

Boston College Third World Law Journal

Volume 16

Issue 2 *The Owen M. Kuperschmid Holocaust and
Human Rights Project Seventh International
Conference*

Article 4

5-1-1996

Equal Protection and the Undocumented Immigrant: California's Proposition 187

Kristen M. Schuler

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/twlj>

 Part of the [Immigration Law Commons](#)

Recommended Citation

Kristen M. Schuler, *Equal Protection and the Undocumented Immigrant: California's Proposition 187*, 16 B.C. Third World L.J. 275 (1996), <http://lawdigitalcommons.bc.edu/twlj/vol16/iss2/4>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Third World Law Journal by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

EQUAL PROTECTION AND THE UNDOCUMENTED IMMIGRANT: CALIFORNIA'S PROPOSITION 187

KRISTEN M. SCHULER*

“Who among us is aboriginal? Indeed those who are aboriginal, the ones we call Native Americans, are the only ones we treat as badly as we treat new immigrants.”¹

I. INTRODUCTION

Proposition 187,² the recently passed California ballot initiative which seeks to deny all social services except emergency medical care to undocumented immigrants,³ has caused significant controversy in the State of California and around the nation. The legal battles which began the day after the passage of the initiative are likely to continue for months or years. Meanwhile, California Governor Pete Wilson has ordered that regulations be drafted to facilitate the implementation of the measure should it survive judicial scrutiny.⁴ The determination and vested interests of advocates on both sides of the issue could bring the Proposition, or at least major parts of it, before the U.S. Supreme Court for decision.⁵

* Executive Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL.

¹ Stephen Yagman, attorney for schoolchildren opposing Proposition 187, quoted during oral argument in Reporter's Transcript of Proceedings at 9, *League of United Latin Am. Citizens v. Wilson*, No. CV. 94-7569 (S.D. Cal. Dec. 14, 1994), available in LEXIS, Hottop Library, Extra File.

² State of California, Proposition 187, available in LEXIS, Hottop Library, Extra File [hereinafter *Proposition 187*].

³ I am choosing to use the term “undocumented immigrants” to describe those individuals residing in the United States who have not been documented as residents. Such people have also been referred to as “illegal aliens” throughout history, and therefore that term will be used where appropriate to accurately reflect certain time periods.

⁴ LULAC Transcript at 26, *League of United Latin Am. Citizens v. Wilson*, No. CV. 94-7569 (S.D. Cal. Dec. 14, 1994), available in LEXIS, Hottop Library, Extra File.

⁵ See Paul Feldman, *State Suit Over Prop. 187 is Moved to Federal Court*, L.A. TIMES, Feb. 24, 1995, at 21 [hereinafter Feldman, *State Suit Moved*]; David Savage, *High Court to Hear Welfare Challenge*, L.A. TIMES, Jan. 17, 1995, at 15.

This type of xenophobic and exclusionary measure is not new for California.⁶ For most of this century, California has passed laws and supported policies designed to deny services, opportunities and personal freedoms to its non-white residents, often regardless of their citizenship status.⁷ Most of the more recent measures have been levied against those of Mexican or Central American origin,⁸ while pre-World War II measures were directed toward Japanese immigrants or Japanese Americans.⁹ Action taken against Hispanic immigrants, both documented and undocumented, has been widespread throughout the latter part of this century.¹⁰ Today that discrimination continues with Proposition 187, which deprives undocumented immigrants of most public social services.¹¹ It represents a ripe opportunity for the Supreme Court to clarify the rights of undocumented immigrants in this country and shed some light on an issue that is in the forefront of the conservative political debate.

This Note will begin with a discussion of Proposition 187, its immediate effects, and the central arguments both in favor of the measure and against it. It will also review the preliminary legal challenges to the Proposition and the results of those challenges. Next, this Note will explore background on the treatment of two groups of non-white immigrants in California, Japanese and Hispanic, and the judicial response to measures designed to deprive these groups of their rights. Finally, it will explore a potential equal protection analysis of Proposition 187 by the current Supreme Court.

II. PROPOSITION 187—AN EMBATTLED REFERENDUM AND ITS INITIAL LEGAL CHALLENGES

On November 8, 1994, the voters of California passed the ballot initiative known as Proposition 187 which would deny almost all social

⁶ See *RACISM IN CALIFORNIA: A READER IN THE HISTORY OF OPPRESSION* v (Roger Daniels & Spencer C. Olin, Jr. eds., 1972) [hereinafter *RACISM IN CALIFORNIA*]; see generally TOMAS ALMAGUER, *RACIAL FAULTLINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* (1994) (giving an extensive view of the situation of immigrants and Native-Americans in California before the twentieth century).

⁷ See generally ALMAGUER, *supra* note 6.

⁸ See generally LEO R. CHAVEZ, *SHADOWED LIVES—UNDOCUMENTED IMMIGRANTS IN AMERICAN SOCIETY* (1992) (an anthropological study of undocumented immigrants in Southern California).

⁹ See *RACISM IN CALIFORNIA*, *supra* note 6, at vi-vii.

¹⁰ See generally CHAVEZ, *supra* note 8.

¹¹ *The Message of Prop. 187*, WASH. POST, Nov. 13, 1994 at C6; see *Proposition 187*, *supra* note 2.

services to undocumented immigrants.¹² Proponents of the measure have claimed predominantly economic justifications, contending that

¹²The relevant text of the proposed law is as follows:

SECTION 5. Exclusion of Illegal Aliens from Public Social Services. Section 10001.5 is added to the Welfare and Institutions Code, to read: 10001.5. (a) In order to carry out the intention of the People of California that only citizens of the United States and aliens lawfully admitted to the United States may receive the benefits of public social services and to ensure that all persons employed in the providing of those services shall diligently protect public funds from misuse, the provisions of this section are adopted. (b) A person shall not receive any public social services to which he or she may be otherwise entitled until the legal status of that person has been verified as one of the following: (1) a citizen of the United States. (2) An alien lawfully admitted as a permanent resident. (3) An alien lawfully admitted for a temporary period of time. (c) If any public entity in this state to whom a person has applied for public social services determines or reasonably suspects, based upon the information provided to it, that the person is an alien in the United States in violation of federal law, the following procedures shall be followed by the public entity: (1) The entity shall not provide the person with benefits or services. (2) The entity shall, in writing, notify the person of his or her apparent illegal immigration status, and that the person must either obtain legal status or leave the United States. (3) The entity shall also notify the State Director of Social Services, the Attorney General of California, and the United States Immigration and Naturalization Service of the apparent illegal status, and shall provide any additional information that may be requested by any other public entity.

SECTION 6. Exclusion of Illegal Aliens from Publicly Funded Health Care. Chapter 1.3 (commencing with Section 130) is added to Part 1 of Division 1 of the Health and Safety Code to read: Chapter 1.3. Publicly-Funded Health Care Services 130. (a) In order to carry out the intention of the People of California that, excepting emergency medical care as required by federal law, only citizens of the United States and aliens lawfully admitted to the United States may receive the benefits of publicly-funded health care, and to ensure that all persons employed in the providing of those services shall diligently protect public funds from misuse, the provisions of this section are adopted. (b) A person shall not receive any health care services from a publicly-funded health care facility, to which he or she is otherwise entitled, until the legal status of that person has been verified as one of the following: (1) A citizen of the United States. (2) An alien lawfully admitted as a permanent resident. (3) An alien lawfully admitted for a temporary period of time. (c) If any publicly-funded health care facility in this state, from whom a person seeks health care services, other than emergency medical care as required by federal law, determines or reasonably suspects, based upon the information provided to it, that the person is an alien in the United States in violation of federal law, the following procedures shall be followed by the facility: (1) The facility shall not provide the person with services. (2) The facility shall, in writing, notify the person of his or her apparent illegal immigration status, and that the person must either obtain legal status or leave the United States. (3) The facility shall also notify the State Director of Health Services, the Attorney General of California, and the United States Immigration and Naturalization Service of the apparent illegal status, and shall provide any additional information that may be requested by any other public entity. (d) For purposes of this section "publicly funded health care facility" shall be defined as specified in Sections 1200 and 1250 of this code as of January 1, 1993.

the 1.6 million undocumented immigrants in California have caused the state to approach bankruptcy; it is estimated that between \$2 billion and \$5 billion is spent annually on public services to the undocumented population.¹³ They also maintain that passage of the measure will send a message to the federal government that the State of California demands enforcement of federal immigration laws.¹⁴

Opponents of the Proposition claim that it is a racist measure, that eliminating undocumented children from schools would create a new illiterate underclass, and that denying medical care to undocumented

SECTION 7. Exclusion of Illegal Aliens from Public Elementary and Secondary Schools. Section 48215 is added to the Education Code, to read: 48215. (a) No public elementary or secondary school shall admit, or permit the attendance of, any child who is not a citizen of the United States, an alien lawfully admitted as a permanent resident, or a person who is otherwise authorized under federal law to be present in the United States. (b) Commencing January 1, 1995, each school district shall verify the legal status of each child enrolling in the school district for the first time in order to ensure the enrollment or attendance only of citizens, aliens lawfully admitted as permanent residents, or persons who are otherwise authorized under federal law to be present in the United States. (c) By January 1, 1996, each school district shall have verified the legal status of each child already enrolled and in attendance in the school district in order to ensure the enrollment or attendance only of citizens, aliens lawfully admitted as permanent residents, or persons who are otherwise authorized to be present in the United States. (d) By January 1, 1996, each school district shall also have verified the legal status of each parent or guardian of each child referred to in subdivisions (b) and (c), to determine whether such parent or guardian is one of the following: (1) A citizen of the United States. (2) An alien lawfully admitted as a permanent resident. (3) An alien lawfully admitted for a temporary period of time. (e) Each school district shall provide information to the State Superintendent of Public Instruction, the Attorney General of California, and the United States Immigration and Naturalization Service regarding any enrollee or pupil, or parent or guardian, attending a public elementary or secondary school in the school district determined or reasonably suspected to be in violation of federal immigration laws within forty-five days after becoming aware of an apparent violation. The notice shall also be provided to the parent or legal guardian of the enrollee or pupil, and shall state that an existing pupil may not continue to attend the school after ninety calendar days from the date of the notice, unless legal status is established. (f) For each child who cannot establish legal status in the United States, each school district shall continue to provide education for a period of ninety days from the date of the notice. Such ninety day period shall be utilized to accomplish an orderly transition to a school in the child's country of origin. Each school district shall fully cooperate in this transition effort to ensure that the educational needs of the child are best served for that period of time [hereinafter Proposed Law].

¹³ Brad Hayward, *Prop. 187 Charges to Victory*, SACRAMENTO BEE, Nov. 9, 1994, at A1 [hereinafter Hayward, *Prop. 187 Charges*].

