RIGHT OF UNDOCUMENTED CHILDREN TO ATTEND PUBLIC SCHOOLS IN TEXAS

I. INTRODUCTION*

In 1975 the Texas Legislature passed legislation which denies undocumented children[1] equal access to free public education.[2] Prior to this enactment, all children were guaranteed free public education at their local schools.[3] The 1975 legislation limits free public education to citizens and legally admitted alien children, thereby denying undocumented children equal access to free public education.[4]

Although a literal reading of the statute does not prohibit un-

---

* The authors wish to express their appreciation to Mr. Peter Roos and the Mexican American Legal Defense and Educational Fund for their advice and assistance with the preparation of this article.

1. Undocumented children are children who are not lawful residents of the United States. Traditionally, children or adults who possessed this status have been referred to as illegal aliens or wetbacks if they were from Mexico. *See* 1973 INS ANNUAL REPORT 8; California State Social Welfare Board, Position Statement, Issue: Aliens in California at 5 (1973); Oretega, *The Plight of the Mexican Wetback*, 58 A.B.A.J. 251 (1972) [hereinafter cited as Ortega]. For purposes of this article, the phrase undocumented person will be used to describe those who are not lawful residents of the United States who lack proper documentation, because this term has proved to be less derogatory.

Undocumented children are not children born in the United States to parents who are illegally in the country. All children born in the United States regardless of their parents' immigration status are citizens. U.S. CONST. amend XIV cl. *See also*, Acosta v. Gaffney, 413 F. Supp. 827, 830-833 (D.N.J., 1976).

2. TEX. EDUC. CODE § 21.031 (Vernon Supp. 1976). *See also*, Shafer, *Foreign-born Children of Illegal Immigrants: A Growing Problem*, Vol. XIV, No. 6 November-December (1976) p. 18 [hereinafter cited as Shafer].

3. Prior to this amended § 21.031 of the TEX. EDUC. CODE provided free public education to all children who were residents of the local school districts. *See* 1939 Op. Atty. Gen. Tex., No. 586.

4. The TEX. EDUC. CODE § 21.031 as amended (Vernon Supp. 1976) reads:

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

documented children from attending public schools,[5] the law was clearly designed to effectively deny these children the opportunity.[6] As a result of this statute, Houston Public Schools will not enroll undocumented children unless they pay $90.00 a month tuition.[7] In the Austin Independent School District, the undocumented child must pay tuition which ranges from $1,300 a year for elementary students to $1,728 a year for senior high school students.[8] Most undocumented children in Texas are from poor Mexican families.[9] Thus, the burden of having to pay tuition will effectively prevent these children from attending public schools.[10]

Proponents of this new law argue that undocumented children are inundating the public schools and thereby adversely affecting the education of other students, as well as burdening the Texas taxpayer.[11] This proposition is highly speculative. First, it is virtually impossible to ascertain the exact number of undocumented children involved or their impact on educational services.[12] More

5. *Id.* *See also* the letter of M. L. Brochette, Texas Commissioner of Education, to the Honorable John A. Fraeger, Texas State Senator, November 28, 1975, wherein Brochette states that under the new law undocumented children "who are admitted to school and not eligible to receive benefits of such state funds and must be provided for by local or other resources."

6. The sponsor of the Texas law, Texas State Representative Ruben M. Torres, in a letter to the Honorable Tom C. Massey, Texas State Representative and Chairman of the Committee on Public Education on March 14, 1975, stated that the purpose of the new law was to "eliminate the admission of illegal aliens to public school districts in Texas."

7. Daily Texan, Oct. 28, 1976, at 12 [hereinafter cited as Daily Texan]. *See also* Texas Outlook, Jan. 1976 at 18; Houston Chronicle, Sept. 12, 1976 at 1.

8. *Id.*

9. United States v. Ortiz, 422 U.S. 891, 95 S.Ct. 2585, 2591 (1975). (Appendix to concurring Opinion of Burger, C.J.); Ortega, *supra* note 1 at 251. *See also* Human Resources Agency, San Diego County, "A Study of the Socioeconomic Impact of Illegal Aliens on the County of San Diego," January 1977 [hereinafter cited as the San Diego Study]. This study was commissioned by the County of San Diego to determine the socio-economic impact of illegal aliens on the County of San Diego, the most highly impacted area in the nation in regard to the problem of illegal immigration. The study at page xi estimated that an undocumented worker earns an average of $4,368 a year, well below that which is required to support a family.

10. Daily Texan, *supra* note 7, at 12.

11. *See* Texas House of Representative's Resolution introduced by State Representative Ruben Torres and others in 1975 creating Subcommittee on Alien Student Enrollment. That resolution stated that: "As the number of illegal aliens in Texas continues to increase, many financially troubled school districts find it difficult to provide educational services for alien children without adversely affecting the overall quality of such services."

See also, Shafer, *supra* note 2, at 18-19. Thereafter, section 21.031 was amended by the bill introduced by Ruben Torres. *See* note 6, *supra.*

12. Attempts to determine the number of undocumented persons in the United States and their impact are highly speculative and figures purporting to show pressure mounting impact should be examined with caution. *See* comment, *The Undocumented Worker: The Controversy Takes a New Turn,* 3 CHICANO L. REV. 164, 165 n. 3 (1976) [hereinafter cited as *Comment on the Undocumented Worker*]; Diamond, *The Alien Hordes: Problem or Propaganda?* NEW WEST, December 6, 1976, p. 103 [hereinafter cited as Diamond]. Nevertheless, in the

importantly, undocumented children, like citizen and lawful resident children, pay their fair share for education.

The public school system of Texas is supported by state and local funds,[13] which is supplemented by federal aid.[14] The state's contribution comes from a variety of sources, including a state *ad valorem* property tax, plus the state's general revenues.[15] These contributions provide the support for the Texas Minimum Foundation School Program,[16] whose funds in turn are earmarked for teachers' salaries, operating expenses, and transportation costs.[17] The contributions of local school districts are derived through the issuance of bonds and the collection of *ad valorem* property taxes.[18]

Undocumented children through their parents or guardians contribute to these funds. Undocumented persons who own property are not immune from payment of property taxes and the majority of undocumented persons who live in rented accommodations contribute to the property tax through their rental payments.[19] Undocumented persons also pay state and federal income and other taxes.[20] Recent studies indicate that some pay more taxes than are required[21] and that on balance they pay more in taxes than they collect in services.[22] Thus, the denial of free public

---

San Diego Study, *supra* note 9, at xxiii the cost impact of undocumented children for 1976-1977 was estimated at $100,000.

13. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 6 (1973).

14. *Id.* at 9. In 1970-1971, State aid accounted for 48% of funds for Texas schools, local funds for 41.1%, and federal sources contributed 10.9%. *Id.* at 9 n.21.

15. The TEX. CONST. and the TEX. EDUC. CODE delineate how state education funds are raised and allocated. *See* TEX. CONST. art 7, §§ 1, 2, 3, 4, 5; TEX. EDUC. CODE, § 16.251 (Vernon Supp. 1976).

16. The Texas Minimum Foundation School Program was enacted by the Texas Legislature to offset disparities in local spending and to meet changing educational requirements in Texas. *See* San Antonio Independent School District v. Rogriguez, 411 U.S. 1 at 9.

17. TEX. EDUC. CODE § 16.251 (a), (Vernon Supp. 1976).

18. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 at 7, citing TEX. CONST., 1876, art 7, 3, as amended, (August 14, 1883).

19. *See* Hirsch, *California Illegal Aliens: They Give More Than They Take,* NEW WEST May 23, 1977 p. 26. In the San Diego Study, *supra* note 9, at xxiii, it was found that of the undocumented aliens interviewed: 61% lived in rented accommodations, 23% lived in rent free housing provided by their employer, 10% lived under a tree or in a hole in an open field, 4% lived in tents or garages and 1% lived in cars.

20. *See* North & Houstoum, THE CHARACTERISTICS AND ROLE OF ILLEGAL ALIENS IN THE UNITED STATES LABOR MARKET: AN EXPLORATORY STUDY (Washington D.C., *Linton & Co.*, 1976); Bustamante, *Salient Issues in the U.S.-Mexico Binational Border Region* (the preliminary report on joint study sponsored by University of Notre Dame) (1976).

21. San Diego Study, *supra* note 9, at xi.

22. The Wall Street Journal after discussing the Labor Department Study described in note 20 *supra*, stated that the study "refutes the widespread belief that undocumented aliens are free loading . . . and that the government is obviously getting more than it gives." *See* Diamond, *supra* note 12, at 108. *See also* Cook, *An Economic Analysis: How Illegal Aliens Pay as They Go*; NEW WEST, May

education to undocumented children deprives them of the benefits derived from their tax contributions.[23]

The denial of education to undocumented children in Texas is of considerable importance to both citizens and non-citizens of Texas as well as the rest of the nation. As the economic situation worsens, state government will come under increasing pressure to do as Texas has done and deny state benefits to undocumented persons.[24] Although other states continue to provide free public education to undocumented children,[25] the Texas statute may serve as a future model.

This article will explore the plight of the undocumented child and the constitutional arguments available to challenge statutes such as the one enacted in Texas.[26] This article will first examine the historical and sociological background of undocumented children and their families. Next, it will explore the general status of undocumented persons under the United States Constitution. Finally, the article will analyze in detail three constitutional limitations on state action which might protect undocumented children from being denied equal access to free public education. These limitations are the equal protection and due process clause and federal pre-emption through the supremacy clause.

23, 1977, p. 34. Similarly, in the San Diego Study, *supra* note 9, it was considered at p. 178-179 that: "Some of the preceding conclusions indicate an impact by illegal aliens on such social services as health care, welfare and education. However, considering that the estimated number of illegal aliens residing in San Diego is 92,138, and that their participation in social service programs may be considered quantitatively minimal, therefore the study concludes that the impact may be less than originally perceived by the general public when the impact is viewed. This impact may be mitigated when considering that illegal aliens are presumed to pay federal and state taxes, social security and disability insurance through payroll deductions for services they mostly never benefit from. This conclusion is consistent with research studies on illegal aliens . . . which indicate the United States government is receiving much more from illegal aliens in the form of tax and social security deductions than what the illegal aliens receive in social services."

23. "The curious argument for keeping these children out of school is that there are so many of them. The argument is curious because it is made by "educators" and because they are, in essence, saying, 'We would admit you if there were only a few of you, but since there are 50,000 of you, we can't.' It is less unconscionable to us to see 50,000 children without an education walking the streets of Los Angeles than if there were only a few. Their stated reason for not admitting them is that these children are a financial burden on the district. But all children are a burden on the district. The fact is that these children and their parents pay taxes and contribute to the economic well being of the community the same as residents." Ortega, *supra* note 1, at 253.

