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Illegal Immigrants and Public Education: Is There a Right to the 3 R's?

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ILLEGAL IMMIGRANTS AND PUBLIC EDUCATION:
IS THERE A RIGHT TO THE 3 Rs?

To the shopworn cliché that the United States is a nation of immigrants must be added the observation that our nation is also becoming home to a second nation of illegal immigrants . . . .

Schools are falling apart at the seams because they have to cram so many students into them.


According to the 1980 census, there were 2.047 million illegal immigrants in the United States. MILTON D. MORRIS, IMMIGRATION - THE BELEAGUERED BUREAUCRACY 52 (1985); DAVID WEISSBROD, IMMIGRATION LAW AND PROCEDURE 21 (1989). By April 1994, the United States Census Bureau estimated that the illegal immigrant population ranged from 3.5 million to 4 million. Telephone Interview with Edward Fernandez, Population Division of the United States Bureau of Census (Mar. 6, 1995) [hereinafter Fernandez interview]. In October of 1992, the INS estimated that 3.4 million illegal immigrants resided in the United States. Id.

It is important to note that immigration data is often uneven, flawed, and delayed. MORRIS, supra, at 10. The same types of data collected by different agencies and studies often do not match one another. Id. This is particularly true with illegal immigration data because of the very nature of illegal immigration; illegal immigrants do not usually notify the authorities of their illegal status. Id. at 51. As a result, the data that does exist involves “self-serving” and “misleading guesses.” Id. at 10. No one really knows how many illegal immigrants are currently in the country or how fast their population is growing. HARWOOD, supra, at 1; MORRIS, supra, at 51; Elizabeth Hull, Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe, 44 U. PITT. L. REV. 409, 409 n.1 (1983). Although many estimates have been made based on census data or the annual number of illegal alien apprehensions, the estimates greatly vary. MORRIS, supra, at 51. The data cited in this note are used with these caveats in mind.

With reference to immigrants, other synonyms for “illegal” are “undocumented” and “unsanctioned.” Although some people prefer the latter two terms over “illegal,” due to its negative connotation, the three shall be used interchangeably in this note. The same holds true for “aliens,” “immigrants,” and “workers.” For an explanation of the different terms and their uses, see HARWOOD, supra, at preface n.2.

I. Introduction

In the United States, illegal immigration is a significant concern, and it has substantially afflicted public schools. Because of the 1982 United States Supreme Court decision of Plyler v. Doe, states are required to provide illegal immigrant students with a free public education. Thirteen years after this Court decision, public school systems in states with large illegal immigrant populations are going bankrupt. These states have stretched finite education resources to the breaking point.

3. See Plyler v. Doe, 457 U.S. 202, 237 (1982) (Powell, J., concurring) (claiming that illegal immigration is a “problem of serious national proportions”); Morris, supra note 1, at 45 (stating that no issue in immigration policy, since the early 1970s, has generated as much concern or received as much attention as illegal immigration); Hiller, supra note 1, at 495 (stating that we have lost control of our borders). During the 1960s, the Immigration and Naturalization Service (INS) apprehended 1.6 million illegal immigrants. Morris, supra note 1, at 51. That number jumped to 8.3 million apprehensions from 1971-1980. Id. Experts estimate that more than 1.2 million people have annually entered the United States legally and illegally in recent years. Rohter, supra note 1, at A12. Cf. The Universal Almanac, supra note 1, at 302 (stating that over a half million new legal immigrants come to the United States each year).

4. See Farrow, supra note 2, at N3 (stating that students do not receive the individualized attention that they need because classrooms are too crowded); Karen Nelis, Retooling Schools Drive to Reform Public Education Shifts into a New Gear in 1990s, Times Union, Sept. 15, 1994, at A1 (noting that the poor quality of American education has caused American students to perform low on academic performance tests); Diego Ribadeneira, Some School Head Candidates Had Trouble with Local Boards, Boston Globe, Mar. 27, 1991, at 26 (discussing the high dropout rates and the poor standardized test results in American public schools); Shannon Sands, Letters Due Today on Homework Ban, L.A. Times, Apr. 19, 1990, at B3 (explaining that public school teachers have ceased assigning homework to students because the school district is not paying the teachers enough money).


resources beyond the limit. Furthermore, taxpayers are opposed to educating so many illegal immigrant students when doing so adversely affects the quality of public education that other students receive. In response, Texas and California have passed laws that prohibit illegal immigrants from receiving a free public education. Other states have also tried suing the federal

Tired]; Engberg, supra note 2, at B7 (explaining that limited budgets are adversely affecting public education); Harris, supra note 2, at B5 (stating that the public schools have leaky roofs, peeling paint, and antiquated heating and plumbing systems); Robert A. Jordan, Needed: A New School Board, BOSTON GLOBE, Aug. 12, 1989, at 17 (explaining that the Boston public school system was bankrupt); Michigan Ends Property Taxes for Schools, Seeks Alternatives, Chi. TRIB., July 29, 1993, at 8 (stating that one school district in Michigan ended the school year early because it had exhausted its budget). But see Booth, supra, at A1 (explaining that Congress set aside $35 million for an "immigration emergency" in 1990). However, an INS spokesman doubts the money has ever been released because the President has not declared such an emergency, nor has it been defined. Id. "What's an emergency? Because we have overcrowded schools - is that an emergency?" Id. (quoting INS spokesman Richard Kenney).

