* notes 308-22 and accompanying text.

[47] *See infra* notes 326-334 and accompanying text.

[48] *See infra* notes 335-42 and accompanying text.

[49] Section one of the fourteenth amendment provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

[50] Kurland, *The Supreme Court, 1963 Term — Forward: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 144 (1964).

[51] Gunther, *The Supreme Court, 1971 Term — Forward: In Search of an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[52] Buck v. Bell, 274 U.S. 200, 208 (1927).

not be found to be beyond the scope of congressional power.[53] Although it was drafted in broad language that went beyond merely prohibiting racial discrimination,[54] early decisions by the Supreme Court interpreted the equal protection clause narrowly. The first Supreme Court opinion interpreting the clause predicted that it would never be applied in a situation not involving discrimination against blacks.[55] By 1886, however, this limited interpretation had been rejected and the equal protection clause had been deemed to apply more broadly.[56]

Regardless of its breadth, the equal protection clause did not impose demanding obligations on the states. The Supreme Court required that a state rest its legislative classifications upon differences that were reasonably related to the purpose of the statute.[57] In applying this reasonableness or rationality requirement, the Court gave considerable deference to the legislative judgment. It did not inquire whether the legislative decision was accurate, provided it was not arbitrary.[58] In the extreme, if any set of facts could reasonably be conceived to provide a rational basis for the classification, the Court would uphold the statute.[59] Thus, in *Kotch v. Board of River Pilot Commissioners,*[60] the Court upheld the constitutionality of a statute which gave harbor pilots complete discretion in the selection of their apprentices.[61] Because completion of an apprenticeship was a statutory prerequisite to obtaining a pilot license, the harbor pilots were able to restrict jobs to their relatives and friends.[62] Although the Court recognized that nepotism in the civil service could pose problems, it concluded that the legislature "might" have intended the statute to foster morale and an *esprit de corps* among river pilots.[63]

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[53] Karst, *The Supreme Court, 1976 Term — Forward: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 14 (1977). A constitutional amendment was thought necessary to overturn the assumptions of racial inferiority and restrictive citizenship that were embodied in the Supreme Court's infamous *Dred Scott* decision of 1856. *Id.* For a discussion of the history behind the adoption of the fourteenth amendment, see Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 133-42 (1950); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 6-65 (1955).

[54] *See supra* note 49.

[55] The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

[56] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (Asians entitled to equal protection); Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886) (equal protection clause applies to corporations).

[57] Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150, 155 (1897). *See also* Tussman and ten-Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344-53 (1949).

[58] *See, e.g.*, Borden's Farm Prods. Co. v. Ten Eyck, 297 U.S. 251, 263 (1936).

[59] Allied Stores, Inc. v. Bowers, 358 U.S. 522, 530 (1959); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). Judicial deference has been said to have operated regardless of whether the conceivable state of facts actually existed, would justify the classification if it did exist, or had ever been urged in the classification's defense. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-3 (1978).

[60] 330 U.S. 552 (1947).

[61] *Id.* at 564.

[62] *Id.* at 555.

[63] *Id.* at 563.

The Supreme Court continues to employ the deferential "rational basis" standard of review to most social and economic regulations.[64] Although the Court has articulated a number of tests which it applies to statutes in order to determine whether legislative classifications have a rational basis, it generally requires that the challenged classification bear a "rational relationship to a legitimate state purpose."[65] Ordinarily, the state need only assert a plausible purpose, regardless of whether it reflects the legislature's actual intent.[66] Consequently, the rational basis standard operates as a presumption of the challenged legislation's constitutionality.[67] As one commentator has noted, the presumption is so strong that judicial scrutiny of legislative classifications under the rational basis test is minimal in theory and virtually nonexistent in fact.[68]

B. *Strict Scrutiny: A Two-Tiered Model of Equal Protection*

Judicial deference to legislative classifications is founded in part on a recognition of the imperfections of the legislative process,[69] and in part, on fundamental notions of the role of the federal courts in our system of government.[70] Nevertheless, the Court has not always deferred to legislative choices. Instead, as Professor Lawrence Tribe has noted, the Court has recognized that some political choices must be subject to close analysis in order to preserve substantive values of equality and liberty.[71] This recognition was first evidenced by invalidation of statutes discriminating on their face against blacks and other racial minorities.[72] The expansion of heightened equal protec-

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[64] *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 175-79 (1980) (rational basis standard employed in review of Railroad Retirement Act); New Orleans v. Dukes, 427 U.S. 297, 303-06 (1976) (regulation of push-cart vendors); Dandridge v. Williams, 397 U.S. 471, 485-87 (1970) (welfare legislation).

[65] *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976). *But see* Johnson v. Robinson, 415 U.S. 361, 374 (1974) ("A classification . . . must rest upon some ground of difference having a *fair* and *substantial* relation to the object of the legislation.") (emphasis added).

[66] United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("It is . . . constitutionally irrelevant whether this reasoning in fact underlay the legislative decision. . . .") (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)).

[67] McGowan v. Maryland, 366 U.S. 420, 425 (1961).

[68] Gunther, *supra* note 51, at 8.

[69] Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955) ("[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."); Metropolis Theatre Co. v. Chicago, 228 U.S. 61, 69 (1913) ("The problems of government are practical ones and may justify, if they do not require, rough accommodations. . . .").

[70] *See, e.g.*, Day-Brite Lighting Co. v. Missouri, 342 U.S. 421, 423 (1952) ("[W]e do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."). *See also* Barrett, *The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications*, 68 KY. L.J. 845, 872-75 (1980).

[71] L. TRIBE, *supra* note 59, at 1000.

[72] *See, e.g.*, Hirabayashi v. United States, 320 U.S. 81, 101 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people

tion scrutiny to other types of legislative classifications was heralded in *United States v. Carolene Products Co.*[73] In *Carolene Products* the Court rejected an equal protection challenge to the Filled Milk Act of 1923, concluding that the legislation was rational.[74] Nevertheless, Justice Stone observed in a footnote that certain legislative choices — those directed at particular minorities or interfering with certain rights — might call for more exacting judicial scrutiny under the fourteenth amendment.[75]

As early as 1944, in *Korematsu v. United States,*[76] the Court noted that racial classifications are "suspect" and therefore subject to "rigid scrutiny."[77] It was not until the Warren Court era, however, that Justice Stone's now famous footnote in *Carolene Products* provided a framework for active judicial review of certain legislative classifications.

Under the Warren Court, statutes which burdened fundamental rights[78] or which classified on the basis of "suspect" criteria[79] came to trigger a more stringent standard of review, or "strict scrutiny." Under the strict scrutiny standard, the Court requires that the state show that the statutory scheme is "necessary to promote a *compelling* governmental interest."[80] Moreover, when reviewing legislation which affects fundamental rights, the Court requires that the state have chosen the "less drastic means" of achieving the statute's objectives.[81]

The strict scrutiny standard is an exacting one. As the rational basis standard operates as a presumption of constitutionality,[82] the application of the

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whose institutions are founded upon the doctrine of equality."). *See also* Strauder v. West Virginia, 100 U.S. 303, 309 (1880).

[73] 304 U.S. 144 (1938).

[74] *Id.* at 152-54.

[75] *Id.* at 152 n.4. Justice Stone's oft-cited footnote stated that:

> [L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation [may] be subject to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
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> [S]imilar considerations may enter into the review of statutes directed at particular religious, or national, or racial minorities: . . . prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. (citations omitted).

[76] 323 U.S. 214 (1944).

[77] *Id.* at 216.

[78] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (voting); Griffin v. Illinois, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring in the judgment) (criminal appeals).

[79] *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 375-76 (1971) (alienage); Hernandez v. Texas, 347 U.S. 475, 479 (1954) (national origin); Korematsu v. United States, 323 U.S. 214, 216 (1944) (race).

[80] Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis supplied by the court).

[81] Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

[82] *See supra* note 67 and accompanying text.

strict scrutiny test, conversely, almost guarantees that the statute will be struck down.[83] Consequently, whether a statute can survive an equal protection challenge depends almost entirely upon whether it is subject to strict scrutiny or minimum rationality analysis. This question in turn depends on whether a suspect class or fundamental right is implicated. As a result, the focus of equal protection analysis has been on the question of what rights should be considered "fundamental" and what classes should be considered "suspect."

1. Fundamental Rights

A classification which restricts or penalizes the exercise of a fundamental right violates the equal protection clause, unless it is necessary to promote a compelling state interest.[84] In *Shapiro v. Thompson,*[85] the Warren Court made its earliest statement of the fundamental rights strand of equal protection strict scrutiny.[86] In *Shapiro,* the plaintiffs had challenged state and federal regulations which imposed a one year residency requirement on applicants for welfare assistance.[87] The Court held that the residency requirement infringed on the applicant's constitutionally protected right to travel and, unless shown to be necessary to promote a compelling state interest, was unconstitutional.[88]

Although the *Shapiro* opinion emphasized that the freedom to travel from state to state had long been recognized as a constitutionally protected right,[89] the opinion suggested to Justice Harlan that strict scrutiny would be applied to any interest or right which the Court considered important or fundamental.[90] The rights actually identified by the Warren Court as fundamental — voting,[91] criminal appeals,[92] and interstate travel[93] — were few. Nonetheless, the broad language of many of the Court's opinions led commentators to speculate that the fundamental rights doctrine might encompass such things as welfare benefits, zoning, municipal services, and education.[94] Recent decisions of the

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[83] Gunther, *supra* note 51, at 8. *But see* Korematsu v. United States, 323 U.S. 214, 219 (1944) (military order excluding Japanese Americans from certain areas of the West Coast upheld under strict scrutiny).