24. *See Comment on the Undocumented Workers, supra* note 12, at 164-165. Moreover, in Texas there is now increasing pressure to deny free public education to lawful resident alien children. *See* Houston Chronicle, December 7, 1976, p. 26; Letter from M. L. Brochette, Texas Commissioner of Education to Governor of Texas and Members of the 64th Legislature, July 24, 1975.

25. *See* for example CAL. EDUC. CODE, § 6950 (West 1975).

26. This article does not explore possible state statutory or constitutional arguments that might be available.

II. HISTORICAL AND SOCIOLOGICAL PERSPECTIVE OF THE UNDOCUMENTED PERSON FROM MEXICO

To understand the problem of the undocumented child in Texas, one must examine the historical background of the problem of illegal immigration from Mexico. Migrating streams generally flow from a place of origin where economic opportunities are restricted to destinations where economic opportunities are comparatively greater.[27] Illegal immigration occurs when the recipient country adopts restrictive immigration laws that conflict with this economic situation. The major cause of migration from Mexico to the United States is the relatively poor economic conditions in Mexico.[28] This economic situation has been exploited by the United States which has developed an immigration policy that has embodied a consistent desire for Mexicans as laborers rather than settlers.[29]

In 1848, the Texas-Mexican border was established with the signing of the Treaty of Guadalupe Hidalgo.[30] This 889 mile border, however, is somewhat of a fiction. It becomes real only when some national policy prompts either the United States or Mexico to assert the fact of its existence. Most often, it is a permeable thing, a membrane that joins rather than separates these two nations.[31]

The first restrictions on immigration to the United States were enacted in 1882 to prevent the importation of cheap labor.[32] At that time migration from Mexico was not a target.[33] Consequently, the immigration restrictions which were enacted were soon waived for Mexican laborers by the Departmental Order of 1918.[34]

---

27. Frisbie, *Illegal Immigration from Mexico to the United States: A Longitudinal Analysis.* 9 INT'L MIGRATION REV. 3 (Spring 1975).

28. United States v. Ortiz, 422 U.S. —, 95 S.Ct. 2585, 2591 (Appendix to concurring opinion of Burger C.J.); DEPARTMENT OF JUSTICE SPECIAL STUDY GROUP ON ILLEGAL IMMIGRANTS FROM MEXICO, A PROGRAM FOR EFFECTIVE AND HUMANE ACTION ON ILLEGAL MEXICAN IMMIGRANTS at 7 (1973) [hereinafter cited as Cramton Report].

29. Samora, LOS MOJADOS: THE WETBACK STORY at p. 57 (1971) [hereinafter cited as *Samora*].

30. *Id.* at 16.

31. Schmidt, SPANISH SURNAMED AMERICANS EMPLOYED IN THE SOUTHWEST, (Government Printing Office, 1970), p.7.

32. *See* Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. REV. 66, 67 (1975) [hereinafter cited as *Cardenas*].

33. The first immigration restrictions were aimed at the Chinese. Mexican immigration and border crossing did not preoccupy the attention of immigration authorities. *See* Samora, *supra* note 29, at 35.

34. The Immigration Law of 1882 (22 stat. 214) established a head tax and provided for the exclusion of certain classes of people and other persons likely to become public charges. In 1885 Congress passed the Alien Contract Labor Law (23 State 332) and in 1917 a literacy test was made a requirement for admissability (39 Stat. 874). The Departmental Order of 1913 by the Commis-

This order represented the first successful attempt by growers and other industrialists to gain governmental approval to import Mexican labor.[35] As a result, American employers actively recruited Mexican labor.[36] This order, thus, represents the first major inducement by the United States to encourage Mexican nationals to work in the United States to better their socioeconomic situation.[37]

Although this order was initiated as a wartime measure, southwestern growers and industrialists continued to encourage the movement of Mexicans across the border as a source of cheap labor after World War I.[38] The Great Depression brought an abrupt end to this relatively open border.[39] During the Depression, Mexican nationals were displaced, deported, and prevented from entering the United States.[40] This reversal in policy created grave hardships for the Mexican nationals who had grown dependent on the United States.[41]

With the advent of war and returning economic activity, the United States again sought to utilize Mexican labor. The Bracero Program was initiated in 1942 through a bilateral agreement between the United States and Mexico which allowed the temporary migration of Mexican farmworkers to the United States.[42] The creation and maintenance of the Bracero Program arose out of the interests of growers and their influence on public policy.[43]

Although the Bracero Program was a means by which a Mex-

---

sioner General of Immigration waived the head tax, contract labor and literacy requirements for Mexican laborers. *See* Cardenas, *supra* note 32, at 67-68.

35. *Id.*
36. Samora, *supra* note 29, at 39.
37. Cardenas, *supra* note 32, at 68.
38. Samora, *supra* note 29, at 39.
39. *Id.* at 40-41.
40. *Id.* at 41-42.
41. *See* McClean, *Tighten the Mexican Border,* 64 SURVEY, p. 28 (1930) wherein he states:

> There are certain elements of injustice in the new border policy. For ten years, the Mexican peon had surely been the Atlas holding upon his broad shoulders the economic life of the Southwest. He has bent his back over every field, toiled on every mile of railroad, and poured his sweat into every cubic yard of concrete. We have needed him; we have felt that we could not get along without him. And when our need was most acute in the industrial epoch which followed the war, we forgot our own immigration laws. Now that the acute need has passed away, by the stricter interpretation we are uprooting these people and sending them home. By actual deportations, or by "putting the fear of God" into their hearts, we are thrusting them into an economic order which they have grown unfamiliar with. Most of them have been conscious of doing no wrong. And when they steal back across the line to reestablish themselves in the social and economic order to which we have accustomed them, they are thrown in jail as common felons. The injustice comes not from any particular border policy, but rather because we have had no consistent policy. Quoted in *Samora, supra,* note 29, at 43.

42. Cardenas, *supra* note 32, at 75.
43. Samora, *supra* note 29, at 44.

ican national could legally work in this country, it actually stimulated immigration.[44] During the Bracero Program, the size of Mexican migration was governed by the ability of the United States to absorb workers rather than by a limitation of the supply of Mexican workers.[45] Nevertheless, the northward movement of Mexican nationals was stimulated by employer's advertising and the expectation of work.[46] The Bracero Program was terminated in 1964, but the importation of Mexicans as temporary agricultural workers continues in accordance with other provisions of the Immigration and Nationality Act.[47]

Throughout this period, efforts to control illegal immigration have corresponded to the United States' ability to absorb and profit from the efficient utilization and exploitation of undocumented Mexican aliens.[48] The transition from a relatively open border to a relatively closed border occurs in cycles depending on the demands of the United States economy.[49] Thus, as one commentator has noted:

> The illegal alien problem is therefore one whose seed has been planted time and again by the United States when it has been in need of Mexican labor. When expediency better serves, however, immigration laws have been administered and changed in response to a problem perceived as having been created by illegal aliens, when in fact it is largely of the United States' own making.[50]

Although the economy of the United States is presently ailing, the economic and employment opportunities here surpass those in Mexico.[51] When this economic impetus is coupled with historical and cultural factors, a tremendous pressure for migration from Mexico to the United States is created.[52]

The life of those who illegally immigrated, however, is hardly

---

44. *See* note 46, *infra*.
45. Samora, *supra* note 29, at 44.
46. *See* Hadley, *Critical Analysis of the Wetback Problem*, 21 LAW AND CONTEMPORARY PROBLEMS, 334 (1956) wherein she states:

> Apparently, the relation between this Mexican contract labor program and the spiraling illegal immigration was this: Contract workers returned with exciting tales of the money that could be earned in the United States. The next year, these same workers wanted to repeat their performance and their neighbors wanted to join. The result was that there were many more Mexicans who wanted to come to the United States than there were certifications of need issued by the Secretary of Labor. Further, managing to be among the workers selected by the Mexican officials for the program characteristically required the persuasion of a bribe. Thus it seemed to many much simpler to seek American employment on their own. Quoted in Samora, *supra* note 29, at 44-45.

47. *See* Cardenas, *supra* note 32, at 79.
48. Samora, *supra* note 29, at 57.
49. *Id.* at 49.
50. Cardenas, *supra* note 32, at 89.
51. Cramton Report, *supra* note 28, at 7-8.
52. *Id.* at 8.

ideal. Undocumented persons living in the United States live in fear.[53] Since undocumented persons are subject to deportation if apprehended by federal authorities, undocumented persons are subjected to abuse and exploitation in a variety of ways.[54] Employers, landlords and merchants are all able to exploit them, knowing that if the undocumented person challenges their authority the undocumented person can be turned over to federal officials for deportation.[55] Undocumented workers from Mexico generally are employed in the lowest paying jobs, oftentimes at a wage below the minimum wage.[56] Nevertheless, they come here illegally because it is the only alternative to the extreme poverty in Mexico.[57]

Undocumented children are caught in the middle of this situation. They are the product of historical and economic factors beyond their control. Education serves as one of the few means to break this cycle of poverty in which they are caught.[58]

III. CONSTITUTIONAL RIGHTS OF UNDOCUMENTED PERSONS

The United States Supreme Court in *Mathews v. Diaz*[59] expressly recognized that undocumented persons are protected by the due process clause of the fifth and fourteenth amendments.[60] Whether other explicit or implicit constitutional rights of citizens extend to undocumented persons remains unclear.[61] Few courts

---

53. Ortega, *supra* note 1, at 251.
54. Cramton Report, *supra* note 28, at 11.
55. Ortega, *supra* note 1, at 252; United States v. Ortiz 422 U.S. —, 95 S.Ct. 2585, 2592 (Appendix to concurring opinion of Burger, C.J.).
56. *See* note 9 *supra*. Also, Samora, *supra* note 29, at 99.
57. Ortega, *supra* note 1, at 251. *See also Samora, supra* note 29, at 97.
58. U.S. CODE CONG. & AD. NEWS, 1965, Education Act of 1965, p. 1448 (S. REP. No. 146). *See also* note 245, *infra* and Brown v. Board of Education of Topeka 347 U.S. 483, 493 (1954).
59. 426 U.S. 67, 96 S.Ct. 1883 (1976).
60. *Id.* at 1890.
61. In *Mathews* the Court stated:

> The Fifth Amendment, as well as the Fourteenth Amendment, protects everyone of these persons from deprivation of life, liberty, or property without due process of law . . . Even one whose presence in this country is unlawful, involuntary, or transitory, is entitled to *that* constitutional protection. 426 U.S. 67, 96 S. Ct. 1883, 1890. [emphasis added].

Thus, the Court implies that undocumented persons might not be entitled to other constitutional protections. *See also* Holley v. Levine 529 F.2d 1294 (2d Cir. 1976) where an illegal Canadian alien sought to invalidate a state statute insofar as it deprived undocumented persons and their children of welfare benefits. The district court had dismissed the complaint for failure to state a claim in which relief could be granted. The Court of Appeal for the District reversed stating:

> [W]e cannot say that the claims are wholly insubstantial or obviously frivolous or that decisions of the Supreme Court foreclose the subject. The Supreme Court has apparently never dealt with the equal protection rights of illegal aliens in this context. *Cf.* Graham v. Richardson 403

have faced these issues in large part because undocumented persons are hesitant to pursue legal actions in the United States.[62]

Undocumented persons have a legal status somewhere between lawfully admitted resident aliens and non-resident aliens. Any discussion of the rights of undocumented persons therefore must begin with an analysis of the rights of these other two groups of aliens.