¹⁴ Ken McLaughlin, *California Approves Proposition 187; Challenges Loom*, ARIZ. REP., Nov. 9, 1994, at A1 [hereinafter McLaughlin, *Challenges Loom*].

immigrants would lead to the spread of disease and the birth of unhealthy United States citizens.¹⁵ Finally, they express fear that its passage and implementation would threaten federal funding for the state, since many federal grant programs are specifically designed for the provision of services to immigrants.¹⁶ Despite these rational and compelling public policy objections, the measure has garnered extensive political support, especially from Republicans like California Governor Pete Wilson, whose support of the measure may have been the deciding factor in his victory over non-supporting gubernatorial challenger Kathleen Brown.¹⁷ The initiative was also a major issue in the California Senatorial race as incumbent victor Dianne Feinstein opposed the measure, while her opponent, Michael Huffington, endorsed it.¹⁸

However, Republican leaders Jack Kemp, former Secretary of Housing and Urban Development, and William Bennett, former Secretary of Education, have publicly denigrated the measure, and have been accused of being disloyal to Pete Wilson, a fellow Republican, because of their actions.¹⁹ Kemp has called the measure unconstitutional and un-Republican, while Bennett has expressed his opinion that it fosters racism, which he considers "poison in a democracy."²⁰

The anti-immigrant sentiment embodied in the initiative has led to some radically racist suggestions. One California state assemblyman has proposed that identification cards should be required for all Hispanics in California, regardless of their citizenship status.²¹ Proposition 187 itself also includes extreme provisions, such as companions to federal law requiring employers to verify the documentation of prospective employees, and to refuse to hire those not able to comply.²² It also contains provisions which require children to report their parents,

¹⁵ *Id.* Both the U.S. Constitution and federal law provide that all persons born on U.S. soil are natural-born citizens, regardless of the status of their parents. See U.S. CONST. amend. XIV, § 1; 8 U.S.C. § 1401a (1994); *Butler v. Penix*, 171 F.2d 761, 762 (5th Cir. 1949), *cert. denied*, 337 U.S. 926.

¹⁶ Hayward, *Prop. 187 Charges*, *supra* note 13, at A1.

¹⁷ David S. Broder, *Wilson Wants Feds to Pay for Illegals*, PLAIN DEALER, Feb. 19, 1995, at 1C.

¹⁸ Mary McGrory, *Decency in Dissent*, WASH. POST, Oct. 25, 1994, at A2 [hereinafter McGrory, *Decency in Dissent*].

¹⁹ *Id.*

²⁰ *Id.* In a year during which Jack Kemp has had presidential ambitions, his stance on Proposition 187 may be politically unpopular, and he has already been told that he can "forget about California." *Id.*

²¹ *Id.*

²² 8 U.S.C. § 1324a (1994).

and teachers to report their students, for being undocumented.²³ As one Los Angeles Board of Education member stated,

The proposition states that those "suspected" of not being legally documented will be questioned. That means anyone who looks foreign, speaks with an accent or doesn't fit into the stereotype of a blond, blue-eyed, red-blooded American. This would create conflict, paranoia and controversy.²⁴

Already, United States citizens who appear Hispanic are asked to show their documentation on a regular basis.²⁵ These citizens fear that Proposition 187 will legitimize these harassing inquiries.²⁶

Negative repercussions of Proposition 187 are already being felt. The portion of the act purporting to deny medical care to undocumented persons has been particularly harmful. Even before the election, while proponents harangued about the money denial of medical care would save, opponents were countering that disease could spread more easily without medical care, even to the documented and citizen population.²⁷ Within the two weeks after the measure passed, hospital outpatient clinics and community facilities reported a ten to twenty percent decline in patient visits, since undocumented patients feared deportation if they kept their appointments.²⁸ One death has already been blamed on the measure; a 12-year-old boy died of leukemia complications when his parents, hearing of the passage of the proposition, were afraid to take him to his clinic appointments.²⁹

The Initial Legal Challenges to Proposition 187

As expected, given the drastic nature of Proposition 187 and adverse human consequences, several legal challenges to halt its implementation were launched immediately after its passage.³⁰ In these

²³ See Proposed Law, *supra* note 12 at Section 7; McGrory, *Decency in Dissent*, *supra* note 18, at A2.

²⁴ Alicia Doyle & Antonio Olivo, *Prop. 187's Impact Upon Race Relations*, L.A. TIMES, Nov. 4, 1994, at 2.

²⁵ Peter H. King, *On California—They Kept Coming*, L.A. TIMES, Nov. 9, 1994, at 3.

²⁶ See *id.*

²⁷ McLaughlin, *Challenges Loom*, *supra* note 14, at A1.

²⁸ *Immigrants Wary of Clinic Visits*, WASH. POST, Nov. 27, 1994, at A4.

²⁹ Lee Romney & Jeff Brazil, *Boy's Death Stirs Debate Over California's Immigrant Initiative*, WASH. POST, Nov. 25, 1994, at A3.

³⁰ *E.g.*, *League of United Latin Am. Citizens v. Wilson*, No. 94-7569 MRP (Jrx) (C.D. Cal. Nov. 15, 1994) available in LEXIS, Hottop Library, Extra File; *Gregorio T. v. Wilson*, No. 94-7652 JMI (GHlx) (C.D. Cal. Nov. 9, 1994) available in LEXIS, Hottop Library, Extra File.

preliminary proceedings, the California Attorney General's Office and Governor Wilson have been mostly unsuccessful in both federal and state courts as they attempt to defend their referendum.³¹ One representative legal action attacking the entire initiative is a Civil Rights Complaint for Declaratory and Injunctive Relief in the class action *Gregorio T. v. Wilson*, in which most of the named plaintiffs are represented by the ACLU Foundation of Southern California.³² The complaint states five causes of action challenging the constitutionality of Proposition 187.³³ Most significantly for the purposes of this Note, the plaintiff class claims that the initiative violates their Fourteenth Amendment Equal Protection rights.³⁴

The Equal Protection component of the ACLU complaint maintains that Proposition 187 creates a class of undocumented immigrants, defined as "persons suspected of not meeting the state's immigration standards," and denies that class public benefits which the state grants others similarly situated.³⁵ The plaintiffs claim that the classification is suspect or quasi-suspect, and that the rights denied are fundamental or quasi-fundamental.³⁶ They also allege an absence of a compelling or important state interest for the classification or denial of rights.³⁷ Finally, they maintain that the classification and denial of rights is not necessary or narrowly tailored to accomplish any legitimate state purposes.³⁸ To support these contentions, the plaintiffs cite the California

³¹ See, e.g., LULAC Stipulated Restraining Order, League of United Latin Am. Citizens v. Wilson, No. 94-7569-MRP (C.D. Cal. Nov. 22, 1994).

³² *Gregorio T.*, No. 94-7652 JMI (GH1X), slip op. at 1.

³³ Complaint for Declaratory and Injunctive Relief of Plaintiff Gregorio T., *Gregorio T. v. Wilson*, No. 94-7652 JMI (GH1x) (C.D. Cal. Nov. 9, 1994) available in LEXIS, Hottop Library, Extra File [hereinafter *Gregorio T. Complaint*].

³⁴ *Id.* at ¶¶ 53-57. The plaintiffs also claim that Proposition 187 violates the Supremacy Clause of the Constitution, Article VI, Clause 2. They claim that the states have no power to pass any laws regulating or burdening immigration, which is relegated to the Federal Government by Article I, Section 8, Clause 4, or laws which burden foreign affairs, relegated to the Federal Government by Article I, Section 8, Clauses 1,3, and 10-16; Article II, Section 2, Clauses 1 and 2, Section 3. *Id.* at ¶¶ 39-43. Another cause of action raised by the plaintiffs is that Proposition 187 is preempted by the Immigration and Nationality Act, 8 U.S.C. § 1101, which they claim "strikes a delicate balance between the rights of the nation to regulate immigration and the rights of aliens within the country" and should not be altered by state action. *Id.* at ¶¶ 44-52. The plaintiffs also argue that Proposition 187 violates the Civil Rights Act, 42 U.S.C. § 1983. *Id.* at ¶¶ 65-68.

³⁵ See *id.* at ¶ 54.

³⁶ *Id.* at ¶ 55.

³⁷ *Id.*

³⁸ *Id.*

Constitution's provisions recognizing not only education as a fundamental right, but also the property rights of aliens.³⁹

The nine named plaintiffs in this class allege various potential harms from the implementation of Proposition 187, ranging from deportation to death.⁴⁰ Seven-year-old encephalitis patient Gregorio T. maintains that he would enter a permanent vegetative state should his medical treatment be ceased.⁴¹ Xiomara T. claims that she will not seek prenatal care out of fear of deportation to Nicaragua, where nine of her relatives have already been assassinated and where she has received death threats.⁴² Thirteen-year-old Carlos P. argues that since he has recently had a kidney transplant, the loss of medical care will render him unable to receive anti-rejection medication which will undoubtedly cause his death.⁴³ The other named plaintiffs claim similar potential harm from both the denial of services and possible deportation to their native countries.⁴⁴

The plaintiffs requested relief in the form of a declaration of the unconstitutionality of Proposition 187, the issuance of a Temporary Restraining Order, and a Preliminary Injunction enjoining the defendants from implementing and enforcing Proposition 187.⁴⁵ On November 22, 1994 Judge Mariana Pfaelzer issued a Stipulated Restraining Order preventing the implementation of Section 7 of Proposition 187 denying education to undocumented children.⁴⁶ In December of 1994, after extensive argument, she issued a preliminary injunction halting the denial of education, medical and social services, as well as the reporting requirements embodied in the initiative.⁴⁷

In her order granting the injunction, Judge Pfaelzer stated that she had considered the state's interest not only in the fact that 60% of the voters had approved Proposition 187, but also in conserving their resources.⁴⁸ Despite this statement, the request for injunction as to sections four, five, six, seven, and nine—the main sections denying

³⁹ *Id.* at ¶ 56.

⁴⁰ *See id.* at ¶¶ 15–23.

⁴¹ *Id.* at ¶ 15.

⁴² *Id.* at ¶ 16.

⁴³ *Id.* at ¶ 18.

⁴⁴ *See id.* at ¶¶ 15–23.

⁴⁵ *Id.* at ¶¶ 69–74.

⁴⁶ LULAC Stipulated Restraining Order, *League of United Latin Am. Citizens v. Wilson*, No. 94–7569-MRP (C.D. Cal. Nov. 22, 1994).

⁴⁷ *See* LULAC Transcript at 40, *League of United Latin Am. Citizens v. Wilson*, No. CV. 94–7569 (S.D. Cal. Dec. 14, 1994), available in LEXIS, Hottop Library, Extra File.

⁴⁸ *Id.* at 37.

services—was granted on preemption, due process and equal protection reasoning.⁴⁹ Judge Pfaelzer agreed with the plaintiffs that the hardships caused by the measure undoubtedly fell on the plaintiff class for all of the enjoined measures.⁵⁰ In assessing the plaintiffs' likelihood of success on the merits, she cited to precedent and relevant law to indicate her belief that there was at least a "fair chance of success" on all challenges.⁵¹

In response to subsequent requests by the plaintiffs' attorneys citing the harmful consequences of the passage of Proposition 187 previously discussed, Judge Pfaelzer later issued a directive order to state officials.⁵² They were required to make clear to state employees and to the public that there would be no enforcement of the elements of Proposition 187 denying social services.⁵³ The order required that state officials distribute a copy of the preliminary injunction to school districts, police agencies, publicly funded health care facilities and government health and welfare offices across California, and that information bulletins explaining the document be posted in those areas as well.⁵⁴

In another ruling strongly opposed by the state, Judge Pfaelzer allowed the California Association of Catholic Hospitals and the Catholic Health Association of the United States to intervene in the lawsuit on theological and legal grounds.⁵⁵ Their petition to intervene cited their moral obligation as Catholic institutions to provide medical care to all persons regardless of citizenship, and they plan to offer expertise about the potential impact of implementation on hospitals.⁵⁶ This ruling is important as it indicates Judge Pfaelzer's willingness to hear all sides of the Proposition 187 issue and to examine it carefully, which the State undoubtedly realizes is not in the measure's best interest. The church is likely to raise some of the moral and religious arguments that the state seeks to prevent since they could have significant emotional impact.

⁴⁹ *Id.* at 40; see Proposed Law, *supra* note 12.

⁵⁰ *Id.* at 39, 40.

