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**Title**

Equal Protection for Undocumented Aliens

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**Journal**

Chicana/o Latina/o Law Review, 5(0)

**ISSN**

1061-8899

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**Publication Date**

1982

**DOI**

10.5070/C750020935

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# EQUAL PROTECTION FOR UNDOCUMENTED ALIENS

## INTRODUCTION

Undocumented aliens in the United States<sup>1</sup> are faced with a peculiar legal dilemma.<sup>2</sup> Despite their presence in a country which includes specific human rights guarantees in its constitution, it is unclear whether the broad language of the Equal Protection Clause<sup>3</sup> extends to shield them from discriminatory state practices.<sup>4</sup> Though the clause's language seems to protect all per-

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1. Undocumented aliens are often referred to as "illegal aliens" primarily due to their assumed unlawful immigration status while in the United States. The following more precise terminology will be used throughout this Comment:

The term "illegal alien" should encompass only those individuals determined by the Immigration and Naturalization Service (INS) to have entered the United States illegally and presently under order of deportation. Conversely, an "undocumented alien" would [include] . . . all aliens *not* under order of deportation. This category would include, for example, aliens who do not have actual possession of proper entry papers due to loss or theft of their entry visa as well as aliens who are eligible for permanent residence status but have not applied for this status.

Letter from Mexican American Legal Defense and Educational Fund (MALDEF) to Hon. Evelle J. Younger (Sept. 5, 1978).

2. See Comment, *The Legal Status of Undocumented Aliens: In Search of a Consistent Theory*, 16 HOUS. L. REV. 667 (1979) (proposes that undocumented aliens' physical presence in this country suffice to support their claim to constitutional rights in areas unrelated to immigration control). See generally Gordon, *The Alien and the Constitution*, 9 CAL. WEST. L. REV. 1 (1972) (discusses aliens' constitutional rights).

3. "Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the law." U.S. CONST. amend. XIV, § 1.

See generally Cox, *The Supreme Court, 1965 Term-Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Gunther, *The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975).

4. This Comment does not address the validity of federal statutes which discriminate against undocumented and documented aliens. Discriminatory federal statutes are more difficult to challenge after *Mathews v. Diaz*, 426 U.S. 67 (1976). In *Diaz* a unanimous Court held that Congress has no constitutional duty to provide all aliens with benefits provided to citizens and that the federal statute which deprived certain Cuban refugees of these benefits was valid. It should be noted, however, that in distinguishing between the state and federal authority to discriminate against aliens, the Court said:

A division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business.

*Id.* at 85.

sons residing in this country, the United States Supreme Court has never declared that equal protection applies to undocumented aliens.<sup>5</sup>

The need to establish constitutional protection for the undocumented is apparent. Between four and twelve million undocumented persons reside in rural areas and cities across the country.<sup>6</sup> Attracted by a higher standard of living, millions of these people will continue to migrate to the United States.<sup>7</sup> Because not everyone wishing to migrate can do so legally,<sup>8</sup> they must enter by surreptitious means.<sup>9</sup> The Immigration and Natu-

5. The issue of whether equal protection of the law applies to undocumented aliens will be decided in *Doe v. Plyler*, 628 F.2d 448 (5th Cir. 1980), *cert. granted*, 101 S. Ct. 2044 (1981).

6. *The New York Times* (Jan. 16, 1980, p. A1) quotes unnamed "authorities in the State Department" as estimating that as of 1980 "the number of illegal aliens in the United States is at least 10 million, and these ranks are swelling at a rate of about two million a year." The 4-6 million range as of mid-1970s has been accepted as reasonable by such responsible sources as former INS Commissioner Leonel Castillo, the Select Committee on Population of the U.S. House of Representatives, and senior demographers at the Bureau of the Census.

Teitelbaum, *Right Versus Right: Immigration and Refugee Policy in the United States*, 59 FOREIGN AFF. 21, 25 (1980). See also THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 36 (March 1, 1981) [hereinafter cited as IMMIGRATION POLICY REPORT]; Fogel, *Illegal Aliens: Economic Aspects and Public Policy Alternatives*, 15 SAN DIEGO L. REV. 63 (1977).

7. Diez millones de personas solicitan anualmente para obtener visas que les permita ingresar a Estados Unidos; 3,500 mexicanos cruzan la frontera de Texas mensualmente con pases que les permite 74 horas de estadia en el territorio norteamericano. El año pasado 120,000 refugiados cubanos llegaron al país. En la actualidad hay un promedio de tres a seis millones de residentes ilegales en Estados Unidos.

La Opinion, 18 de Oct., 1981, en 1, col. 1. See also D. REAVIS, WITHOUT DOCUMENTS (1978).

8. The "push-pull" theory of international migration helps to explain why and how aliens are influenced to enter this country illegally.

[E]conomic disparity between Mexico and the United States produces mass undocumented migration of unemployed and underemployed Mexicans in search of relatively well-paying jobs in the United States. This hypothesis finds its roots in modern demographers' "push-pull" theory that mass migration, including temporary migration, is due to socioeconomic imbalances between regions. Certain factors "push" people away from source regions and others "pull" them into destination regions. In the case of Mexico and the United States, push-pull results from inadequate economic opportunity in Mexico and superior opportunity in the United States.

Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. Rev. 615 (1981). See also Lee, *A Theory of Migration*, 3 DEMOGRAPHY 46 (1966); Ravenstein, *The Laws of Migration*, 52 J. ROYAL STATISTICAL SOC'Y 241-301 (1889).

9. In 1980 the INS denied entry to 915,600 aliens. Of those found ineligible, 856,000 chose to withdraw their applications for admission rather than appear in formal exclusion hearings. UNITED STATES DEP'T OF JUSTICE, THE ANNUAL REPORT, UNITED STATES ATTORNEY GENERAL 162 (1980). There is no way of determining how many of those aliens denied entrance entered through surreptitious means.

About 40 per cent of the illegal aliens are persons who entered the country

ralization Service (INS)<sup>10</sup> cannot locate, let alone deport, a majority of these persons.<sup>11</sup> This Comment therefore assumes that INS policies will continue to be ineffective.

Fearing deportation, the undocumented are reluctant to invoke legal mechanisms against persons who exploit their precarious legal status.<sup>12</sup> Also, many are unaware of their legal rights

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legally and then violated a condition of their entry. *About 60 per cent are persons who entered illegally, either through the use of forged documents or by crossing U.S. land and sea borders without inspection.*

U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESS: PROSPECTS DIM FOR EFFECTIVELY ENFORCING IMMIGRATION LAWS ii (1980) (emphasis added).

10. The Immigration and Naturalization Service (INS) is the federal agency charged by Congress with exclusive authority to control the human migration of persons flowing into and out of our national borders.

It is . . . manifest that immigration legislation reflects political policy. Throughout the history of the United States those policies have been debated, and the debate still continues. The conclusions have not been uniform, but two major trends may be detected. The first pattern, which persisted until about 1875, was one of tolerance and encouragement. The second, launched in 1875, was restrictive. There were restrictive aspects of the first period and relaxed intervals in the second, but the major thrust was in a single direction. The modest requirements of the 1875 legislation have been followed by restrictions of ever increasing severity.

However, the trend in recent years has been for selective liberality on an emergency or selective basis. This has been reflected in special legislation for refugees and displaced persons by a constantly increasing volume of private relief legislation to avoid hardships produced by the general legislation, and by limited ameliorations in the general law enacted almost annually since 1957. A major milestone in this liberalizing process was the 1965 legislation eliminating the national origins quota system. Since World War II the United States has accepted about 20% of the refugees who have migrated from Europe.

C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 1.1 (1974) (footnotes omitted).

11. The sheer number of individual illegal aliens arrested [(in 1978 there were 400,000 in the San Diego region alone)] obviously precludes prosecution in each and every case . . . . [I]t should be fairly obvious that neither the courts, the United States Attorney, the Border Patrol, nor the prison system could survive such an attempt . . . .

UNITED STATES DEP'T OF JUSTICE, UNITED STATES ATTORNEY S. DIST. OF CAL., 1978 REPORT 45-46 (1978).

12. Any pay is better than no pay, he [shop manager] says of his workers' checks.

It is the same in six other New York Chinatown garment shops on Allen and Division streets visited recently. All unionized, all a little cleaner than others, all offering a chance of a decent life. But all caught in a nasty web that, if uncorrected, could lead to the return of sweat work [characterized by slave wages, child labor and dingy, dirty and dangerous working conditions].

\* \* \*

The sweatshops emerge wherever an exploitable pool of labor, usually illegal immigrants with few skills and great hopes, settles.

Many are in other parts of the country, as far away as stucco homes in Los Angeles, flats in Dallas and housing projects in Miami.

