Equal Protection Clause Requires a Free Public Education for Illegal Alien Children: *Plyler v. Doe,* 102 S. Ct. 2382 (1982).

In 1977 parents of undocumented alien children filed a class action suit in the United States District Court for the Eastern District of Texas on behalf of their school-age children, who complained of exclusion from the Tyler Independent School District.[1] The children challenged the validity of section 21.031 of the Texas Education Code,[2] which authorized local districts to deny enrollment in their public schools to children not legally admitted into the United States. The district court held that the statute violated the equal protection clause of the fourteenth amendment since the state had not demonstrated even a rational basis for denying an education to undocumented children.[3] On appeal, the Fifth Circuit Court of Appeals affirmed the district court's judgment, concluding that section 21.031 was unconstitutional regardless of whether it was tested under the rational basis standard of review or the strict scrutiny standard.[4] In November 1979 the Judicial Panel of Multidistrict Litigation consolidated other claims challenging the

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1. Doe v. Plyler, 458 F. Supp. 569 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *aff'd*, 102 S. Ct. 2382 (1982).

2. TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1982). The statute provides, in pertinent part:

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

3. 458 F. Supp. at 585.

4. Doe v. Plyler, 628 F.2d 448, 458 (5th Cir. 1980), *aff'd*, 102 S. Ct. 2382 (1982).

Texas statute into a single action, *In re Alien Children Education Litigation*,[5] which was heard before the District Court for the Southern District of Texas. Applying strict judicial scrutiny, the court in *Alien Children* held that section 21.031 violated the equal protection clause of the fourteenth amendment due to the absolute deprivation of education by the state.[6] After the Fifth Circuit Court of Appeals summarily affirmed the district court's decision, the Supreme Court granted certiorari and consolidated these claims. The Supreme Court ruled that strict judicial scrutiny was not justified because illegal aliens were not a suspect classification and education was not a fundamental right.[7] However, the Court applied an intermediate level of judicial review since the Texas statute imposed a lifetime hardship on a discrete class of children not accountable for their disabling status.[8] After reviewing the state's interests, the Court reasoned that the classification embodied in section 21.031 of the Texas Education Code failed to further a substantial goal of the state and violated the equal protection clause of the fourteenth amendment.[9]

I. ALIENS AND THE APPLICATION OF EQUAL PROTECTION

The fourteenth amendment to the United States Constitution asserts that no state shall deny the equal protection of its laws to any person within its jurisdiction.[10] The equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the government but does not mandate identical treatment of different categories of persons.[11] The crucial issue in equal protection analysis is an examination between legislative classifications and state objectives to determine whether state classifications are based on impermissible criteria and whether they arbitrarily burden a particular group of individuals.[12]

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5. 501 F. Supp. 544 (S.D. Tex. 1980).
6. *Id.* at 564.
7. Plyler v. Doe, 102 S. Ct. 2382, 2398 (1982).
8. *Id.*
9. *Id.* at 2402.
10. U.S. CONST. amend. XIV, § 1.
11. Reed v. Reed, 404 U.S. 71, 75-76 (1971).
12. The Supreme Court uses two tests in equal protection analysis, although recent cases indicate the use of a third test. Under the rational basis test, statutory classifications receive a presumption of constitutionality, rebuttable by a showing that the classification bears no reasonable relation to the furthering of a legitimate government objective. *See*

Although the Supreme Court had ruled that the due process provisions of the fifth and fourteenth amendments extended to illegal aliens,[13] the Court had not previously decided whether the equal protection clause applied to aliens who entered the country unlawfully.[14] However, in *Yick Wo v. Hopkins*,[15] the Court decided that the guarantees of the fourteenth amendment did not apply exclusively to citizens.[16] The Court held unconstitutional a San Francisco ordinance banning the operation of hand laundries in wooden buildings. The licensing system was being used to deny licenses to resident Chinese aliens while non-Chinese persons were granted licenses. The Court concluded that application of the law violated the fourteenth amendment and that aliens were persons entitled to the guarantees of the equal protection clause.[17]