⁵¹ *Id.* at 38.

⁵² Paul Feldman, *State Must Tell Public About Prop. 187 Delay*, L.A. TIMES, Jan. 20, 1995, at 3 [hereinafter Feldman, *State Must Tell Public*].

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Paul Feldman, *Judge Allows 2 Church Groups to Enter Prop. 187 Court Fight*, L.A. TIMES, Jan. 10, 1995, at 3.

⁵⁶ *Id.*

Consequently, the federal injunction issued by Judge Pfaelzer has already been appealed to the U.S. Court of Appeals by the State of California, where success is unlikely since the Ninth Circuit would have to find that the judge abused her discretion in issuing the order.⁵⁷ Governor Wilson has also retaliated by filing a suit in Superior Court in San Francisco in an attempt to remove the issue from federal court.⁵⁸ In that suit, the State of California maintains that a state court ruling, such as the one sought by Wilson, barring Proposition 187's educational provisions from taking effect, removes the need for a federal injunction, and that Judge Pfaelzer should therefore abstain from deciding the case.⁵⁹ In the concerted effort to halt the progress of the federal lawsuit, the California Attorney General's office also filed a motion for abstention in Judge Pfaelzer's court on February 3, 1995.⁶⁰ They maintained that "it is well settled that it is the province of the state courts to construe state law," and threatened a motion to dismiss if the judge refused to abstain.⁶¹ The basis for the state's argument is that since Proposition 187 is a state law, the state must have a reasonable opportunity to interpret it before the constitutionality is decided by a federal judge.⁶² The major problem for California is that the initiative clearly implicates the protections of the United States Constitution, which will ultimately be interpreted by federal courts.⁶³

On November 20, 1995, in the last ruling preceding this publication, Judge Pfaelzer struck down most of Proposition 187 on federal preemption grounds, stating that it created an "impermissible state

⁵⁷ Feldman, *State Suit Moved*, *supra* note 5, at 21.

⁵⁸ Patrick J. McDonnell, *State Appeals U.S. Order Blocking Prop. 187*, L.A. TIMES, Jan. 31, 1995, at 18 [hereinafter McDonnell, *State Appeals*].

⁵⁹ *Id.*

⁶⁰ See Paul Feldman, *State Asks Judge to Dismiss Prop. 187 Case*, L.A. TIMES, Feb. 4, 1995, at 22. [hereinafter Feldman, *State Asks Judge to Dismiss*].

⁶¹ *Id.* ACLU attorney Mark Rosenbaum indicated his disapproval of this forum shopping posture, and his belief that the suit will eventually end up in federal court by quipping, "[t]hey are ignoring the advice of the great constitutional scholar Muhammad Ali, who said, 'you can run, but you can't hide.'" See Paul Feldman, *State Tries to Wrest Prop. 187 Case From U.S. Judge*, L.A. TIMES, Feb. 21, 1995, at 3.

⁶² See Feldman, *State Asks Judge to Dismiss*, *supra* note 60, at 3. The relevant abstention doctrine for this case is the *Pullman* doctrine. That doctrine states that a federal court must abstain from deciding an issue when state law is uncertain and a state court's clarification of state law might make a federal court's constitutional ruling unnecessary. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 595 (1989).

⁶³ See Feldman, *State Asks Judge to Dismiss*, *supra* note 60, at 3. Governor Wilson has had little success in federal court on another immigration matter as well. On February 13, a federal judge dismissed his lawsuit against the federal government to recover the costs of serving illegal immigrants. *Around the Nation - Reimbursement Denied*, WASH. POST, Feb. 14, 1995, at A11. Wilson has vowed to appeal that decision all the way to the U.S. Supreme Court. *Id.*

scheme to regulate immigration."⁶⁴ The only portions she did not strike down were fine and sentencing provisions for those convicted of manufacturing or selling false citizenship documents.⁶⁵ A motion to reconsider the ruling was filed on November 30, 1995 by the State of California, and Judge Pfaelzer has instructed attorneys on both sides to point out any unresolved issues, and has set a future hearing date.⁶⁶ Despite the severity of Pfaelzer's ruling, Proposition 187 supporters are quick to point out that they will exercise their right to appeal to a higher court, and that legislation similar to Proposition 187 is currently pending in Congress, where complete power over immigration undoubtedly lies.⁶⁷

Proposition 187 has not received a positive response in state court either.⁶⁸ Judge Stuart Pollak of the San Francisco Superior Court issued a preliminary injunction blocking the provision barring undocumented immigrants from attending public universities, stating that the petitioners were likely to prevail at trial.⁶⁹ Judge Pollak had issued a temporary

⁶⁴ Laura Mecoy, *Prop. 187 Backers Hope to Win Appeal*, SAN FRANCISCO EXAMINER, Nov. 24, 1995, at A27.

⁶⁵ *Proposition 187 Hearing Set*, SACRAMENTO BEE, Nov. 30, 1995, at B2.

⁶⁶ *Id.*

⁶⁷ Mecoy, *supra* note 64, at A27.

⁶⁸ Maura Dolan, *Prop. 187 Ban on Higher Education Blocked*, L.A. TIMES, Feb. 9, 1995, at 3.

⁶⁹ *Id.* The federal injunction issued by Judge Pfaelzer did not block this provision since she concluded that she did not have jurisdiction over the state's universities. See LULAC Transcript, *supra* note 1, at 40. The text of the section dealing with post secondary education reads as follows:

SECTION 8. Exclusion of Illegal Aliens from Public Postsecondary Educational Institutions. Section 66010.8 is added to the Education Code to read: 66010.8. (a) No public institution of postsecondary education shall admit, enroll, or permit the attendance of any person who is not a citizen of the United States, an alien lawfully admitted as a permanent resident in the United States, or a person who is otherwise authorized under federal law to be present in the United States. (b) Commencing with the first term or semester that begins after January 1, 1995, and at the commencement of each term or semester thereafter, each public postsecondary educational institution shall verify the status of each person enrolled or in attendance at that institution in order to ensure the enrollment or attendance only of United States citizens, aliens lawfully admitted as permanent residents in the United States, and persons who are otherwise authorized under federal law to be present in the United States. (c) No later than 45 days after the admissions officer of a public postsecondary educational institution becomes aware of the application, enrollment or attendance of a person determined to be, or who is under reasonable suspicion of being, in the United States in violation of federal immigration laws, that officer shall provide that information to the state Superintendent of Public Instruction, the Attorney General of California, and the United States Immigration and Naturalization Service. The Information shall also be provided the applicant, enrollee, or person admitted.

Proposition 187, *supra* note 2, at § 8.

restraining order in November that halted the initiative's denial of education on the state level.⁷⁰

In the aftermath of these federal and state lawsuits, ensuing restraining orders and preliminary injunctions, only one portion of Proposition 187 remains valid, enforceable, and in use: Section 2 which provides for a five year sentence or \$75,000 fine for those convicted of selling false immigration documentation has not been challenged and has therefore become part of the penal code.⁷¹ However, contrary to the wishes of Proposition 187 proponents, the first defendants convicted under the initiative entered into a plea bargain granting them a lesser sentence than that provided by Section 2.⁷² Prosecutors maintain that the sentence provided by Section 2 is not mandatory, and that they have discretion in making plea bargains in such cases.⁷³ Apparently, even the one surviving provision of Proposition 187 is not working in the manner in which its drafters had envisioned. The extreme nature of the measures currently under injunction, and the drastic changes their implementation would cause in California, renders them open to this very type of resistance by prosecutors.

Although its draconian proposals may seem a product of new conservatism, Proposition 187 does not represent a new philosophy or attitude toward immigrants in California; Japanese and Hispanic immigrants, both documented and undocumented, have been discriminated against and legislated against for many years.⁷⁴ Some measures were more successful than others. Most were challenged in the courts by civil rights organizations or individuals, with varying judicial responses. The next two sections will present a survey of the major examples of such initiatives and the response of various courts to the ensuing challenges.

⁷⁰ Dolan, *supra* note 68, at 3.

⁷¹ Paul Feldman, *Forgers Get 6 Months in Prop. 187 Plea Bargain*, L.A. TIMES, Jan. 5, 1995, at 1. [hereinafter Feldman, *Forgers Get 6 Months*]. The text of the section reads:

SECTION 2. Manufacture, Distribution or Sale of False Citizenship or Resident Alien Documents: Crime and Punishment. Section 113 is added to the Penal Code, to read: 113. Any person who manufactures, distributes or sells false documents to conceal the true citizenship or resident alien status of another person is guilty of a felony, and shall be punished by imprisonment in the state prison for five years or by a fine of seventy-five thousand dollars (\$75,000).

Proposition 187, *supra* note 2, at § 2.

⁷² *Id.* at 1.

⁷³ *Id.*

⁷⁴ See generally RACISM IN CALIFORNIA, *supra* note 6 (giving an extensive history of the treatment of non-whites in California throughout the Twentieth Century).

III. THE JAPANESE EXPERIENCE IN CALIFORNIA

The Japanese who immigrated to the West Coast of the United States in the early part of the twentieth century experienced significant difficulties.⁷⁵ They had the serious disadvantage of arriving after the Chinese, who had previously been the subject of prejudice and exclusion because of their unwillingness to assimilate with Californians.⁷⁶ The Japanese came from the same area as the Chinese, were similar in physical appearance to the Chinese, and, perhaps most importantly, accepted the same low economic rank.⁷⁷ Californians fused the two groups together and applied their prejudices equally to both. They were not content to let the Japanese occupy a higher economic rank than had the Chinese, and enacted measures to prevent that eventuality.⁷⁸

A. *Alien Land Laws*

Even before the Japanese Empire became the enemy of the United States in World War II, Californians had begun to promote and propose policies designed to exclude those of Japanese descent from the state and its economy. In the early 1900s, the main goal of citizens was to halt the acquisition of agricultural land by Japanese immigrants.⁷⁹ In California politics, a main proponent of such initiatives was Democratic activist James D. Phelan, who wrote to presidential candidate Woodrow Wilson in 1911,

It is vital, I believe, for our civilization [and] for the preservation of our domestic institutions . . . that Oriental coolies be excluded from these shores. . . . Even where coolies are capable of doing a day's work, . . . should they be allowed . . . to lower the standards of living . . . of members of the white race, who stand for home life, Republican Government and Western civilization?⁸⁰

⁷⁵ See generally CAREY McWILLIAMS, *PREJUDICE: JAPANESE AMERICANS, SYMBOL OF RACIAL INTOLERANCE* (1944) (giving an early twentieth century account of the treatment of the Japanese in America).

⁷⁶ Yamato Ichihashi, *Anti-Japanese Agitation*, in *RACISM IN CALIFORNIA*, *supra* note 6, at 105; see ALMAGUER, *supra* note 6, at 154-55.

⁷⁷ Ichihashi, *supra* note 76, at 106.

⁷⁸ See *id.*

⁷⁹ Roger Daniels, *The Progressives Draw the Color Line*, in *RACISM IN CALIFORNIA*, *supra* note 6, at 117.

⁸⁰ *Id.* at 125.