But large numbers are . . . in New York City—in the cracking, red-brick tenements off Restaurant Row in Chinatown, in storefronts on the blistering boulevards of the Bronx, in cellars of run-down wooden houses in

and remedies.<sup>13</sup> Although exploitative employment practices can be remedied by courts,<sup>14</sup> redress for undocumented aliens who are discriminated against by state governments is not so solidly based.<sup>15</sup> To remedy this problem, this Comment proposes that

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the Corona section of Queens and across the Hudson River in garages in Union City, N.J.

Koreans. Haitians. Taiwanese. Cubans. Columbians. Mexicans. And more. They are the urban version of the migrant farm worker.

Afraid of deportation, handicapped by a language barrier, unaware of legal remedies, fearful of authority and in desperate need of money, however little, they take the work.

\* \* \*

Some estimate that 50,000 illegal immigrants toil in 3,000 sweatshops in New York City alone. Many earn less than \$1 an hour. The laws governing pay are routinely violated. Overtime is unheard of. Vacations, a dream. A day off means docked pay.

Often, officials say, taxes are deducted from paychecks but never paid to governments. The same holds true for workers' compensation dues. And Social Security deductions.

L.A. Times, Sept. 6, 1981, Part I, at 2, col. 1. See also Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981) ("It is not surprising, therefore, that they are often found working below minimum wage, in safe conditions, nor that they suffer in unsafe conditions, nor that they suffer inhumane and discriminatory treatment."); IMMIGRATION POLICY REPORT, *supra* note 6, at 42.

13. Whether the undocumented are unaware of their rights or merely afraid to test the courts does not seem to matter; in either case, these persons do not often invoke the legal system. As the *Doe v. Plyler* court noted:

Because they are within this country illegally, they often do not receive the benevolent protections of the law, for they know that to invoke government protection would subject them to possible identification and deportation to their native country. Hence, the rights of these illegal aliens and the corresponding responsibilities of the states toward them have not been litigated to an appreciable degree.

628 F.2d at 451.

14. The National Labor Relations Act (NLRA), for example, protects undocumented aliens against unfair labor practices. *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355 (7th Cir. 1978). In *Sure-Tan* the court acknowledged that undocumented aliens' violation of the immigration statute did not nullify their votes in a union certification election. One court has noted that denying the undocumented NLRA protection would encourage employers seeking to circumvent labor laws to hire these aliens. *NLRB v. Apollo Tire Co.*, 604 F.2d 1180 (9th Cir. 1979). But see Note, *Retaliatory Reporting of Illegal Alien Employees: Remediating the Labor-Immigration Conflict*, 80 COLUM. L. REV. 1296 (1980) (critical of *Sure-Tan* result on policy grounds); Comment, *Illegal Aliens as "Employees" Under the National Labor Relations Act*, 68 GEO. L. J. 851 (1979) (critical of the *Apollo* result). See generally J. COMMONS & J. ANDREWS, *PRINCIPLES OF LABOR LEGISLATION* 346-54 (4th ed. 1967).

Undocumented aliens can also sue citizens for breach of employment or other contracts. *Gates v. Rivers Const. Co.*, 515 P.2d 1020 (Ala. 1973). They can sue for personal injuries negligently inflicted upon them. *Janusis v. Long*, 284 Mass. 403, 188 N.E. 228 (1933). They may also recover workers' compensation benefits. *Commercial Fire & Marine Co. v. Galindo*, 484 S.W.2d 635 (Tex. Civ. App. El Paso 1972, writ ref'd n.r.e.). Undocumented aliens can use our divorce courts. *Williams v. Williams*, 328 F. Supp. 1380 (D.V.I. 1971). See also notes 82-100 & accompanying text *infra*.

15. Undocumented aliens are subject to several sorts of state discrimination. The Texas legislature has denied the undocumented the right to an equal educational opportunity. *Doe v. Plyler*, 628 F.2d 448 (5th Cir. 1980), *cert. granted*, 101 S. Ct. 2044 (1981); *In re Alien Children Educ. Litigation*, 501 F. Supp. 544 (S.D. Tex. 1980);

courts extend equal protection analysis to adjudicate undocumented alien-based state discrimination cases.<sup>16</sup>

This Comment first describes the undocumented aliens' dilemma<sup>17</sup> and gives examples of various discriminatory state practices. It shows how these practices threaten the policies underlying the legislative schemes involved.<sup>18</sup> Second, this Comment introduces state practices in the primary and secondary education and nonemergency health care areas that have adversely affected undocumented aliens. This is followed by discussion of

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Certain Named & Unnamed Noncitizen Children & Their Parents v. Texas, 101 S. Ct. 12 (1980).

The County of Los Angeles recently implemented a policy which denies undocumented aliens nonemergency medical care. County Health Alliance (CHA) v. Board of Supervisors, No. 0360546 (L.A. Super. Ct. 1981) (application for temporary restraining order) [hereinafter cited as the CHA case]. John E. Huerta, Associate Counsel of the Mexican American Legal Defense and Educational Fund (MALDEF), noted that California's Riverside Board of Supervisors enacted a policy similar to the Los Angeles denial; the policy's implementation awaits the outcome of the CHA case. Mr. Huerta also noted that Fresno County, California, has enacted and implemented a policy which similarly denies nonemergency medical care to undocumented aliens. A comparable discriminatory policy is being considered in Houston, Texas. Interview with John E. Huerta, Associate Counsel, MALDEF, Los Angeles, California (Sept. 4, 1981).

16. Recent commentators have urged adoption of a preemption analysis to cure defects inherent in equal protection challenges to state practices discriminating against undocumented aliens. Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069 (1979) (argues that the Court's alienage-related equal protection opinions have followed an "unarticulated theory of preemption") [hereinafter cited as *Preemption or Equal Protection?*]; Comment, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 YALE L.J. 940 (1980) (argues that a preemption model orders alienage jurisprudence better than equal protection analysis). *But see* Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 225 (1959) ("In those situations where the alternative constitutional ground [to pre-emption] is an independent standard, such as due process or equal protection, congressional approval of the state law is not likely to alter the Court's hostile view of the state law, and the only effect of relying preferentially on pre-emption would be to postpone the eventual showdown."). *See also* Comment, *Preemption in the Field of Immigration: De Canas v. Bica*, 14 SAN DIEGO L. REV. 282 (1976).

These attacks on equal protection analysis, however, have been inadequately based. One argument suggests the Supreme Court seems to have followed an unarticulated preemption theory in its alienage cases. *Preemption or Equal Protection?*, note 16 *supra*. This argument, however, treads too roughly on constitutionally thin ice. It is true that the Court, in *Truax v. Raich*, 239 U.S. 33, 42 (1915), mentioned the federal interest in assuring aliens the privileges conferred by their lawful admission. However, the *Truax* case clearly involved equal protection substance. The Court clearly decided the case on equal protection grounds. Most alien cases will involve some federal interest, but the real test in deciding what set of constitutional principles will apply to the controversy should turn on the salient facts and issues raised in the particular case. If the state's power to regulate in an area which *may* have some effect on illegal immigration is called into question, *see De Canas v. Bica*, 424 U.S. 351 (1976), then use of preemption analysis might be appropriate. Where the issue raised is the state's alleged violation of the equal protection clause, however, equal protection principles should control adjudication of the case. *See, e.g., Graham v. Richardson*, 403 U.S. 365 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1947).

17. *See* notes 22-34 & accompanying text *infra*.

18. *See* notes 35-74 & accompanying text *infra*.

why these practices frustrate accepted state and federal policies. Third, this Comment will examine the historical background of the equality principle to show how the policies underlying the equal protection clause are threatened by denying the undocumented the right to challenge discriminatory state practices.<sup>19</sup> Also, this Comment will discuss areas of law in which undocumented aliens' rights have been recognized. It will show how this recognition furthers social policies underlying these laws.

This Comment then proposes a solution to the undocumented aliens' legal dilemma. It proposes allowing undocumented persons to challenge discriminatory state practices when (1) immigration law has not been invoked; (2) the state action is, on its face, independent of the federal immigration scheme; and (3) the state action discriminates against undocumented aliens.<sup>20</sup> This Comment also describes how requiring states to abide by a virtually exceptionless equal treatment principle solves the dilemma.

Finally, this Comment applies the proposed solution and suggests how allowing undocumented persons to challenge discriminatory state actions on equal protection grounds will result in a more rational and just administration of the law.<sup>21</sup>

### I. THE UNDOCUMENTED ALIENS' DILEMMA

In *Yick Wo v. Hopkins*,<sup>22</sup> the Supreme Court held that the provisions of the fourteenth amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."<sup>23</sup> The Court granted relief to a Chinese alien who charged that a facially neutral San Francisco ordinance had been used to prevent persons of Chinese ancestry from operating their established laundries. The Court, however, did not make any finding regarding the alien's legal status. Despite the broad language used in the decision,<sup>24</sup> the facts of the case do not necessarily require extending equal protection to aliens who are illegally within the country.<sup>25</sup>

Ten years later, in 1896, the Supreme Court in *Wong Wing v. United States*<sup>26</sup> revived the all-inclusive "universal in their appli-

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19. See notes 75-79 & accompanying text *infra*.