[84] Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[85] *Id.*

[86] L. TRIBE, *supra* note 59, at 1003.

[87] 394 U.S. at 621-22.

[88] *Id.* at 634.

[89] *Id.* at 629.

[90] Justice Harlan, dissenting in *Shapiro,* expressed concern that the Court had created an exception which threatened to swallow the rule, 394 U.S. at 661 (Harlan, J., dissenting), and stated that : "I know of nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental,' and give them added protection under an unusually stringent equal protection test." *Id.* at 662.

[91] Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966).

[92] Griffin v. Illinois, 351 U.S. 12, 20-21 (1969) (Frankfurter, J., concurring in the judgment).

[93] Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

[94] Gunther, *supra* note 51, at 9. *See also* Michelman, *The Supreme Court, 1968 Term — Forward: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7 (1969).

Burger Court, however, have shown such speculations to have been premature. In *Dandridge v. Williams,*[95] the Court employed the rational basis standard in evaluating an equal protection challenge to a state statute which imposed a ceiling on welfare benefits.[96] Although the Court recognized that the case concerned the "most basic economic needs of impoverished human beings," it concluded that the classification was in the area of social and economic regulation and thus there was no basis for the application of a strict standard.[97] The Court thus upheld the ceiling on welfare benefits as a rational means to further the state's interest in encouraging employment.[98]

The implication in *Dandridge* that the Burger Court would construe the fundamental rights aspect of strict scrutiny narrowly was confirmed in *San Antonio Independent School District v. Rodriguez*.[99] In that case, the Court held that for purposes of equal protection, fundamental rights are those rights explicitly or implicitly protected by the Constitution.[100] In *Rodriguez*, the Court sustained a state's public school financing scheme which relied in part on local property taxes.[101] The scheme resulted in significant disparities in per-pupil expenditures between property-poor and property-rich school districts.[102] Finding that education was neither explicitly nor implicitly guaranteed by the Constitution, the Court determined that the appropriate standard of review was the rational basis test.[103] The court concluded that the school financing scheme was rational and therefore constitutional.[104]

Although the Court in *Rodriguez* did not offer guidelines as to when a right would be deemed *implicitly* protected by the Constitution, it has yet to expand the concept of fundamental rights beyond those rights which had been identified as fundamental prior to *Rodriguez*. Despite Justice Harlan's concerns,[105] fundamental rights analysis has not been transformed into a tool for wide-ranging and perhaps arbitrary invalidation of governmental action. Rather, the list of fundamental rights remains in fact quite limited; government action is invalidated as infringing on fundamental rights only when, without compelling justification, it infringes on an individual's right to vote, to obtain a criminal appeal, or to travel.

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[95] 397 U.S. 471 (1970).

[96] *Id.* at 486-87.

[97] *Id.* at 485.

[98] *Id.* at 486-87.

[99] 411 U.S. 1 (1973).

[100] *Id.* at 33-34.

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

[102] *Id.* at 15.

[103] *Id.* at 40. The Court left open, however, the question of whether an *absolute* deprivation of educational benefits, as opposed to the *relative* deprivation presented in *Rodriguez*, would trigger heightenend scrutiny. *Id.* at 25 n.60 & 36-37.

[104] *Id.* at 55.

[105] *See supra* note 90 and accompanying text.

2. Suspect Classifications

The second strand of equal protection analysis which has evoked strict judicial scrutiny has focused on the nature of the class affected. The Court has struck down legislation which draws lines on the basis of membership in certain suspect classes, unless the state has shown that the statute furthers a compelling state interest. Implicit in the idea that particular classifications are suspect is a recognition by the Court that certain "discrete and insular minorities" may need judicial protection from the adverse affects of a majoritarian political system.[106] Under the Warren Court, the suspect class aspect of equal protection strict scrutiny, like the fundamental rights doctrine, had the potential for considerable expansion.[107] The Court drew heavily on Justice Stone's language in *Carolene Products,* labeling as "discrete and insular minorities," and therefore suspect classes, groups defined on the basis of race,[108] alienage,[109] and national origin.[110] The mere labeling a class as a "discrete and insular minority," however, contributes little to an understanding of which classes will be accorded extra judicial protection; such a description could apply to almost any identifiable group which is on the losing side in the political process.[111] Nevertheless, the Warren Court in particular appeared to favor an expansive application of the doctrine, and statements in several opinions led many to believe that the poor would be deemed a suspect class, thus finding heightened protection under the equal protection clause.[112]

Just as the Burger Court has significantly limited the scope of the fundamental rights doctrine, however, it has similarly defined and limited the concept of suspect classes. The Court has identified several additional indicia of suspectness which it has used primarily to explain why certain classes are *not* accorded suspect status.[113] In *San Antonio Independent School District v. Rodriguez*,[114] in addition to determining that education is not a fundamental right,[115] the Court held that the state school financing scheme which was based in part on

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[106] *See supra* note 75.

[107] Gunther, *supra* note 51, at 9-10.

[108] Loving v. Virginia, 388 U.S. 1, 9 (1967); Korematsu v. United States, 323 U.S. 214, 216 (1944).

[109] Graham v. Richardson, 403 U.S. 365, 372 (1971).

[110] Hernandez v. Texas, 347 U.S. 475 (1954).

[111] Sugarman v. Dougall, 413 U.S. 634, 656-57 (1973) (Rehnquist, J., dissenting) ("Our society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road.").

[112] Gunther, *supra* note 51, at 9-10. *See, e.g.*, McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969) ("A careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, ... two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.").

[113] *See infra* notes 116-122 and accompanying text.

[114] 411 U.S. 1 (1973).

[115] *See supra* notes 99-104 and accompanying text.

local property taxes did not discriminate against a suspect class.[116] The Court reasoned that the plaintiff class, composed of residents of poorer tax districts, was not "saddled with such disabilities, or subject to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from a majoritarian political process."[117] Similarly, in *Mathews v. Lucas*,[118] the Court upheld a Social Security Act provision which gave legitimate children seeking insurance benefits certain procedural advantages that were denied to illegitimate children.[119] Finding that illegitimates were not a suspect class, the Court noted that "illegitimacy does not carry an obvious badge, as race and sex do" and that "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes."[120] Other factors the Court has identified as relevant to determining whether a class is suspect include whether the class has been subject to a history of purposeful unequal treatment based on stereotyped characteristics not truly indicative of ability,[121] and whether the class suffers from an immutable characteristic determined solely by the accident of birth.[122]

Despite the delineation by the Burger Court of this set of criteria for identifying suspectness, the Court has not applied these criteria consistently.[123] In *Frontiero v. Richardson*,[124] for instance, a plurality of the Court identified a class based on gender as inherently suspect.[125] Nonetheless, later decisions have not subjected gender based classifications to strict scrutiny.[126] Apparently, it is unlikely that the Burger Court will expand the categories of either interests considered fundamental or classes considered suspect.[127] In spite of, or perhaps because of this reluctance to increase the scope of strict scrutiny, the two-tiered analysis has proven itself unable to deal adequately with the range of interests potentially implicated by the equal protection clause. Consequently, the Court has, at times explicitly, but often implicitly, attempted to devise new ways of dealing with these interests.

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[116] 411 U.S. at 28.

[117] *Id.*

[118] 427 U.S. 495 (1976).

[119] *Id.* at 516.

[120] *Id.* at 506.

[121] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (age not a suspect criterion).

[122] Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

[123] Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 978 (1975).

[124] 411 U.S. 677 (1973).

[125] *Id.* at 688.

[126] *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464, 468-69 (1981); Craig v. Boren, 429 U.S. 190, 197 (1976).

[127] *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-19 (1976) (Marshall, J., dissenting) ("[The Court] has apparently lost interest in recognizing further 'fundamental' rights and 'suspect' classes.").

C. *The Development of an Intermediate Standard of Review*

Theoretically, the two tiered model of equal protection analysis involves two analytical processes. The Court first determines the appropriate standard of review by examining the nature of the right and class affected. It then applies that standard to the particular classification and statute in question. In practice however, the first step, the selection of the standard of review, is likely to determine the outcome of the case. The designation of a class as suspect, or a right as fundamental, is regarded as tantamount to invalidation of the statutory classification.[128] Similarly, if the rational basis standard is employed, the challenged legislation is generally upheld.[129] Although one previously noted result of this sharp dichotomy between the two standards of review has been reluctance on the part of the Burger Court to declare additional fundamental rights or suspect classes,[130] another has been widespread dissatisfaction with the two-tiered approach to equal protection analysis generally.[131] Thus, in a growing range of cases, the Court has invoked an intermediate level of scrutiny, somewhere between the innocuous rational basis test and the generally fatal strict scrutiny test.[132] Selection of an intermediate standard of review, as opposed to the rational basis or strict scrutiny standards, does not determine the outcome of the case. Rather, the Court focuses on the second aspect of equal protection analysis, the application of the standard to the facts of the case.