The reasoning of *Yick Wo* was later applied to legislation pertaining to aliens which nonresident plaintiffs claimed violated the fifth and sixth amendments. In *Wong Wing v. United States*,[18] the Supreme Court struck down a statute which provided that persons of Chinese descent adjudged to be unlawfully in the United States could be imprisoned at hard labor for one year and then deported.[19] The Court stated that its decision in *Yick Wo* established that all persons within the territory of the United States are entitled to the protection guaranteed by the fifth and sixth

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Dandridge v. Williams, 397 U.S. 471 (1970). The classification will be upheld if it serves any conceivable state purpose. *See* McGowan v. Maryland, 366 U.S. 420 (1961). The second standard the Court uses is the compelling government interest test. Under this test, a classification is invalid unless justified by a compelling government interest. *See* Brown v. Board of Educ., 347 U.S. 483 (1954). This standard is used when the classification encroaches on a fundamental right or a suspect classification. For opinions dealing with fundamental rights, see Dunn v. Blumstein, 405 U.S. 330, 336-43 (1972); Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969). For cases dealing with suspect classifications, see Graham v. Richardson, 403 U.S. 365, 371-72 (1971); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964). In addition, an intermediate level of scrutiny has been used in recent Court opinions. Under this standard, the state must prove that its classification is substantially related to an important governmental interest. This standard has been used most frequently for classifications based on gender and illegitimacy. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978); Craig v. Boren, 429 U.S. 190 (1976).

13. Mathews v. Diaz, 426 U.S. 67, 77 (1976); Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51 (1950); Wong Wing v. United States, 163 U.S. 228, 238 (1896).

14. Doe v. Plyler, 628 F.2d 448, 455 (5th Cir. 1980), *aff'd*, 102 S. Ct. 2382 (1982).

15. 118 U.S. 356 (1886).

16. *Id.* at 369.

17. *Id.*

18. 163 U.S. 228 (1896).

19. *Id.* at 233-34.

amendments.[20]

A. *Aliens as a Suspect Classification*

Classifications based on race and national origin have long been held inherently suspect and subject to close judicial scrutiny by the courts.[21] However, it was not until 1971, in *Graham v. Richardson*,[22] that the Supreme Court determined that a legislative distinction between resident aliens and United States citizens was a suspect classification.[23] The Court held that the equal protection clause prevented a state from providing welfare benefits solely to United States citizens or persons who had resided in the United States for a specified number of years. The Court determined that the state interest in favoring its own citizens in the distribution of limited resources was not a compelling reason for the classification.[24] Furthermore, the justification given by the state of limiting expenses was especially inappropriate when the class discriminated against was composed of aliens who also pay taxes and may have lived and worked in the state for many years.[25]

Although the Court disallowed the classification of aliens by the state in *Graham*, it later upheld Congress' authority to deny aliens benefits awarded to citizens in *Mathews v. Diaz*.[26] In holding that Congress could condition an alien's participation in a federal medical insurance program on continuous residence in the United States for a five-year period,[27] the Court determined that Congress had no duty to give aliens the full benefits received by citizens.[28] The Court based its decision on the fact that Congress, due to its

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20. *Id.* at 238.

21. *See* McLaughlin v. Florida, 379 U.S. 184 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954).

22. 403 U.S. 365 (1971).

23. *Id.* at 371-72.

24. *Id.* at 375. In earlier alienage decisions, the Court gave the states significant freedom to establish classifications on the basis of alienage under a special public interest theory. This was particularly apparent in areas of natural resources, ownership of land, and employment. *See* Terrace v. Thompson, 263 U.S. 197 (1923); Truax v. Raich, 239 U.S. 33 (1915); Patsone v. Pennsylvania, 232 U.S. 138 (1914). The first cases to reject this theory were Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) and Oyama v. California, 332 U.S. 633 (1948).

25. 403 U.S. at 376.

26. 426 U.S. 67 (1976).

27. *Id.* at 87.