The rights of lawfully admitted resident aliens are not coextensive with the rights of citizens.[63] The Court's recent decisions striking down state laws that discriminate against lawfully admitted aliens do not alter this conclusion.[64] The states can in limited situations treat aliens differently than citizens.[65] And the federal government has even greater power to treat aliens differently from citizens.[66]

In contrast, a non-resident alien lacks those rights of a lawfully admitted alien. In *Kleindienst v. Mandel*,[67] a non-resident alien sought admission to the United States for purposes of lecturing on Marxism. There the Court recognized that an unadmitted and nonresident alien had no constitutional rights.[68]

Undocumented persons are like lawfully admitted resident

U.S. 365, 371, 91 S.Ct. 1848, 29 L. Ed. 534 (1971); *See also* Bolanos v. Kiley 509 F.2d 1023, 1025 (2d Cir. 1975). Nor is the claim that children whose parents are illegal aliens have their own rights to benefits an insubstantial one. *Cf.* Weber v. Aetna Casualty and Surety Co. 406 U.S. 164, 92 S.Ct. 1400, 31 L. Ed, 2d 768 (1972). We do not characterize plaintiff's constitutional arguments as persuasive; we hold merely that the district judge could not dismiss them out of hand. 529 F.2d at 1295-1296.

62. Aside from deportation cases which are initiated by the Federal Government, undocumented persons have been hesitant to take part or initiate legal actions for fear that their illegal status would be discovered. *See* Ortega, *supra* note 1, at 252-253. Also, an undocumented person's right to maintain a civil action to protect his or her rights has not been clearly established. See Comment, *The Right of an Illegal Alien to Maintain a Civil Action*, 63 CAL. L. REV. 762 (1975) [hereinafter cited as *Comment on Right of Illegal Alien to Maintain a Civil Action*].

63. Harisiades v. Shaughnessy, 342 U.S. 580, 586 (1952) wherein the Court stated: "Under our law, the alien in several respects stands on equal footing with citizens, but in others has never been conceeded legal parity with the citizen." *See also* Comment: *Immigrants Aliens, and the Constitution*, 49 NOTRE DAME LAW 1075, 1087, (1974); Comment, *The Alien and the Constitution*, 20 U. CHICAGO L. REV. 547, 564 (1953).

64. For example, *See* Sugarman v. Dougall, 413 U.S. 634 (1973). There, a New York Law prohibiting aliens from holding state civil service jobs was held to violate the equal protection clause of the fourteenth amendment as interpreted in Graham v. Richardson 403 U.S. 365, 371 (1971) and In re Griffith 413 U.S. 717, 720 (1973). However, the court recognized that a state may require citizenship as a basis for particular state jobs and voting. 413 U.S. at 647-649.

65. *Id.*

66. Hampton v. Mow Sun Wong 426 U.S. 88, 96 S.Ct. 1895, 1903-1904 (1976); Mathews v. Diaz 426 U.S. at 67, 96 S.Ct. 1883, 1886-1887 (1976); Fiallo v. Bell 45 U.S.L.W. 4402, 4403 (April 26, 1977).

67. 408 U.S. 753 (1972).

68. *Id.* at 762. *See also* Pilapil v. Immigration and Naturalization Service 424 F.2d 6, 11 (10th Cir. 1970).

aliens in that they reside within the territory of the United States.[69] On the other hand, they are like nonresident aliens seeking admission in so far as the federal government has not legitimized their status. Although undocumented persons are afforded the protection of the due process clause, this does not mean they are afforded other constitutional rights.[70] The due process protection afforded undocumented persons[71] is qualitatively different from other constitutional rights. Freedom from arbitrary state deprivations which due process prohibits differs from the right to enjoy the benefits of the state's largess.[72] Recent decisions by lower courts have reached varied results on the rights of undocumented persons.[73] With this in mind, this article will examine the constitutional arguments that undocumented children can employ to challenge the Texas statute denying them equal access to education.

---

69. For an analysis of constitutional guarantees based on the concept of territorial jurisdiction, *see* Comment *on Right of Illegal Alien to Maintain Civil Action, supra* note 61 at 770; Comment, *The Constitutional Status of State and Federal Governmental Discrimination Against Resident Aliens,* 16 HARV. INT'L L. J. 113, 127 (1975).

70. *See* text accompanying notes 59-62, *supra.*

71. Mathews v. Diaz 426 U.S. 67, 96 S.Ct. 1883, 1890 (1976).

72. *See* Dandridge v. Williams 397 U.S. 471 (1970) where the court upheld a state welfare regulation that placed a maximum limit on the amount of money a family could receive. In upholding the regulation the court distinguished between procedural protections afforded when benefits are terminated and the right of an individual to demand such benefits from the state. As the court noted:

> The Constitution may impose certain procedural safeguards upon systems of welfare administration, Goldberg v. Kelly, *ante,* p. 254. But the Constitution does not empower this court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. *Id.* at 487.

73. For example, in Alonso v. California 50 Cal. App. 3d. 242, 123 Cal. Rptr. 536 (1975), an undocumented worker was denied employment benefits. In upholding this administrative decision, the court stated:

> [E]ven if appellant put money into the fund, he is not entitled to the benefits. An illegal alien who enters the United States without inspection in violation of 8 U.S.C. section 1251 is subject to deportation. His entry is illegal and any subsequent acts done by him in this country would be in furtherance of that illegal entry. To allow an illegal alien to collect unemployment benefits would reward him for his illegal entry into this country. In essence, his entry into this country is fraudulent, and as such he should not be allowed to profit from the illegal act. *Id.* at 253-253.

In reaching this conclusion, the court pointed out the " . . . obvious catastrophic effect upon the economic well-being of California citizens by the tremendous influx of illegal aliens." *Id.* at 257.

In contrast, another division of the California Court of Appeals in Ayala v. Unemployment Insurance Appeals Board 54 Cal. App. 3d 676, 126 Cal. Rptr. 210 (1976) held that an undocumented worker who had complied with all state statutes could not be denied disability benefits.

> To conclusively presume that an illegal alien who has been attached to the labor force and who has in all respects complied with the sections of the Unemployment Insurance Code cannot, simply because he is an illegal alien, collect disability benefits is contrary to the statutes . . . In addition, the Supreme Court of the United States has consistently invalidated statutory or administrative classifications bottomed on such conclusive presumptions. *Id.* at 680.

IV. LIMITATIONS IMPOSED BY THE EQUAL PROTECTION CLAUSE[74]

Undocumented persons appear to be protected by the equal protection clause of the fourteenth amendment. In *Yick Wo. v. Hopkins*[75] the Supreme Court ruled that the guarantees of the equal protection clause of the fourteenth amendment were not confined to the protection of citizens.[76] The Court stated that equal protection is guaranteed to all persons within the United States.[77] And some lower courts have expressly held that the equal protection clause of the fourteenth amendment extends to undocumented persons.[78]

The equal protection clause of the fourteenth amendment embodies three analytically separate limitations on the legislative power of a state.[79] First, certain bases of classification which are "suspect" may be used, if at all, only in unusual circumstances.[80] Secondly, legislation is invalid when a classification made therein is not rationally related to a legitimate state purpose.[81] Finally,

---

74. Although the concept of equal justice under law of the equal protection clause is applied to the federal government through the fifth amendment guarantee of due process, Bolling v. Sharpe, 347 U.S. 497 (1954), the protection afforded under the fifth amendment against federal legislation is not co-extensive with the limitations placed on the states by the fourteenth amendment, especially in regard to protection of aliens. *See* Hampton v. Mow Sun Wong, 426 U.S. —, 96 S.Ct. 1895 (1976). This article deals only with equal protection limitations on state legislation.

75. 118 U.S. 356 (1886).

76. *Id.* at 369.

77. *Id.*

"The Fourteenth Amendment of the U.S. Constitution states that:

> 'Nor shall any State deprive any person of life, liberty, or property without Due Process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

These provisions are universal in their application, to all persons within the territorial jurisdiction without regard to any differences of race, color, or of nationality; and the equal protections of the laws is a pledge of the protection of equal laws."

It is important to take notice that the word "citizen" appears in section 1 of the fourteenth amendment with regard to privileges and immunities, but speaks of "persons" with regards to due process and equal protections of the laws, the court has relied on specific language of the fifth and fourteenth amendments and has concluded that the word "person" which is more inclusive, was intended to encompass all individuals who were not citizens.

See Comment *on the Right of Illegal Aliens to Maintain a Cause of Action, supra* note 4, at 767. *See* Takahashi v. Fish and Game Commission 334 U.S. 410 (1948); Bridges v. Wixon 326 U.S. 135 (1945); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Wong Wing v. U.S., 163 U.S. 228 (1896).

78. Bolanos v. Kiley 509 F.2d 1023 (2d Cir. 1975); Williams v. Williams, 328 F. Supp. 1380, 1383 (D.V.I. 1970). *See also* Holley v. Lavine 529 F.2d at 1294 (2d Cir. 1976).

79. Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 B.Y.U.L. REV. 89, 90 [hereinafter referred to as *Barrett*].

80. Graham v. Richardson, 403 U.S. 365, 372 (1971); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 2566 (1976).

81. United States Department of Agriculture v. Moreno, 413 U.S. 528, 538 (1973); Mathews v. Lucas, 427 U.S. 495, 96 S.Ct. 2755, 2764-2765 (1976).

strict scrutiny is required when the classification impermissibly interferes with the exercise of a fundamental or constitutional right.[82] This section will examine the Texas Education Statute in light of these three limitations.

A. Undocumented Children as a Suspect Classifications

The Texas Education Statute creates a classification between children who are citizens or who are legally in the United States and children who are in the country illegally, or without documents.[83] This classification is the basis for providing tuition free public education to some children in Texas, while denying it to others.[84]

Although a state is not barred by the equal protection clause from creating classifications in its statutes, some classifications are so disfavored by the court that strict judicial scrutiny is required.[85] In the now famous footnote 4 of *United States v. Caroline Products*,[86] the Supreme Court began to carve out a principled basis for departure from general principles of judicial restraint in passing on the constitutionality of legislation under the equal protection clause. Therein Justice Stone observed:

> prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[87]

Subsequent decisions have applied this principle, identifying as suspect, classifications based on race,[88] alienage,[89] and national origin.[90] In determining whether a particular legislative classification is suspect, the Court looks to see if the class:

---

82. Shapiro v. Thompson, 394 U.S. 618 (1969); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 29 (1973).

83. TEX. EDUC. CODE ANN., § 21.031 [Vernon Supp. 1976].

84. *Id.* The code provides that those children who are citizens or legally admitted aliens can attend the public free schools and are entitled to the benefits of Available School Fund. By negative implication those children who do not have such status are not entitled to the rights mentioned in the statute. And in fact some school districts have begun to require tuition fees of some children. *See* text accompanying notes 1-12 *supra*.

85. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 2567 (1976).

86. 304 U.S. 144 (1938).

87. *Id.* at 152, n.4.

88. Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

89. Graham v. Richardson, 403 U.S. 365 at 372 (1971); In Re Griffith, 413 U.S. 717, 721 (1973).

90. Hernandez v. Texas, 347 U.S. 475 (1954); Oyama v. California 332 U.S. 633 (1948).

Each of these classifications involves the imposition of burdens upon groups which as individual classes are prime examples of discrete and insular minorities. Graham v. Richardson, 403 U.S. 365, 375.

> is . . . one saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[91]

The classification of undocumented children fits within this criteria. Undocumented persons individually and as a group are politically powerless. Like lawfully admitted aliens, undocumented persons are not guaranteed the right to vote.[92] Consequently, they are dependent on others to protect their interests. The political powerlessness of undocumented children is more severe in the sense that they cannot even rely on their own parents to protect their interests. Additionally, undocumented persons have historically been the target of purposeful and severe legal, economic and social discrimination and exploitation because of their defenselessness.[93]

Most of the undocumented children in Texas are of Mexican ancestry.[94] They share with most legally resident Mexican nationals and other ethnic and racial minorities physical, cultural, language characteristics which set them apart from the Anglo majority and make them identifiable as part of a distinct and insular minority.[95] Another notable factor related to this is that the classification is based, like race and national origin, on a characteristic, their migration status, over which the children have no control.[96] Since undocumented children suffer under the full range of disabilities and handicaps required for suspect classification, they deserve the Court's extraordinary protection.[97]

Demonstrating that undocumented children are a suspect class for equal protection analysis would be tantamount to invalidation of the classification made by the Texas statute.[98] Only once has the Supreme Court upheld discrimination against a sus-

---

91. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 2566 (1976).

92. Sugarman v. Dougall, 413 U.S. 634, 646-648 (1973).

93. *See* text accompanying notes at 53-56.

94. *See* note 9, *supra.*

95. *See* Keyes v. Denver School District No. 1, 413 U.S. 189, 197 (1973).

96. Jiminez v. Weinberger, 417 U.S. 628, 632 (1974).

97. In recent decisions the Supreme Court has refused to enlarge the number of suspect classifications. In each of these cases, unlike the case of undocumented children, the classifications in question did not meet the Court's criteria. *See* Mathews v. Lucas, 427 U.S. 495, 96 S.Ct. 2755, 2762 (1976) (illegitimacy not an "obvious badge" and no history of purposeful discrimination); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 2566 (1976) (old age marks a stage in life, no history of purposeful unequal treatment, no unique disabilities); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973) (wealth, no history of purposeful unique treatment of the poor nor are they relegated to a position of political powerlessness).

98. Barrett, *supra* note 79, at 94.

pect class.[99] Here, the state fiscal interest would not be sufficient to justify the unequal treatment of undocumented children.[100]

It is unlikely, however, that the Court will be willing to classify undocumented children as a suspect class. The Court seems to be following a trend of not adding to the number of groups so classified.[101] Moreover, there is tremendous political pressure to prevent undocumented persons from living in this country.[102] However, this does not diminish the fact that undocumented children are suffering severe disabilities and unequal treatment and should be protected.

B. Undocumented Children as an Irrational Classification

Even if the classification is not suspect, equal protection requires that it be rationally related to a legitimate state purpose.[103] Legislative action normally will be presumed to be valid[104] and it is up to the challenging party to prove the insubstantiality of the relation between a classification and the legislative purpose.[105] The Supreme Court, however, has stated that the standard by which the showing of materiality of the relation is "to be judged is not a toothless one."[106]

This type of analysis presents analytical problems.[107] The initial problem is determining the legislative objective of a statute.[108] Another is determining if the classification serves to achieve the legislative objective.[109] An additional variable is how

---

99. Korematsu v. United States, 323 U.S. 214 (1944).
100. Graham v. Richardson, 402 U.S. 365, 375; Shapiro v. Thompson, 394 U.S. 618, 633.
101. *See* note 97, *supra.*
102. *See* Comment, *The Undocumented Alien Laborer and DeCanas v. Bica: The Supreme Court Capitulates to Public Pressure,* 3 CHICANO L. REV. 148 (1976). [hereinafter cited as Comment *on the Undocumented Alien Laborer & DeCanas v. Bica*].
103. Trimble v. Gordon, — U.S. —, 45 U.S.L.W. 4395, 4396 (April 26, 1977) United States Department of Agriculture v. Moreno, 413 U.S. 528, 538 (1973); Reed v. Reed 404 U.S. 71, 76-77 (1971).
104. McGown v. Maryland, 366 U.S. 420, 425-426 (1961).
105. Mathews v. Lucas 427 U.S. 495, 96 S.Ct. 2755, 2762 (1976).
106. *Id.* Trimble v. Gordon, 45 U.S.L.W. 4395, 4396 (April 26, 1977).
107. Barrett, *supra* note 79, at 124.
108. This problem is discussed in depth in Note, *Legislative Purpose, Rationality and Equal Protection,* 82 YALE L.J. 123 (1972) [hereinafter cited as *Note on Legislative Purpose*] wherein it is stated:

> It is always possible to define the legislative purpose in such a way that the statutory classification is rationally related to it. When a statute names a class, that class is the definitional attribute of a "class." The nature of the burdens or benefits created by a statute and the nature of the chosen class' commonality will always suggest a statutory purpose to so burden or benefit the common trait shared by members of the identified class. A statute's classifications will be rationally related to such a purpose because the reach of the purpose has been derived from the classifications themselves. *Id.* at 128 [footnotes omitted].

109. *See* Barrett, *supra* note 79, at 122. *See also,* Note on *Developments in the Law of Equal Protection,* 82 HARV. L. REV. 1065 (1969) at 1077-1079.

the balance between the importance of the legislative interest and the level of irrationality is to be struck, this can vary depending on the nature of the legislation.[110] Justice Marshall, of the U.S. Supreme Court, has observed that the standard of review used by the Court in its approach to equal protection varies in degree with the particular classification being scrutinized.[111]

There are, however, specific factors which the Court disfavors in such an analysis. First, the Court has consistently disfavored classifications which are based on conclusive or irrebuttable presumptions.[112] The decisions invalidating classification based on such presumptions exhibit a blend of both due process and equal protection considerations in their reasoning.[113] A legislative classification which is used to define a class of individuals should not be based on some stereotyped characteristic which few members if any, of the class may share.[114]

Similarly, in a second line of equal protection cases involving the rights of illegitimate children, the Supreme Court has invalidated classifications which punish children based on a status over which they have no control.[115] The Court has stated that no child

---

110. Barret, *supra* note 79 at 122-129.
Professor Barrett has suggested that there are at least five possible ways of constructing the balancing model and suggests different outcomes for each.

111. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 99 (Marshall, J., dissenting).

112. Jimenez v. Weinberger, 417 U.S. 628 (1974) (held unconstitutional for the Secretary of Health and Welfare to conclusively presume that unacknowledged after born illegitimate child not dependent on disabled parent); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) (held unconstitutional a school board regulation which presumed that teachers in their fifth month of pregnancy were unfit to teach); United States Department of Agriculture v. Murry, 413 U.S. 508 (1973) (denied effect to a federal law which presumed that a household was not in need of food stamps if one member had been declared a tax dependent of a person in another ineligible household); United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (denied effect of provision in federal law which presumed that unrelated persons living together does not constitute a household); Vlandis v. Kline, 412 U.S. 441 (1973) (upset a Connecticut statute which presumed certain entering university students were nonresidents for out-of-state tuition purposes for four years); Moreno v. University of Maryland, 420 F. Supp. 541 (D. Md. 1974) (held unconstitutional to presume that no class of non-immigrant aliens can establish domicile).

113. Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CAL. L. REV. 1532, 1544 (1974) [hereinafter cited as Bartlett].

114. *Id.* at 1544. This analysis has been most often used in cases involving the substantial infringement of some significant, although not necessarily fundamental, right. Jiminez v. Weinberger, 417 U.S. 628 (1974) (Social Security support benefits). Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (employment); United States Department of Agriculture v. Murry, 413 U.S. 508 (1973) (food stamp assistance); Vlandis v. Kline, 412 U.S. 441 (1973) (reduced instate tuition payment); Stanley v. Illinois, 405 U.S. 645 (1972) (custody of natural children); Moreno v. University of Maryland, 420 F. Supp. 541 (D. Md. 1974) (education.).

115. *See* Trimble v. Gordon, — U.S. —, 45 U.S.L.W. 4395 (April 26, 1977) (State probate law allows illegitimate children to inherit by intestate succession through their mothers while legitimate children can inherit through either parent); Jiminez v. Weinberger, 417 U.S. 628 (1974) (Social Security provision denying benefits to illegitimate children born after onset of disability of natural

is responsible for his or her birth and that penalizing a child on the basis of such a status is unjust.[116] To deny a child a right or benefit for the disapproved past conduct of their parents which results in their particular status is contrary to principles that "legal burdens should bear some relationship to individual responsibility for wrongdoing."[117]

In the context of the Texas statute, the first issue to examine is the statute's purpose. As was noted earlier, such a search is not without difficulty.[118] The Supreme Court has not limited itself in the past to accepting the purpose suggested by the plain terms of a statute. It has used various methods to reach an independent determination of a statute's purpose.[119] In the past, the Court has made an independent assessment in order to define a statute's purpose in such a way that a challenged classification is inappropriate to its purpose.[120] However, there is no reason to think that the Court may not use the same method to find support for a classification by reading the purpose of a statute in such a way as to make the classification appropriate.[121]

From the history and the construction of the amended statute it is readily apparent that the overarching purpose of the change was to discriminate against undocumented children in equal access to education.[122] Although the states have wide latitude in drawing their statutes, they are limited when their purpose in doing so is to harm a politically unpopular group.[123] Consequently, Texas'

---

father); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (New Jersey statute effectively denying benefits to illegitimate children under Welfare Assistance to the Working Poor program); Gomez v. Perez, 409 U.S. 535 (1973) (Texas statute denying right to support from natural father to illegitmate children); Weber v. Aetna Casualty & Surety Company, 406 U.S. 164 (1972) (state law excluding illegitimate children from sharing equally with other children in the recovery of workers' compensation benefits for the death of their parent); Levy v. Louisiana, 391 U.S. 68 (1968) (Louisiana statute denying illegitimate right to recover for wrongful death of their mother.).