The Court has expressly extended an intermediate level of scrutiny to some legislative classifications, such as those based on gender[133] or illegitimacy.[134] In other cases, however, the Court has applied an intermediate type of analysis while its express rationale has adhered to the traditional two-tiered model of analysis. For example, in *Reed v. Reed*,[135] the Court addressed a challenge to a state statute which gave mandatory preference to males over females in the appointment of intestate administrators.[136] Although the Court ostensibly applied the rational basis standard of review, it noted that legislative classifications "must rest upon some ground of difference having a *fair and substantial* relation to the object of the legislation. . . ."[137] The Court concluded that the difference in the sex of the applicants was not sufficiently related to the

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[128] *Id.* at 119.

[129] *Id.*

[130] *See supra* notes 99-104, 123-127 and accompanying text.

[131] *See, e.g.*, Gunther, *supra* note 51, at 17-18; Wilkinson, *supra* note 123, at 946. Perhaps the most outspoken critic of the two-tiered formulation has been Justice Marshall. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting); San Antonio v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-20 (1970) (Marshall, J., dissenting).

[132] L. TRIBE, *supra* note 59, at 1082.

[133] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

[134] *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 762-67 (1977).

[135] 404 U.S. 71 (1971).

[136] *Id.* at 72-73.

[137] *Id.* at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

state's interest in reducing the workload of its probate courts to be consistent with the equal protection clause.[138] Similarly, in *Weinberger v. Wiesenfeld*,[139] the Court struck down a provision of the Social Security Act which awarded survivor's benefits to widows, but not to widowers, who were responsible for dependent children.[140] In *Wiesenfeld*, the Court again purported to review the statute under the rational basis standard.[141] Rather than uphold the statute on any grounds that would make it rational, however, the Court looked to the legislature's *actual* purpose.[142] The Court rejected the state's asserted purpose "to compensate women beneficiaries as a group for the economic difficulties which still confront women who seek to support themselves and their families"[143] and instead determined that the actual statutory purpose was to enable the surviving parent to remain at home to care for the child.[144] The Court concluded that for the purposes of childcare, a distinction between widows and widowers was irrational, and therefore unconstitutional.[145]

In 1976, in *Craig v. Boren*,[146] Justice Powell expressly acknowledged that classifications based on gender evoke a standard of review more sharply focused than the normally deferential rational basis standard, but less demanding than the strict scrutiny standard.[147] In *Craig*, the Court struck down a statute which prohibited the sale of 3.2% beer to males under 21 years of age and to females under 18.[148] The Court noted that classifications based on gender generally are the product of "archaic and overbroad generalizations" about the proper roles of men and women.[149] To withstand the constitutional challenge, the Court held, such classifications must serve "important governmental objectives" and be "substantially related" to those objectives.[150] Although it found the state's interest in public health and safety to be important, the Court concluded that the statistics presented by the state, which showed a slightly higher percentage of 18-21 year old males were arrested for drunk driving than females in the same age group, provided an "unduly tenuous fit" to justify the classification.[151] Because the classification was not *substantially related* to the State's objective, therefore, the Court held that the statute was unconstitutional.[152]

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[138] *Id.* at 76-77.
[139] 420 U.S. 636 (1975).
[140] *Id.* at 637-39.
[141] *Id.* at 648.
[142] *Id.* & n.16.
[143] *Id.* at 648.
[144] *Id.*
[145] *Id.* at 653. Compare the Court's treatment of statutory purposes in Kotch v. Board of River Pilot Comm'rs, 330 U.S. 532 (1947), discussed *supra* notes 59-63 and accompanying text.
[146] 429 U.S. 190 (1976).
[147] *Id.* at 210-11 n.* (Powell, J., concurring).
[148] *Id.* at 210.
[149] *Id.* at 198.
[150] *Id.* at 197.
[151] *Id.* at 201-02.
[152] *Id.* at 204.

In addition to classifications based on gender, the Court has expressly applied an intermediate standard of review to classifications disadvantaging illegitimates.[153] Although illegitimates are not a suspect class,[154] the Court has noted that classifications based on illegitimacy rest on the individual's status of birth, and punish the individual for the misdeeds of the parents.[155] Thus, in *Trimble v. Gordon,*[156] the Court struck down an Illinois statute which allowed illegitimate children to inherit from their fathers by intestate succession only if the child had been legitimated by the intermarriage of the parents.[157] The plaintiff was an illegitimate child who had not been acknowledged and whose parents had never married, but whose father's paternity had been determined in a judicial decree ordering support payments.[158] The Court noted that the state had a strong interest in safeguarding the orderly disposition of property, and that the problems of proving paternity of illegitimate children might justify the imposition of more demanding requirements on such children claiming under their fathers' estates.[159] Nevertheless, because the statute required the marriage of the parents and thereby excluded a large number of children who might otherwise have been able to present a claim without jeopardizing the orderly settlement of an estate,[160] the Court concluded that the limitation was not "carefully tuned to alternative considerations" and was therefore unconstitutional.[161]

Addressing a similar statute in *Lalli v. Lalli*,[162] the Court again applied an intermediate level of scrutiny. In *Lalli*, however, the Court upheld a statute which required that the paternity of the father have been determined in a judicial proceeding prior to the father's death, in order for illegitimate children to claim under his estate.[163] The Court noted that although the statute would exclude some children who might otherwise have been able to claim without seriously disrupting the settlement of estates, unlike the statute in *Trimble*, it did not totally disinherit illegitimate children who had not been legitimized.[164] The Court, therefore, concluded that the statute was substantially related to the state's interest in the orderly administration of estates.[165]

As *Trimble* and *Lalli* illustrate, the intermediate standard of review is a more flexible tool than strict scrutiny. The designation of a particular class as

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[153] Lalli v. Lalli, 439 U.S. 259, 265 (1978); Trimble v. Gordon, 430 U.S. 762, 767 (1977).

[154] Mathews v. Lucas, 427 U.S. 495, 504 (1976).

[155] Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175-76 (1972).

[156] 430 U.S. 762 (1977).

[157] *Id.* at 763 & 776.

[158] *Id.* at 763-64.

[159] *Id.* at 770-71.

[160] *Id.*

[161] *Id.*

[162] 439 U.S. 259 (1978).

[163] *Id.* at 261, 275-76.

[164] *Id.* at 272-73. The Court noted that the plaintiffs in *Trimble* would not have been barred under the statute upheld in *Lalli*. *Id.* at 276.

[165] *Id.* at 275-76.

one entitled to an intermediate standard of review, as opposed to strict scrutiny does not leave "ungoverned and ungovernable" an entire legislative area.[166] The intermediate standard of review has thus enabled the Court to deal with classifications such as alienage, which may be appropriate for some legislative purposes but not for others. The Court has held that aliens are a "prime example of a 'discrete and insular' minority" and thus are a suspect class.[167] More recently, however, the Court has retreated from that holding and instead has applied an intermediate level of scrutiny to most alienage classifications.[168] The Court has stated, that to require all state statutes classifying on the basis of alienage to meet the standards of strict scrutiny would be to "obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship."[169] The treatment of aliens as a class clearly does not fit well with either strict scrutiny or minimum rationality analysis. Under the former, aliens would become de facto citizens and under the latter they might well be subject to arbitrary government action based solely on their status as aliens. The impetus for a middle ground is clear.

In *Sugarman v. Dougall,*[170] the Court invalidated a statutory prohibition against the employment of aliens in the state civil service.[171] The Court stated that, in analyzing a classification based on alienage, it would examine the substantiality of the state's interest, and the narrowness of the limits within which the discrimination was contained.[172] Although the Court recognized the important state interest in having loyal employees, it concluded that the statute was "neither narrowly confined nor precise in its application" and did not withstand "close judicial scrutiny."[173] The Court noted, however, that for an appropriately defined class of positions, the state could validly make citizenship a qualification for employment.[174] A citizenship qualification, the Court suggested, would be appropriate for elective and non-elective governmental offices and for officers who participate directly in the formulation, execution, and review of broad public policy, since these functions go to the heart of representa-

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[166] Gunther, *supra* note 51, at 23 (analogizing to Justice Jackson's rationale for preferring equal protection over substantive due process as grounds for invalidating statutes in Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring)).

[167] Graham v. Richardson, 403 U.S. 365, 372 (1971). In *Graham*, the Court struck down state statutes which excluded some aliens from certain state funded welfare programs. *Id.* at 376. The states' interests in preserving limited benefits for their own citizens, the Court concluded, was not a compelling justification for discrimination against aliens and therefore the statutes were unconstitutional. *Id.*

[168] *See, e.g.*, Foley v. Connelie, 435 U.S. 291, 294 (1978); Sugarman v. Dougall, 413 U.S. 634, 642-43 (1973). *Cf.* Amback v. Norwick, 441 U.S. 68, 73-74 (1979) (rational basis standard).