28. *Id.* at 80.

complete power over immigration and naturalization, could make classifications between United States citizens and aliens which a state could not justify.[29]

In *DeCanas v. Bica*,[30] the states were granted the power to classify on the basis of alienage. The State of California had prohibited the knowing employment of illegal aliens when lawful resident workers would be disadvantaged. The Supreme Court reasoned that states had authority to regulate with respect to aliens, at least where such action mirrored federal objectives.[31] Noting that there was no legislative history indicating Congress' intent to preclude state regulations touching on the employment of illegal aliens, the Court held the law was not an unconstitutional regulation of immigration.[32] The Court determined that the Immigration and Nationality Act[33] was mainly concerned with the terms and conditions of admission and the treatment of aliens legally in the country;[34] therefore, congressional concern over the employment of illegal aliens was peripheral while the regulation of employment was a proper police power objective of the state.[35]

The distinction between federal and state power regarding alienage classifications was again discussed in *Nyquist v. Mauclet*,[36] in which the Supreme Court held unconstitutional a state law which granted aid for higher education to citizens and resident aliens who were or would be applying for citizenship.[37] Stating that classifications by a state based on alienage were inherently suspect and subject to strict judicial scrutiny,[38] the Court nevertheless explained that relaxed judicial scrutiny was used in *Diaz* because of the broad power Congress enjoys over naturalization and immigration.[39] Therefore, the Court indicated that it used two different tests in construing federal and state alienage classifications: state classifications were subject to strict judicial scrutiny

29. *Id.* at 84-87.
30. 424 U.S. 351 (1976).
31. *Id.* at 355-56.
32. *Id.* at 356-58.
33. 8 U.S.C. §§ 1-1557 (1976).
34. 424 U.S. at 359.
35. *Id.* at 356.
36. 432 U.S. 1 (1977).
37. *Id.* at 12.
38. *Id.* at 7.
39. *Id.* at 7 n.8.

while federal classifications were subject only to the rational basis level of review.[40]

B. *The Right to a Public Education*

The Supreme Court has never held that there is a fundamental right to public education, requiring the use of strict judicial scrutiny in equal protection analysis. Previous decisions have, however, indicated that education is perhaps the most important institution for preserving democratic values and, therefore, should be available to all persons.[41] In *Brown v. Board of Education*,[42] the Supreme Court stressed the importance of education, noting that an educational opportunity should be available to all persons due to its importance to the individual and the cultural and democratic values of the country.[43] Although the decision is noted for its impact on segregation, the Court described education as the most important function of state and local governments and reasoned that a child could not expect to succeed in life if denied the benefit of an education.[44] The Court determined that when the state has undertaken to provide an educational opportunity, that opportunity must be made available to all persons on equal terms.[45]

Almost two decades later the Court, in *San Antonio Independent School District v. Rodriguez*,[46] ruled that education was not a right found explicitly in the Constitution.[47] Mexican-American parents had filed a class action suit on behalf of all children residing in Texas school districts financed by low property tax bases.[48] The plaintiffs argued that financing public education based on property taxes discriminated against children from poorer dis-

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40. Although the Supreme Court will give federal classifications great deference, in Ambach v. Norwick, 441 U.S. 68, 74-75 (1979), the Court held that a state alienage classification would also be judged by the rational basis test when the classification related to a state function that was bound up with the operation of the state as a governmental entity. *See also* Foley v. Connelie, 435 U.S. 291 (1978) (state law upheld which excluded aliens from appointment as members of state police force).

41. *See* Ambach v. Norwick, 441 U.S. 68, 76-77 (1979); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Abington School Dist. v. Schempp, 374 U.S. 203, 230 (1963).

42. 347 U.S. 483 (1954).

43. *Id.* at 493.

44. *Id.*

45. *Id.*

46. 411 U.S. 1 (1973).

47. *Id.* at 35.

48. *Id.* at 5.

tricts.[49] Plaintiffs also maintained that the relationship between education and the fundamental freedoms of speech and voting should establish education as a fundamental right.[50] Although declining to hold that public education was a fundamental right,[51] the Court did not rule out the possibility that some degree of educational opportunity might be required for all persons.[52] The Court noted that no allegation had been made that the state financing system denied each child the opportunity to acquire the minimal skills necessary to enjoy the rights of speech and full participation in the political process.[53] The Court upheld the use of local property taxes to finance public education, even though the system allowed school districts within the state to have differences in the amount of money spent per student on educational programs.[54]