In 1913, two different kinds of alien land bills were introduced in the California legislature: one barring all aliens from the ownership of land, the other barring only those aliens who were "ineligible to citizenship."⁸¹ A bill limiting leases of agricultural land to terms of three years, and barring further land purchases by aliens, passed the legislature and was signed by the Governor of California in May of 1913.⁸² The bill represented the first official act of racism and discrimination aimed at the Japanese.⁸³ Some citizens of California protested that the bill was too easy to circumvent, while others condemned it as inspired by the "rudimentary race hatred . . . deeply imbedded in the social life of California."⁸⁴ In 1920, a new Alien Land Act was passed to close the loopholes in the 1913 version, but it had little of the effect its proponents desired.⁸⁵ For some citizens, merely restricting the land ownership of the Japanese was not enough, they wanted their complete exclusion from California.⁸⁶

The Supreme Court ruled in three separate cases, decided within a week of each other in 1923, that California could constitutionally exclude aliens ineligible for citizenship from any interest in agricultural land.⁸⁷ The Supreme Court reasoned that the Fourteenth Amendment was not designed to affect the right of the states to prohibit alien ownership or possession of land.⁸⁸ The Court's reasoning behind supporting California's distinction between aliens eligible for citizenship and those not eligible was that the latter group "[c]an never become the support and dependence of this nation but remain the support, maintenance and dependence of their own government."⁸⁹

⁸¹ *Id.* at 128.

⁸² *See id.* at 132.

⁸³ McWILLIAMS, *supra* note 75, at 45.

⁸⁴ Daniels, *supra* note 79, at 133.

⁸⁵ McWILLIAMS, *supra* note 75, at 64. The average acreage of Japanese farms in California was reduced from 80.1 acres in 1920 to 44 in 1940, but the total value of their production actually increased between those years. *Id.*

⁸⁶ *Id.*; ALMAGUER, *supra* note 6, at 186.

⁸⁷ *Porterfield v. Webb*, 263 U.S. 225, 228 (1923); *Webb v. O'Brien*, 263 U.S. 313, 326 (1923); *Frick v. Webb*, 263 U.S. 326, 334 (1923). In all three cases, Justice Butler rendered almost exactly the same extremely brief written opinion regarding the constitutional issue. It is interesting to note that Justices McReynolds and Brandeis did not think there was a justiciable question involved in any of the three cases and had promoted dismissal, indicating that the issue of the rights of Japanese Americans were not very important to the high court. *Porterfield*, 263 U.S. at 233; *O'Brien*, 263 U.S. at 326; *Frick*, 263 U.S. at 334. *Cf.* *Oyama v. California*, 332 U.S. 633 (1947) (a post World War II decision in which there were two concurring opinions and two dissenting opinions rendered in a case involving exactly the same issue, indicating a greater willingness on the part of the Court to recognize the rights of the Japanese-American).

⁸⁸ *Porterfield*, 263 U.S. at 228.

⁸⁹ *Id.* at 229.

In 1947, a post-war challenge to that Alien Land Act reached the Supreme Court, which declined to rule on the constitutionality of the statute since its decision could be reached on other grounds.⁹⁰ However, a scathing concurrence by Justice Black expressed his view that the statute was a violation of the Equal Protection Clause of the Fourteenth Amendment.⁹¹ Another concurrence by Justice Murphy stated that the law “[i]s rooted deeply in racial, economic and social antagonisms.”⁹² Therefore, although the Court refused to consider the constitutional issue, the sentiments of at least some of its members were obvious.

The California courts soon adopted this sentiment and declared their Alien Land Act unconstitutional as violative of the Fourteenth Amendment in 1952.⁹³ The Supreme Court of California cited the guidance of the Supreme Court of the United States in both *Oyama v. California* and *Takahashi v. Fish and Game Commission*,⁹⁴ another case upholding the individual rights of the Japanese, and declared the law invalid. While the decision was not unanimous, the court emphatically overruled previous cases upholding the Alien Land Act, stating that the law “[i]s obviously designed and administered as an instrument for effectuating racial discrimination. . . .”⁹⁵ Unfortunately, this judicial recognition of the real purpose behind the legislation came too late for the numerous Japanese Americans who had lost their property or had it escheat to the state. The type of reasoning and sentiment that had led to the passage of the Alien Land Act in the early part of the century was a haunting prelude to the justifications given for the complete exclusion of the Japanese from American society just twenty years later.

B. *Wartime Exclusion and Internment*

The exclusion and internment of Japanese Americans during World War II is one of the most egregious and horrible acts of the twentieth century, and has been described as “[t]he most widespread disregard of personal rights since . . . slavery.”⁹⁶ The Japanese attack on Pearl

⁹⁰ *Oyama*, 332 U.S. at 647.

⁹¹ *Id.* (Black, J., concurring).

⁹² *Id.* at 662 (Murphy, J., concurring).

⁹³ *Fujii v. State*, 242 P.2d 617, 639 (Cal. 1952).

⁹⁴ 334 U.S. 410 (1948). This case invalidated a California statute which denied commercial fishing licenses to “aliens ineligible for citizenship” on equal protection grounds. 334 U.S. at 427.

⁹⁵ *Fujii*, 242 P.2d at 630.

⁹⁶ Roger Daniels, *Why It Happened Here*, in *RACISM IN CALIFORNIA*, *supra* note 6, at 167 [hereinafter Daniels, *Why It Happened Here*].

Harbor on December 7, 1941, was an event that sparked terror in the minds of West Coast Americans as fears of an attack on the mainland became prevalent.⁹⁷ However, in California, the fear and racism had begun even before the bombs fell.⁹⁸

In March of 1935 a California Congressman told his Washington colleagues that there were 25,000 armed Japanese on the West Coast ready to take to the field in case of war.⁹⁹ This "yellow peril" was partially a product of the actions of the California press which referred to Japanese as "japs," "nips," "yellow men," "mad dogs" and "yellow vermin," all terms which seized upon the fear of Californians and promoted the widespread hysterical racism.¹⁰⁰ A 1940 editorial by prominent journalist William Randolph Hearst reads, "Colonel Knox¹⁰¹ should come out to California and see the myriads of little Japs peacefully raising fruits and flowers on California sunshine, and saying hopefully . . . : 'Some day I come with Japanese army and take all this.'"¹⁰² Given this type of pre-Pearl Harbor sentiment and anti-Japanese hysteria, the internment of the Japanese was unlikely to offend the sensibilities of the majority of Californians.

In February of 1942, the full West Coast Congressional delegation, led by Senator Hiram Johnson of California, submitted a letter to President Roosevelt suggesting the immediate evacuation of all persons of Japanese lineage from the United States.¹⁰³ On February 19 Roosevelt signed Executive Order No. 9066, authorizing the War Department to exclude any or all persons from prescribed military areas.¹⁰⁴ General De Witt was placed in charge of the military areas, and immediately began issuing proclamations which effectively ordered all persons of Japanese ancestry to leave the zones.¹⁰⁵ Congress assisted De Witt with Public Law No. 503, declaring it a criminal offense for an excluded person to refuse to leave.¹⁰⁶ Then Attorney General Earl Warren testified extensively before Congress regarding his belief in the necessity

⁹⁷ PETER IRONS, *JUSTICE AT WAR—THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* 26 (1983).

⁹⁸ See generally McWILLIAMS, *supra* note 75.

⁹⁹ *Id.* at 106-7.

¹⁰⁰ Daniels, *Why it Happened Here*, *supra* note 96, at 168.

¹⁰¹ Colonel Knox was then the Secretary of the Navy under President Roosevelt. IRONS, *supra* note 97, at 4.

¹⁰² McWILLIAMS, *supra* note 75, at 107.

¹⁰³ *Id.* at 108.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 109.

¹⁰⁶ *Id.*

of exclusion, stating that “[a]ny delay in the adoption of the protective measures is to invite disaster . . . we too will have in California a Pearl Harbor incident.”¹⁰⁷ Logistical problems with the evacuation process led to the internment of evacuees in “assembly centers” and “relocation centers,” as the Japanese were given a choice between prison and these “concentration camps.”¹⁰⁸

The military reasons given for the exclusion of the Japanese were numerous and marginally convincing, but the danger of sabotage and risk of espionage by Japanese living in the United States were the most heavily relied upon by General De Witt.¹⁰⁹ Special interest groups in California exerted considerable political pressure in support of mass evacuation.¹¹⁰ These groups were predominantly produce producers in a state where Japanese produce production had an estimated annual value of \$35 million, and where their share of the Los Angeles florist business was valued at approximately \$4 million annually.¹¹¹ There is no doubt that these special interests stood to gain economically from a complete exclusion of Japanese persons, and their influence cannot be under-emphasized.¹¹²

C. *Judicial Response*

Although support for exclusion and internment in California’s political power structure was widespread and militant, a few evacuees had the courage to challenge the laws, although their efforts went essentially unrewarded.¹¹³ Four of the plaintiffs’ cases reached the Supreme Court, either by their agreeing to be part of a test case or by chance arrest.¹¹⁴ Two of the four cases arose out of California incidents; they involved Fred Toyosaburo Korematsu and Mitsuye Endo.¹¹⁵

¹⁰⁷ *The Testimony of Attorney General Earl Warren: Hearings Before the Select Comm. Investigating National Defense Migration*, reprinted in *RACISM IN CALIFORNIA*, *supra* note 6, at 153.

¹⁰⁸ See *IRONS*, *supra* note 97, at 75.

¹⁰⁹ *McWILLIAMS*, *supra* note 75, at 110. The Supreme Court later found that there was no evidence of disloyalty by Japanese-Americans. *Korematsu v. United States*, 323 U.S. 214, 236 (1944).

¹¹⁰ *McWILLIAMS*, *supra* note 72, at 128.

¹¹¹ *Id.* at 127.

¹¹² *Id.* at 128.

¹¹³ *IRONS*, *supra* note 97, at 75.

¹¹⁴ *Id.*

¹¹⁵ See *id.* at 93–99. Two prior cases had arisen out of incidents in other West Coast States. *Hirabayashi v. United States*, 320 U.S. 81 (1943), was a planned test case in Washington where Hirabayashi turned himself in to the FBI and announced his refusal to comply with the evacuation order. *IRONS*, *supra* note 97, at 88. He was arrested for curfew violations, so his case reached the

Fred Korematsu did not intend to be a test case; although he was an American citizen, he had in fact undergone plastic surgery after the exclusion order was handed down to avoid evacuation.¹¹⁶ He was nevertheless arrested and convicted; and his appeal represents a landmark Supreme Court decision.¹¹⁷ The Court's opinion, like those before it, relies heavily on a military necessity argument, emphasizing, "Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire."¹¹⁸ However, unlike its predecessor decisions involving curfews,¹¹⁹ this case had three dissenting opinions. Justices Roberts, Murphy, and Jackson dissented from the Court's ruling, writing separate opinions expressing their views that the exclusion and internment orders were unconstitutional.¹²⁰ Justice Murphy maintained, "[S]uch exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."¹²¹ Some members of the Court were beginning to recognize that racism and discrimination had almost as much to do with the treatment of the Japanese as did military necessity.¹²²

The final challenge to the internment came in the form of a *habeas corpus* action brought by Mitsuye Endo challenging her detention in a California relocation center.¹²³ The Court ordered Endo's release after she proved her loyalty to the United States, therefore severing any rational relationship between her detention and the wartime anti-espionage campaign.¹²⁴ Again, the Court did not reach the constitutional issue, and Justice Murphy was incited to write a concurring opinion again expressing his view, "[r]acial discrimination of this

high court on that issue. *Id.* at 92. The court invoked military necessity and war powers to uphold the constitutionality of the curfew, and Hirabayashi's conviction. See *Hirabayashi*, 320 U.S. at 104.

Similarly, *Yasui v. United States*, 320 U.S. 115 (1943), was a planned test case in Oregon to challenge the curfew proclamation in that area. IRONS, *supra* note 97, at 81. The case, although it was instituted six months before *Hirabayashi*, reached the court at the same time and was published later. The court cited *Hirabayashi*'s precedent and upheld Yasui's conviction in a two-page opinion. See *Yasui*, 320 U.S. at 117.