[169] Foley v. Connelie, 435 U.S. 291, 295 (1978) (quoting Nyquist v. Mauclet, 432 U.S. 1, 14 (1977) (Burger, C.J., dissenting)).

[170] 413 U.S. 634 (1973).

[171] *Id.* at 646.

[172] *Id.* at 642.

[173] *Id.* at 642-43.

[174] *Id.* at 647.

tive government.[175] For other types of positions, the preclusion of aliens was unconstitutional. Relying on the "*Sugarman* exception" the Court has since upheld state statutes barring aliens from such positions as public school teacher,[176] and police officer.[177] In other areas, the Court has continued to apply heightened, if not strict, scrutiny to state statutes that discriminate on the basis of alienage.[178]

Despite the growing body of precedent employing an intermediate standard of review, the Court has applied that standard erratically. The Court has not articulated a principled theory of when such scrutiny will be considered appropriate. Professor Tribe has suggested that intermediate level scrutiny is triggered when important, though not fundamental, rights are at stake, or when sensitive, though not suspect, classifications are employed.[179] The Court however, frequently reverts to a rigid two-tiered analysis when intermediate scrutiny appears more appropriate.[180] For example, in *Massachusetts Board of Retirement v. Murgia*,[181] the Court upheld a statute which mandated retirement at

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[175] *Id.*

[176] Amback v. Norwick, 441 U.S. 68, 74-76 (1979) (public school teachers perform a task that "goes to the heart of representative government.").

[177] Foley v. Connelie, 435 U.S. 291, 297-300 (1978) ("police function is . . . one of the basic functions of government").

[178] *See, e.g.*, Nyquist v. Mauclet, 432 U.S. 1, 7-9 (1977) (statute excluding aliens from educational benefits); Examining Bd. of Engineers v. Flores de Otero, 426 U.S. 572, 601-02 (1976) (statute preventing aliens from practicing as licensed engineers); *In re* Griffiths, 413 U.S. 717, 721-22 (1973) (statute excluding aliens from practice of law).

As a result of the problematic status of aliens under the equal protection clause, many commentators have argued that preemption principles provide a more uniform framework for the analysis of alienage classifications. *See, e.g.*, Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1063-64 (1979); Note, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 YALE L. J. 940, 940-47 (1980). The Supreme Court recently used this approach to avoid reaching equal protection issues in Toll v. Moreno, 102 S. Ct. 2977, 2982 (1982). *Toll* involved both equal protection and preemption challenges to a state regulation which denied to non-immigrant aliens reduced "in-state" tuition at state universities. *Id.* at 2979. The Court concluded that the regulation was preempted by federal immigration law and thus did not reach the equal protection claim. *Id.* at 2982.

A similar approach has been urged for regulations affecting undocumented aliens. Note, *supra*, at 953. *See also* Note, *Right of Illegal-Alien Children to State-Provided Education: Plyler v. Doe*, 96 HARV. L. REV. 130 (1982) (asserting that the Court in *Plyler* should have undertaken a preemption analysis to avoid the equal protection claim). A finding that a state statute is preempted allows the Court to avoid reaching an equal protection claim and thus the need to apply apparently different standards to state and federal alienage classifications. A finding that a statute is *not* preempted, however, is not dispositive of the state's authority to employ the classification. As the Court noted in *Graham*, Congress cannot authorize a state to violate the equal protection clause. 403 U.S. 365, 382 (1971).

[179] *See generally* L. TRIBE, *supra* note 59, at 1089-90. Note that gender, alienage, and illegitimacy all possess some, though not all, of the attributes that the Court has used to identify a suspect class.

[180] *See, e.g.*, Maher v. Roe, 432 U.S. 464, 478 (1977) (upholding under rational basis test state regulations limiting state funding to medically necessary abortions); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (mandatory retirement age); San Antonio v. Rodriguez, 411 U.S. 1, 40 (1973) (school financing scheme based on local property taxes).

[181] 427 U.S. 307 (1976).

age fifty for state police officers.[182] The Court determined that the statute did not impinge on a fundamental right or discriminate against a suspect class and, therefore, strict scrutiny was not appropriate.[183] The Court concluded that the classification was rationally related to the state's purpose of insuring the fitness of its police force and therefore constitutional.[184] Although the statute impinged on employment, which, though not a fundamental right, is arguably important,[185] and although it classified on the basis of age, which has at least some of the characteristics of a suspect class, the Court did not consider the possibility of employing an intermediate level of review.

Many commentators, attempting to understand and reconcile the Court's equal protection decisions, have suggested models for intermediate scrutiny.[186] Professor Gerald Gunther, one of the earliest commentators to recognize the Court's apparent departure from the traditional approach to equal protection, proposed a model for intermediate level scrutiny which involved a relatively narrow, means-focused scrutiny of legislative classifications.[187] Under Gunther's model, the Court would require that the means chosen by the legislature substantially further the legislature's articulated purpose.[188] The Court would measure the means in relation to the legislative objective asserted by the government in support of the classification, rather than resort to hypothetical purposes conceived by the Court of its own volition.[189] Moreover, the Court would not weigh the importance of the state's interest, permitting the state to achieve a range of objectives.[190]

In many of the equal protection cases decided since Professor Gunther's article, however, the Court has clearly gone beyond the limited means-focused inquiry envisioned by the proposed model. The Court has analyzed statutory ends as well as means, requiring that the State's interest be substantial.[191] Simple concern for administrative convenience or judicial economy, for example, has been held to be insufficient justification for classifications based on gender

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[182] *Id.* at 310.

[183] *Id.* at 312-13.

[184] *Id.* at 314.

[185] *Id.* at 322 (Marshall, J., dissenting). The right to work is "of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth Amendment] to secure. . . ." *Id.* at 317 (quoting Traux v. Raich, 239 U.S. 33, 41 (1915)).

[186] *See, e.g.*, Gunther, *supra* note 51, at 20-24; Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071, 1079-94 (1974); Wilkinson, *supra* note 123, at 984-88.

[187] Gunther, *supra* note 51, at 20.

[188] *Id.* at 20-21. For the classic discussion of the relationship between statutory means and ends under the equal protection clause, see Tussman and tenBroek, *supra* note 57, at 343-53. *See also Note, Equal Protection: A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 813-21 (1978).

[189] Gunther, *supra* note 51, at 21. This standard is considerably less vigorous than the strict scrutiny standard, which requires that the means be *necessary* and the *least drastic alternative*. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634, 637 (1969). *See also supra* notes 85-88 and accompanying text.

[190] Gunther, *supra* note 51, at 21.

[191] Nowak, *supra* note 186, at 1071-72.

and illegitimacy.[192] The Court's approach is not easily characterized in terms of a single identifiable test. Professor Tribe has identified five techniques of intermediate review that the Court has employed:[193] assessing the importance of the state's objectives;[194] demanding close fit between legislative means and ends;[195] requiring current articulation of the statutory purpose;[196] limiting afterthought justifications;[197] and permitting rebuttal.[198]

Increasingly, in an attempt to formulate uniform principles of equal protection review, commentators have discussed the Court's analysis in terms of a balancing of the competing individual and governmental interests.[199] Professor J. Harvie Wilkinson, for example, has proposed a balancing approach to intermediate level review of statutes which deny "equality of opportunity" to particular groups.[200] Under Professor Wilkinson's model, the Court would weigh and balance the following elements: "(1) the importance of the opportunity being unequally burdened or denied; (2) the strength of the state interest served in denying it; and (3) the character of the groups whose opportunities are denied."[201] As such, Wilkinson's approach is virtually the same as the balancing approach that Justice Marshall has consistently advocated.[202] Marshall, however, asserts that the Court, despite its outward adherence to the two-tiered model of equal protection analysis, has and does apply a balancing test in all equal protection cases.[203]

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[192] *See* Reed v. Reed, 404 U.S. 71, 76 (1971); *supra* notes 135-138 and accompanying text.

[193] L. TRIBE, *supra* note 59, at 1082.

[194] *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76-77 (1971) (state's objective of insufficient importance to sustain use of gender criterion in the appointment of intestate administrator).

[195] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 201-02 (1976) (statistics showing that a slightly higher percentage of males than females were arrested for drunk driving provided unduly tenuous fit to justify gender based classification).

[196] According to Professor Tribe, this technique involves refusing to hypothesize a rationale for a statute when the rationale is not argued by the government in support of the statute. L. TRIBE, *supra* note 59, at 1083-85.

[197] *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975) (rejecting state's contention that statute which limited survivor's benefits to widows was designed to compensate women for economic difficulties unique to them).

[198] Professor Tribe asserts that this technique requires that a legal scheme be altered to permit rebuttal in individual cases even if the scheme is not struck down altogether. L. TRIBE, *supra* note 59, at 1088. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father must be allowed to prove his fitness as a parent in a custody proceeding).

[199] Wilkinson, *supra* note 123, at 984-98; Note, *supra* note 188, at 869-88.