C. *Children and Unjust Punishment*

Although illegal aliens have never been held to constitute a suspect classification, decisions have indicated that children are a definable class when punished for acts for which they are not morally or legally culpable.[55] This proposition became most apparent in *Weber v. Aetna Casualty & Surety Co.*,[56] in which the Supreme Court struck down a statute punishing children for their illegitimate status. The statute granted full recovery for legitimate and acknowledged illegitimate children when their parents were injured, but limited benefits to unacknowledged illegitimate children.[57] The Court stated that when unacknowledged illegitimate children were dependent on their injured parents there was no reason for denying them full benefits.[58] Furthermore, the Court reasoned it was wrong to punish the children for their status of illegit-

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49. *Id.* at 22.
50. *Id.* at 35.
51. *Id.* at 37.
52. *Id.* at 36-37.
53. *Id.* Although an illegal alien may not participate fully in the political process, he may play a leadership role in other areas of the community. Nyquist v. Mauclet, 432 U.S. 1, 12 (1977).
54. 411 U.S. at 54-55.
55. *See* Trimble v. Gordon, 430 U.S. 762 (1977); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).
56. 406 U.S. 164 (1972).
57. *Id.* at 175-76.
58. *Id.* at 169-70.

imacy, noting that imposing disabilities on a child was contrary to the concept that legal burdens should bear some relationship to individual wrongdoing.[59]

II. Denial of Free Public Education to Undocumented Children

To curtail the rising costs of education, Texas recently attempted to limit the availability of a free public education to children of illegal aliens. However, these attempts have been challenged as a denial of equal protection by the parents of the undocumented children. In *Hernandez v. Houston Independent School District*,[60] a Texas court of civil appeals denied a challenge by undocumented children that section 21.031 of the Texas Education Code, which denied them a free public education, violated the equal protection clause of the fourteenth amendment.[61] Holding that education was not a fundamental right and that illegal aliens did not constitute a suspect class, the court subjected the statute to the rational basis standard of review.[62] Under this standard, the court upheld the statute and reasoned that section 21.031 was rationally related to the legitimate state interest of preserving limited revenues for educational purposes.[63] According to the court, the classification embodied in section 21.031 was not based on race or national origin, but was instead based on residence within the United States in violation of the law.[64] Moreover, a child unlawfully in the United States should have no greater rights to a free education than he would have had if he had never entered the country.[65] Therefore, the court reasoned that an undocumented child was not entitled to a free education at the expense of the State of Texas.

The Fifth Circuit Court of Appeals reached a different conclusion in *Boe v. Wright*,[66] in which the court affirmed a district court's order enjoining the Dallas Independent School District

59. *Id.* at 175.
60. 558 S.W.2d 121 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).
61. *Id.* at 124.
62. *Id.*
63. *Id.* at 125.
64. *Id.* at 124.
65. *Id.*
66. 648 F.2d 432 (5th Cir. 1981).

from refusing to provide illegal aliens with a free public education.[67] Justice Reavley disagreed with the court's decision, but did not dissent since he was bound by an earlier decision in which the Fifth Circuit held that section 21.031 violated the equal protection clause of the fourteenth amendment.[68] However, in a concurring opinion, Justice Reavley stated that section 21.031 could be supported under traditional equal protection analysis.[69] The concurring opinion cited as legitimate state interests the need to decrease costs and to lessen the incentive for persons to unlawfully enter the United States.[70] Justice Reavley indicated that the Texas Legislature had considered the importance of education by deciding not to dilute limited educational resources available for citizens and lawful residents.[71] Moreover, the concurrence stated that it was irrelevant that Texas had failed to enact a better method to deter the influx of illegal aliens into the country, such as enacting a statute prohibiting the employment of unlawful residents. Reasoning that the best method of deterrence need not be enacted to survive equal protection analysis, the concurrence stated that section 21.031 could not be set aside if any state of facts could reasonably justify its purpose.[72]

III. PLYLER V. DOE

In *Plyler v. Doe*,[73] the Supreme Court addressed the constitutionality of excluding undocumented alien children from state public schools. The Court, holding that the equal protection clause of the fourteenth amendment extended to illegal aliens, struck down a Texas statute which denied undocumented alien children a free public education. The Court determined that the classification im-

67. *Id.* at 433. Since the court had previously held in Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980), that § 21.031 violated the equal protection clause, the court affirmed the injunction, stating that the issue involving § 21.031 had already been resolved. 648 F.2d at 433.