¹¹⁶ IRONS, *supra* note 97, at 96.

¹¹⁷ *Korematsu v. United States*, 323 U.S. 214 (1944).

¹¹⁸ *Id.*, 323 U.S. at 223.

¹¹⁹ See *supra* note 115 and accompanying text.

¹²⁰ See *Korematsu*, 323 U.S. at 225-48.

¹²¹ See *id.* at 233 (Murphy, J., dissenting).

¹²² See *id.*

¹²³ IRONS, *supra* note 97, at 100. Her lawyer described the accommodations at the camp, located in a converted race track near San Francisco in the following manner, "[t]hey'd put a family in a stall big enough for one horse, with whitewash over the manure . . . [g]uards with machine guns stood at the gates." *Id.* at 102.

¹²⁴ See *Ex Parte Endo*, 323 U.S. 283, 302 (1944).

nature bears no reasonable relation to military necessity, and is utterly foreign to the ideals and traditions of the American people."¹²⁵

In 1948, Congress passed a statute that would allow those who lost real and personal property because of the internment to recover for their property damages.¹²⁶ The act, as interpreted by the courts, did not allow compensation for damages from death or personal injury, personal inconvenience, physical hardship, or mental suffering.¹²⁷ Over 26,000 claims were filed and approximately \$37 million was distributed.¹²⁸ Therefore, although those traumatized by their experience were ultimately reimbursed by the government for their lost property, the experiences of the individuals incarcerated by the military are unforgettable.

IV. DOCUMENTED AND UNDOCUMENTED HISPANIC IMMIGRANTS

Japanese Americans are not the only non-white minority group that has been discriminated against and persecuted by Californians. Even during the time of the internment, Mexican Americans were beginning to experience the same treatment and hysterical persecution that the Japanese had, but there was no war to justify it.¹²⁹ Although the sense of national danger did not exist with respect to the Mexican Americans, discrimination against them was prevalent because their allegedly squalid and separate lifestyle increasingly marginalized them from the white population.¹³⁰

Hostility and racist attitudes towards residents and immigrants in California from Mexico and Central America has varied historically. An article written in the late 1940s described a California where de facto discrimination was prevalent while the laws of California purported to prevent it.¹³¹ The author described incidents where students on a school field trip had to sit in segregated areas of the movie theater, one for "whites" and one for "Mexicans."¹³² He also described a city council which placed a sign in the bathhouse of a public pool reading

¹²⁵ *Id.* at 308 (Murphy, J. concurring).

¹²⁶ American-Japanese Evacuation Claims Act, 50 U.S.C. §§ 1981-1987 (1988).

¹²⁷ *Hohri v. United States*, 586 F. Supp. 769, 784 (D. D.C. 1984).

¹²⁸ *Id.* at 785.

¹²⁹ Ralph H. Turner & Samuel J. Surace, *Zoot-Suiters and Mexicans*, in *RACISM IN CALIFORNIA*, *supra* note 6, at 210.

¹³⁰ W. Henry Cooke, *The Segregation of Mexican-American School Children in Southern California*, in *RACISM IN CALIFORNIA*, *supra* note 6, at 221-22.

¹³¹ *Id.* at 223.

¹³² *Id.* at 222.

FOR WHITE RACE ONLY, and expressly admitted that it was for the purpose of keeping out the "Mexican" children who desired to swim there.¹³³

Anthropologist Leo Chavez has found that heightened concern about immigration often follows periods of economic downturn in California, such as that occurring in the early 1980s, which may have set off a cycle culminating in Proposition 187.¹³⁴ Over the years, Californians, especially residents of southern San Diego county, have engaged in some reasonably harsh action to prevent and discourage immigration. One extreme example is the "Light Up the Border" rally, where San Diegans line up their cars at the border and shine their headlights on it to express their opposition to immigration.¹³⁵ A 1986 candidate for the County Board of Supervisors once remarked:

Nowhere else in San Diego County do you find the huge gangs of illegal aliens that line our streets, shake down our schoolchildren, spread diseases like malaria, and roam our neighborhoods looking for work or homes to rob. We are under siege in North County. . . .¹³⁶

This extreme political sentiment gave rise to many specific measures designed to discriminate against those immigrants in nearly every aspect of their lives.

A. *English-Only Initiatives: Proposition 63*

Although the movement to declare English the official language of the United States has been directed at groups other than the Spanish-speaking, in California, they were undoubtedly one of the logical targets.¹³⁷ In 1986, California voters passed Proposition 63, which amended their state constitution to declare English the official language of California.¹³⁸ Not intended to be merely symbolic, the amend-

¹³³ *Id.* at 223.

¹³⁴ CHAVEZ, *supra* note 8, at 15.

¹³⁵ *Id.* at 17.

¹³⁶ *Id.*

¹³⁷ See Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293, 302 (1989). A recent *U.S. News & World Report* poll indicated that 73% of Americans favor making English the official language of the government, which would mean printing government forms only in English. Susan Headden, *One Nation, One Language?*, U.S. NEWS & WORLD REP., Sept. 25, 1995, at 40.

¹³⁸ Cal. Const. art. III, § 6(b) (1995).

ment gives the legislature the power to enforce it, and directs them and state officials to take all necessary steps to ensure that the role of the English language is preserved.¹³⁹ The legislature is also prohibited from making a law that diminishes or ignores the role of English as the official language of the state.¹⁴⁰

English-Only proponents have unsuccessfully attempted to use Proposition 63 to eliminate services such as bilingual voting assistance and bilingual education.¹⁴¹ The amendment has also been cited by defendants in cases where discriminatory policies have been challenged. In *Teresa P. v. Berkeley Unified School District*,¹⁴² U.S. English (USE), a prominent group supporting the measure filed an amicus brief asserting that Proposition 63 explicitly rejected bilingual education.¹⁴³ The court did not reach the issue raised by the group, but the filing of the brief is indicative of the sentiments of such grassroots organizations.¹⁴⁴

Similarly, in *Gutierrez v. Municipal Court*¹⁴⁵ the defendants used Proposition 63 as a defense against a wrongful discharge claim, maintaining that the firing of a non-English speaking employee was justified since an English-only workplace was required by the State Constitution.¹⁴⁶ The workplace in question was the clerk's office of a municipal court,¹⁴⁷ so the defendants argued that the amendment required the use of English in all official state business, thereby requiring the plaintiff, a Hispanic employee, to communicate in English while at work.¹⁴⁸ The Ninth Circuit rejected the constitutional argument since the interpretation was not a fair reading of the provision itself and since the legislative history accompanying the ballot initiative did not support such a reading.¹⁴⁹

¹³⁹ *Id.* at § 6(c).

¹⁴⁰ *Id.*

¹⁴¹ Califa, *supra* note 137, at 302.

¹⁴² Civ. Action No. C 87 2396 DLJ (N.D. Cal. Feb. 14, 1989).

¹⁴³ Califa, *supra* note 137, at 302 & n.69. This group's reputation was severely tainted eight years ago when its founder wrote a memo suggesting that Hispanics have "greater reproductive powers" than Anglos. Headden, *supra* note 137, at 40.

¹⁴⁴ *Id.* at n.69.

¹⁴⁵ 838 F.2d 1031 (9th Cir. 1988).

¹⁴⁶ *Id.* at 1043.

¹⁴⁷ *Id.* at 1036.

¹⁴⁸ *Id.* at 1043.

¹⁴⁹ *Id.* at 1043-44.

Proponents of the English-Only amendment claim that it will force recent immigrants to learn English, something they believe the immigrants have not been doing.¹⁵⁰ They maintain that these immigrants' inability to speak English makes them poor, unskilled, and uneducated, thereby posing a threat to the nation.¹⁵¹ However, 98% of Hispanic parents think that knowing English is essential, and the waiting lists for English classes are tremendous, thereby indicating that legal coercion is unnecessary.¹⁵² This attempt to mold immigrants into clones of "Americans" is misguided and unnecessary, and partially arises out of fear that Spanish will one day overtake English as the dominant language of the United States.¹⁵³

The push for an English-Only policy reflects an irrational fear of Hispanic immigration and power which has become instilled in American citizens.¹⁵⁴ Especially in California, where the border is loosely controlled, such measures represent simplistic solutions to complex problems, born out of racism and fear.¹⁵⁵ It is also a reminder of the state's history of prejudice toward speakers of foreign tongues.¹⁵⁶ The 1986 Constitutional amendment can be seen as both a result of many years of immigration and racism and a precursor to the extreme measures proposed by Proposition 187 and passed by the voters of the state.

B. Education

The education system of California has not escaped the effects of racism and discrimination. Education has been described by the Supreme Court as "[p]erhaps the most important function of state and local governments" and "[t]he very foundation of good citizenship."¹⁵⁷ However, at both the public school and university levels in California, segregation and discrimination against those of Hispanic lineage has been prevalent.¹⁵⁸

¹⁵⁰ Califa, *supra* note 137, at 312.

¹⁵¹ *Id.* at 313.

¹⁵² *Id.* at 316.

¹⁵³ *See id.* at 322.

¹⁵⁴ *See id.* at 328.

¹⁵⁵ *See id.* at 329.

¹⁵⁶ *See* Headden, *supra* note 137, at 41-42.

¹⁵⁷ *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

¹⁵⁸ *See generally* Cooke, *The Segregation of Mexican-American School Children*, *supra* note 130. This is one type of measure that was also leveled against those of Japanese descent in the early part of the century. In 1909, a bill was proposed in the California legislature to segregate the public schools along racial lines. Rhetoric described Japanese school children as "[m]atured Japs, with their base minds, their lascivious thoughts, multiplied by their race . . . sitting in the seats

In the 1940s, public schools in California were segregated by race along the lines of white or Mexican the same way they were segregated between whites and blacks.¹⁵⁹ In the late years of World War II, parents of Mexican-American school-children and the organized group known as the League of United Latin American Citizens¹⁶⁰ brought suit against four Orange County school districts for their segregation policies.¹⁶¹ The plaintiffs asked the Federal District Court for an injunction, maintaining that their Fourteenth Amendment equal protection right had been violated.¹⁶²

The federal judge for the Southern District of California declared that the segregation of pupils of Mexican descent was unconstitutional stating, “[A] paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage.”¹⁶³ The Ninth Circuit affirmed.¹⁶⁴ Although the case was not decided on the issue of race, since Mexicans were considered Caucasian, the court decided that the Mexican children were classified based on their national descent and were deprived of the equal protection of the laws.¹⁶⁵ Despite this decision, de facto segregation of Mexican-Americans and white public school students still existed in some counties of California.¹⁶⁶

In the area of higher education, California courts have held that undocumented immigrants cannot qualify as residents of California for tuition purposes.¹⁶⁷ The decision followed an earlier published opinion handed down by the California Attorney General John K. Van De Kamp.¹⁶⁸ Such a statutory provision was held not to deny such immigrants equal protection of the laws given that the state had numerous legitimate interests.¹⁶⁹ They included: not subsidizing violations of law, preferring to educate its own lawful residents, avoiding enhancing the

next to the pure maids of California . . .” Daniels, *The Progressives Draw the Color Line*, *supra* note 79, at 118.

¹⁵⁹ Cooke, *The Segregation of Mexican-American School Children*, *supra* note 130, at 220.

¹⁶⁰ This group remains active today, and is a plaintiff in one of the legal challenges to Proposition 187. See, e.g., *League of United Latin Am. Citizens v. Wilson*, No. CV. 94-7569 (S.D. Cal. Dec. 14, 1994), available in LEXIS, Hottop Library, Extra File.