[200] Wilkinson, *supra* note 123, at 989. Professor Wilkinson identifies three areas of equality in which equal protection issues arise: equality in political participation, equality of competitive opportunity, and economic equality. *Id.* at 955. Under his proposed model, classifications which result in political inequalities are subject to the strictest review, while classifications bearing on economic inequality are subject to deferential review. *Id.* at 946.

[201] *Id.* at 991.

[202] *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 90-91 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting).

[203] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting). "[The Court] has focused upon the character of the classification in question, the

Despite the consistent advocacy of Justice Marshall and other commentators, a majority of the Court has never expressly embraced a balancing theory of equal protection analysis. Generally, the Court has continued to articulate the traditional two-tiered theory, although the Court's application of its own standards is erratic.[204] The result has been what one commentator has called "an accumulation of ad hoc doctrines flexible enough to accommodate a cautious Court's preferences for mildly progressive results."[205] It was against this background that the Supreme Court decided *Plyler v. Doe.*

II. *Plyler v. Doe*

In *Plyler v. Doe*,[206] the Supreme Court held that a state statute which allowed schools to deny a tuition free education to undocumented children did not further a substantial interest of the state and therefore, was invalid under the equal protection clause of the fourteenth amendment.[207] This section of the casenote examines the Court's analysis of the equal protection claim. In particular, it studies the Court's approach to selecting an appropriate standard of review. It then examines the Court's application of the standard to the facts of the case. Finally, this section presents the reasoning of the concurring and dissenting opinions.

A. *The Majority Opinion*

Justice Brennan, writing for a five member majority, began his analysis in *Plyler* by considering the state's contention that undocumented aliens were not "persons" within the meaning of the equal protection clause.[208] Prior to *Plyler*, the Supreme Court had never addressed whether the equal protection clause was applicable to undocumented aliens. First, Justice Brennan noted that undocumented aliens had been held to be "persons" guaranteed due process by the fifth and fourteenth amendments.[209] He then addressed the appellants' contention that the words "within its jurisdiction" limit the scope of the equal protection clause to persons legally within the United States.[210] Justice Brennan asserted that neither the relevant precedent, the purposes of the equal protection clause, nor the legislative history of the Fourteenth Amendment, supported such an interpretation.[211] Moreover, he noted that undocumented aliens were subject to the full range of obligations imposed by the state's civil

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relative importance to individuals in the class discriminated against of the governmental benefits they do not receive, and the state interest asserted in support of the classification." *Id.*

[204] Wilkinson, *supra* note 123, at 951.

[205] *Id.* at 953-54.

[206] 457 U.S. 202 (1982).

[207] *Id.* at 230.

[208] *Id.* at 210.

[209] *Id.*

[210] *Id.* at 210-16.

[211] *Id.* at 211-13. Justice Brennan noted that the Court had consistently emphasized the territorial meaning of the language of the fourteenth amendment. *Id.* & n.12.

and criminal laws as long as they remained within the state's borders.[212] Justice Brennan concluded, therefore, that undocumented aliens were "persons within the jurisdiction" of the state, and, therefore, were entitled to the equal protection of the laws.[213]

Justice Brennan then examined whether the Texas statute violated the equal protection clause.[214] He identified three possible standards under which the statute could be evaluated.[215] In addition to the traditional rational basis and strict scrutiny standards, Justice Brennan included an intermediate standard of review.[216] Under an intermediate standard, he stated, the Court inquires whether the classification could "fairly be viewed as furthering a substantial interest of the State."[217] This intermediate test, Justice Brennan asserted, was appropriately applied whenever a statute discriminated on the basis of a classification not "facially invidious," but giving rise to "recurring constitutional difficulties."[218] In order to determine which of the three standards was appropriate, Justice Brennan turned to an examination of the nature of the class singled out, and of the right asserted.[219]

In discussing the nature of the plaintiffs' class, Justice Brennan observed that various governmental policies had created a situation in which undocumented aliens constituted an "underclass" within our society.[220] Although the presence of this underclass was tolerated, if not welcomed, undocumented aliens were subject to the denial of benefits made available to citizens and lawfully admitted aliens.[221] The Court also noted that undocumented alien children were, as children, a special category of this underclass.[222] The Court compared the situation faced by undocumented children in *Plyler* to that faced by children discriminated against on the basis of their illegitimacy.[223] In both situations, Justice Brennan noted, the children were being penalized because of the conduct of their parents, over which they had no control.[224] Whatever justifications the state might have for withholding benefits from the parents, he stated, they did not apply equally to the children.[225] Consequently, the Court

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[212] *Id.* at 215.

[213] *Id.*

[214] *Id.* at 215-16.

[215] *Id.* at 216-18.

[216] *Id.*

[217] *Id.* at 217-18. The Court cited *Craig v. Boren* and *Lalli v. Lalli* as examples of cases in which an intermediate standard of review was employed. *Id.* at 218 n.16. Both of those cases employed a test which required that the classification be substantially related to an important state objective. *See* Lalli v. Lalli, 439 U.S. 259, 295 (1978); Craig v. Boren, 429 U.S. 190, 197 (1976).

[218] 457 U.S. at 217.

[219] *Id.* at 218-23.

[220] *Id.* at 218-19.

[221] *Id.*

[222] *Id.*

[223] *Id.* at 220.

[224] *Id.*

[225] *Id.*

asserted, it was difficult to conceive of a rational basis for the statute.[226] Nevertheless, Justice Brennan in a footnote concluded that undocumented aliens, and thus undocumented alien children, were not a suspect class.[227] In support of his finding of non-suspectness, Justice Brennan pointed out that entry into the class was a product of voluntary action.[228] Moreover, he reasoned, since undocumented status was not irrelevant to permissible federal legislative goals such as foreign policy and naturalization, undocumented status was not a "constitutional irrelevancy."[229]

The Court then turned to an examination of the right asserted. Justice Brennan began his analysis by citing to *San Antonio v. Rodriguez*, which, he stated, held that education was not a fundamental right under the Constitution.[230] This holding was not dispositive in Justice Brennan's view because education was distinguishable from other forms of social welfare legislation.[231] Referring to cases from a number of areas of constitutional law which have recognized the importance of education to our society,[232] Justice Brennan asserted that although education was not a fundamental right, it played a "fundamental role" in maintaining society.[233] Education, he stated, is the primary vehicle for transmitting societal values and for preparing citizens to participate effectively and intelligently in the American political system.[234]

Having noted the general importance of education, Justice Brennan then discussed the significant costs that a complete denial of education would impose on society and the individual.[235] Justice Brennan observed that even though non-citizens are limited in their ability to participate in our political system, the role of education as preparation for political participation was still important.[236] In support he noted that the lower courts had determined that many of the plaintiff children would remain in the country permanently and eventually become citizens.[237] Even for those who would not eventually become citizens,

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[226] *Id.*

[227] *Id.* at 219 n.19.

[228] *Id.* Although Justice Brennan established that undocumented alien children were not responsible for their status, he apparently did not treat the children as a separate class in determining whether the class was suspect.

[229] *Id.*

[230] *Id.* at 221. *See supra* notes 99-104 and accompanying text.

[231] *Id.*

[232] *Id.* The Court cited Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating under the due process clause a statute which prohibited the teaching of foreign languages before the eighth grade); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (invalidating a statute requiring Bible readings in schools as a violation of the establishment clause); Amback v. Norwick, 441 U.S. 68 (1979) (sustaining against an equal protection challenge a state statute prohibiting certain aliens from teaching in public schools); and Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that a statute requiring Amish children to attend school beyond the eighth grade violated the establishment clause).

[233] 457 U.S. at 221.

[234] *Id.*

[235] *Id.* at 221-23.

[236] *Id.* at 222 n.20.

[237] *Id.*

Justice Brennan asserted, education was important because of its role as a transmitter of societal values, which helps to maintain social order and stability.[238] Consequently, he asserted, the complete denial of education to a discrete group of children imposed great costs on society.[239]

In addition to the costs to society, Justice Brennan also noted the significant costs a lack of education imposed on the individual. The illiteracy caused by a lack of education, he stated, was an enduring disability, which limits a child's advancement on the basis of merit.[240] The ultimate effect of such a disability, Justice Brennan asserted, would take an inestimable toll on the "social, economic, intellectual, and psychological well-being of the individual. . . ."[241] Justice Brennan concluded that strict scrutiny was not appropriate because the statute affected neither a suspect class nor a fundamental right.[242] Nevertheless, he stated, because of the significant costs that the denial of a basic education to a discrete group of children imposes on both society and the individual, the Court would require that the Texas statute be shown to further a substantial state interest if it was to be upheld.[243]

Once he had selected an intermediate standard of review, Justice Brennan turned to the application of that standard to the facts of the case.[244] At the outset, Justice Brennan rejected the proposition that simply because Congress implicitly created the undocumented status of the children, the state could rationally withhold benefits based on that status.[245] That Congress had not sanctioned the children's presence within the United States, he stated, did not necessarily mean that the state could discriminate against them.[246] Justice Brennan noted that although the Court had previously held that a state could regulate undocumented aliens when the regulation furthered both a federal policy and legitimate state goals,[247] he concluded that no federal policy supported the denial of education benefits to undocumented children.[248]

Justice Brennan then addressed the state objectives urged in support of the statute.[249] The Justice summarily disposed of the state's argument that its desire to preserve its limited resources was, without more, sufficient justifica-

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[238] *Id.*

[239] *Id.* at 222.