68. 648 F.2d at 434 (Reavley, J., concurring). Reavley stated that due to the court's previous decision in Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980), he was bound to follow the court's precedent absent some intervening authority from the Supreme Court or the Fifth Circuit sitting en banc. 648 F.2d at 434. However, he wrote a concurring opinion to express his disagreement with the Fifth Circuit's decision in *Plyler*.

69. 648 F.2d at 434.

70. *Id.* at 436-37.

71. *Id.* at 436.

72. *Id.* at 438.

73. 102 S. Ct. 2382 (1982).

posed by section 21.031 of the Texas Education Code[74] violated the equal protection clause since it failed to further a substantial state goal.[75]

The Court began its discussion by interpreting the phrase "within its jurisdiction" in the equal protection clause of the fourteenth amendment.[76] The Court, interpreting the phrase for the first time, rejected the state's claim that the phrase, which is not present in the due process clause, made the equal protection clause available to a smaller class of persons.[77] Texas maintained the phrase "within its jurisdiction" did not require a state to provide the equal protection of its laws to illegal aliens since they were not lawfully within the jurisdiction of the state. However, the Court relied on legislative history to reject this argument, determining that sponsors of the amendment intended to ensure that equal protection of the laws was provided to all persons within a state's boundaries, including the alien population.[78] If the state's interpretation were allowed, the majority feared that a state could relieve itself of the obligation to apply its laws equally to all persons.[79] The Court preferred a construction of the fourteenth amendment that would not allow a state to identify a subclass of persons whom it could determine to be beyond its jurisdiction.[80]

The Court rejected the state's argument that the undocumented status of the children established a sufficient basis for denying them the benefit of an education.[81] Although the children

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74. TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1982).

75. 102 S. Ct. at 2402.

76. *Id.* at 2391-94. The due process provision of the fourteenth amendment states: "nor shall any State deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, § 2. The equal protection clause of the fourteenth amendment states: "nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* Note the absence of the words "within its jurisdiction" in the due process clause and their presence in the equal protection clause.

77. 102 S. Ct. at 2393. The State of Texas argued that since the phrase "within its jurisdiction" was present in the equal protection clause but absent from the due process clause, the protection under equal protection was less than coextensive with that available under due process. *Id.* at 2391-92.

78. *Id.* at 2393-94.

79. *Id.* at 2393.

80. *Id.*

81. *Id.* at 2398-2400. Texas argued that charging tuition to undocumented children would stem the tide of illegal immigration, which is a legitimate federal objective. *Id.* However, the district court in *Plyler* said that charging tuition to undocumented aliens was a "ludicrously ineffectual" attempt to stem the tide of illegal immigration. Plyler v. Doe, 458

were in the country unlawfully and were subject to deportation, there was no finding of congressional intent to deny the children an education while they were present in the United States.[82] The Court found persuasive the plaintiff's argument that under current federal policy there was no guarantee that a child subject to deportation would ever be deported.[83] Thus, the Court refused to impute to Congress the intent to withhold from the children the access to a basic education.

In determining the level of judicial scrutiny to apply to section 21.031, the Court concluded that illegal aliens did not constitute a suspect class[84] and that public education was not a fundamental right.[85] Therefore, strict judicial scrutiny did not apply to the classification and an intermediate level of scrutiny was used due to the harm the statute imposed on the nation and the undocumented children, who were not morally culpable for their unlawful status.[86] The Court noted the special situation created by the presence of millions of illegal aliens in the United States.[87] The Court determined that the plaintiff children were special members of this underclass whose unlawful presence in the country was not a product of their own unlawful conduct, but that of their parents.[88] There-

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F. Supp. 569, 584-85 (E.D. Tex. 1978). *But see* Boe v. Wright, 648 F.2d 432, 437-38 (5th Cir. 1980) (Reavley, J., concurring) (best method of deterrence not needed under rational basis test).

82. 102 S. Ct. at 2400.

83. *Id.* at 2399.

84. *Id.* at 2396 n.19. The Court stated that in prior cases it had never addressed the question of whether persons unlawfully in the country constituted a suspect class. The Court rejected the claim that illegal aliens were a suspect class, reasoning that entry into this classification was a product of voluntary action. *Id.*

85. *Id.* at 2397.