¹⁶¹ Cooke, *The Segregation of Mexican-American School Children*, *supra* note 130, at 224.

¹⁶² *Id.*

¹⁶³ *Id.* at 226.

¹⁶⁴ *Westminster School Dist. v. Mendez*, 161 F.2d 774, 781 (1947).

¹⁶⁵ *Id.* at 777.

¹⁶⁶ Cooke, *The Segregation of Mexican-American School Children*, *supra* note 130, at 228.

¹⁶⁷ *Regents Univ. of Cal. v. Superior Ct.*, 276 Cal. Rptr. 197, 201 (Cal. App. 2 Dist. 1990)

¹⁶⁸ *Regents*, 276 Cal. Rptr. at 201-02.

¹⁶⁹ *Id.* at 202.

employment prospects of those to whom employment is forbidden by law, and not subsidizing the education of students whose parents, because of the risk of deportation, are less likely to pay taxes.¹⁷⁰

C. *Medical Treatment*

The denial of non-emergency medical treatment to undocumented immigrants is a major component of Proposition 187, but like many other aspects of the initiative, it is not a new concept for California. Health care providers and others have often challenged the provision of free health services to undocumented immigrants, but they thankfully have not found a sympathetic ear in the courts of the state.¹⁷¹

In 1989, an undocumented immigrant who had been admitted to the UCLA Medical Center and treated with chemotherapy for acute leukemia, was denied Medi-Cal¹⁷² payment for a necessary bone marrow transplant because the hospital did not deem it to be emergency treatment, which was all he was entitled to as an undocumented immigrant.¹⁷³ The court ruled against the hospital in determining that the transplant was covered by the portion of the statute applicable to the patient and instructed that payment be rendered.¹⁷⁴

Similarly, in 1990, the State Department of Health sought to deny Medi-Cal coverage to undocumented immigrants having medical needs for long-term care or kidney dialysis.¹⁷⁵ The state also sought to require individuals applying for medical care for emergency and pregnancy-related services to disclose extensive information regarding their own immigration status or that of members of their family or household.¹⁷⁶ The court issued a preliminary injunction that was upheld on appeal, citing the persuasive evidence that those immigrants challenging the regulation would risk serious disability or even death should their treatments be denied.¹⁷⁷

¹⁷⁰ *Id.*

¹⁷¹ They may have found a sympathetic ear in Congress. House Speaker Newt Gingrich recently proposed a multibillion dollar plan under which the federal government would fully reimburse states for providing emergency medical care to undocumented immigrants. Tony Perry, *Gingrich Offers to Fully Repay States on Immigrant Care*, L.A. TIMES, Oct. 21, 1995, at A1.

¹⁷² Medi-Cal is California's version of the federal Medicaid program which provides health services to indigent California residents. CAL. WELF. & INST. CODE §§ 14000-16000 (West 1991).

¹⁷³ *Dominguez v. Superior Ct.*, 226 Cal. App. 3d 524, 527 (1990).

¹⁷⁴ *Id.* at 534.

¹⁷⁵ *Crespin v. Kizer*, 226 Cal. App. 3d 498, 503 (1990).

¹⁷⁶ *Id.* at 503-04.

¹⁷⁷ *Id.* at 507.

D. *Welfare Benefits*

Recently, the California Legislature has successfully legislated to cut off social services aside from medical care to undocumented immigrants. Although the measures are not necessarily as radical in nature as Proposition 187, and often follow similar federal guidelines, a characteristic they share is that the burden of assessing the immigration status of an individual is often placed on individual providers of services. This type of enforcement will undoubtedly lead to suspicion and interrogation of anyone of Hispanic appearance, a discriminatory and racist process.

Two years ago, California enacted a durational residency requirement for receipt of Aid to Families with Dependent Children (AFDC) benefits, which did not allow full benefits until an applicant had resided in the state for one full year.¹⁷⁸ Such a requirement would undoubtedly affect the undocumented population and was likely designed to deter migration to California. However, the statute was challenged by U.S. citizen plaintiffs who had moved to California from other states.¹⁷⁹ The District Court, affirmed by the Ninth Circuit, struck down the statute on equal protection grounds, stating that deterring migration by poor people into the state is not a compelling state interest.¹⁸⁰ It is difficult to discern from the case whether the outcome would have been different had the statute been challenged by undocumented residents of California, but the exclusionary spirit of that residency requirement has been exhibited in Proposition 187.¹⁸¹

Another significant recent measure prevents undocumented immigrants from using state job training services and requires job training agencies to verify the citizenship status of their clients.¹⁸² In reality, this means that the receptionist or intake worker at the job training facility, a private citizen, will be required to visually identify those clients likely to be undocumented, ask them to show their documents and ask them to leave or report them when they fail to do so.

In similar fashion, the city of Costa Mesa, an affluent area of Orange County, attempted to cut financial support to the charities and

¹⁷⁸ CAL. WELF. & INST. CODE § 11450.03 (West Supp. 1995).

¹⁷⁹ *Green v. Anderson*, 811 F. Supp. 516, 517 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95, 96 (9th Cir. 1994).

¹⁸⁰ *Green v. Anderson*, 26 F.3d 95, 96 (9th Cir. 1994).

¹⁸¹ See *supra* note 12 and accompanying text.

¹⁸² Jenifer M. Bosco, *Undocumented Immigrants, Economic Justice, and Welfare Reform in California*, 8 GEO. IMMIGR. L.J. 71, 75 (1994).

agencies that provide food, clothing and other aid to undocumented workers by withholding federal grant money.¹⁸³ Their discriminatory effort was derailed when Jack Kemp, United States Secretary of Housing and Urban Development, rejected a ruling that would have permitted the cutoff, relying on the "clear injustices and absurdities" proposed by the measure.¹⁸⁴

E. *Encinitas, California and the Green Valley Immigrant Camp- Testing Ground for Proposition 187*

The coastal city of Encinitas, in Southern San Diego County, has been the center of the controversy surrounding undocumented immigrants for many years.¹⁸⁵ The city built itself up around a large settlement of Mexican and Central American immigrants, an area known as Green Valley.¹⁸⁶ The encampment eventually became surrounded by upper-class suburban neighborhoods, whose residents did not take kindly to the undocumented population's presence.¹⁸⁷

The main complaint residents raised in the mid-1980s regarding these immigrants was that they congregated on El Camino Real, the main road through the community, to wait for building or landscaping work, of which there was plenty because of the extensive residential development in the area.¹⁸⁸ Residents associated other problems with these migrant workers, such as believing that they were a drain on property values, their basic needs made them potential criminals, and their economic position contrasted sharply with the economic class of the surrounding communities; basically, they were just too different and not good enough to live near the wealthy residents of Encinitas.¹⁸⁹ The city established a task force to deal with the problem of undocumented immigrants, which regularly received complaints from local residents about Green Valley residents' excessive noise, drunkenness, defecation in public, and trespassing.¹⁹⁰ Since many residents of Green Valley had obtained permission to reside legally in the United States as Seasonal Agricultural Workers under provisions of the Immigration Reform and Control Act of 1986, it was becoming more difficult to rid

¹⁸³ Patrick McDonnell, *Migrant Labor: City Issue Now*, L.A. TIMES, Nov. 17, 1990, at 1.

¹⁸⁴ *Id.*

¹⁸⁵ See CHAVEZ, *supra* note 8, at 83-87.

¹⁸⁶ *Id.* at 83.

¹⁸⁷ *Id.* at 84.

¹⁸⁸ See *id.* at 84-85.

¹⁸⁹ See *id.* at 85.

¹⁹⁰ *Id.* at 87.

the community of their presence than simply having federal immigration officials round them up and deport them.¹⁹¹ Therefore, the residents of Encinitas turned to the health department for assistance.

While residents of Encinitas had branded the Green Valley inhabitants as uncivilized, the operational restaurants that the undocumented residents had constructed within their encampment were the catalyst that sparked the health department's involvement in the problem.¹⁹² An investigation was undertaken, and on September 27, 1988, an inspector for San Diego County's Environmental Health Services signed an abatement order for Green Valley.¹⁹³

The order mandated that the owner of the property either abate the dangerous conditions by providing toilets, running water and code-complying buildings, or dismantle the camp.¹⁹⁴ The owners decided to dismantle, which spawned controversy and protest throughout the community.¹⁹⁵ The dismantling was delayed by community and religious groups concerned with the future of the camp's residents.¹⁹⁶ However, the camp was eliminated in January of 1989, thereby bringing to light the problem of a lack of low-income housing in the area when the Green Valley residents, and residents of other similar encampments, had no place to go.¹⁹⁷

The shortage of housing caused other encampments to spring up in other valleys of the Encinitas area.¹⁹⁸ It also led to litigation where three homeless day laborers challenged the validity of the 1990 General Plan for the City of Encinitas.¹⁹⁹ The plaintiffs claimed that the city had failed to comply with provisions of the California Planning and Zoning Law,²⁰⁰ specifically the housing elements of the statute. Although days after the lawsuit was filed, the California Department of Housing and Community Development informed Encinitas that its

¹⁹¹ *Id.* at 94.

¹⁹² *Id.* at 107.

¹⁹³ *Id.* at 83.

¹⁹⁴ *See id.* at 109.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 114.

¹⁹⁸ *Id.* at 115.

¹⁹⁹ *Hernandez v. City of Encinitas*, 33 Cal. Rptr. 2d 875, 878 (Cal. App. 4 Dist. 1994).

²⁰⁰ CAL. GOV'T CODE § 65000-66409 (West 1991). Basically, the homeless workers contended that Encinitas, in adopting its plan, failed to "adequately analyze the special housing needs of farm workers and the homeless" as required by section 65583(a)(6), and that its land use plan violated sections 65913 and 65913.1 requiring them to attempt to provide housing at the lowest possible cost. *Hernandez*, 33 Cal. Rptr. 2d at 879.

plans for future housing development had not met state standards,²⁰¹ the court ultimately upheld Encinitas' general plan, finding its zoning for high density lower cost housing to be adequate given the city's expressed desire to preserve a residential character for their community.²⁰² Therefore, although only twenty-four percent of the 5380 dwelling units to be developed were in multi-family land use categories, the Encinitas plan, which basically forced the former inhabitants of Green Valley-type encampments to go elsewhere for shelter, was upheld by the California courts.²⁰³

Encinitas did not desist in their attempt to rid their city of undocumented immigrants. In October of 1990, the city sent a bill for \$281,695.25 to the General Accounting Office in Washington for expenses it incurred solving the migrant labor problems of the 1980s, problems it blamed on the Federal Government's immigration policies.²⁰⁴ The move came after the city became the first in California to declare a state of emergency concerning migrant laborers.²⁰⁵ When the Federal Government rejected the request to declare a state of emergency, Encinitas adopted an anti-solicitation ordinance that outlawed the curbside hiring that had been relied upon by those undocumented migrant workers.²⁰⁶ However, the city was forced to rescind the ordinance when a federal judge ruled it a violation of the First Amendment's protection of free speech.²⁰⁷

It is not a leap of logic to argue that Proposition 187 represents a culmination of the policies and initiatives of the past one hundred years in California. As some segments of the population and the political community have attempted to guard the resources and benefits of the state for themselves, they have been met at almost every turn by a judiciary whose tolerance for such actions has varied. For the most part, the courts have been sympathetic to plaintiffs denied services, and have ruled in their favor. Perhaps this resistance to more low-scale measures led to the frustration which produced Proposition 187, or perhaps its passage is just a reflection of the current political climate.