20. See Part IV(A) *infra*.

21. See notes 111-33 & accompanying text *infra*.

22. 118 U.S. 356 (1886).

23. *Id.* at 369.

24. *Id.* The court in *Doe v. Plyler* used this broad language in *Yick Wo* to justify extending equal protection to undocumented aliens. 628 F.2d at 455.

25. 118 U.S. at 368-69. The Court did not raise as an issue the Chinese alien's legal status.

26. 163 U.S. 228, 238 (1896).

cation" language to decide that all persons within the territorial United States are entitled to fifth<sup>27</sup> and sixth<sup>28</sup> amendment protection.<sup>29</sup> The case involved undocumented Chinese aliens who had been subjected to infamous punishment at hard labor.<sup>30</sup> In this context, the Court expressed its intent to protect both documented and undocumented aliens.<sup>31</sup>

These early holdings illustrate the undocumented alien's constitutional dilemma. *Yick Wo* did not explicitly include the undocumented under equal protection's coverage and *Wong Wing* merely extended the fifth and sixth amendment protections to unlawfully present aliens. The undocumented therefore do not enjoy constitutional protection afforded to other persons within the jurisdiction, though they contribute to the American economy, often under serf-like working conditions.<sup>32</sup>

The United States Supreme Court has not clarified whether equal protection extends to undocumented aliens subsequent to these early cases.<sup>33</sup> Since the Supreme Court has not decided the issue, states discriminate against the undocumented<sup>34</sup> without fear of judicial scrutiny. Undocumented persons residing in the United States thus will continue to face grave legal disabilities if the Court refuses to hold that the equal protection clause extends to them.

## II. DISCRIMINATORY STATE PRACTICES FRUSTRATE FEDERAL AND STATE POLICIES

The federal government is allowed some discretion in estab-

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27. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in double jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

28. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel in his defence.

U.S. CONST. amend. VI.

29. 163 U.S. at 238.

30. *Id.* at 237.

31. *Id.* at 234-35.

32. See note 12 *supra*.

33. The Court has declared, however, that the fourteenth amendment's due process clause protects undocumented aliens. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

34. See Parts II(A)(1) & II(B)(1) *infra*.

lishing alienage-based classifications,<sup>35</sup> and may use these classifications to grant or deny aliens certain benefits.<sup>36</sup> States do not have the same discretion.<sup>37</sup> Historically, states have been precluded by the federal authority over foreign commerce from controlling alien movement between state and national borders.<sup>38</sup>

Apparently responding to recent immigrant influxes, state and local legislatures have implemented, or seek to pass, statutes or policies<sup>39</sup> intended to ease the perceived social burden which may accompany alien arrivals.<sup>40</sup> These state actions have singled out the undocumented alien for unequal treatment.<sup>41</sup> Each legislative scheme is enacted to further particular social policies. The next two sections outline how the social policies underlying education and health care schemes are frustrated by allowing discriminatory state practices.

## A. Education

### 1. State Practice

The Texas Education Code<sup>42</sup> exemplifies state discrimination. Section 21.031 denies undocumented alien children a free public education.<sup>43</sup> The statute commands the free public education of its citizens and legally resident alien children.<sup>44</sup> One Texas

35. *Mathews v. Diaz*, 426 U.S. 67 (1976).

36. *Id.*

37. *See* *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948); *Truax v. Raich*, 239 U.S. 33, 39 (1915); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

38. *Chy Lung v. Freeman*, 92 U.S. 275 (1875); *Henderson v. Mayor of N.Y.*, 92 U.S. 259 (1875); *Smith v. Turner*, 48 U.S. 283 (1849) (The Passenger Cases).

39. *See* note 15 *supra*.

40. According to recent studies, undocumented aliens are perceived to be more of a social burden than they actually are. A study on the impact of undocumented aliens on the County of San Diego (99% of whom were from Mexico) concluded that the aliens do impact local social services by an approximate yearly cost of \$2,000,000. It was further estimated, however, that undocumented aliens contributed an approximate yearly total of \$48,800,000 in taxes from wages earned locally. COUNTY OF SAN DIEGO HUMAN RESOURCES AGENCY, A STUDY OF THE SOCIO-ECONOMIC IMPACT OF ILLEGAL ALIENS ON THE COUNTY OF SAN DIEGO 173 (1977).

Data further suggest that only one to four percent of undocumented Mexicans take advantage of public social services such as welfare, unemployment benefits, AFDC benefits and the like. ORANGE COUNTY TASK FORCE ON MEDICAL CARE FOR ILLEGAL ALIENS, THE ECONOMIC IMPACT OF UNDOCUMENTED IMMIGRANTS ON PUBLIC HEALTH SERVICES IN ORANGE COUNTY (1978).

41. *See* Parts II(A)(1) & II(B)(1) *infra*.

42. TEX. EDUC. CODE ANN. tit. 2, § 21.031(a) (Vernon 1980).

(a) All children who are children of the United States or *legally admitted aliens* and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

*Id.* (emphasis added).

43. *Id.*

44. In declaring the statute's discriminatory nature, one court said: "That statute [§ 21.031] by negative implication also permits local school officials to exclude un-

school district, Tyler Independent School District, implemented the policy by denying children without proper documentation an education unless their parents pay a \$1000 tuition fee per year for each child.<sup>45</sup>

Undocumented aliens usually come from poverty-stricken countries.<sup>46</sup> Given the poverty level at which undocumented aliens in the United States usually subsist,<sup>47</sup> the tuition charge precludes undocumented children from receiving even a basic elementary and secondary school education.

## 2. Federal and State Policies

Congress has declared its intention to provide every person within the country an equal educational opportunity regardless of race, color, religion, sex, national origin, or social class.<sup>48</sup> The high priority placed upon education stems from the attitude that

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documented children from public schools." *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 549 (S.D. Tex. 1980).

45. *Doe v. Plyler*, 628 F.2d 448 (5th Cir. 1980), *cert. granted*, 101 S. Ct. 2044 (1981). Texas has declined to provide financial aid for the education of alien children who are unable to document the legality of their presence. *Id.* at 449-50.

46. One study found that most of the illegal aliens apprehended who originated from the western hemisphere came from Mexico. Others came from El Salvador, Guatemala, Columbia, and Equador. In spite of the fact that these countries are undergoing considerable economic development, their level of per capita income (which ranged from \$286 in El Salvador to \$681 in Mexico) indicate their status as developing nations and signal the existence of extreme poverty. The United States has a highly developed economy and a much higher per capita income of \$4,981. D. NORTH & M. HOUSTOUN, *THE CHARACTERISTICS AND ROLE OF ILLEGAL ALIENS IN THE U.S. LABOR MARKET: AN EXPLORATORY STUDY (1976)* [hereinafter cited as the NORTH STUDY].

Though labor-market data for Latin-America are scanty, unemployment and underemployment are marked, indicating severe differences in economic welfare within the populations of these sending nations. Despite Mexico's dynamic economy and rapid industrialization, for example, the number of people seeking work far out number the jobs available. *Id.* at 55-61.

47. Though no empirical studies calculate the number of undocumented aliens residing in the country, the North Study examined qualitative aspects of the undocumented population. See NORTH STUDY, *supra* note 46, at A-2.

The North Study was conducted in 1975 to gather, for the first time, information on the demographic characteristics, country of origin, employment history, wages and participation in public services of the undocumented in the United States. The Study could not purport to be a representative study of all "illegals" in the labor market or in the United States.

With the cooperation of the INS, researchers interviewed 793 apprehended undocumented aliens, sixteen years of age or older, who had worked in the country at least two weeks; over half of the respondents had been in the U.S. for two years or more. These interviews form the data upon which the study was based.

In concluding, the study found that undocumented alien workers in the United States are likely to be disadvantaged persons, with significantly less education and fewer skills than the U.S. labor market as a whole. *Id.* at A-3. Most are likely to be employed in low-level jobs. The average hourly wage for all aliens interviewed was \$2.71. Mexican aliens earned an average of \$2.34 an hour. *Id.* at 115. See also IMMIGRATION POLICY REPORT, note 6 *supra*.

48. 20 U.S.C. § 1221e(a) (1976).

an informed populace is one which will be more able to exercise other democratic freedoms.<sup>49</sup> The clear governmental intention is to provide access for all.

The Texas Education Code declares that the state's public education system is grounded upon the conviction that a general diffusion of knowledge is essential for the welfare of Texas and for the preservation of every person's liberties and rights.<sup>50</sup> Federal and state education statutory schemes therefore counsel adherence to the equal educational opportunity principle. Denying education to children present within this country under a dubious legal status frustrates the policy of equal educational opportunity for all.