86. *Id.* at 2398. Several commentators have suggested ways in which the intermediate standard of review should be analyzed. One approach is a means-scrutiny test. *See* Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24 (1972). Gunther described this theory as a "means inquiry" which would put "new bite" into the rational basis test. *Id.* This approach is different from the intermediate level or middle tier approach used in Orr v. Orr, 440 U.S. 268 (1979); Craig v. Boren, 429 U.S. 190 (1976); and Reed v. Reed, 404 U.S. 71 (1971). In those gender cases, the Court required a showing of a substantial relationship to an important government interest.

87. 102 S. Ct. at 2395-96. The Court stated that this "shadow population" raised the specter of a permanent caste of undocumented resident aliens encouraged by some to remain here as a source of cheap labor, but denied the benefits that are available to citizens and lawful residents. *Id.*

88. *Id.* at 2396.

fore, because section 21.031 imposed its discriminatory impact on the basis of a legal characteristic over which the children had no control, there could be no permissible justification for penalizing the children for their presence in the United States.[89] Although the analogy was not perfect, the majority adopted its reasoning from prior decisions construing illegitimacy classifications.[90] The Court compared the illegitimacy cases to the present one by stating that legislation directing the onus of the parent's misconduct against his children did not comport with fundamental conceptions of justice.[91]

In discussing the importance of education, the Court followed its earlier decision in *San Antonio Independent School District v. Rodriguez*[92] and held that public education was not a right granted to individuals by the Constitution,[93] although it did note that past decisions had stressed the importance of education in maintaining the fabric of society.[94] Relying on the plaintiff's contention that a deprivation of education would leave undocumented children with an enduring disability, the Court stated that it could not ignore the social costs borne by the nation when select groups were denied the means to absorb the values upon which rested the social order of the country.[95] Therefore, the denial of an education to an isolated group of children was determined to be contrary to the equality embodied in the equal protection clause.[96]

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89. *Id.* at 2397.

90. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972). In *Weber* the Court noted that penalizing the child is "an ineffectual—as well as unjust—way of deterring the parent." *Id.*

91. 102 S. Ct. at 2396. In the dissenting opinion, Chief Justice Burger argued that the majority's analogy to the cases involving illegitimate children was misleading. The dissent reasoned that the state had not thrust disabilities on the plaintiff children because of their status at birth. Instead, the dissent argued that the children's status was based on their illegal presence in the country and was a direct result of Congress' valid exercise of its broad powers in the field of naturalization and immigration. The dissent also noted that the plaintiff children could be deported because of their illegal status. The dissenting opinion implied that this would be no less of a penalty than the denial of privileges provided to legal residents. *Id.* at 2410 (Burger, C.J., dissenting).

92. 411 U.S. 1 (1973).

93. 102 S. Ct. at 2397.

94. *Id.*

95. *Id.*

96. *Id.* The Court said that the denial of education to some isolated group of children posed an affront to one of the goals of the equal protection clause: the abolition of government barriers presenting unreasonable obstacles to advancement on the basis of individual merit. *Id.*

The decision on the application of the fourteenth amendment marks the first time the equal protection clause has been extended to illegal aliens. Because due process rights attach merely upon illegal entry into the United States[97] and because illegal aliens have long enjoyed the benefits of the due process clause,[98] the decision logically extends the application of equal protection in the same manner. Moreover, the lower court correctly noted that a probable reason for the Court's failure to decide the equal protection issue previously was a lack of opportunity due to the illegal alien's reluctance to assert a claim because of his unlawful status.[99] The due process issue normally appears in deportation proceedings; therefore, the opportunity to decide the issue arose more frequently.[100]

In interpreting the classification in section 21.031, the Court resolved the issue it left unanswered in *Rodriguez*: what level of judicial scrutiny is to be employed when a state requires a complete denial of educational benefits to some of its children? In *Rodriguez* traditional equal protection scrutiny was applied to a state system of allocating educational resources in which there was at least some opportunity to acquire basic minimal skills.[101] However, in the present case, the Court determined that a complete denial of educational benefits imposed on some children could not be justified unless it furthered a substantial goal of the state.[102] Thus, a distinction was drawn between the relative differences in spending levels among school districts in *Rodriguez* and the com-

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97. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950). Although the Supreme Court had not previously held that the equal protection clause applied to illegal aliens, some lower court opinions have suggested that it did. *See* Holley v. Lavine, 529 F.2d 1294, 1294-95 (2d Cir. 1976); Bolanos v. Kiley, 509 F.2d 1023 (2d Cir. 1975); Commercial Standard Fire & Marine Co. v. Galindo, 484 S.W.2d 635 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.).