²⁰¹ John M. Glionna, *Encinitas Councilwoman Takes on Migrant Issue*, L.A. TIMES, Aug. 27, 1989, at Metro 1.

²⁰² See *Hernandez*, 33 Cal. Rptr. 2d at 889.

²⁰³ See *id.* at 884, 889.

²⁰⁴ John M. Glionna, *Encinitas Bills U.S. for Costs Tied to Immigrant Problems*, L.A. TIMES, Oct. 31, 1990, at Metro 8.

²⁰⁵ *Id.*

²⁰⁶ Jorge Casuso, *Suburb Fights to Curb Influx of Illegal Aliens*, SACRAMENTO BEE, May 18, 1990, at B4.

²⁰⁷ McDonnell, *supra* note 183, at 1.

In any event, the courts have already become involved in the initiative's existence, halting it indefinitely. Since it is likely that the Supreme Court will eventually rule on the validity of Proposition 187, this Note will next examine the potential outcome of one particular type of challenge.

V. THE CURRENT SUPREME COURT—POSSIBLE OUTCOME OF AN EQUAL PROTECTION CHALLENGE

A. *Historical Analysis of Alienage*²⁰⁸ *Classifications*

Supreme Court equal protection jurisprudence regarding the status of non-citizens, both documented and undocumented, is anything but settled. The level of scrutiny applied to classifications based on alienage has varied over the years not only as the Court's membership and leadership has changed, but also as the relevant issues in the cases reaching that level have changed.²⁰⁹ The modern courts have used a bifurcated scheme of analysis; some alienage classifications are subjected to strict scrutiny,²¹⁰ while others pertaining to "political functions" are subjected to a lower level.²¹¹ It is important to note that the following line of cases where strict scrutiny was used do not deal with the issue of undocumented immigrants, but with those non-citizens legally present in the United States.

The first case to use strict scrutiny to strike down a classification based on alienage was *Graham v. Richardson*.²¹² The Court ruled that both Arizona's and Pennsylvania's denial of welfare benefits to aliens based on their citizenship and residency status violated the Equal Protection Clause of the Fourteenth Amendment.²¹³ Justice Blackmun stated that, "The classifications involved in the instant cases. . .are

²⁰⁸ In this section I will use the words "alien" and "alienage" to avoid confusion, because the Courts have traditionally referred to undocumented immigrants in this manner.

²⁰⁹ See *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *Foley v. Connelie*, 435 U.S. 291, 296 (1978); *Graham v. Richardson*, 403 U.S. 365, 376 (1971).

²¹⁰ Strict scrutiny is the highest level of constitutional scrutiny; it requires the government to show that the challenged policy serves a crucial or "compelling" governmental interest, is a substantially effective means of furthering the compelling governmental interest, and is a necessary or least restrictive method of achieving the governmental goal. Richard A. Brisbin, Jr. & Edward V. Heck, *The Battle Over Strict Scrutiny: Coalitional Conflict in the Rehnquist Court*, 32 SANTA CLARA L. REV. 1049, 1053 (1992).

²¹¹ GERALD GUNTHER, CONSTITUTIONAL LAW 680 (12th ed. 1991); see *infra* note 219 and accompanying text.

²¹² 403 U.S. 365 (1971).

²¹³ *Graham*, 403 U.S. at 376.

inherently suspect and are therefore subject to strict judicial scrutiny. . . ."²¹⁴ There were no dissenters in *Graham*, but the conservative Justice William Rehnquist had not yet been appointed to the Court.

Rehnquist, the current Chief Justice, was the sole dissenter in the next major case applying strict scrutiny to strike down a classification based on alienage.²¹⁵ Justice Blackmun again wrote the majority opinion in *Sugarman v. Dougall*, holding that a state could not constitutionally deny non-citizens the right to hold positions in civil service.²¹⁶ In his dissent, Justice Rehnquist stated that strict scrutiny was not appropriate in cases involving alienage because aliens were capable of altering their citizenship status, thereby rendering that status not an immutable characteristic.²¹⁷ He therefore concluded that legislative classifications based on citizenship should be subject only to a rational basis test of equal protection.²¹⁸

After *Sugarman*, the court began to erode the use of strict scrutiny for classifications based on alienage by applying a more deferential analysis to exclusions of aliens from public employment using the "political function" exception.²¹⁹ The court upheld exclusions of aliens from employment as state troopers,²²⁰ public school teachers,²²¹ and probation officers,²²² all based on the justification that citizenship bore a rational relationship to the employment in question.²²³ The dissenters in these cases, Justices Blackmun, Brennan, Marshall and Stevens, would have applied strict scrutiny.²²⁴

²¹⁴ *Id.*

²¹⁵ See *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973).

²¹⁶ *Id.* at 646.

²¹⁷ See *id.* at 657 (Rehnquist, J., dissenting).

²¹⁸ *Id.* at 658 (Rehnquist, J., dissenting).

²¹⁹ See *Cabell v. Chavez-Salido*, 454 U.S. 432, 438-39 (1981); *Ambach v. Norwick*, 441 U.S. 68, 74 (1979); *Foley v. Connelie*, 435 U.S. 291, 296 (1978). This erosion stemmed from an exception to the *Sugarman* rule of strict scrutiny articulated by Justice Blackmun in his opinion, where he stated that "our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives . . . to preserve the basis conception of a political community." *Sugarman*, 413 U.S. at 648.

²²⁰ *Foley*, 435 U.S. at 300.

²²¹ *Ambach*, 441 U.S. at 81.

²²² *Cabell*, 454 U.S. at 447.

²²³ See *Cabell*, 454 U.S. at 444; *Ambach*, 441 U.S. at 80; *Foley*, 435 U.S. at 300.

²²⁴ See *Cabell*, 454 U.S. at 450 (Blackmun, J., dissenting); *Ambach*, 441 U.S. at 84 (Blackmun, J., dissenting); *Foley*, 435 U.S. at 303 (Marshall, J., dissenting).

These dissenters became part of the majority in *Bernal v. Fainter*, where Justice Marshall used strict scrutiny to strike down a state law requiring notary publics to be citizens.²²⁵ The political function exception to strict scrutiny that had been used in the prior cases was deemed to be inapplicable here, since that exception was only to apply to personnel “[i]nvested either with policy making responsibility or broad discretion in the execution of public policy. . . .”²²⁶ Not surprisingly, Justice Rehnquist dissented, stating only that he did so for the same reasons as he had in *Sugarman*.²²⁷

These previous cases all involved the status of non-citizens legally in the United States, while Proposition 187 is directed only at undocumented immigrants. However, as one commentator has stated, “[i]f a person’s status as an alien is not a problematic basis for differential treatment under equal protection, then, *a fortiori*, a person’s status as an *undocumented* alien is not a problematic basis.”²²⁸ Intuitively, using the Rehnquist reasoning, the fact that non-citizens legally residing in the United States are not entitled to additional protection would render it virtually certain that those non-citizens illegally residing in this country, who would be affected by Proposition 187, would likewise not be entitled to anything but rational basis review.

The Supreme Court decision likely to weigh heavily in the equal protection debate over Proposition 187 is the landmark *Plyler v. Doe*.²²⁹ In that case the Court struck down, on equal protection grounds, a Texas statute denying free public education to undocumented immigrant children.²³⁰ The Court immediately rejected the state’s argument that undocumented immigrants, because of their immigration status, are not “persons” within the meaning of the Fourteenth Amendment, and therefore are not entitled to the protections of the Equal Protection Clause.²³¹ The Court stated that “[t]he Equal Protection Clause was intended to work nothing less than the abolition of all. . . invidious class-based legislation. That objective is fundamentally at odds with the

²²⁵ *Bernal v. Fainter*, 467 U.S. 216, 227 (1984).

²²⁶ *Id.* at 226.

²²⁷ *Id.* at 228 (Rehnquist, J., dissenting).

²²⁸ Michael J. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections on, and Beyond, Plyler v. Doe*, 44 U. PITT. L. REV. 329, 335 (1983).

²²⁹ 457 U.S. 202 (1982).

²³⁰ *Id.* at 230.

²³¹ *Id.* at 210. The Due Process Clause of the Fourteenth Amendment had already been held applicable to undocumented immigrants. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection."²³²

The *Plyler* majority appears to use a rational basis test to rule that Texas could not exclude the children of illegal aliens from public education.²³³ However, the Court discussed at length the nature of the classification of the alien children, as well as the nature of the right to education, without concluding either that the children were a suspect class, or that education was a fundamental right.²³⁴ The Court stated that undocumented aliens themselves are not a suspect class, but that their children, brought to Texas through no fault of their own, are entitled to heightened protection.²³⁵ Again, Justice Rehnquist joined in a surprising dissent by Chief Justice Burger, in which they refused to apply heightened scrutiny to the exclusion of the undocumented alien children, despite their lack of responsibility for their status.²³⁶

In dismissing numerous state arguments as to the purpose of the statute, Justice Brennan stated, "It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries. . . ."²³⁷ While the *Plyler* decision is difficult to understand, and its ruling was limited to its unique facts by the concurrence,²³⁸ its overall effect on the states is clear. It does not preclude most state efforts to discourage undocumented immigration, since the Court states that the efforts will be sustained as long as they serve important governmental interests.²³⁹ Similarly, it does not require states to provide undocumented immigrants with any social services other than education.²⁴⁰

B. Possible Equal Protection Analysis of Proposition 187

The most interesting and disturbing issue surrounding the potential analysis of the various aspects of Proposition 187 is the current make-up of the Court. The *Plyler* case is extremely relevant, as is the

²³² *Plyler*, 457 U.S. at 213.

²³³ *See id.* at 220.

²³⁴ *See id.* at 218-23.

²³⁵ *Id.* at 220.

²³⁶ *Id.* at 245, (Burger, C.J., dissenting).

²³⁷ *Id.* at 230.

²³⁸ *Id.* at 236 (Powell, J., concurring).

²³⁹ Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*, 44 U. PITT. L. REV. 409, 430 (1983).

²⁴⁰ *Id.*

level of review the current Court will use to assess the initiative.²⁴¹ The current Court, consisting primarily of conservative appointees of Presidents Reagan and Bush, has not yet had an opportunity to deal with an alienage classification by a state, and Proposition 187 is the next likely opportunity.²⁴²

Strict adherence to precedent would likely lead to the striking down of at least Section 7 of Proposition 187, since it conflicts directly with the decision in *Plyler*. In that case, a heightened level of scrutiny was applied not because undocumented persons are a suspect classification, but because the law imposed a “hardship on a discrete class of children not accountable for their disabling status.”²⁴³ There is no reason to believe that the children who will be affected by Section 7 are any more responsible for their undocumented status than the Texas children of the 1980s.

It is difficult to discern the standard used by the majority in *Plyler*, since they did not openly adhere to either a rational basis or strict scrutiny mode of analysis.²⁴⁴ The Court essentially balanced a quasi-fundamental right and a quasi-suspect classification against the state’s proffered interest, without stating that an intermediate level of scrutiny was being used.²⁴⁵ This use of quasi-suspect classifications and quasi-fundamental rights by the majority led the dissent to state, perhaps accurately, that the decision was of little use outside of its unique facts.²⁴⁶ Supreme Court review of Section 7 of Proposition 187 would involve the same facts as *Plyler*, but whether the current Court would apply the quasi-suspect, quasi-fundamental right analysis remains doubtful.²⁴⁷ Although the Court may be limited by precedent in ruling on

²⁴¹ Also interesting and perhaps ultimately important is the fact that Peter Schey, attorney for the League of United Latin American Citizens in the current challenge to Proposition 187, argued for the plaintiffs in *Plyler* in 1982. LULAC Transcript, *supra* note 1, at 28.