## B. *Nonemergency Health Care*

### 1. State Practice

In California, the Los Angeles County Board of Supervisors<sup>51</sup> recently implemented a policy which effectively denies undocumented alien indigents free, nonemergency medical treatment.<sup>52</sup>

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49. *Brown v. Board of Educ.*, 347 U.S. 483, 496 (1954) (education is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment).

50. TEX. EDUC. CODE ANN. tit. 1, § 2.01 (Vernon 1972).

51. Power to implement local health care policies is delegated by the state to the various County Boards. CAL. HEALTH & SAFETY CODE § 450 (West 1979). The Boards of Supervisors, in turn, are charged with preserving and protecting the public health by implementing measures not in conflict with general laws. *Id.* The Boards shall appoint a health officer, *id.* at § 451, who is employed to prevent the spread of contagious, infectious and communicable diseases, *id.* at § 3110.

In terms of particular duties, the State Department of Human Services must conduct epidemiological studies of the incidence of cancer and studies on the sources of morbidity and mortality and the effects of localities, employments, conditions and circumstances on the public. *Id.* at §§ 211, 211.3. The Department must also keep each county health officer advised of the most current knowledge relating to the nature and causes of sudden infant death syndrome. *Id.* at § 218. Furthermore, the Director of health services may develop, or prescribe standards for and approve, an emergency medical technician training and testing program for the California Highway Patrol, Department of Forestry, and other public safety agency personnel. *Id.* at § 219(a). The Director must also prescribe standards to train all ocean and public beach lifeguards and firemen to administer first aid, i.e. cardiopulmonary resuscitation. *Id.* at § 217.

The Health and Safety Code also requires the Department of Human Services to care for physically handicapped children whose parents cannot afford to pay for services, *id.* at §§ 249, 250, high-risk pregnancies, *id.* at §§ 283, 283.2, maternal and child health, *id.* at § 300 *et seq.*, children nutrition, *id.* at § 310, detect preventable heritable disorders, *id.* at § 309, prevent child health disabilities, *id.* at §§ 320 *et seq.*, detect sickle cell anemia, *id.* at § 325, to treat those afflicted by genetically handicapped conditions, *id.* at § 341, and other public health problems. Thus, it is the state's intention to obligate the counties to prevent and resolve general human health problems.

52. See Letter from County of Los Angeles Chief Administrative Officer to Board of Supervisors (Feb. 25, 1981) (Recommendations for Health Care Financing Legislation and for Maximizing Health Services Revenues) [hereinafter cited as County Health Policy Recommendations]. See also CHA case, note 15 *supra*. The

On its face the cost-saving policy<sup>53</sup> declares an "equal applica-

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need to maintain nonemergency treatment for all persons who cannot otherwise afford medical care is widely known:

It is well settled that nonemergency, preventive wellness-oriented care is the only effective way to deal with communicable disease. In many cases, the average person, while aware that he is ill, does not know that his symptoms are those of a communicable disease. This is particularly true for people of little education. Many undocumented aliens have less than an eighth grade education.

Additionally, it is often impossible for the average person, much less a person of little education, to know whether the symptoms he is suffering are simply temporary in nature or are indicative of a more serious, emergent condition. Such knowledge often cannot be obtained until the person arrives at the hospital for a professional diagnosis.

*Id.* at 20-21 (declaration of Dr. David Hayes-Bautista, Associate Professor of Medical Care, School of Public Health, University of California, Berkeley).

53. Plaintiffs in the CHA case, note 15 *supra*, made cogent arguments that denying undocumented aliens nonemergency medical care would not save money and would, in fact, adversely affect the general public's health.

Not only do the undocumented aliens in this community tend to have high rates of communicable diseases of public significance, but disproportionate numbers of them tend to work in restaurants, other places of public accommodation and other service industries, where the opportunity for the spread of such disease . . . is great.

\* \* \*

This living pattern [i.e. undocumented living in close proximity to the rest of the population] provides dangerous channels for the spread of undetected and untreated communicable diseases and other health problems throughout the entire community.

CHA case, *supra* note 15, at 17-18 (declaration of Dr. Lester Breslow who served on the California Department of Public Health for 22 years).

Medical conditions characterized by such common symptoms as coughing, masses and lumps, pain, fever, swelling of the ankles, tiredness, sores, decreased visual acuity, and weakness would 'inevitably progress to a stage requiring their treatment as an emergency' in the absence of prompt diagnosis and treatment.

\* \* \*

Finally, any reduction of non-emergency health service for indigent, undocumented aliens would unbalance the County's health delivery system. Reduction would significantly increase patient appearances at emergency ward: it would create

. . . an intolerable load on emergency rooms, and . . . effectively dilute the quality of care available to all patients.

CHA case, *supra* note 15, at 9.

A patient with a headache may have malignant hypertension. In this condition, the patient has severe high blood pressure; so high that it causes rapid damage to the other organs of the body. If the kidney is damaged, the end result could be the need for chronic hemodialysis to sustain life. This treatment is costly—around \$50,000 per year for the remainder of the patient's life. Early treatment prevents this result.

CHA case, *supra* note 15, at 22.

Since the County Health system is the provider of health care of last resort, when a condition deteriorates, as it will if not treated earlier, the County often must deal with the problem on an emergency basis. In virtually every case to treat such emergent condition will be vastly more difficult and expensive than it would have been to treat the condition at the non-emergent stage. Far more important than the potential increased cost is the increased possibility of death, serious disability, or a major public health problem if conditions are not promptly treated.

tion" of the Board's medical treatment policies.<sup>54</sup> In actual operation, however, the policy requires all persons seeking nonemergency health care to apply for Medi-Cal.<sup>55</sup> Previously, any sick person could receive county medical treatment without going through the long Medi-Cal application process.<sup>56</sup>

Medi-Cal is the California component of the federal Medicaid Program.<sup>57</sup> As previously noted, the Supreme Court has held

CHA case, *supra* note 15, at 10 n.14.

*See also* Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974). The Court in *Maricopa* held that a 12 month durational residency requirement imposed upon indigent residents seeking nonemergency medical care at Arizona county facilities was unconstitutional because it impinged upon these persons' fundamental right to travel interstate. In discussing the durational residency requirement's failure to save money, the Court observed:

In addition, the County's claimed fiscal savings may well be illusory. The lack of timely medical care could cause a patient's condition to deteriorate to a point where more expensive emergency hospitalization (for which no durational residence requirement applies) is needed. And, the disability that may result from letting an untreated condition deteriorate may well result in the patient and his family becoming a burden on the State's welfare rolls for the duration of his emergency care, or permanently, if his capacity to work is impaired.

*Id.* at 265 (footnotes omitted).

54. County Health Policy Recommendations, *supra* note 52, at 4.

55. CAL. WELF. & INST. CODE § 14005 *et seq.* (West 1980).

Through a process called "presumptive eligibility" Medi-Cal will pay for services (emergency and nonemergency) to undocumented aliens if these patients will complete a form (CA-6) attesting that they are not under order of deportation by the Immigration and Naturalization Service. Most undocumented patients at screening opt for a payment plan rather than risk exposure to INS.

CHA case, *supra* note 15, at 3.

One opponent of the county policy noted that undocumented aliens will not seek medical treatment at all because their fear of being detected and deported by the INS will be too great. Maria Rodriguez, Chicano Rights Attorney, Mexican American Legal Defense and Educational Fund (MALDEF), Los Angeles, California (interview Sept. 12, 1981). Another attorney suggested that even if undocumented aliens apply for Medi-Cal benefits, and are not immediately deported, they will, according to the federal aid criteria, be denied benefits. Linda J. Wong, Immigration Attorney, Mexican American Legal Defense and Educational Fund (MALDEF), Los Angeles, California (interview Sept. 14, 1981).

56. Throughout its hundred year history, the County Health Care System has not refused necessary care to any individual who lacked the ability to acquire the care elsewhere. I know of my own personal knowledge that the County has provided non-emergency medical care to undocumented aliens at least since 1953. To my knowledge, no question has been raised about providing this service to all needy people until recent years.

*Citizens Legal Defense Alliance v. County of Los Angeles*, No. C 319927 at 1-2 (L.A. Super. Ct. July 30, 1980) (exhibit 4, declaration of Robert H. White, Director of the County of Los Angeles Department of Health Services).

57. 42 U.S.C.A. § 1396 *et seq.* (1980) (provides for federal authorization to assist participating states in furnishing medical assistance to needy individuals and families); 42 U.S.C.A. § 1396a(a)(10)(A) (1980) (makes medical assistance available to persons receiving aid under any state plan approved under other federal aid provisions). Because most federal aid statutes condition eligibility for aid upon United States citizenship or lawful presence in this country, the federal Medicaid Program does not provide for assistance to undocumented aliens. *See, e.g.*, 42 U.S.C.A. § 1382(a)

that the federal government may exercise its discretion with regard to aliens in handing out federal benefits.<sup>58</sup> Federal Medicaid requirements disallow undocumented aliens from participating in the program.<sup>59</sup> By requiring all persons to apply for Medi-Cal, the County of Los Angeles piggy-backs on the federal ability to discriminate against particular classes of aliens.<sup>60</sup> Consequently, the Los Angeles health care policy denies undocumented aliens nonemergency health care treatment.