[240] *Id.*

[241] *Id.*

[242] *Id.* at 223.

[243] *Id.* at 222-24.

[244] *Id.* at 224-230.

[245] *Id.* at 224.

[246] *Id.* at 224-226.

[247] *Id.* In De Canas v. Bica, 424 U.S. 351 (1976), the Court held that a state law which prohibited employers from hiring undocumented aliens was not preempted by the federal Immigration and Nationality Act. *Id.* at 365. The Court found that the state statute was a valid exercise of the state's power to regulate employment and that Congress had not evidenced an intent to occupy the field. *Id.* at 356-58. The Court did not address whether the statute violated the equal protection clause as none of the parties had standing to raise the issue.

[248] 457 U.S. at 226.

[249] *Id.* at 227.

tion for the classification.[250] He then turned to what he considered to be three colorable state interests that might have supported the statute.[251]

Justice Brennan first addressed the state's interest in protecting itself from the potentially harmful economic effects of an influx of undocumented aliens.[252] He noted that the state had not presented evidence that undocumented aliens had burdened the state's economy.[253] In fact, he stated, the district court had found evidence that undocumented aliens contributed more to the state's economy than they received in benefits.[254] Moreover, Justice Brennan found that the dominant incentive for illegal immigration was the availability of employment, not free public education.[255] Even if the state had an interest in detering illegal immigration, he concluded, the denial of educational benefits was a "ludicrously" ineffective means to that end.[256]

The second possible justification for the classification was that undocumented aliens imposed special burdens on the state's education system.[257] Justice Brennan noted that the district court had determined that the exclusion of undocumented children would do little to improve the quality of education in the state.[258] Justice Brennan also noted that in terms of the burdens they imposed on the education system, undocumented children were "basically indistinguishable" from legally resident alien children.[259] Finally, Justice Brennan addressed the state's asserted interest in limiting its educational benefits to children who would remain within the state.[260] Without determining whether such an interest was legitimate, he concluded that there was no indication that undocumented children were more likely than other children to leave the state.[261]

Having thus concluded that no substantial state interest was furthered by the state's classification, Justice Brennan held that Section 21.031 was unconstitutional.[262]

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[250] *Id.*

[251] *Id.* at 228.

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.* at 228-29. The Court noted that the prohibition of employment of undocumented aliens would probably be more effective. *Id.* The lower courts had noted that Texas had not enacted such a statute, thus questioning the state's asserted exclusionary motive. 458 F. Supp. 569, 585 & n.21 (E.D. Tex. 1978).

[257] 457 U.S. at 229.

[258] *Id.*

[259] *Id.* Although the district court found that Mexican immigration had caused overcrowding in the border school districts which was compounded by the poverty of the parents and the special needs of the children, such as bilingual education, free lunches, and free clothing, the court also noted that these characteristics were shared by both legally resident and undocumented alien children. 458 F. Supp. 569, 589 (E.D. Tex. 1978).

[260] 457 U.S. at 229-30.

[261] *Id.* at 230.

[262] *Id.*

B. *The Concurring Opinions*

Justice Marshall filed a brief concurring opinion asserting his belief that education should be considered fundamental.[263] In support of his conclusion, Justice Marshall drew upon his dissent in *San Antonio v. Rodriguez*.[264] As in *Rodriguez*, Justice Marshall argued that "the unique status accorded public education by our society," and the "close relationship between education and some of our most basic constitutional values," demanded that education be considered a fundamental right.[265] Justice Marshall also repeated his criticism of the two-tiered approach to equal protection.[266] He noted that the facts in *Plyler*, in particular, demonstrated the wisdom of an approach which allows varying levels of scrutiny.[267]

Justices Powell and Blackmun also filed concurring opinions, each emphasizing a different aspect of the majority's analysis. Justice Blackmun asserted that the nature of the interest at stake was crucial to the decision in the case.[268] He began his analysis by discussing both the fundamental rights aspect of equal protection and the *Rodriguez* holding that education was not a fundamental right.[269] Blackmun asserted that when nonconstitutional rights were at stake, even those involving the "most basic economic needs of impoverished human beings," no special treatment was warranted under the equal protection clause.[270] Nevertheless, Justice Blackmun concluded that a classification resulting in a *complete denial* of education should trigger stricter standards of review than the rational basis test.[271] The stricter standard was necessary, Justice Blackmun reasoned, because an absolute deprivation of educational benefits, as opposed to the relative deprivation confronting the Court in *Rodriguez*,[272] would create a "sub class of illiterate persons" who would be permanently and insurmountably disadvantaged.[273] Because the majority had concluded that the statute did not further a substantial state interest, Justice Blackmun reasoned that it was not necessary to decide whether an even stricter standard might be called for.[274]

Justice Powell concurred separately in order to emphasize what he considered to be the crucial aspect of the case: the nature of the class of the children

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[263] *Id.* (Marshall, J., concurring).

[264] *Id.*

[265] *Id.* (quoting *Rodriguez*, 411 U.S. 1, 111 (1973) (Marshall, J., dissenting).

[266] 457 U.S. at 231.

[267] *Id.*

[268] *Id.* (Blackmun, J., concurring).

[269] *Id.* at 231-32.

[270] *Id.* at 232 (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)).

[271] *Id.* at 234.

[272] In *Rodriguez*, the Court emphasized that the challenged school financing scheme provided the plaintiff children with an opportunity to acquire basic minimal skills. 411 U.S. 1, 37 (1973). The Court, however, left open the question of whether a state could constitutionally withhold all educational opportunities. *Id. See generally* Michelman, *supra* note 94, at 33-39.

[273] 457 U.S. at 234.

[274] *Id.* at 235.

affected by the statute.[275] Drawing on decisions concerning illegitimacy classifications,[276] Justice Powell asserted that undocumented children should not be discriminated against because they have been assigned a legal status over which they had no control.[277] The appropriate standard of review, he concluded, was an intermediate one which would require that the state's interests be substantial and that the classification bear a "fair and substantial relation" to those interests.[278]

Agreeing with the majority that the state's interests were poorly served by the exclusion of undocumented children from public schools, he concluded that the statute was unconstitutional.[279] Justice Powell noted however, that his conclusion was restricted to a statute which excluded minor children who were not responsible for their presence in the country.[280] He suggested that a different case would be presented if the plaintiff class had included mature minors who were responsible for their violation of the federal immigration laws.[281]

C. *The Dissenting Opinion*

Chief Justice Burger, joined by Justices White, Rehnquist, and O'Connor, filed a dissenting opinion.[282] The dissent criticized the majority for departing from "principled constitutional adjudication" by adopting an "unabashedly result-oriented approach."[283] It agreed with the majority's conclusion that undocumented alien children were not a suspect class, and that education was not a fundamental right.[284] The dissent asserted, however, that the level of scrutiny employed by the majority, was the result of a piecing together of "quasi-fundamental-rights and quasi-suspect-class analysis," custom tailored to the facts of the case.[285] The dissent asserted, therefore, that once the Court had determined that strict scrutiny was not appropriate, it should have limited its inquiry to determining whether the classification bore a "rational relationship to a legitimate state purpose."[286]

According to the dissent, the majority's reliance on cases involving illegitimates was misleading.[287] Unlike illegitimates, the status of undocumented

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[275] *Id.* at 236 (Powell, J., concurring).

[276] *See supra* notes 153-165 and accompanying text.

[277] 457 U.S. at 238.

[278] *Id.* at 239.

[279] *Id.* at 239-40.

[280] *Id.* at 240 n.5.

[281] *Id.*

[282] *Id.* at 242.

[283] *Id.* at 244.

[284] *Id.*

[285] *Id.* Although the dissent cited *Lalli v. Lalli* to distinguish the plaintiff class from the class of illegitimates, it did not discuss the standard of review which *Lalli* applied. Nor did the dissent discuss any other case employing an intermediate standard of review.

[286] *Id.* at 248.