116. Trimble v. Gordon, — U.S. —, 45 U.S.L.W. 4395, 4397 citing Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

117. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

118. *See* text accompanying note 108, *supra.*

119. Among the methods employed are: a) ignoring the purpose, b) stating the purpose as a unit rather than as a mix of policies, and c) manipulating the level of abstraction at which the purpose defined. *Note on Legislative Purpose, supra* note 108, at 132.

120. *Id.*

121. *See* Matthews v. Lucas, 426 U.S. 495 (1976) wherein the Court accepted HEW's argument that the design of the statute in question was "to provide for all children of deceased insures who can demonstrate their 'need' in terms of dependency at the time of the insured's death." *Id.* at 507. The Court held that the regulation requiring illegitimate children to show proof of dependency, while not requiring such a showing by other children, was reasonably related to this purpose. *Id.* at 510. *Cf.* Jiminez v. Weinberger, 417 U.S. 628 (1974); Gomez v. Perez, 409 U.S. 535 (1973); Trimble v. Gordon, — U.S. —, 45 U.S.L.W. 4395 (April 26, 1977).

122. *See* note 6, *supra.*

123. United States Department of Agriculture v. Moreno, 413 U.S. 528, 534.

purpose of discriminating against undocumented children cannot stand as the legitimate government interest against which to test its classification.

Another purpose advanced by the proponents of the amended statute is that it was designed to prevent the burden of educating undocumented children from being placed on the taxpayers of Texas.[124] The structure of the Texas school financing scheme relies on contributions from local, state, and federal sources.[125] These funds are to be used by local school districts for the education of local residents.[126]

This aim of equalizing contributions may very well be a legitimate state interest.[127] However, the manner in which Texas seeks to achieve its aim is not sufficiently related to its purpose and at the same time the deprivation it produces is significant.

The classification which singles out undocumented children to pay tuition is both under-inclusive and over-inclusive.[128] It does not require tuition of children whose parents may reside in a community but pay no property taxes, directly or indirectly, or contribute to the education fund in other ways. At the same time, it includes all undocumented children, large numbers of whose parents do contribute to available education funds through property taxes, income taxes and other means.[129]

The statutory classification attributes to undocumented children as a class the characteristic that their parents or guardians do not contribute to the financial support of the Texas public schools.[130] At the same time, it denies to them the opportunity to show that their parents or guardians do in fact contribute to the maintenance of public instruction in Texas.[131] In effect, the classification raises a conclusive or irrebuttable presumption

---

124. *See* text accompanying note 11, *supra.*

125. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 6; Wright v. Houston Independent School District, 393 F. Supp. 1149, 1154 (S.D. Tex., 1975). *See also* text accompanying notes 13-18, *supra.*

126. Love v. City of Dallas, 40 S.W. 2d 20 (1931) was a decision by the Texas Supreme Court involving a suit brought by minor high school students, all of whom lived outside the city of Dallas and some of whom lived outside the County of Dallas. They sought to require the Dallas school board to admit them into Dallas city high schools. The court held that since the state constitution, article 7, § 3:

> . . . . contemplates that [school] districts shall be organized and taxes levied for the education of scholastics within the districts, it is obvious that the education of non-resident scholastics is not within their ordinary functions as quasi municipal corporations, and . . . the Legislature cannot compel a district to construct buildings and levy taxes for the education of non-resident pupils. *Id.* at 27.

127. *See* Vlandis v. Kline, 412 U.S. 441, 448 (1973).

128. *See* Barret, *supra* note 79, 122.

129. *See* text accompanying note 19-22, *supra.*

130. *See* text accompanying note 114, *supra.*

131. *See* Bartlett, *supra* note 113, 1545.

against them. Such a presumption consistently has been disapproved of by the Supreme Court.[132]

Further, the classification punishes them for a status over which they have no control.[133] As children, they cannot determine for themselves where they will live. They are subject to their parents decision to come to the United States and have not willingly and knowingly accepted the status of an undocumented individual.[134] To punish them by denying them education on this basis is irrational.[135] Their families will not leave Texas simply because the children cannot obtain free education.[136] The economic forces which initially have brought them to the United States and Texas[137] will keep them here despite the handicaps placed on these children.[138] Therefore, this classification should be invalidated, because it punishes these children for actions and a status for which they are not responsible.

C. *Education as a Fundamental Right*

Finally, the equal protection clause prohibits a state from burdening fundamental rights of a class of people. In this analysis, the focus of attention shifts from an examination of the classification to the type of interest burdened.[139] If an individual can show that a classification serves to penalize the exercise of a constitutionally protected or fundamental right, the state must show that the classification is necessary to promote a compelling governmental interest.[140] Absent such a showing the classification will be held invalid.

---

132. *See* text accompanying notes 112-114, *supra.*

133. *See* text accompanying note 114, *supra.*

134. *See* text accompanying notes 172-173, *infra.*

135. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

136. Far greater hardships are encountered by undocumented persons from Mexico (ranging from exploitation to police brutality, *see* Ortega, *supra* note 1, at 251-252), yet this has done little to deter illegal immigration. *See* text accompanying notes 51-56, *supra.* Moreover, it is questionable whether information obtained from students regarding their immigration status can be given to the Immigration and Naturalization Service. *See* Family Educational Rights and Privacy Act of 1974, 20 U.S.C.S. 1232g (1975). *See also* TIME, May 2, 1977 at 30 where it was noted that "[i]n 1975, a California Court ruled that school officials cannot release the names of illegal aliens."

137. *See* text accompanying notes 27-57, *supra. See also* TIME, May 2, 1977, at 27-28.

138. *See* TIME, May 2, 1977, at 27-28.

139. Discrimination by legislation against constitutionally protected interests will normally be held invalid, either by simply applying the underlying constitutional provision or equal protection. *See* Barrett, *supra* note 79, at 109. Where a classification burdens a constitutional right in such a degree as to be inconsistent with the constitutional protection afforded the interest it will be held invalid. This normally requires a weighing process to determine if the state interest is sufficiently important to justify the burden on the protected right. *Id.* at 110. In this case we are dealing with a situation where the Texas statute is burdening the education rights of undocumented children by authorizing local districts to require these children to pay tuition.

140. Shapiro v. Thompson, 394 U.S. 618, 634.

The initial step in the analysis requires a determination as to whether or not the right in question is a fundamental right. The key to determining whether a right is "fundamental for purposes of equal protection analysis lies in assessing whether the right is explicitly or implicitly guaranteed by the Constitution."[141]

In *San Antonio Independent School District v. Rodriquez*,[142] the Court addressed the question of whether education is a fundamental right deserving strict scrutiny of legislative action which might burden it.[143] Justice Powell, writing for the majority noted that education is not one of the rights "afforded explicit protection under our Federal Constitution."[144] He went on to hold that there was no basis for finding it implicitly protected in the context of a challenge to the Texas state education benefit-distribution and finance scheme.[145]

The opinion in *San Antonio*, however, left open the question of whether the total denial of education might be a violation of a fundamental right to some minimum quantum of education.[146] The Court admitted that the nexus argument which was advanced in *San Antonio* as the basis for finding education as a fundamental right has more immediacy where education is denied totally.[147] A total denial would seriously limit an individual's ability to participate in the governmental process.[148] The Court itself has recognized the severe injury to an individual which can be occasioned by the denial of education.[149] Also, deserving consideration is the cost to society in general which can result when children are denied the benefits of adequate education.[150] One court has noted that to deny education to a group of lawfully admitted nonimmigrant children could:

> . . . . develop and foster a ghetto of ignorance, with count-

---

141. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 33-34 (1973).
142. 411 U.S. 1 (1973).
143. *Id.* at 35-37.
144. *Id.* at 35.
145. *Id.* at 37. The Court found unpersuasive the argument that education is a fundamental right because it is essential to the effective exercise of first amendment freedoms and to an intelligent exercise of the right to vote. *Id.* at 37. The Court observed that it did not possess "either the ability or the authority to guarantee citizenry the most effective speech or the most informed electoral choice." *Id.* at 36. The Court went on to point out that no argument could be made that the Texas system failed to provide the basic minimal skills necessary for the enjoyment of the rights of free speech and voting. *Id.* at 37. The Court also noted that the Texas scheme was reformatory in nature and was an effort to extend public education and to improve its quality. *Id.* at 39.
146. *Id.* at 37. *See also* Goss v. Lopez, 419 U.S. 565, 574 (1975).
147. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 at 37, 102-103. (Marshall, J. dissenting).
148. *Id.* at 112.
149. Goss v. Lopez, 419 U.S. 565 at 574 (1975).
150. Hosier v. Evans, 314 F. Supp. 316 (D.V.I. 1970).

> less numbers of untrained, untutored, and perhaps untended children roaming the streets; this with the concomitant evils of crime, immorality and general social degeneracy.[151]

Assuming that there is a protected right to some quantum of education, Texas must demonstrate that the classification which effectively denied education to undocumented children is closely related to a compelling state interest.[152] This is a heavy burden: whenever the Court has applied this standard the legislation has been held invalid.[153] Moreover, it was shown in the preceding section that the classification is not rationally related to a legitimate state interest.[154]

But even if it can be established that there is a fundamental right to some minimum quantum of education, there are further problems presented in this instance. First of all, the nexus arguments that education is necessary to properly exercise the protected rights of free speech and voting[155] may not be as strong where aliens are involved. The nexus argument is undercut because, although aliens residing in this country are accorded freedom of speech,[156] the states are not required to extend to them the right to vote.[157] Secondly, it has not been established that undocumented aliens generally, and undocumented children specifically are entitled to substantive constitutional rights.[159]

V. DUE PROCESS

The due process clause of the fourteenth amendment also limits the power of state legislatures. The due process clause protects all persons within the United States from state action which deprives them of life, liberty, or property without due process.[159] The Supreme Court has unequivocally stated that these rights are guaranteed to aliens who are unlawfully in the country.[160]

---

151. *Id.* at 321.
152. Barrett, *supra* note 79, at 110-111.
153. *Id.* at 111.
154. *See* text accompanying notes 118-140, *supra.*
155. *See* text accompanying note 147, *supra.*
156. Bridges v. Wixon, 326 U.S. 135, 148 (1945).
157. Sugarman v. Dougall, 413 U.S. 634 at 647-649.
158. *See* notes 59-73, *supra.*
159. U.S. CONST., amend XIV, § 1, cl. 2; Yick Wo. v. Hopkins, 118 U.S. 356 at 369; Mathews v. Diaz, 426 U.S. 67, 96 S.Ct. 1883, 1890 (1976).
160. *See* Mathews v. Diaz, 426 U.S. 67, 96 S.Ct. 1883, 1890 (1976), wherein the court stated: 'There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivations of life, liberty, or property without due process of law.' Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51; Wong Wing v. United States, 163 U.S. 228, 238; *see* Russian Fleet v. United States, 282 U.S. 481, 389. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection. Wong Yang Sung, *supra*; Wong Wing, *supra.*

The due process clause places two analytically distinct limitations on state action. First, substantive due process prevents a state from violating fundamental concepts of justice which are basic to our system.[161] Second, procedural due process prevents a state from depriving a person of life, liberty, or property without some kind of prior hearing.[162] Undocumented children who are denied equal access to public schools should employ both prongs of the due process clause when challenging such legislation.