## 2. Health Care Policy

Congress has expressed a strong commitment to promoting public health.<sup>61</sup> The Public Health Service conducts research and investigation into causes, diagnosis, treatment, control and prevention of physical and mental diseases and impairments afflicting humans.<sup>62</sup> To promote this end, the Service encourages federal-state cooperation in preventing and suppressing communicable diseases.<sup>63</sup> The federal government also appropriates funds to assist the states in comprehensive and continuous planning for current and future health needs.<sup>64</sup> Congress has declared that equal access by all persons to quality health care at a reasonable cost is a federal priority.<sup>65</sup> Congress has emphasized its intention to provide primary care services for medically underserved populations, especially those located in rural or economically depressed

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(1980) (eligible individuals are aged, blind, or disabled); 42 U.S.C.A. § 1382c(a)(1) (1980) (for purposes of § 1382, an "aged, blind, or disabled individual" must be a resident of the United States, and either a citizen or an alien lawfully admitted for permanent residence or otherwise permanently residing in the country under color of law).

58. *Mathews v. Diaz*, 426 U.S. 67 (1976).

59. *See note 57 supra*.

60. This riding by state governments upon the federal authority to discriminate is of questionable constitutional validity. The Supreme Court has held that Congress cannot authorize the states to violate the equal protection guarantee. *Graham v. Richardson*, 403 U.S. 365, 382 (1971):

Although the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization, Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.

*Id.*; *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969). Allowing the states to violate this constitutional mandate of equality not only runs across constitutional infirmities but also violates health care policy, *see notes 61-74 & accompanying text infra*.

61. 43 U.S.C. § 241 *et seq.* (Supp. III 1976). Even with this strong governmental commitment to health care, one commentator has argued that the right to health care is unlikely to rise to the constitutional level. Carey, *A Constitutional Right to Health Care: An Unlikely Development*, 23 CATH. U. L. REV. 492 (1974) (both private and public hospitals might be imbued with state action but the inequities perpetuated under state health care systems are unlikely to constitute unlawful discrimination).

62. 42 U.S.C. § 241 *et seq.* (Supp. III 1976).

63. 42 U.S.C.A. § 243(b) (Supp. 1980).

64. 42 U.S.C. § 246(d)(1) (Supp. III 1976).

65. 42 U.S.C.A. § 300k(a)(1) (Supp. 1980).

areas.<sup>66</sup>

The California provisions dealing with the powers and duties of the State Department of Health Services similarly establish a strong state interest in providing for public health.<sup>67</sup> The Department of Health Services examines causes of communicable diseases afflicting human beings and domestic animals.<sup>68</sup> The Department maintains all actions and proceedings to preserve the public health<sup>69</sup> and may, when necessary, control and regulate county action.<sup>70</sup>

California, like other states, provides nonemergency medical treatment to indigent residents.<sup>71</sup> Maintaining financially deprived persons' health, however, is but one reason to provide the poor with nonemergency medical care. Since the poor do not live in an environmental vacuum,<sup>72</sup> health care policy provides for preventive, nonemergency treatment in order to shortcut spread of disease from the untreated to others with whom they inevitably come into contact. By distributing medical care to needy persons the health of indigents and the population as a whole is substantially assured.

A local practice, such as the Los Angeles policy, which denies particular classes of persons equal access to nonemergency medical treatment at county facilities clearly violates basic health care policies. The California and national goal of preserving the pub-

66. 42 U.S.C.A. § 300k-2(a)(1) (Supp. 1980).

67. See generally CAL. HEALTH & SAFETY CODE § 200 *et seq.* (West 1979).

68. CAL. HEALTH & SAFETY CODE § 200 (West 1979).

69. CAL. HEALTH & SAFETY CODE § 205 (West 1979).

70. CAL. HEALTH & SAFETY CODE § 207 (West 1979).

71. See, e.g., CAL. WELFARE & INST. CODE § 17000 (West 1980) ("Every county and every city shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions."). See CAL. GOV'T CODE §§ 243, 244 (West 1980), which implicitly defines lawful resident to include undocumented aliens, see *Cabral v. State Bd. of Control*, 112 Cal. App. 3d 1012, 169 Cal. Rptr. 604 (1980); N.J. STAT. ANN. § 44:5-2 *et seq.* (West 1981) (localities without public hospital facilities may contract for provision of care to indigents by private sources within certain financial limits without state approval or control); ARIZ. REV. STAT. ANN. § 11-291 (1977) (individual county governments are charged with the mandatory duty of providing necessary hospital and medical care for their indigent sick). See also *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), where the Court decided that Arizona's 12-month durational residency requirement for non-emergency medical care to indigents was unconstitutional. The Court noted:

To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health. Cancer, heart disease, or respiratory illness, if untreated for a year, may become all but irreversible paths to pain, disability, or even loss of life. The denial of medical care is all the more cruel in this contest, falling as it does on indigents who are often without the means to obtain alternative treatment.

*Id.* at 261.

72. See note 53 *supra*.

lic health cannot effectively succeed if needy sections within the population go untreated. Because undocumented aliens work throughout the American service sector,<sup>73</sup> denying them nonemergency medical care endangers health policies on two counts. The denial threatens the undocumented families' lives and it exposes the public to diseases which these untreated persons might transmit. Consequently, implementing a discriminatory cost-saving policy of the Los Angeles variety frustrates the policy's underlying national and state health promotion.<sup>74</sup>

### III. JUSTIFICATION FOR EXTENDING EQUAL PROTECTION TO UNDOCUMENTED ALIENS

#### A. *History*

Equal protection is a constitutional mandate which prohibits states from arbitrarily discriminating against individuals or groups within state borders. Both history and the equality principle underlying the equal protection clause counsel that it be applied to all persons if it is to continue as a meaningful constitutional doctrine.

Two years after the Civil War, the fourteenth amendment was passed to constitutionalize principles embodied in the 1866 Civil Rights Act.<sup>75</sup> The amendment was intended to "forever dis-

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73. See notes 12 & 53 *supra*.

74. The education and health care denials are not isolated incidents. Other state and local governments have engaged in activities discriminating against undocumented persons. By the same step, these governments have encroached upon undocumented alien's civil rights. *United States v. Otherson*, 637 F.2d 1276 (9th Cir. 1980) (undocumented aliens are protected by the Civil Rights Act).

Recently, in Walla Walla County, Washington, a court had to restrain local police officials from enforcing the Immigration and Nationality Act. The police were prohibited from stopping, questioning or otherwise detaining individuals to determine their immigration status. *Maltos v. Kepohl*, No. C-77-354 (E.D. Wash., Mar. 5, 1979), 13 CCH 119 (July 1979).

In Umatilla County, Oregon, the court prohibited local police from enforcing immigration laws or detaining anyone more than 24 hours on a verbal immigration hold. *De la Cerda v. Umatilla County*, No. 8-908 (D. Ore., filed Mar. 1, 1979), 13 CCH 220 (July 1979).

In a Ninth Circuit case, the court upheld convictions of two United States Border Patrol agents for violating the plaintiff undocumented aliens' civil rights. The agents were convicted of beating, pursuant to a deliberate plan or policy, aliens illegally entering from Mexico. *United States v. Otherson*, 637 F.2d 1276 (9th Cir. 1980).

These illustrations exemplify the delegation of undocumented aliens in our society to second class positions. The abuse is apparently justified on the grounds that these aliens have no legal right to remain in this country. *Coules v. Pharris*, 212 Wis. 558, 250 N.W. 404 (1933), *overruled*, *Arteaga v. Literski*, 83 Wis. 2d 128, 265 N.W.2d 148 (1978). *Arteaga* overruled *Coules* on the grounds that undocumented aliens, by their very presence in this country, have the right to sue for personal injuries negligently inflicted upon them.

75. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws

able every one of them [the States] from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to *all persons who happen to be within their jurisdiction*."<sup>76</sup> The amendment was drafted as a forward-looking instrument which would bar unjustifiable state discrimination.

The equality principle is ingrained into the fabric of constitutional discourse. People similarly situated ought to be treated alike.<sup>77</sup> Neither a person's human characteristics such as race or sex, nor a person's status such as illegitimacy or alienage ought to play a part in determining his or her rights under the Constitution. This equal protection pledge is assurance that the states will administer the law uniformly without using such characteristics as the basis upon which to discriminate arbitrarily against particular groups. Though motivated as an anti-racial discrimination amendment, the fourteenth amendment was worded as a general bar to all forms of state discrimination.<sup>78</sup> Consequently, the U.S. Supreme Court has interpreted the principles embodied in the fourteenth amendment expansively.<sup>79</sup>

### B. *Territorial Argument*

Various courts and commentators have argued that the equal protection clause was written to protect all persons residing within the United States' jurisdiction.<sup>80</sup> The promise of equal treatment typically extends to all persons residing within the state's territo-

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and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1980). See also Brousseau, *Alienage and the Constitution: The Requirement of State Action Under Section 1981*, 30 ARK. L. REV. 1 (1976); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1026 (1979) (fourteenth amendment constitutionalized the 1866 Civil Rights Act).