[287] *Id.* at 246.

aliens is a result of Congress's obviously valid exercise of its broad constitutional powers in the field of immigration and nationality.[288] The dissent noted that the majority had not suggested that undocumented alien children, because of their lack of culpability for their illegal status, could not be deported.[289] Because the relationship between the undocumented alien and the United States was a federally prohibited one, the dissent concluded, there could be "no presumption that a State has a constitutional duty to include illegal aliens among the recipients of its governmental benefits."[290] The dissent further stated that numerous federal welfare programs exclude undocumented aliens from participation.[291] The opinion concluded, therefore, that it was rational for the state to deduce that it did not have the same obligations toward people who were not lawfully within the country as it had toward lawful residents.[292]

III. Analysis of the Court's Opinion in *Plyler*

The majority, concurring, and dissenting opinions in *Plyler* are all framed in terms of the traditional, multi-tiered approach to equal protection analysis, in which characterization of the challenged classification determines the appropriate standard of review. There are indications in the majority opinion, however, that Justice Brennan may be attempting to blur the distinctions between the various standards of review, and that he has, at least tacitly, adopted a balancing approach to the resolution of equal protection cases. This section of the casenote examines the analytical models employed in the *Plyler* opinions. First the majority opinion in *Plyler* is discussed, focusing on Justice Brennan's departure from the traditional model of equal protection analysis.[293] It is submitted that the majority opinion in fact undertakes a balancing of the competing interests involved in the case. Then, different models of equal protection balancing are set forth and analyzed, and a five factor model is proposed.[294] The majority and concurring opinions are then examined in light of this proposed model.[295] Finally, the merits of employing a balancing approach in equal protection analysis are discussed, drawing in particular on Chief Justice Burger's dissent in *Plyler*.[296]

A. *The Majority Opinion and Equal Protection Balancing*

At first glance, Justice Brennan's majority opinion in *Plyler v. Doe* appears to have undertaken a traditional equal protection analysis. The opinion identi-

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[288] *Id.*
[289] *Id.*
[290] *Id.*
[291] *Id.* at 251.
[292] *Id.* at 250-51.
[293] *See infra* notes 297-307 and accompanying text.
[294] *See infra* notes 308-322 and accompanying text.
[295] *See infra* notes 326-34 and accompanying text.
[296] *See infra* notes 235-342 and accompanying text.

fied three possible standards under which the challenged classification might be reviewed: the rational basis, strict scrutiny, and intermediate standards.[297] The selection of the appropriate standard, Justice Brennan asserted, depended on the nature of the class or the right affected.[298] Nevertheless, upon closer examination, it is apparent that Justice Brennan's reasoning departs in several respects from the analysis traditionally applied by the Court. Ordinarily, in determining the appropriate standard of review in equal protection cases, the focus of the Court's analysis is on whether the class affected is "suspect" and whether the right or benefit burdened is "fundamental." Justice Brennan, however, summarily disposed of both contentions in the earliest part of his analysis. Justice Brennan's discussion of the suspect class issue was relegated to a textual statement noting that undocumented status is not immutable,[299] and to a footnote which neither cited nor discussed any equal protection cases.[300] He also disposed of the fundamental rights issue with a perfunctory cite to *San Antonio v. Rodriguez*.[301] In spite of the fact that a significant amount of equal protection analysis since the Warren Court era has focused on these issues, Justice Brennan concluded that the identification of a class as suspect or a right as fundamental was an "abstract question."[302]

There are other indications in Justice Brennan's opinion which suggest that he was attempting to downplay the Court's traditional emphasis on rigid categorizations of classes, rights, and standards of review. For example, Justice Brennan identifies an intermediate level of scrutiny that requires the classification to further "some substantial goal of the State."[303] Ordinarily, under the intermediate test, the Court has required that the statutory classification bear *a substantial relation* to a substantial or important state interest.[304] In light of the Court's history of using a precisely and consistently formulated test, Justice Brennan's departure from the traditional wording is probably not inadvertent.

Although the *substantial state interest* test that he articulates might be thought to be indicative of an intention to focus primarily on the importance of the state's interest, and less on the relationship between the means and the ends, an examination of his reasoning in *Plyler* indicates that this is not the case.[305] In his discussion of the various interests asserted in support of the Texas statute, Justice Brennan considered the relationship between the interest

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[297] 457 U.S. at 216-18.

[298] *Id.*

[299] *Id.* at 220.

[300] *Id.* at 219.

[301] *Id.* at 221.

[302] *Id.* at 223.

[303] *Id.* at 224.

[304] *See supra* notes 146-165 and accompanying text.

[305] Such an approach would be directly contrary to the intermediate level approach proposed by Professor Gunther, which focused on the relationship between the means and the ends but did not consider the relative importance of the interests asserted. *See supra* notes 187-190 and accompanying text.

and the classification employed, as well as the substantiality of the state's interest.[306] Rejecting as a justification for the statute the state's interest in protecting itself from an influx of illegal immigrants, he noted that the primary incentive for such immigration is employment rather than education, and that charging tuition was a "ludicrously ineffectual" means to achieve that objective.[307] From this it does not appear that Justice Brennan intended to suggest a new, less demanding intermediate scrutiny test. Rather, Justice Brennan's approach can be seen as an effort to deemphasize the significance of the particular words or standard selected. Moreover, it is submitted that the reasoning of the majority opinion in *Plyler,* best can be described as a weighing of the individual and state interests, consistent with a balancing model of equal protection analysis.

B. *A Balancing Approach to Equal Protection Analysis*

1. The Balancing Approach Defined

In 1970, in *Dandridge v. Williams,* Justice Marshall first asserted that the Supreme Court had applied and should apply a balancing process in reviewing equal protection challenges to legislative classifications.[308] In *Dandridge*, the Court upheld a state regulation which imposed a maximum on welfare benefits regardless of the number of children in the family.[309] The Court concluded that the regulation was in the area of economics and social welfare and needed only meet the demands of the rational basis test.[310] Justice Marshall, dissenting, asserted that the limitation was grossly overinclusive and underinclusive in terms of the purpose of the statute, and unless the state showed a persuasive justification for the classification, the regulation was not rational.[311] The majority, he alleged, avoided any analysis of the statute in issue by focusing on the "abstract dichotomy" between the two approaches to equal protection review traditionally employed by the Court.[312] Rather than focus on the *a priori* definition of a right, fundamental or otherwise, Justice Marshall asserted, concentration should be placed on three factors: (1) "the character of the classification in question, [(2)] the relative importance to individuals in the class discriminated against of the governmental benefits they do not receive, and [(3)] the asserted state interests in support of the classification."[313] Since *Dandridge*, Justice Marshall has consistently asserted that a balancing model most accurately explains the analysis which the Court undertakes in its review of equal protection challenges.[314]

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[306] 457 U.S. at 228.
[307] *Id.*
[308] 397 U.S. 471, 521 & n.15 (1970) (Marshall, J., dissenting).
[309] *Id.* at 486.
[310] *Id.* at 484-85. *See supra* notes 95-98 and accompanying text.
[311] *Id.* at 519-27.
[312] *Id.*
[313] *Id.* at 520-21.
[314] *See* cases cited *supra* note 202.

According to Justice Marshall's interpretation, when fundamental rights or suspect classes are involved, the balancing approach is functionally equivalent to strict scrutiny.[315] Under such circumstances, the weight which would be accorded the character of the class or the importance of the right would be such that it could, in essence, only be balanced by the demonstration of a compelling state interest.[316] Similarly, classifications involving simple economic regulation ordinarily would be balanced by a showing that the classification is rationally related to a legitimate state purpose.[317] According to Justice Marshall, the advantages of the balancing approach become apparent when the Court deals with traditionally less protected rights and classes,[318] such as education,[319] employment,[320] welfare benefits,[321] and old age.[322]

Although Marshall consistently identifies three factors which the Court considers in balancing equal protection claims, one commentator has persuasively argued that the Court's decisions in fact involve the balancing of four factors; two on the individual's side and two on the government's.[323] In this four-factor model, the Court considers (1) the nature of the personal interest that is burdened and (2) the extent of the burden, on the individual's side; on the government's side, the Court considers (3) the nature of the governmental interest served by the statute at issue, and (4) the extent to which that interest is served, i.e., the fit between the means and the end.[324] Marshall's balancing test and the four-factor model overlap to a certain extent. Both consider the nature of the personal interest affected and the importance of the governmental interest served. Moreover, although Marshall refers only to the *strength* of the state interest involved, his application of the balancing test in equal protection cases demonstrates that he also considers the closeness of the means-ends fit in weighing the state's interest, as does the four-factor model. For example, in *Dandridge*, Marshall noted that "to the extent there is a legitimate state interest in encouraging the heads of [welfare] households to find employment, application of the maximum grant regulation is also grossly *underinclusive* because it singles out and affects only large families."[325] Justice Marshall thus considers the effectiveness of the means chosen by the state, as well as the importance of the state's interest.

Justice Marshall's balancing test and the four-factor model differ in that only Justice Marshall considers the nature of the class disadvantaged, while the

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[315] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. at 319 n.1.

[316] *See id.*

[317] *Id.*

[318] *Id.* at 319 n.1.

[319] San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting).

[320] *Murgia*, 427 U.S. 307, 321-27 (1976) (Marshall, J., dissenting).

[321] Dandridge v. Williams, 397 U.S. 471, 519-30 (1970) (Marshall, J., dissenting).

[322] *Murgia*, 427 U.S. at 321-27.

[323] Note, *supra* note 188, at 869.

[324] *Id.*

[325] 397 U.S. at 527 (Marshall, J., dissenting) (emphasis in original).

four-factor model considers the *extent* to which the individual's interest is burdened. It is submitted that any attempt to explain the Court's past decisions in terms of a balancing model must account for the elements of Marshall's three-prong balancing test as well as those of the four-factor model. An accurate balancing model should consider the nature of the class discriminated against, since it is clear that certain classifications, such as those based on race, can only be balanced by a compelling state interest, even when the individual's interest is slight and the burden is not great. In addition, the model would consider the extent to which the personal interest is burdened, because the Court has upheld slight infringements on important personal interests.[326] This casenote proposes therefore, a five-factor balancing model which encompasses all the factors the Court has relied on in past equal protection decisions. The five-factor model would weigh (1) the nature of the class burdened, (2) the importance of the individual interest burdened, and (3) the *extent* to which the interest is burdened, against (4) the importance of the governmental interest asserted and (5) the fit between the means selected and the ends sought.