A. Substantive Due Process

Until 1937, the Supreme Court utilized substantive due process as a tool to invalidate a substantial number of laws dealing with social and economic matters.[163] Discredited by overuse and lack of judicial restraint,[164] substantive due process has for many years taken a back seat to equal protection for protecting personal liberties and rights.[165] Unlike equal protection which looks at comparative classifications, substantive due process looks at the quality of the right and the extent to which it is burdened by state law.[166] In recent years, there has been a discernable resurgence in the Court's use of substantive due process analysis.[167]

Substantive due process rights are not limited to those rights specifically enumerated in the Bill of Rights.[168] Rather, due process protects those concepts which lie at the base of our civil and political institutions.[169] One such fundamental concept protected by the due process clause is that punishment must be predicated upon personal guilt.[170] In *Weber v. Aetna Casualty & Surety*

---

161. Powell v. Alabama, 287 U.S. 45, 67 (1932); St. Ann v. Palisi, 495 F.2d 423, 425 (5th Cir. 1974).

162. Board of Regents v. Roth, 408 U.S. 564, 569-570 (1972); Goss v. Lopez, 419 U.S. 565, 572-574.

163. *See* Barrett and Bruton, CONSTITUTIONAL LAW: CASES AND MATERIALS (1973) p. 713, n.1.

164. *E.g.*, West Coast Hotel Co. v. Parrish 300 U.S. 379 (1937). *See also* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1972 SUPREME CT. REV. 34.

165. *See* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Protection* 86 HARV. L. REV. 1, 42 (1972)0.

166. Bartlett, *supra* note 113 at 1544.

167. *See* Tribe, *The Supreme Court, 1972 Term—Forward: Toward A Model of Roles in the Due Process of Life and Law* 87 HARV. L. REV. 1, 2 (1973).

168. *See* Roe v. Wade, 410 U.S. 113, 152 (1973); Karr v. Schmidt 460 F.2d 609, 614 (5th Cir. 1972) (en banc).

169. Powell v. Alabama, 287 U.S. 45, 67; St. Ann v. Palisi, 495 F.2d 423, 425.

170. *See* Scales v. United States, 367 U.S. 203, 244-225 (1961) wherein the Court stated:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be

Company,[171] the Supreme Court invalidated a workers' compensation law which discriminated against illegitimate children. There the Court stated that:

> [I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parents.[172]

Thus, the due process clause requires that personal guilt be established before the state can punish an individual by depriving that individual of life or liberty.[173]

State laws which deprive undocumented children of equal access to education punish these children for a status over which they have no control. The status of undocumented children, like that of illegitimate children, is controlled by the actions of their parents. Illegal immigration is caused in large part by the economics of underdevelopment which force familes to come to the United States illegally.[174] The primary role of the parent in the rearing of their minor children and the destinies of their families is beyond question.[175] Children of undocumented workers are no different than their counterparts who reside legally in the United States in that their parents exercise control over them. Moreover, the undocumented child commits no crime by being in this country illegally and is subject to deportation only at the behest of federal authorities.[176] Consequently, state authorities by denying undocumented children equal access to public education create a disability not contemplated by the federal law[177] based on a status which has been foisted upon the undocumented child.

---

sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

171. 406 U.S. 164 (1972).

172. *Id.* at 175. *See also* New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619, 620 (1973); Trimble v. Gordon, — U.S. —, 45 U.S.L.W. 4395, 4397 (April, 1977).

173. St. Ann v. Palisi, 495 F.2d 423, 426 (1974).

174. *See* United States v. Ortiz, 422 U.S. 891, 95 S.Ct. 2585, 2591 (1975). (Appendix to Concurring Opinion of Burger, C.J.); Samora, *supra* note 29, at 94-96; Comment, *Illegal Aliens and Enforcement: Present Practices & Proposed Legislation* 8 U.C.D.L. REV. 127, 128 (1975) [hereinafter cited as *Comment on Illegal Aliens and Enforcement*].

175. The Supreme Court on numerous occasions has recognized the parent's primary role in the upbringing of children and the raising of their family. *See* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972), Stanly v. Illinois, 405 U.S. 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *See also* In re John S. 66 Cal. App. 3d 343, 135 Cal. Rptr. 893 (1977) (wherein the court upheld the right of a parent to commit an unconsenting minor child to a mental hospital).

176. *Comment on Illegal Aliens and Enforcement, supra* note 174, at 138 n.84.

177. *See* Williams v. Williams, 328 F. Supp. 1380 (D.V.I., 1971) where it was

The requirements of due process, however, do not apply to all state-created disabilities. Due process applies only to the deprivation of interests encompassed by the fourteenth amendment's protection of life or liberty.[178] To constitute punishment without personal guilt under the due process clause, undocumented children must demonstrate that the Texas statute deprives them of a protected interest in either property or liberty. Although liberty and property are broadly defined for purposes of the due process clause,[179] they are not unlimited.[180]

Protected property interests are defined by sources other than the United States Constitution.[181] These sources are state statutes or rules granting people certain benefits.[182] Undocumented children cannot claim that they have been denied a property right. The Texas education code at issue specifically excludes undocumented children from the benefit of free public education.[183] Consequently, the Texas statute precludes the excluded benefit from being a protected property interest.[184]

Public education, however, can be considered a protected liberty interest. Interests in liberty are inherently more vague and difficult to define than property interests, yet the meaning of liberty is broad.[185] It encompasses those privileges long recognized as essential to the "orderly pursuit of happiness by a free people."[186] When the Supreme Court has sought to give examples of protected liberty interests, it made clear that more than freedom from bodily restraint is involved.[187]

---

held that an illegal alien could not be denied access to state divorce courts. In so holding, the court stated:

> The enforcement of immigration laws properly remains with those whom it is entrusted by Law and does not need in aid of enforcement the judicially created civil disability of exclusion from our divorce courts. *Id.* at 1383.

178. St. Ann v. Palisi, 495 F.2d 423, 426-427; Board of Regents v. Roth, 408 U.S. 564, 569-570.
179. Board of Regents v. Roth, 408 U.S. 564, 571.
180. *Id.*
181. *Id.* at 577; Goss v. Lopez, 419 U.S. 565, 572-573 (1975).
182. *Id.*
183. TEX. EDUC. CODE, § 21.031 (Vernon Supp. 1977).
184. *See* Goss v. Lopez, 419 U.S. 565, 577-578.
185. Board of Regents v. Roth, 408 U.S. 564, 572.
186. *Id.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
187. As the Supreme Court stated in *Board of Regents v. Roth*:

> While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of an individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men. 408 U.S. 564, 572 quoting from Meyers v. Nebraska, 262 U.S. 390, 399 (1923).

Education is vital and basic to a free society.[188] Without sufficient education, one is unable to enjoy life to the fullest.[189] The Supreme Court has held that a restraint on the teaching of foreign language in the public schools interfered with a protected liberty.[190] Similarly, it has held that a state prohibition on the type of education one must have interferes with a protected liberty.[191] If a student's right to attend private school or to learn a foreign language is a protected liberty, it would appear that a student's right to attend public school must also be a protected liberty interest.

Although education has not been deemed a fundamental right for purposes of the equal protection clause,[192] this does not affect the determination of whether it is a liberty interest protected by the due process clause.[193] The Supreme Court appears to have recognized public education as a protected liberty interest.[194] Consequently, by denying undocumented children free public education, Texas deprives them of a protected liberty interest without a basis of personal guilt.[195]

Once an encroachment upon a basic element of due process has been found, the state must satisfy a substantial burden to jus-

---

188. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 30; Brown v. Board of Education, 347 U.S. 483, 493 (1954).

189. Dixon v. Alabama State Board of Education, 294 F.2d 150, 157 (5th Cir. 1961) *cert. denied*, 368 U.S. 930 (1961).

190. Meyer v. Nebraska, 262 U.S. 390 (1923).

191. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

192. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 35 (1974).

193. St. Ann v. Palisi, 495 F.2d 423, 429; Goss v. Lopez, 419 U.S. 565, 586 (Powell J. dissenting). *See also* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961), where an employee was summarily denied access to the site of her former employment. It was argued that since she had no constitutional right to be there, she could not question the means used to deny her access. The Court rejected this argument stating:

> One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of Law. 367 U.S. at 894 quoting from Homer v. Richmond, 110 U.S. App. D.C. 226, 229, 292 F.2d 719, 722.

194. Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Goldberg v. Kelly, 397 U.S. 254, 262 n.9 (1970). *See* also Goss v. Lopez, 419 U.S. 565 (1975). These cases, however, involved citizens and its is possible that a court would refuse to extend this analysis to undocumented persons. *See* note 195 *infra*.

195. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 96 S.Ct. 1895 (1976) where the Court overturned a federal civil service regulation denying employment to aliens. There the Court stated:

> [I]neligibility for employment is a major sector of the economy is of sufficient significance to be characterized as a deprivation of an interest in liberty. Indeed we deal with a rule which deprives a discrete class of persons of an interest in liberty on a wholesale basis. By reason of the Fifth Amendment, such a deprivation must be accompanied by due process. 426 U.S. 100, 96 S.Ct. 1895, 1905.

But see DeCanas v. Bica, 424 U.S. 351, 96 S.Ct. 933 (1976) where the Court did not even mention the due process problems of effectively denying undocumented workers employment within California by making it a crime for employers to hire them.

tify such encroachment.[196] Texas' interest in denying undocumented children equal access to public education is merely fiscal, an attempt to save money.[197] A concern for fiscal integrity, however, should not be a sufficient justification.[198]

B. Procedural Due Process

Procedural due process analysis differs fundamentally from equal protection and substantive due process analysis. The substantive due process and equal protection arguments outlined above require the judiciary to extend constitutional rights to undocumented persons. Procedural due process analysis does not require such an extension. In terms of procedural due process the issue is not whether Texas can deny undocumented children equal access to education. Rather, it is whether the state can deprive a child of the benefit of free public education without a prior hearing.[199]

According to the law of Texas, a child who is either a citizen or a lawful resident alien can attend free public schools.[200] Such a state statute established a child's legitimate entitlement to a public education as a property interest which is protected by the due process clause and which may not be taken away without adherence to the minimum procedures required by that clause.[201] If a child was not lawfully admitted into this country, that child is not entitled to a free public education in Texas.[202] Since the determination of one's unlawful immigration status will result in the loss of a protected property interest, that determination must be made in accordance with due process procedural protections.[203] Thus, prior to denying a child access to free public education, Texas must provide that child with procedural due process.