76. 71 CONG. GLOBE 2766 (May 23, 1866) (emphasis added).

77. See generally Perry, note 75 *supra*.

78. See note 79 *infra*.

79. *Matthews v. Lucas*, 427 U.S. 495 (1976) (illegitimacy is a characteristic not within the control of the illegitimate individual; such persons are protected by the Court's "heightened scrutiny."); *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (gender-based classifications are closely scrutinized by courts under equal protection); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (aliens as a class are a prime example of a "discrete and insular" minority for whom heightened judicial solicitude is appropriate); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (equal protection applies to racial segregation as well as to other forms of differential treatment); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (aliens are protected by the equal protection clause).

80. *Doe v. Plyler*, 628 F.2d 448, 455 (5th Cir. 1980) (precedent, language and logic of equal protection clause require extending equal protection to undocumented aliens), *cert. granted*, 101 S. Ct. 2044 (1981); Comment, *Equal Protection and the Education of Undocumented Children*, 34 Sw. L.J. 1229, 1233 (1981) (failure of the Supreme Court to rule on the application of equal protection to undocumented aliens may be explained more as a lack of opportunity than as a purposeful omission); Kane & Velarde-Muñoz, *Undocumented Aliens and the Constitution: Limitations on State*

rial jurisdiction. Undocumented aliens would thus be included within the clause's territorially-based protection.<sup>81</sup> Applying the equal protection guarantee on a territorial basis to all persons eliminates litigation concerning the initial question of whether a group is covered by the equal protection clause. Additionally, it is easier to administer a uniform equality rule.

C. *Recognizing Undocumented Aliens' Rights in Other Areas Has Furthered Social Policies in Those Areas*

Courts have in various contexts recognized undocumented aliens' right to be protected by United States law. In cases involving labor, contract, tort, divorce, and workers' compensation law, federal and state courts have ignored the undocumented aliens' legal status in allowing them access to the courts. By deciding these cases on the merits, courts effectively furthered the policy objectives underlying the substantive law.

1. Labor Law: Fair Labor Practices

Courts have recognized the right of undocumented employees to work, and to vote in union elections.<sup>82</sup> In *NLRB v. Sure-Tan, Inc.*,<sup>83</sup> a Chicago federal court examined an NLRB union certification to determine whether it was valid. The company challenged the certification arguing that six of the seven voters in the election were undocumented aliens, who had since been deported, and were therefore ineligible to vote.<sup>84</sup> The court of appeals denied the company's assertion and held that undocumented aliens are "employees" within the meaning of the National Labor

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*Action Denying Undocumented Children Access to Public Education*, 5 HASTINGS CONST. L. Q. 461 (1978).

81. One commentator has presented a territorial theory for courts to follow in examining undocumented alien's rights:

The key to resolving the judicial conflict [in addressing the legal status of undocumented aliens] is to develop a coherent theory based on the distinction between immigration control and unrelated governmental purposes. Once immigration control is factored out of state law, and to the extent such control is absent from federal law, a more refined analysis is possible which is firmly grounded on the territorial notions of rights reflected in the United States Constitution.

Comment, *The Legal Status of Undocumented Aliens: In Search of a Consistent Theory*, 16 HOUS. L. REV. 667, 709 (1979).

82. *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355 (7th Cir. 1978) (acknowledged that undocumented aliens' violation of the immigration statute does not nullify their votes in a union certification election); *NLRB v. Apollo Tire Co., Inc.*, 604 F.2d 1180 (9th Cir. 1979) (followed *Sure-Tan* in holding that undocumented aliens are "employees" according to NLRA and could charge unfair labor practices against employers under the Act. The court also noted that denying undocumented aliens NLRA protection would encourage employers to hire such persons to circumvent labor laws).

83. 583 F.2d 355 (7th Cir. 1978).

84. *Id.* at 358.

Relations Act.<sup>85</sup> They are therefore within the Act's protection. The court also noted that no immigration statute prohibits an undocumented alien from participating and voting in an NLRB election.<sup>86</sup> The court determined that declining to certify a union, some of whose voting members were undocumented, would only encourage violations of immigration laws. Companies could circumvent labor laws by simply hiring undocumented workers. Labor law policies which encourage fair labor practices were effectively furthered by the outcome of the case.

## 2. Contract Law: Preventing Unjust Enrichment

Furthering the objectives of contract law, courts have held that undocumented aliens can enter contracts in this country and recover for their breach.<sup>87</sup> In *Gates v. Rivers Const. Co., Inc.*,<sup>88</sup> the Alaska Supreme Court found that undocumented aliens who enter into employment contracts can recover for breach of contract. To hold otherwise would unjustly enrich employers at undocumented aliens' expense. Such a result, the court noted, might have the effect of encouraging illegal immigration since employers would have an incentive to enter into such agreements with undocumented aliens and, with impunity, refuse to pay them for their services.<sup>89</sup>

## 3. Tort Law: Compensating Victims and Deterring Negligence

Cases deciding whether undocumented aliens have access to the courts to sue for personal injury claims have held that the undocumented can bring such actions.<sup>90</sup> In *Janusis v. Long*,<sup>91</sup> the

85. 29 U.S.C.A. § 151 *et seq.* (1980).

86. 583 F.2d at 359.

87. *Gates v. Rivers Const. Co.*, 515 P.2d 1020 (Ala. 1973) (Canadian unlawfully present and working in Alaska was permitted to sue on an employment contract to recover wages); *Commercial Standard Fire & Marine Co. v. Galindo*, 484 S.W.2d 635 (Tex. Civ. App. El Paso 1972, writ *ref'd n.r.e.*) (violation of immigration laws does not make illegal the employment contract on which the worker's compensation claim was based; penalty for immigration offense was deportation rather than loss of unrelated benefits. Court noted applicability of § 1981 of 1964 Civil Rights Act and equal protection.); *Montoya v. Gateway Ins. Co.*, 168 N.J. Super. 100, 401 A.2d 1102 (1979) (although plaintiff was illegally in this country, he had a right of access to the courts to enforce personal injuries portions of no-fault automobile insurance policy); *Dezsofi v. Jacoby*, 178 Misc. 851, 36 N.Y.S.2d 672 (Sup. Ct. N.Y. Co. 1942) (illegal alien not barred from recovering upon labor contract).

88. 515 P.2d 1020 (Ala. 1973).

89. *Id.* at 1022.

90. *Janusis v. Long*, 284 Mass. 403, 188 N.E. 229 (1933) (illegal aliens can prosecute actions for personal injury); *Hagl v. Stern*, 396 F. Supp. 779 (E.D. Pa. 1975) (equal protection of the law guarantees the right to sue to those who are physically injured, including undocumented aliens); *Arteaga v. Literski*, 83 Wis. 2d 128, 265 N.W.2d 148 (1978) (illegal aliens do have right to sue for personal injury); *Torres v. Sierra*, 553 P.2d 721 (N.M. 1976) (an alien, who is a citizen of a friendly country, and who entered the United States illegally, is entitled to maintain an action for personal

court stressed the Massachusetts policy of opening up courts to the subjects of friendly foreign nations, regardless of whether the alien may be illegally present in the country.<sup>92</sup> The court was concerned by the anomaly that might result if it denied aliens such basic rights. Also, the court did not want to sanction the negligent infliction of harm and create a class of legally defenseless persons.

#### 4. Divorce Law: Dissolving Disharmonious Marriages

In *Williams v. Williams*<sup>93</sup> a Virgin Island district court emphasized that enforcing immigration law properly rests with the INS and that such enforcement does not require exclusion of undocumented aliens from divorce court.<sup>94</sup> Divorce laws promote prompt an effective dissolution of disharmonious marriages. Since this policy would be furthered by allowing undocumented aliens the right to use divorce courts, they were extended the right to adjudicate their cases.<sup>95</sup>

#### 5. Workers' Compensation

The basic philosophy underlying workers' compensation law is to protect employees in the workplace.<sup>96</sup> The best way to attain the safety goal is to apply the compensation scheme uniformly to all persons.<sup>97</sup> Consequently, courts have recognized undocumented workers as "employees" within the meaning of the respective state acts and therefore eligible to receive benefits.<sup>98</sup> In

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injuries); *Martinez v. Fox Valley Bus Lines, Inc.*, 17 F. Supp. 576 (N.D. Ill. 1936) (illegal aliens are subject to the fourteenth and fifth amendment protections and can sue for personal injury); *Feldman v. Murray*, 171 Misc. 360, 12 N.Y.S.2d 533 (Sup. Ct. Bronx Co. 1939) (illegals can sue for personal injury); *Calalanotto v. Palazzolo*, 46 Misc. 2d 381, 259 N.Y.S.2d 473 (Sup. Ct. N.Y. Co. 1965) (illegal alien not barred from prosecuting action for personal injury).