2. The Balancing Approach Applied

The functioning of the proposed five-factor balancing model can be illustrated by examining two equal protection cases whose results are difficult to reconcile under traditional equal protection theories. *Trimble v. Gordon*[327] and *Lalli v. Lalli*[328] both involved equal protection challenges to state statutes that limited the ability of illegitimates to inherit by intestate succession from their fathers' estates.[329] In *Trimble*, the state required that illegitimate children seeking to claim under their fathers' estates have been legitimated by the intermarriage of their parents. Similarly, in *Lalli*, the state required that illegitimates who claimed under fathers' estates have had the father's paternity decided in a judicial proceeding prior to the father's death. Although the statutes were similar, the Court struck down the statute in *Trimble* while it upheld the statute in *Lalli*. When analyzed in terms of the balancing model however, the results in the two cases are not inconsistent. In both statutes, the nature of the class discriminated against — illegitimates; the importance of the state's interest — assuring the orderly disposition of estates; and the importance of the individual's interest — the right to inherit, were identical. In *Lalli*, however, the challenged statute placed less of a burden on illegitimates claiming under their fathers' estates than did the statute in *Trimble*. While an illegitimate can seek a judicial determination of paternity, he or she cannot affect the marriage of his or her parents. Moreover, the statute in *Lalli*, because it excluded fewer illegitimate children who could otherwise present a claim without jeopardizing

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[326] *See, e.g.*, Lalli v. Lalli, 439 U.S. 762 (1972).
[327] 430 U.S. 762 (1977).
[328] 439 U.S. 259 (1978).
[329] *See supra* notes 153-165 and accompanying text.

the orderly administration of estates, was more closely related to the state's interest than the statute in *Trimble*. The lessening of the burden imposed on the class in *Lalli*, combined with the closer fit between statutory means and ends, could be seen as sufficient to shift the equal protection balance in favor of the state.

C. Plyler *as a Balancing Decision*

The five-factor balancing test can be further illustrated with the majority opinion of *Plyler*. Although Justice Brennan framed the issues presented in *Plyler* in terms of a three-tiered model, his analysis can be seen as tacitly following the five-factor balancing test. Justice Brennan began by discussing the nature of the class, noting its underclass status.[330] He pointed out that the Texas statute was directed at a special sub-class of undocumented children, who were not responsible for their legal status.[331] He then addressed the importance of the governmental benefit withheld. He noted that the Court had consistently recognized the importance of education in our society.[332] This importance, he stated, was not significantly lessened by the fact that the children involved were not citizens.[333] He then discussed the high cost of a denial of education for both the individual and society.[334] Having thus examined the nature of the class and the importance of the right or benefit withheld, he concluded that, to justify the statute, the state would have to show that its interests were substantial.[335] He then considered the interests asserted in support of the statute. He noted that the state's interest in preserving its resources, standing alone, was not substantial enough to justify the classification.[336] He then considered the interests asserted by the state in support of the statute, addressing both the substantiality of the state's interest and the relationship between the interest and the classification.[337] He concluded that the asserted justifications were insufficient to uphold the classification, in light of the substantial costs imposed by the statute.[338]

Despite Justice Brennan's apparent tacit acceptance of a balancing approach, the concurring and dissenting opinions demonstrate that a majority of the Court continues to apply a more traditional two or three-tiered analysis. Although Justices Powell and Blackmun both joined the Court's opinion as well as its judgement, their rationales differed considerably from Justice Brennan's. Justice Brennan's discussion of the nature of the class of undocumented alien children and the importance of the educational benefits withheld was

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[330] 457 U.S. at 218-19.
[331] *Id.* at 219-20.
[332] *Id.* at 221-22.
[333] *Id.* at 222 n.20.
[334] *Id.* at 221-23.
[335] *Id.* at 223-24.
[336] *Id.* at 227.
[337] *Id.* at 228-30.
[338] *Id.* at 230.

directed at determining how significant a state interest would be required to shift the equal protection balance in favor of the state. Justices Powell and Blackmun, however, emphasized that the crucial issue was the characterization or categorization of the right and class affected, from which the appropriate standard could be determined. Justice Powell noted that he considered the nature of the class of undocumented children to be essential to the proper resolution of the case. Relying on the Court's decisions concerning illegitimacy classifications, Justice Powell concluded that because the children were not responsible for their status, they could not be discriminated against without a showing that the classification was substantially related to a substantial state interest. Justice Blackmun stated that he found the nature of the right to be crucial to the proper resolution of the case. Moreover, Justice Blackmun's opinion contains suggestions that he continues to find a two-tiered approach to equal protection appropriate. Consequently, although he differs with the dissent on the proper characterization of the denial of a right to education, he appears to accept a similar model of equal protection analysis.

D. *An Assessment of Equal Protection Balancing*

The situation before the Court in *Plyler v. Doe* illustrates the inadequacy of the traditional two-tiered model of equal protection. The class of undocumented alien children, and the right to a basic minimum of education, are not easily characterized in terms of either the rational basis or strict scrutiny tests. Although there are few restrictions on Congress's ability to regulate aliens, both those who have entered the country lawfully as well as those who are here unlawfully, the states have no similar broad power. Yet under traditional equal protection analysis, the nature of the class itself would determine the standard to which the statute will be subjected. Thus, deference to federal regulations cannot easily be reconciled with heightened scrutiny of state regulations. An intermediate standard of review which employs a balancing process is flexible enough, however, to account for the differences between federal and state interests.

The very flexibility that a balancing approach provides also gives rise to an unpredictability in equal protection law. A balancing approach necessitates more of a case-by-case approach to equal protection analysis than is required when categories are narrowly defined and outcomes readily predicted. The analysis is in many ways subjective; courts and individual judges will disagree how much weight should be accorded governmental and individual interests, and how much precision should be required in different statutory schemes.[339] Despite the subjectivity and unpredictability of balancing, however, it is still to be preferred to the traditional two-tiered approach. Balancing can at least take into account the wide range of individual interests implicated by the equal protection clause without completely tying the hands of government.

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[339] *See generally* Note, *supra* note 188, at 869-91.

Chief Justice Burger, dissenting in *Plyler*, asserted that the majority opinion would stand for little outside the facts of the particular cases. "In the end," he stated, "we are told little more than that the level of scrutiny employed to strike down the Texas law applies only when illegal alien children are deprived of a public education."[340] He noted that the majority implied that the equal protection clause would not require that the state provide welfare benefits to illegal aliens.[341] Although this is perhaps the very type of flexibility that is desirable in equal protection analysis, the Chief Justice appears to object to the lack of clearly identifiable standards that is inherent in a balancing approach.

Although there is an inherent danger that a balancing approach will result in ad hoc decisions, balancing need not be unprincipled.[342] A balancing process could result in "a body of standards applicable to different legislative subjects, personal interests, and classificatory traits."[343] Similar balancing processes are employed by the Court in reviewing challenges to legislative actions under the first amendment and the due process clauses of the fifth and fourteenth amendments.[344] The discomfort of many with a balancing approach in the equal protection context arises from the fact that equal protection values, in contrast to those of the first amendment, are not clearly defined in the Constitution. Opponents of a more active judicial approach to equal protection analysis argue that when the Court balances competing interests, it is usurping the legislative function.[345] Legislative policymaking, they argue, involves the very weighing that a balancing process entails, and courts would simply substitute their opinions as to the appropriate balance for those of the legislature.[346] Inherent in the principle of judicial review of legislative decisions, however, is recognition that the Constitution may require more or less than the political process will supply. By adopting a balancing approach in equal protection cases, the Court merely undertakes to perform its own function in a manner that most fully and honestly supports the principles of the Constitution.

CONCLUSION

Despite the apparent balancing of interests undertaken by the majority in *Plyler*, the Court continues to adhere at least outwardly to the tiered model of equal protection analysis that evolved under the Warren Court. Whether or not it is considered desirable, however, a balancing model more accurately describes the analysis undertaken by the Court on equal protection cases. As

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[340] 457 U.S. at 244 (Burger, C.J., dissenting).

[341] *Id.* n.3.

[342] Note, *supra* note 188, at 889.

[343] *Id.*

[344] For a discussion of the problems and benefits of balancing in the first amendment context, see generally Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972).

[345] *Cf.* Barrett, *supra* note 70, at 875-88.

[346] *Id.*

long as the Court continues to obscure its true analysis with the terminology of the Warren Court, the focus of debate will remain on the "abstract questions" of whether a classification is "suspect," or a right is "fundamental." A more forthright presentation of the majority's analysis would allow the dialogue among the different factions on the Court and legal commentators to contribute to the development of a consistent and comprehensible equal protection doctrine.

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