---

196. St. Ann v. Palisi, 495 F.2d 423, 427 (1974).
197. *See* text accompanying note 11, *supra.*
198. Graham v. Richardson, 403 U.S. 365, 375. *See also* Hoosier v. Evans, 314 F. Supp. 316, 320-321 where a district court stated that non-citizens could not be denied access to public schools to save the school district money.
199. *See* Dandridge v. Williams, 397 U.S. 471, 487 (1970).
200. TEX. EDUC. CODE, § 21.031 (Vernon Supp. 1976).
201. Goss v. Lopez, 419 U.S. 565, 574 (1975).
202. TEX. EDUC. CODE, § 21.031 (Vernon Supp. 1976).
203. Goss v. Lopez, 419 U.S. 565, 579 (student cannot be suspended for ten days without hearing to determine alleged misconduct); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits cannot be terminated without hearing to determine recipient's ineligiblity); Fuentes v. Shevin, 407 U.S. 67 (1972) (chattels cannot be repossessed without hearing to determine one's right to the chattels); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (state cannot post notice denying individual right to purchase alcoholic beverages without hearing to determine whether an individual fits the proscribed status); Bell v. Burson, 402 U.S. 535 (1971) (driver's license cannot be revoked prior to hearing of driver as a result of the accident).

"Once it is determined that due process applies, the question remains what process is due."[204] It can be argued that all the procedural rights afforded a person subject to deportation[205] should be provided in determining whether a child is in this country illegally.[206] At a minimum, however, due process requires that a person be given notice and an opportunity to be heard before the disability is imposed.[207] The purpose of this requirement is to protect individuals from unfair or mistaken deprivations of a protected property interest.[208] Substantively unfair and mistaken deprivations of property interests can only be prevented when a person has an opportunity to speak up in his own defense prior to the deprivation.[209]

A more serious problem arises as to the substantive standards the state will use in deciding whether a child is lawfully admitted into the country.[210] In determining whether a child is a lawful resident for educational purposes, the state will necessarily encroach upon the exclusive authority of the federal government to regulate immigration.[211]

VI. FEDERAL PRE-EMPTION

The supremacy of federal power to regulate immigration is unquestioned.[212] Until recently it was thought that Congress' power "to establish a uniform rule of naturalization"[213] and the Immigration and Nationality Act[214] had pre-empted state legisla-

---

204. Goss v. Lopez, 419 U.S. 565, 577.

205. See 8 U.S.C. § 1251 *et seq.* (1970); 8 C.F.R. §§ 241-244 (1977). *See also* Comment *Alternatives to Deportation: Relief Provisions of the Immigration and Nationality Act*, 8 U.C.D.L. REV. 323, 327 (1975) [hereinafter cited as Comment *on Alternatives to Deportation*] for a survey of deportation procedures.

206. *See* Williams v. Williams, 328 F. Supp. 1380, 1383.

207. Goss v. Lopez, 419 U.S. 565, 578-580; Wisconsin v. Constantineau, 400 U.S. 433, 436. *See also* Mathews v. Eldridge, 429 U.S. — (1976) where the Court held that due process does not require an evidentiary hearing prior to the termination of disability benefits when there is a pretermination notice to the recipient, an opportunity to respond in writing, and a subsequent evidentiary hearing. Unlike the disability benefits involved in Mathews which are not based on financial need and thus not so vital. *Id.* at 340-341. Denial of education to a child is a much more serious event. *See* Goss v. Lopez, 419 U.S. 565, 576.

208. Fuentes v. Shevin, 407 U.S. 67 at 81.

209. *Id.*, Goss v. Lopez, 419 U.S. 565 at 580 (1974).

210. The Texas Law allows "lawfully admitted aliens" to attend school. TEX. EDUC. CODE, § 21.031 (Vernon Supp. 1976). A problem of interpretation arises as to whether lawfully admitted aliens who subsequently violate the conditions of their entry and are subject to deportation under 8 U.S.C. § 1251 (1970) would be entitled to free public education.

211. *See* text accompanying notes 230-262, *infra.*

212. De Canas v. Bica, 424 U.S. 351, 96 S. Ct. 933, 936 (1976); Hines v. Davidowitz, 312 U.S. 52, 62 (1941).

213. U.S. CONST., art. 1, § 8, ch. 4.

214. 8 U.S.C., § 101 *et. seq.* (1970).

tion impacting immigration.[215] In *De Canas v. Bica*,[216] however, the Supreme Court held that not every state enactment dealing with aliens is a regulation of immigration and thus per se pre-empted by the federal government's power over immigration.[217] Under *De Canas* the test for determining federal pre-emption is two-pronged. Federal regulation is deemed pre-emptive of state regulatory power if either "Congress has unmistakenly so ordained" or "the nature of the regulated matter permits no other conclusion."[218]

A. Congressional Intent to Pre-empt

Any discussion of Congressional intention to pre-empt state regulations impacting on immigration must begin with *De Canas*. There the Court held that Congress did not intend to pre-empt states from regulating the employment of illegal aliens.[219] In so holding, the Court looked at the following four factors. First, states have broad authority to regulate the employment relationship to protect workers within the state.[220] Second, the working and legislative history of the Immigration and Nationality Act do not indicate that Congress intended to preclude harmonious state regulation dealing with the employment of illegal aliens.[221] Third, employment of illegal aliens is at best a "peripheral concern" of the Immigration and Nationality Act.[222] And, finally, the Federal Farm Labor Contractor Registration Act[223] deals with the employment of illegal aliens and that Act specifically allowed supplemental state regulation.[224]

When these four factors are analyzed in the context of the denial of equal access to education to undocumented children, a different result is reached. Although the regulation of education, like the regulation of employment, is primarily a matter of local or state concern,[225] this conclusion does not foreclose further anal-

215. *See* Comment *on The Undocumented Worker, supra* note 12 at 165-166. On the subject of preemption generally and the Burger Court's unwillingness to preempt state action *see* note *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court* 75 COL. L. REV. 623 (1975).

216. 424 U.S. 351, 96 S. Ct. 933 (1976).

217. *Id.* at 936. For a critique of the Court's treatment of this issue, *see* Comment, *The Undocumented Alien Laborer and De Canas v. Bica: The Supreme Court Capitulates to Public Pressure*, 3 CHICANO L. REV. 148, 150-155 (1976).

218. *Id.* at 937. This test was derived from Florida and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) which dealt with federal preemption in the context of a state regulation of commerce.

219. De Canas v. Bica, 424 U.S. 351, 96 S. Ct. 933, 937, 939.

220. *Id.* at 937.

221. *Id.* at 937.

222. *Id.* at 939.

223. 7 U.S.C., § 2041 *et seq.* (1973).

224. De Canas v. Bica, 424 U.S. —, 96 S. Ct. 933, 939-940.

225. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 at 42.

ysis. "Even state regulation[s] designed to protect vital state interests must give way to paramount federal legislation."[226] However, the Court has stated in *De Canas* that the words and legislative history of the Immigration and Nationality Act leave room for some type of "harmonious" state regulation impacting on aliens.[227] The issue remains whether a state statute denying undocumented children equal access to education is the type of statute the Act has left room for.

"The central concern of the [Immigration and Nationality Act] is with the terms and conditions of admission to the country. . ."[228] Since this is the central concern of the Act, it is presumed that Congress intended to pre-empt state action in this area.[229] States lack the power to add or to take away from the conditions imposed by Congress upon admission, naturalization and residence of aliens in the United States.[230] The conditions upon which an alien may be excluded[231] or deported[232] have been set out by Congress and interpreted by the Courts and administrative agencies.[233] Moreover, Congress has established provisions that allow an otherwise deportable alien to remain lawfully in the country.[234] Thus, an alien can only be deported upon the government sustaining the burden of proof on the issue of deportability,[235] or upon the alien's admission to official agents.[236] As a consequence, until an order of deportation is obtained by the Attorney General, the federal government cannot force an alien to leave the country.[237]

A state statute, such as the Texas statute, which deprives un-

226. De Canas v. Bica, 424 U.S. 351, 96 S. Ct. 933, 937.
227. *Id.* at 937-938.
228. *Id.* at 938.
229. *Id.*
230. *Id.* at 939 n.6 quoting from Takahashi v. Fish & Game Commission, 334 U.S. 410, 419 (1948).
231. 8 U.S.C., § 1182, *et seq.* (1970).
232. 8 U.S.C., § 1251, *et seq.* (1970).
233. Procedure for judicial review of deportation orders after administrative remedies are exhausted is found in 8 U.S.C., § 1105a (1970).
234. Types of discretionary relief from deportation include suspension of deportation, stay of deportation, adjustment of status, waiver of deportation and private bills. *See* Comment *on Alternatives to Deportation, supra* note 205 at 333-339.
235. Palmer v. Ultimo, 69 F.2d 1 (7th Cir. 1934); Gastelum-Quinones v. Kennedy, 374 U.S. 469, 83 S. Ct. 1819, 10 L. Ed. 2d 1013 (1963); 2 C. Gorden 7 H. Rosenfield, IMMIGRATION LAW AND PROCEDURE, 5-118 - 5-123, § 5.10b (1977). Although deportation is a civil proceeding, the burden of proof on the government is higher than in ordinary civil cases. *See In re S*, 7 I. & N. Dec. 529 (1957).
236. *See* United States v. Ortiz, 422 U.S. 891, 95 S. Ct. 2590, 2593 (1975) (Appendix to Concurring Opinion of Burger, C.J.).
237. 8 U.S.C. § 1252 (1970). An alien who is technically in the country illegally is not guilty of any crime and is subject only to the sanction of deportation under federal law. 2 C. Gordon & H. Rosenfield, IMMIGRATION LAW AND PROCEDURE, 9-4, § 9.1 (1977); Abrams and Abrams, *Immigration Policy—Who Gets In and Why?* THE PUBLIC INTEREST, Winter 1975, at 23.

documented children equal access to the public schools, mandates that local state authorities determine which children are unlawfully in the country. Such a determination is the central concern of the federal government under the Immigration and Nationality Act.[238] The California Labor Code provision which was examined in *De Canas*[239] did not create this problem. This statute operates only with respect to individuals whom the federal government has already declared cannot work in the country.[240]

The California statute prohibited an employer from knowingly hiring an alien who is not entitled to lawful residence in the United States.[241] To enforce such a statute the state does not determine the immigration status of a particular individual employee. Rather, the state of mind of an employer at the time he or she hires a worker is at issue. This issue can be determined solely by reference to state law.[242]

In contrast, the issue to be determined in applying a statute which denies equal access to education to undocumented children is the immigration status of the child. This issue has been determined by Congress to be exclusively a federal question subject to the provisions of the Immigration and Nationality Act.[243] Also unlike the employment statute in *De Canas*, there is no comparable federal statute which deals with denying undocumented children equal access to education.[244] Consequently, under this prong of the pre-emption test articulated in *De Canas*, a different result would be reached for a statute denying undocumented children equal access to public schools.