98. *See supra* note 13.

99. Doe v. Plyler, 458 F. Supp. 569, 579-80 n.12 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *aff'd*, 102 S. Ct. 2382 (1982).

100. *See* Leng May Ma v. Barber, 357 U.S. 185 (1958); Shaughnessy v. Mezei, 345 U.S. 206 (1953).

101. 411 U.S. at 37.

102. 102 S. Ct. at 2398. The dissent argued that since education was not a fundamental right, the central question was whether there was some legitimate basis for a legislative distinction between different classes of persons. The dissent also said that the fact that the distinction was drawn in legislation affecting public education—as opposed to legislation affecting other governmental benefits, such as public assistance, health care, and housing—could not make a difference in the level of scrutiny to be applied. *Id.* at 2410-11 (Burger, C.J., dissenting).

plete denial of education in the present case.[103] In the latter instance, when a state mandates a total deprivation, the classification must promote at least a substantial state goal.

Moreover, in subjecting a complete denial of educational benefits to a stricter level of judicial scrutiny, the Court raised the benefit of a public education to a higher level than other government benefits in the area of economics and social welfare. Although refusing to elevate education to a constitutionally protected right, the Court stated that education was a more meaningful interest than other interests regulated by the state.[104] The Court said the heightened interest was due to the importance of education in maintaining basic institutions and the lasting impact that its deprivation had on the child.[105] In prior decisions, the Court had held that classifications bearing on nonconstitutional issues were not entitled to a closer examination under the equal protection clause.[106] Furthermore, the decision in *Rodriguez* established that the judiciary should not create substantive rights in the name of guaranteeing equal protection of the laws.[107] Relying on such precedent, the Court was unwilling to fashion a new substantive right, but nevertheless refused to use the rational basis level of judicial review when faced with a disfavored class of innocent children being denied an interest which could lead to illiteracy.[108] Therefore, section 21.031 was subjected to an intermediate level of judicial review. In using intermediate scrutiny, the Court probably ensured that state classifications denying other government benefits to illegal aliens will be analyzed by only the rational basis level of review. In clearly distinguishing between education and other forms of economic and social welfare benefits, the Court seemed to indicate that a denial of the latter could be more easily justified by a

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103. Justice Blackmun's concurring opinion noted this distinction, explaining that *Rodriguez* reserved judgment on a system that occasioned an absolute denial of educational benefits to its children. *Id.* at 2404 (Blackmun, J., concurring).

104. *Id.* at 2397.

105. *Id.*

106. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 30-31 (1973); Dandridge v. Williams, 397 U.S. 471, 485-87 (1970).

107. 411 U.S. at 33.

108. 102 S. Ct. at 2398. The concurrence compared education to the right to vote, which is not a constitutionally protected right but which is accorded extraordinary treatment in equal protection analysis. Justice Blackmun stated that § 21.031 was unconstitutional because the classification allocated rights contrary to notions of equality. *Id.* at 2403-04 (Blackmun, J., concurring).

state.

Although the Court used an intermediate standard of review, section 21.031 could have been struck down by using only traditional equal protection analysis. The State of Texas argued that the classification furthered an interest in preserving the state's limited resources for the education of its citizens and lawful residents.[109] The issue could have been resolved by holding that denial of an education to illegal alien children was an unconstitutional method in which to accomplish the state goal of preserving state funds. The district court in *Plyler* determined that it was impossible for an illegal alien to live in Texas without paying consumer taxes and also found that many illegal aliens contributed to Social Security taxes.[110] Therefore, the Court could have determined that denying an education to undocumented children for the purpose of preserving state funds is unjust when their parents contribute to the state treasury. Denying an education to children of illegal aliens who pay taxes is no more rational than denying an education to children of poor American citizens, who also contribute little by way of taxes. Moreover, the district court determined that many illegal aliens will remain permanently in the United States and that many will change their status through marriage to a citizen or permanent resident.[111] Thus, the Court could have concluded that subjecting the children to illiteracy was not a permissible method of preserving state resources since the creation of such a subclass would add to the costly problems of unemployment, welfare, and crime.