91. 284 Mass. 403, 188 N.E. 229 (1933).

92. *Id.* at 410.

93. 328 F. Supp. 1380 (D.V.I. 1971).

94. *Id.* at 1381.

95. *Id.*

96. CAL. CONST. art. 14, § 4 (West 1981) grants to the state legislature plenary power to create and enforce a worker's compensation system.

A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party. . . .

*Id.* See also 1C WORKMAN'S COMPENSATION LAW § 47.50 (Larson 1980).

97. The California workers compensation scheme does not discriminate against undocumented aliens. CAL. LAB. CODE § 3351 (West 1980) (state Workman's Compensation Act specifically includes aliens and, by implication, undocumented aliens, within definition of "employee").

98. *Commercial Standard Fire & Marine Co. v. Galindo*, 484 S.W.2d 635 (Tex. Civ. App. El Paso 1972, writ ref'd n.r.e.). See also *Ayala v. California Unemployment Ins. Appeals Bd.*, 54 Cal. App. 3d 676, 126 Cal. Rptr. 210 (1976) (undocumented

*Commercial Standard Fire and Marine Co. v. Galindo*,<sup>99</sup> the Texas appellate court found undocumented aliens to be "employees" within the meaning of the Texas Workman's Compensation Act. They therefore qualified to receive benefits. Taking judicial notice of the applicability of the 1964 Civil Rights Act<sup>100</sup> to undocumented aliens, the court in effect determined that respect for their civil rights and the policy of promoting safety in the workplace were best served by compensating undocumented workers.

#### IV. PROPOSAL

This Comment has shown how discriminating against undocumented aliens in the education and health care fields threatens sound public policies.<sup>101</sup> It has shown how the history and the policies underlying the equal protection clause, as well as the effective furtherance of various state policies in other areas of the law, counsel extending the equal protection guarantee to undocumented aliens. This Comment proposes a reasoned solution to the undocumented aliens' legal dilemma.

##### A. *Criteria and Reasons for Criteria*

The proposal requires the reviewing court to examine the state action to determine three factors: (1) whether immigration law is uninvoked, (2) whether the state action on its face is independent of the federal immigration regulatory scheme, and (3) whether the state action discriminates against undocumented aliens. If all three factors are present in a state discrimination case, the equal protection clause should be allowed as a grounds for undocumented aliens to challenge the state practice.

Regarding the initial question, the reviewing court must determine whether INS federal authority is invoked in the particular

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aliens are eligible for state worker's disability benefits). *But see* *Alonso v. State*, 50 Cal. App. 3d 242, 123 Cal. Rptr. 536 (Ct. App. 1975), *cert. denied*, 425 U.S. 903 (1976) (Unemployment Insurance Board decision denying statutory unemployment benefits to an alien who refused to claim or to prove that he was legally in the country upheld); *Pinella v. Board of Review in the Dep't of Labor & Indus.*, 155 N.J. Super. 307, 382 A.2d 921 (Super. Ct. 1978) (where deportation proceedings have been initiated against an undocumented alien, such person is not eligible for unemployment benefits); *Bastas v. Board of Review in the Dep't of Labor & Indus.*, 155 N.J. Super. 312, 382 A.2d 923 (Super. Ct. 1978).

99. 484 S.W.2d 635 (Tex. Civ. App. El Paso 1972, writ *ref'd n.r.e.*).

100. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1980).

101. *See* notes 35-74 & accompanying text *supra*.

case. If the INS has initiated deportation proceedings against the individual undocumented plaintiff challenging the state action, the court is justified in choosing not to enforce the equal protection guarantee with regard to that individual. This is because the alien would soon or will have already been deported. He or she is afforded all the constitutional safeguards attending a deportation proceeding.<sup>102</sup> Where the INS is not involved, however, the reviewing court would examine the next two factors.

The court would look to the challenged state practice to see whether the state is acting independently of the federal statutory scheme. State statutory schemes, however, are designed primarily to promote the welfare of state residents. In contrast, immigration laws serve different purposes.<sup>103</sup> Attempting to combine the various purposes in one statutory scheme is inherently counterproductive.<sup>104</sup> In addition, there is a federalism concern in that the federal government is empowered with the authority to control the immigration flow. Immigration control is not the province of the states.<sup>105</sup>

In the Texas education denial case,<sup>106</sup> this element is present. Although the regulation is tailored to impact on those aliens whose presence in the country is thought to be unlawful, the state statute on its face regulates in the education field independently of the federal immigration scheme. Where this element of independent action is fulfilled, the analysis may proceed.

Finally, the reviewing court would examine the state practice to see whether it adversely discriminates against undocumented aliens. If the state practice discriminates, then the co-existence of the previously discussed elements would tip the balance in favor of recognizing the undocumented alien's right to equal protection of the law.

The parties challenging the state action must show that the state action actually treats a class of persons unequally.<sup>107</sup> Con-

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102. See, e.g., 8 C.F.R. § 287.3 (1981) (providing that a person arrested by a warrant or against whom a deportation proceeding is commenced by an order to show cause must be advised of "the reason of his arrest and his right to be represented by counsel of his own choice, at no expense to the Government. . . . He shall also be advised that any statement he makes may be used against him in a subsequent proceeding. . . ."). See also *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971) (supporting the notion that, in the course of a deportation proceeding, the alien deserves rights roughly analogous to those accorded a criminal defendant).

103. See note 10 *supra*.

104. See notes 42-74 & accompanying text *supra*.

105. See notes 37 & 38 *supra*.

106. *Doe v. Plyler*, 628 F.2d 448 (5th Cir. 1980), *cert. granted*, 101 S. Ct. 2044 (1981).

107. See G. GUNTHER, *CASES AND MATERIALS ON INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW* 506-16 (3d ed. 1981).

tinuing with the Texas education denial case,<sup>108</sup> the State of Texas extends free public education only to children legally within its borders.<sup>109</sup> A group of undocumented school-age children of Mexican descent residing within the Tyler Independent School District challenged the statute as violating their constitutional equal protection guarantee.<sup>110</sup> Since Texas extends free public education only to documented children, the school district implemented this policy by charging undocumented children a \$1000 yearly tuition fee. Clearly, undocumented school-age children are treated differently from documented school-age children. Therefore, equal protection is applicable. The next step is to determine the rigor with which the court will review such discriminatory state action.

### B. *Equal Protection Analysis*

The Court has traditionally used two tests in equal protection analysis for reviewing challenged state action.<sup>111</sup> The first tier, commonly called the "strict scrutiny" standard of review, is invoked when the challenged state action involves a suspect class or impinges upon a constitutionally recognized fundamental right. It is the highest level of review and requires that the challenged state action be necessary to achieve a compelling state goal to remain intact.<sup>112</sup> The second tier is a more relaxed standard of review and requires merely that the state action be rationally related to a legitimate state goal.<sup>113</sup> This two-tiered method of reviewing state statutes, while not perfect,<sup>114</sup> allows courts to examine the type of classification made by the state, the state's justification for the state action, as well as the means to end relationship of the state action to its objective. Even though the standard of review varies

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108. *Doe v. Plyler*, 628 F.2d 448 (5th Cir. 1980), *cert. granted*, 101 S. Ct. 2044 (1981).

109. TEX. EDUC. CODE ANN. tit. 2, § 21.031(a) (Vernon 1980).

110. *Doe v. Plyler*, 628 F.2d 448 (5th Cir. 1980), *cert. granted*, 101 S. Ct. 2044 (1981).

111. See G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 670-84 (10th ed. 1980).

112. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (courts must subject legal restriction curtailing the civil rights of a single racial group to the most rigid scrutiny).

113. See G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 670-76 (10th ed. 1980).

114. Justice Marshall would subject discriminatory state action to even more particularized review. In *Dandridge v. Williams*, 397 U.S. 471, 489 (1970) (Marshall, J., dissenting), he attacked the traditional two-tiered analysis and proposed a sliding scale, a spectrum of analysis weighing the constitutional and societal importance of the interest affected and the recognized invidiousness of the basis upon which the classification is drawn. See also *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (Marshall, J., dissenting).

depending upon the nature of the classification or the interest affected, at least a cursory review of the state action is made.

### 1. Strict Scrutiny

The Texas statute<sup>115</sup> denying undocumented school children a free public education should be reviewed under the strict scrutiny standard of review. First, undocumented school children should be a suspect class. Second, the statute involves the total denial of an arguably fundamental right. Third, the combination of the child's political powerlessness and the importance of education should trigger strict scrutiny.

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115. See note 42 *supra*.

This section of the Comment will analyze the education denial case under an equal protection analysis. This footnote outlines how an equal protection argument may be made against the Los Angeles County Board policy described in Part II(B)(1).