B. *Pre-emption by Burdening Federal Objectives*

Although the result reached above is sufficient to invalidate

238. De Canas v. Bica, 424 U.S. 351, 96 S. Ct. 933, 938.
239. CAL. LAB. CODE, § 2805(a) (West Supp. 1975).
240. De Canas v. Bica, 424 U.S. 351, 96 S. Ct. 933, 940.
241. CAL. LAB. CODE, § 2805(a) (West Supp. 1975).
242. Under California law " 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission." CAL. PENAL CODE, § 7.4 (West, 1970). *See also* People v. Glumerfelt, 35 Cal. App. 2d 495, 96 P. 2d 190 (1939).
243. *See* text accompanying notes 228-229, *supra*.
244. The only federal statute dealing with local educational policy is Title 1 of the Elementary and Secondary Education Act of 1965 as amended (20 U.S.C., § 241 *et seq.* (1976). That statute allowed for the distribution of federal funds to local schools to aid low income children. The purpose of the Act was "to give young people a chance to break the cycle of poverty and poor education that so many of them and their parents have known." H.R. REP. No. 93-805, 93d Cong., 2nd Sess. 1974, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4093, 4096. In this Act, children are defined as "all children aged five through seventeen inclusive." 20 U.S.C. § 241c.(c) (Supp. v 1975). The only implication one can draw from this is that the federal government will grant money to local schools who teach undocumented children of low income backgrounds.

the Texas statute, the statute raises even more serious problems under the second prong of the test. The second prong requires federal pre-emption if the state statute " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the [Immigration and Nationality Act].' "[245] Such an analysis involves determining whether the state statute " 'can be expressed without impairing the Federal superintendence of the field.' "[246] The Supreme Court in *De Canas* could not reach this issue on the record before it and remanded it to the California court.[247] In remanding, the Court indicated that the California court should attempt, if possible, to reconcile the state statute with the federal scheme.[248] At least one commentator has stated that he believes the California statute is unconstitutional in this context.[249] To determine whether the Texas statute impairs federal power, two areas will be examined: first, the Texas statute's impairment of the objectives of the Immigration and Nationality Act; and second, the statute's effect on the federal government's exclusive power over international relations.

When a state is allowed to determine a persons' immigration status a potential conflict with federal immigration standards and policies of the Immigration and Nationality Act exists. Federal officials are charged with the responsibility of enforcing our immigration laws.[250] Moreover, federal standards govern who is or can become a lawful resident.[251] To allow states to determine

---

245. De Canas v. Bica, 424 U.S. 351, 96 S. Ct. 933, 940.
246. *Id.*
247. *Id.* at 940-941.
248. As the Court noted in De Canas v. Bica, 424 U.S. 351, 96 S.Ct. 933, 937 n.5:

> Of course, even absent such a manifestation of Congressional intent to 'occupy the field,' the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any Federal laws or treaties . . . However, 'conflicting law absent repealing or exclusivity provisions, should be pre-empted . . . "only to the extent necessary to protect the achievement of" " the aims of the federal law, since 'the proper approach is to reconcile" the operation of both statutory schemes with one another than holding [the state scheme] completely ousted. . . ." '

249. Professor T. Krattinmacher at the Conference on Immigration Law held Georgetown University Law Center on March 26, 1976 stated:

> De Canas is a 'sterile' case in that the California Court held 2805 unconstitutional in the abstract and the Supreme Court reversed that decision as such . . . Whether the statute can ever be constitutional as applied to any given fact situation is a totally different question. My hunch is that the state court will find 2805 unconstitutional as well . . . [quoted in Comment *on Undocumented Alien Laborers and De Canas v. Bica*, note 217, at 163, n.66].

250. The Attorney General is charged with the administration and enforcement of the Immigration and Nationality Act. 8 U.S.C., § 1103(a) (1970). In exercising this responsibility, Attorney General Bell has indicated that he intends to eliminate massive deportations of undocumented persons because it would be inhumane and impractical. San Francisco Chronicle, February 14, 1977, at 5 col. 6.
251. *See* text accompanying notes 229-237, *supra.*

immigration status for purposes of imposing disabilities on undocumented children would conflict with federal power in this area.[252]

Also, regulation of immigration is integrally related to international relations,[253] which is an area of exclusive federal power.[254] In *Hines v. Davidowitz*,[255] the Supreme Court held that Pennsylvania's Alien Registration Act was pre-empted by the Federal Alien Registration Act.[256] There the Court noted that any state enforcement of laws regarding aliens was a particularly dangerous area since:

> [s]ubjecting . . . [aliens] . . . to indiscriminate and repeated interception and interrogation by public officials . . . bears an inseparable relationship to the welfare and tranquilty of all the states.[257]

Concern regarding abuses generated by federal enforcement of the immigration laws has come from foreign governments[258] and members of minority groups in the United States.[259] Discriminatory enforcement of the immigration law, especially with respect to persons of Mexican descent, has been widespread.[260] The federal government is working to rectify the problems associated with the immigration laws.[261] Local enforcement efforts will only exacerbate this situation.[262]

Moreover, the federal government in exercising its power over international relations has entered into an international

---

252. *See* Williams v. Williams, 328 F. Supp. 1380 at 1383 wherein it was stated:

> "To deny an alien access to our divorce courts on the sole ground that he may be in violation of an immigration law would be to deny both due process and equal protection of the laws. Such a denial would attach a civil disability to some aliens without the prior benefit of the procedures designed for the purpose of enforcing the immigration laws . . . The remedy for a violation [of immigration laws] is deportation or other administrative sanction, not withdrawal of the right of access to our divorce courts."

253. Hines v. Davidowitz, 312 U.S. 52 at 62-65.

254. Zschernig v. Miller, 389 U.S. 429, 440-441 (1968).

255. 312 U.S. 52 (1941).

256. *Id.* Although the holding in Hines has been construed by lower courts as recognizing total federal preemption of in the field of immigration (*see e.g.*, Dolores Canning Co., Inc. v. Howard, 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (1974), the Courts' decision in De Canas gives Hines a narrow construction. De Canas v. Bica, 424 U.S. 351, 96 S.Ct. 933. 940.

257. Hines v. Davidowitz, 312 U.S. 52 at 65-66.

258. Comment *on Illegal Aliens and Enforcement, supra* note 174, at 148.

259. *Id.* at 132. In United States v. Brignoni-Ponce, 422 U.S. 873, 96 S.Ct. 2574, 2582-2583 (1975) the Supreme Court held as unconstitutional the Immigration Service practice of detaining people of Mexican ancestry to discover undocumented aliens when their only basis for doing so was the people's Mexican appearance.

260. *Id.*, Cramton Report, *supra* note 28, at 12; *Hearings before the Subcommittee on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess., ser. 22, at 2 (1973).

261. *See* for example Cramton Report, *supra* note 28; TIME, May 2, 1977, at 32.

262. *See* Comment *on Illegal Aliens and Enforcement, supra* note 174, at 148.

agreement regarding education. The "Protocol of Buenos Aires"[263] amending the charter of the Organization of American States was ratified by the United States and over two thirds of the Organization's member states.[264] That agreement was designed to promote "the economic, social, and cultural development of the peoples of the Hemisphere" by "reaffirming the determination of the American States to combine their efforts in a spirit of solidarity in the permanent task of achieving the general conditions of well-being that will ensure a life of dignity and freedom to their peoples."[265] Under this protocol, it was agreed that each signatory would endeavor to provide compulsory free public education to all children.[266] The Texas statute is contrary to the spirit of this international agreement. It is well established that a state statute cannot stand in the way of a federal treaty.[267] International controversies of great magnitude may arise from real or imaginary wrongs to another country's subjects inflicted or permitted by the federal government.[268] The Texas statute denying undocumented children equal access to free public education creates the potential for such a controversy.

VII. CONCLUSION

Fueled by the hysteria regarding "illegal aliens" in the United States, states are now seeking to limit the entry of undocumented persons by denying them state benefits.[269] The Supreme Court in the past has invalidated attempts by individual states to protect their own resources in the face of a national problem.[270] The attempt by Texas to protect its school funds by barring undocumented children from free public education presents an analogous situation.

---

263. Protocol of Amendment to the Charter of the Organization of American States, "Protocol of Buenos Aires," February 27, 1967, 21 U.S.T. 659, TIAS 6847.

264. *Id.* 21 U.S.T. at 811; TIAS 6847.

265. *Id.* U.S.T. at 659; TIAS 6847.

266. Article 47 of the Protocol reads:

> "The member States will exert the greatest efforts, in accordance with their constitutional purposes, to ensure the effective exercise of the right to education, on the following bases:
>
> a) Elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the state, it shall be without charge."

Id. 21 U.S.T. at 672, TIAS 6847 (1971).

267. Hauenstein v. Lynhaj 100 U.S. 483, 488, (1880); United States v. Pink, 315 U.S. 203, 230-231 (1942).

268. Hines v. Davidowitz, 312 U.S. at 64-65 (1941).

269. *See* Comments of Professor Charles Gordon, former Chief Counsel for the Immigration and Nationality Service quoted in *Comment on the Undocumented Alien Laborer and De Canas v. Bica, supra* note 217 at 155 n.35.

270. *See* Edwards v. California, 314 U.S. 160 (1941) in which the Court held invalid as an unconstitutional burden on interstate commerce a California law developed to preserve state resources during the depression by making it a crime to bring into the state any indigent person who is not a resident of the State.

Specific federal legislation prohibiting states from denying undocumented children equal access to public education would resolve this problem.[271] Increased federal financial responsibility for education would also eliminate the financial problems that have caused Texas to deny free public education to undocumented children.[272]

Since Congress has not yet taken such action, undocumented children must rely on the courts to protect them as a powerless minority against discriminatory state regulations. This article has analyzed the constitutional provisions a court might employ to strike down such legislation. It is difficult to predict how a court will treat these issues. The equal protection and substantive due process analyses represent an extension of constitutional protection to undocumented persons. In contrast, the pre-emption argument avoids the necessity of enlarging the rights of undocumented persons. Pre-emption exists not to protect the interest of the undocumented person, but rather to protect the federal government's interest in a uniform national immigration policy.

State regulation of this kind will do little to solve the national problem of illegal immigration.[273] Illegal immigration is caused by economics and the eventual solution involves federal policies to foster international economic cooperation.[274]

FELIPE V. FLORES
ROBERT F. KANE
FELIX VELARDE-MUNOZ

271. Under the supremacy clause as expressed in U.S. CONST. art. VI, cl. 2, "any state law, however clearly within a state's acknowledged power, which . . . is contrary to Federal, must yield." Free v. Bland, 369 U.S. 633, 666 (1962).

272. *See* Comment, *Health Care for Indigent Illegal Aliens*, 8 U.C.D.L. REV. 107, 123-126 (1975) where an analogous proposal relating to federal financial responsibility for health care for undocumented persons was discussed.

273. *See* note 136 *supra.*

274. *See* Cramton Report, *supra* note 28, at 40; Comment *on Illegal Aliens and Enforcement, supra* note 174, at 161.