²⁴² See Jennifer Huffman, Note, *Justice Rehnquist and Alienage as a Suspect Classification*, 7 GEO. IMMIGR. L.J. 845, 863 (1993).

²⁴³ *Plyler*, 457 U.S. at 223.

²⁴⁴ John F. Casey, Comment, *Plyler v. Doe: The Quasi Fundamental Right Emerges in Equal Protection Analysis*, 19 NEW. ENG. L. REV. 151, 165 (1983–84).

²⁴⁵ *Id.* at 167. The author of this comment also notes that Justices Brennan and Marshall used this case to argue for a more flexible mode of equal protection analysis that does not strictly adhere to the tier system. *Id.* at 168.

²⁴⁶ *Plyler*, 457 U.S. at 243 (Burger, C.J., dissenting).

²⁴⁷ It is interesting to note that the ACLU’s complaint articulates the quasi-suspect, quasi-fundamental language, along with stronger strict scrutiny language. Gregorio T. Complaint at ¶ 55, Gregorio T. v. Wilson, No. 94-7652 JMI (GHLx) (C.D. Cal. Nov. 9, 1994) available in LEXIS, Hottop Library, Extra File.

Section 7, the other portions of Proposition 187 denying welfare benefits and medical care have no precedent behind them, and therefore will likely be subjected to a deferential rational basis analysis in which the State will solely be required to offer a minimally rational reason for the measures.²⁴⁸

An argument likely to be raised by the State of California is an economic one similar to that raised by Texas in *Plyler*.²⁴⁹ The state argued that its compelling interest in the classification was to “preserv[e] . . . the state’s limited resources for the education of its lawful residents.”²⁵⁰ The Court emphatically rejected this argument in *Plyler*, stating that, “[o]f course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources,”²⁵¹ but the current economic conditions of California could be shown to be sufficiently dire to render the economic argument acceptable to a rational basis analysis if it is accompanied by other state interests.²⁵² Governor Wilson has already sued the Federal Government to recover funds California has spent on undocumented immigrant services; such a lawsuit, along with other economic data could serve as compelling evidence of economic necessity for Proposition 187.

However, the *Plyler* Court did articulate three colorable state interests that they believed may support the statute.²⁵³ An important example, which is likely to be argued by California, is the state’s legitimate interest in protecting itself from an influx of illegal immigrants, an interest at the very heart of Proposition 187.²⁵⁴ In *Plyler*, however, the Court did not ascertain a connection between excluding undocumented children from schools and immigration control.²⁵⁵

Leaving Section 7 aside, since the precedent of *Plyler* weighs strongly against its survival, extending the Court’s rationale could lead to Proposition 187’s surviving scrutiny if the Court finds that it furthers California’s interest in curbing unlawful immigration. The Court has stated,

²⁴⁸ See *Plyler*, 457 U.S. at 223–24.

²⁴⁹ See *id.* at 227.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² See *id.*

²⁵³ *Id.* at 228–30.

²⁵⁴ *Id.* at 228. The court also articulated a state interest in improving the quality of education, which would require a showing that the exclusion of undocumented children is likely to improve the quality of education in the State. *Id.* at 229.

²⁵⁵ *Id.* at 228.

“[W]e cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.”²⁵⁶ Therefore, the holding in *Plyler* leaves open the possibility that if California can show that Proposition 187, in whole or in part, furthers its interest in preventing undocumented immigrants from adversely affecting the state, it can be upheld without specifically overruling *Plyler*.

To show that the measure furthers such an interest, the Court appears to require that the benefit or service denied to undocumented persons by the state be a factually proven incentive for illegal entry.²⁵⁷ Therefore, if California can show that its education, welfare, and medical care services are dominant incentives for the influx of immigrants into the State, the Court may find both a State interest and a relationship between that interest and the classification, sufficient to support the restrictions in Proposition 187.²⁵⁸ The State will also have to show that denial of those services to undocumented immigrants will have some effect on the influx of immigrants into the State of California.²⁵⁹

The most interesting aspect of an analysis of Proposition 187 is that the Court which decided *Plyler* in 1982 has been effectively dismantled by retirements and appointments by Republican presidents. Of the majority which struck down the statute, only Justice Stevens remains, while Justices Rehnquist and O'Connor were among the dissenters who would have upheld the statute subject to a rational basis examination.²⁶⁰ With the notable absences of Justice Brennan and especially Justice Blackmun, who wrote the majority of the opinions applying strict scrutiny to classifications based on alienage, what remains today is a conservative court with Chief Justice Rehnquist as its leader.

Chief Justice Rehnquist's position on the proper analysis of alienage, documented or undocumented, is clear; he does not believe it to be entitled to either strict scrutiny or any form of heightened scrutiny.²⁶¹ He has emphatically stated his belief that alienage is not a suspect classification since it is not an immutable characteristic like

²⁵⁶ *Id.* at 228, n.23.

²⁵⁷ *See id.* at 228. The court found that employment opportunity, and not education, was the dominant incentive for illegal immigration into Texas. *Id.*

²⁵⁸ *See id.*

²⁵⁹ *See id.* at n.24.

²⁶⁰ *Id.* at 203.

²⁶¹ Huffman, *supra* note 242, at 859.

race, because the alien always has the option of becoming a citizen.²⁶² His equal protection jurisprudence in general is extremely deferential to states, and has been described as “rational basis with a vengeance.”²⁶³ He has been willing to allow states to classify based on alienage for almost any rational reason.²⁶⁴ Justice Rehnquist would likely uphold the provisions of Proposition 187, but the ultimate question is whether his current, admittedly conservative, peers would follow his lead.

Justice Scalia has been considered, along with Justices Rehnquist and Kennedy, to be part of a coalition that “legitimizes ‘reasonable’ restrictions on the rights of disadvantaged groups.”²⁶⁵ This indicates that he would support a rational basis review of the measure, especially given the fact that undocumented immigrants were not intended to be protected by the Constitution, an important criteria for Scalia’s equal protection jurisprudence. Justice Thomas, although not on the Court for an extended period, would likely be included in that coalition. Justice O’Connor, while not necessarily a part of that coalition, dissented in *Plyler*, which makes her a likely candidate to join Chief Justice Rehnquist, as well as Justices Scalia, Thomas and Kennedy, in applying rational basis scrutiny to uphold Proposition 187, or the portions of it which can be shown to advance a state interest.

Justice Stevens, like former Justices Brennan and Marshall, has consistently rejected the strict tiers of equal protection analysis.²⁶⁶ A detailed analysis of his jurisprudence is inappropriate here, but it is enough to note that he seeks to assess the “relevance of the [questioned] classification to a valid public purpose.”²⁶⁷ He would be more likely than the other justices to examine Proposition 187 more closely and attempt to relate California’s stated purposes to the classifications made by the measure.²⁶⁸ It is also important to note that Justice Stevens is the one remaining member of the *Plyler* majority, a majority which created a quasi-suspect classification in order to protect the undocumented children denied education in Texas.²⁶⁹

²⁶² *Sugarman*, 413 U.S. at 657; see *Huffman*, *supra* note 242, at 850.

²⁶³ Thomas Kleven, *The Constitutional Philosophy of Justice William H. Rehnquist*, 8 VT. L. REV. 1, 25 (1983).

²⁶⁴ *Id.*

²⁶⁵ *Brisbin & Heck*, *supra* note 210, at 1102.

²⁶⁶ Note, *Justice Stevens’ Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146, 1154 (1983). This Note articulates an in-depth analysis of Justice Stevens’ jurisprudence and equal protection theory.

²⁶⁷ *Id.*

²⁶⁸ See *id.*

²⁶⁹ See *Plyler*, 457 U.S. at 203.

Justices Souter, Ginsburg, and Breyer, three newer additions to the Court, given what we know about the other six justices, could have little impact on the outcome of an equal protection challenge to Proposition 187. While none of the three are as reputedly conservative as Justice Rehnquist, they are unlikely to be as strong protectors of the rights of the disadvantaged and politically powerless as were Justices Brennan, Marshall, and Blackmun, three *Plyler* majority members notably absent from the Court today.

VI. CONCLUSION

The vision for the future of Proposition 187 in California depends upon what both sides of the issue consider the purpose behind the ballot initiative. Those who believe its passage is essentially a wake up call for the Federal Government to adhere to its responsibility to enforce the immigration laws could be pleasantly satisfied,²⁷⁰ especially given a recent State of the Union address in which President Clinton indicated his support for tighter borders with Mexico. Even if Proposition 187 does not survive judicial scrutiny, California has succeeded in putting undocumented immigration at the forefront of American politics. Other states like Florida have followed California by beginning their own grassroots efforts against undocumented immigration.

Those who hope for Proposition 187's survival in order for the State to be rid of the undocumented could be disappointed. As has been indicated by the failure of district attorneys to use the sentencing provision of the only surviving portion of the initiative, practical success of the provisions of Proposition 187 is speculative at best.²⁷¹ Many of those responsible for enforcing the various denials of rights, including several state officials, have come out against the initiative, and their opposition is not likely to cease even with a Supreme Court decision upholding Proposition 187.²⁷²

Whether the Supreme Court will uphold the measure remains to be seen. An equal protection challenge to any portion of the initiative except Section 7 denying public education could prove unsuccessful

²⁷⁰ See *The Message of Prop. 187*, *supra* note 11, at C6.

²⁷¹ See Feldman, *Forgers Get 6 Months*, *supra* note 71, at 1.

²⁷² Plaintiffs who signed on to the stipulated restraining order include Assemblyman Richard Polanco, Los Angeles City Board of Education Members Victoria Castro and Jeff Horten, Los Angeles City Councilpersons Mike Hernandez and Jackie Goldberg and Pomona Mayor Edward Cortez. See LULAC Stipulated Restraining Order at 15, *League of United Latin Am. Citizens v. Wilson*, No. 94-7569-MRP (C.D. Cal. Nov. 22, 1994), available in LEXIS, Hottop Library, Extra File.

given the Court's membership. The state interests supporting Proposition 187 are arguably stronger today than those articulated by Texas in the *Plyler* case a decade ago. Similarly, since Proposition 187 denies more than just education to undocumented immigrants, it is feasible that successful implementation of the measure could further the State's interest in curbing undocumented immigrant immigration in California.

No matter what happens in the judiciary, Proposition 187 has already succeeded in polarizing California politics and in causing irreparable harm to the undocumented immigrant population.²⁷³ The political right has already begun to capitalize on the momentum of the last election by proposing a ban on affirmative action in the State.²⁷⁴ This raises the very real and very important question of where the hysteria will end. As attorney Steven Yagman so eloquently argued in favor of a preliminary injunction against Proposition 187, "[A] preliminary injunction should issue barring the barbarians outside our gates from vandalizing our Constitution and from pillaging our society and from taking away from the sensible minority of us who deplore Proposition 187 the right to treat others among us in a humane way."²⁷⁵ If we as a society are to maintain our humanity in the face of immigration problems, Proposition 187, whether declared constitutional or not, cannot be fully implemented.

²⁷³ Cara Matthews, *Fighting Threats to Immigrants, Advocates for Recent Residents Call California Law Dangerous*, NEWSDAY, Feb. 13, 1995, at B7.

²⁷⁴ See George Skelton, *Affirmative Action Issue: Another 187?*, L.A. TIMES, Feb. 2, 1995, at 3.

²⁷⁵ LULAC Transcript at 10, *League of United Latin Am. Citizens v. Wilson*, No. CV 94-7569 (S.D. Cal. Dec. 14, 1994), available in LEXIS, Hottop Library, Extra File.