The precedential impact of the decision is potentially limited due to the broad powers Congress retains over naturalization and immigration.[112] If Congress chooses, it can limit illegal immigration into the country, deport many illegal aliens already present, and share the financial burden of educating undocumented children. Such actions would dispose of much of the cost and many of the burdens currently imposed on border states such as Texas, which must educate these children.[113] However, legislation currently

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109. 102 S. Ct. at 2400.

110. 458 F. Supp. at 578.

111. *Id.* at 577.

112. *See* Nyquist v. Mauclet, 432 U.S. 1 (1977); Mathews v. Diaz, 426 U.S. 67 (1976).

113. Texas' principal argument throughout the *Plyler* litigation was that denying an education to illegal alien children would preserve state funds for the education of citizens

pending in Congress could make the *Plyler* decision even more significant. In 1982 the Senate passed a bill that would grant amnesty to millions of illegal aliens.[114] The proposal, which has yet to be passed by the House, would ensure that millions of illegal aliens would be destined to remain in the United States. The *Plyler* decision does not alleviate the tremendous financial burden already existing in border states such as Texas, which are required to educate all undocumented children. However, the Court has decided that the social costs borne by the nation in the creation of a subclass of illiterates outweighs whatever financial burden is required. Furthermore, with congressional approval to remain in the United States, border states could no longer argue, as did Texas, that the undocumented children's unlawful status is a sufficient justification for denying them an education.[115]

Finally, if Congress should decide to grant amnesty to many illegal aliens, it is doubtful that a federal classification denying educational benefits to illegal alien children could be upheld if applied to those children allowed to remain in the United States. Although great deference is given to federal classifications based on alienage,[116] the importance the Court placed on education makes the constitutionality of such a federal classification unlikely. It would hardly seem rational for Congress to allow the children to remain in the country and then subject them to an enduring disability by denying them important educational benefits. However, denying educational benefits to illegal alien children not included in the amnesty program could be a permissible federal classification. If Congress clearly used the exclusion to deter illegal immigration, the classification could be upheld as a permissible instrument of immigration policy. Such a policy would be similar to imposing sanctions on employers who knowingly hire illegal aliens and could be justified due to the complete power Congress retains over immigration and naturalization.

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and lawful residents. Texas also feared an influx of aliens and sought to justify § 21.031 as a deterrent to unlawful entry into the United States. However, if Congress were to help fund the education of undocumented children or else deport many illegal aliens currently in the country, both of these complaints by Texas would be lessened in intensity.

114. S. 2222, 97th Cong., 2d Sess. (1982).

115. 102 S. Ct. at 2398-99.

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

IV. CONCLUSION

In *Plyler v. Doe*,[117] the Supreme Court held that the equal protection clause of the fourteenth amendment applied to illegal aliens and that the classification embodied in section 21.031 of the Texas Education Code, which denied an education to undocumented children, was unconstitutional because it failed to further a substantial state goal. The Court decided that education was not a fundamental right and that illegal aliens were not a suspect class. However, the Court applied an intermediate standard of review due to the harm the statute imposed on the nation and the undocumented children, who were not responsible for their undocumented status. The decision is based largely on the importance of education and the adverse effect a denial of the benefit would have on undocumented children, many of whom will probably remain in this country. Although the right to a free public education is not a fundamental right, the decision establishes that education is a more important interest than other social and economic interests provided by the state. The decision also provides that a stricter scrutiny will be used when a state singles out a class of children and totally deprives them of the benefit of an education. The decision is especially important in that Congress will more than likely pass pending legislation granting amnesty to millions of illegal aliens. The financial impact on border states which must educate the undocumented children could be enormous. However, with congressional approval for many illegal aliens to remain permanently in the United States, the *Plyler* decision ensures that the equal protection clause will not permit a state to create and perpetuate a subclass of illiterates within its borders.

Mark Packard

117. 102 S. Ct. 2382 (1982).