The Los Angeles County Board "cost-saving" policy is "state action" since the county acts under the authority of state enabling statutes. The County Board thus functions as an arm of the state.

The state action must also actually discriminate against a particular class of persons. The "cost-saving" policy, as applied, is specifically tailored to deny aid to undocumented aliens by conditioning aid on an application to Medi-Cal. Medi-Cal not only denies aid to undocumented persons, but subjects them to possible deportation. This prevents undocumented aliens from obtaining nonemergency medical care. Only undocumented persons suffer the denial; persons with documentation do not.

At least three arguments can be asserted against the policy's means to end relationship. The policy diminishes the level of health enjoyed by the general public, thus defeating basic health care objectives. Because only emergency health care will be available to the undocumented, emergency wards will be overburdened by the increased emergency visits. Further, since emergency treatment is usually more expensive than nonemergency service, the cost of treating these individuals in more advanced stages of illness increases overall medical costs.

Whether denying nonemergency medical treatment to undocumented aliens will lower the level of societal health turns on the degree to which these persons are integrated into society. Because the undocumented live and work in close proximity to the rest of the population, the medically untreated serve as a conduit of disease to the rest of the population. This situation provides dangerous channels for the spread of undetected and untreated communicable diseases and other public health problems throughout the entire community. Thus the discriminatory health policy will have the effect of spreading disease. Overall medical costs therefore will increase to treat greater numbers of diseased persons.

The policy will also place a great burden upon already overcrowded emergency wards. Undocumented aliens fall victim to disease at rates similar to those existing before the policy was passed. These persons will develop symptoms and/or otherwise suffer minor pain but will not be received at county medical facilities until their condition becomes severe and endangers their lives. Emergency wards will have to bear the burden of increased numbers of more serious cases. This result does not save medical costs; it merely shifts them to the emergency ward. No net savings are realized.

Finally, when disease or physical injuries go untreated, persons suffer immediately, and later require more extensive and expensive emergency care. Any cost saving realized by denying non-emergency care in the first instance is cancelled out by the subsequent increased cost.

In sum, as long as *any* equal protection analysis is allowed the undocumented alien, denying nonemergency medical care has serious constitutional infirmities since it fails to meet its purported justification.

Courts will use the strict scrutiny standard of review requiring a compelling goal and a means necessary to achieve that goal when discriminatory classifications are based upon such suspect classes as race, nationality, or alienage.<sup>116</sup> These are classes "saddled with such disabilities, or subject to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."<sup>117</sup>

In the Texas education denial case,<sup>118</sup> the group discriminated against is a subclass of the suspect alien class.<sup>119</sup> Because undocumented aliens suffer disabilities to at least as great an extent as do documented aliens,<sup>120</sup> state statutes aimed at these politically powerless persons should likewise command the courts' most stringent review. Further, the undocumented Texas school children can be analogized to illegitimate children who constitute a class deserving of heightened scrutiny.<sup>121</sup> The undocumented school children are morally blameless in their legal status as are illegitimate children in their illegitimacy status.

Courts will also apply the "strict scrutiny" test in cases where the state action impinges on a "fundamental right."<sup>122</sup> Although the Court has not found that the right to education is fundamental,<sup>123</sup> it has been suggested that education is of greater constitutional significance than less essential forms of governmental entitlements.<sup>124</sup>

Lastly, combining the political powerlessness of the Texas undocumented school children and the importance of education should trigger a heightened level of scrutiny. Because of their political powerlessness aliens are a suspect class; since *undocu-*

116. See *Graham v. Richardson*, 403 U.S. 365 (1971), where it was said that: "Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate." *Id.* at 372 (footnotes omitted).

117. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

118. *Doe v. Plyler*, 628 F.2d 448 (5th cir. 1980), *cert. granted*, 101 S. Ct. 2044 (1981).

119. *Nyquist v. Maucelot*, 432 U.S. 1, 9 (1977).

120. The Court has determined that lawfully admitted aliens are a suspect class. *Nyquist v. Maucelot*, 432 U.S. 1 (1977); *Examining Bd. of Eng'r v. Flores de Otero*, 426 U.S. 572 (1976); *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973). A careful study of these cases, however, reveals that suspect class status was not extended to undocumented persons. The Court has yet to determine whether undocumented persons constitute a suspect class.

121. *Mathews v. Lucas*, 427 U.S. 495 (1976) (although Justice Blackmun rejected the "suspect" label, he conceded that illegitimacy like race or national origin, is a characteristic determined not by causes within the control of the illegitimate individual).

122. *Shapiro v. Thompson*, 394 U.S. 618 (1969). See also Comment, *Equal Protection Shell Game*, 15 TULSA L.J. 183, 195-206 (1979).

123. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

124. *Id.* at 111 (Marshall, J., dissenting).

mented aliens are also politically powerless,<sup>125</sup> they should share the same distinction. Also, education is crucial in American society today.<sup>126</sup>

Applying strict scrutiny either under a suspect class or fundamental rights theory shifts the burden to the state to prove its discriminatory action was necessary to accomplish a compelling state goal. If so, it must be tailored to meet that end.<sup>127</sup> This is a difficult burden to meet.

Since the next section will demonstrate the constitutional infirmities of the Texas statutory scheme under a rational basis test, the scheme would obviously fail under a strict scrutiny test.

## 2. Rational Basis

The laxer standard of review for the state to meet is the "rational basis" test which requires that the state have a legitimate goal in passing legislation. The legislation must also be rationally related to the legitimate state goal.<sup>128</sup>

Two justifications<sup>129</sup> can be made for the Texas statutory scheme. One is that it protects Texas school district's financial integrity. The second is that it discourages illegal immigration.

Protecting the school district's financial integrity while not a "compelling" goal may be a legitimate one<sup>130</sup> in that school districts are under a duty not to arbitrarily squander taxpayers' money. To protect the fiscal integrity of the school district, school officials may decide to withhold free education to undocumented children on the theory that their parents contribute the least amount of money in taxes to the district. This theory, however, is not sufficiently related to its purpose in that it is at once overinclusive and underinclusive. It is overinclusive in that it includes all undocumented children, large numbers of whose parents contribute to educational funds through property taxes, income taxes and other means.<sup>131</sup> It is underinclusive in that it does not include children whose parents may pay no property or income taxes.

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125. See generally D. REAVIS, WITHOUT DOCUMENTS (1978).

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

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

128. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

129. For other possible justifications, see *Doe v. Plyler*, 628 F.2d 448, 460-61 (5th Cir. 1980), cert. granted, 101 S. Ct. 2044 (1981).

130. See, e.g., *New Orleans v. Dukes*, 427 U.S. 297 (1976) (the Court in a per curiam decision overruled *Morey v. David*, 354 U.S. 457 (1957), the only decision between the late 1930s and the 1970s in which the Court had struck down an economic regulation on equal protection grounds).

131. COUNTY OF SAN DIEGO HUMAN RESOURCES AGENCY, A STUDY OF THE SOCIO-ECONOMIC IMPACT OF ILLEGAL ALIENS ON THE COUNTY OF SAN DIEGO (1977); the NORTH STUDY, note 46 *supra*; Hirsh, *California Illegal Aliens: They Give More Than They Take*, NEW WEST, May 23, 1977, at 26.

The second justification, to discourage illegal immigration, has two major defects. First, it is the federal government's exclusive province to enforce immigration laws, not the state's.<sup>132</sup> But even if the state could act in concert with the federal government, denying undocumented children an education is a totally ineffectual means of achieving that goal. The immigration problem will not be affected by undocumented aliens' realization that their children will be denied a free public education.<sup>133</sup>

## V. CONCLUSION

Recognizing that undocumented aliens are equally protected by the constitution from discriminatory state practices solves the undocumented persons' legal dilemma. The states would be prohibited from stepping beyond their constitutional powers in enacting legislation which discriminates against particularly vulnerable classes of people. Also, declaring that undocumented aliens are due equal protection of the law requires states to abide by the constitutional mandate to treat persons alike when they are similarly situated.

State practices discriminating against undocumented people will at least be subjected to a rational basis test. Irrational and discriminatory state practices will be invalidated. Legitimate legislative objectives will be furthered.

Adopting the proposal would not affect the federal government's exclusive authority over immigration and naturalization. The INS would continue to enforce its laws at the border or in workplace raids. Undocumented aliens would remain subject to deportation if detected by INS authorities.

Adopting the proposal would merely require each branch of government and each state to perform its proper constitutional function. It requires that each state treat all people equally in its pursuit to improve the human condition; that the federal government perform its duty to regulate immigration; and that the courts assure that both the state and federal governments act in conformance with constitutional mandates.

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132. See notes 35 & 38 *supra*.

133. See Lopez, *supra* note 8, at 623-26.

\* The author wishes to express special thanks to his editor, Antoinette Sedillo, and to the Chicano Law Review Staff.