Although many states have illegal immigrants among their populations, only a handful of states account for a majority of the illegal immigrant burden, namely the border states of California, Arizona, Texas, and Florida. Fernandez interview, supra note 1. See Peter J. Spiro, The States and Immigration in an Era of Demi-Sovereignties, 35 VA. J. INT'L L. 121, 121, 124 (1994) (explaining that immigrants do not usually spread evenly within countries and that the distribution distortion will be greater the larger the nation is). Other states with large illegal immigrant populations include Illinois, New York, and New Jersey. Tom Morganthau, America: Still a Melting Pot?, NEWSWEEK, Aug. 9, 1993, at 20-21; Adam Pertman, Mexico's Economy May Jeopardize U.S. Immigration Gains, BOSTON GLOBE, Jan. 14, 1995, at 3; Rohter, supra note 1, at A12; Fernandez interview, supra note 1. According to the most recent INS data, 1,625,000 illegal immigrants reside in California; 500,000 reside in New York; 400,000 in Texas; 200,000 in Florida; 125,000 in New Jersey; and 75,000 live in Arizona. Pertman, supra, at 3. See Congressional Leaders to Push for Change in Employer Sanctions, DAILY REP. FOR EXECUTIVES, Mar. 8, 1995, at A45 (noting Senator Dianne Feinstein's view that the inequities would be much less drastic if illegal immigrants were "spread out evenly over the country") [hereinafter Change in Employer Sanctions]. For additional data on the state immigrant populations, see THE UNIVERSAL ALMANAC, supra note 1, at 304-05 (including charts of the "Foreign-Born Population By State, 1990" and the "Five States With the Highest Percentage of Foreign-Born Population, 1990").

8. See Hiller, supra note 1, at 496-97 (stating that illegal immigrants place an additional pressure on society and the government). See infra § IV.B.

9. See Change in Employer Sanctions, supra note 7, at A45 (California Senator Dianne Feinstein explaining that California citizens are fed up with illegal immigration); Dorothy Hove, Take Back Your Poor, TIME, July 12, 1993, at 5 (claiming American taxpayers are tired of supporting illegal immigrants); Send Back Your Tired, supra note 7, at 26 (stating that Americans are angry that they have to pay to educate illegal immigrants who have no right to be in the country). "We want illegal immigrants deported, not supported." Hove, supra, at 5. "We take better care of them than of our own people." Send Back Your Tired, supra note 7, at 26. See also Bob Sipchen, Addressing State of Education, L.A. TIMES, Nov. 15, 1990, at E14 (explaining that middle-class parents are removing their children from public schools and enrolling them in private schools in search of a higher quality education). See infra notes 319-34 and accompanying text.

government to relieve themselves of this burden, but they have been unsuccessful.\textsuperscript{11}

Therefore, it is time for Congress to relieve these states from this financial burden.\textsuperscript{12} Although the ideal solution would be to solve illegal immigration generally, it is unlikely that Congress will find such a solution in the near future.\textsuperscript{13} In the meantime, however, Congress needs to give relief to the public school systems.\textsuperscript{14} Thus, Congress should enable states to restrict illegal immigrant students from enrolling in and attending public schools.\textsuperscript{15}

Currently, Congress prohibits illegal immigrants from receiving several types of benefits, including food stamps,\textsuperscript{16} Supplemental Security Income,\textsuperscript{17} and unemployment,\textsuperscript{752} but the government has not been able to relieve themselves of this burden.\textsuperscript{11}

\begin{itemize}
\item from receiving a free public education. See also infra § IV.A. & C.
\item 11. See infra § IV.B.1.
\item 12. See Patrick T. Reardon, Divided State Does Out Unequal Education for All, CHI. TRIB., Oct. 23, 1994, § 1, at 13 (noting that Illinois schools and school children have been burdened by inadequate financing). But see PARVIZ ASHEGHIAN, INTERNATIONAL ECONOMICS 457 (1995) (claiming that illegal immigrants pay more in taxes than they receive in benefits, and therefore are not a financial burden). Tax statistics have been used to support both sides of the illegal immigrant burden/benefit debate. However, the issue of taxes is beyond the scope of this note.
\item 13. Illegal immigration is a phenomenon based on a variety of socioeconomic and demographic problems, commonly called "push-pull factors." ASHEGHIAN, supra note 12, at 450; JOHN A. JOANNES ET AL., THE IMMIGRATION REFORM AND CONTROL HANDBOOK 2 (1987); MORRIS, supra note 1, at 62-63; Hiller, supra note 1, at 498; John E. Huerta, Immigration Policy and Employer Sanctions, 44 U. PITT. L. REV. 507, 514-15 (1983); Spiro, supra note 7, at 124. Push factors are those forces that encourage people to leave one country and migrate to another. ASHEGHIAN, supra note 12, at 450; MORRIS, supra note 1, at 63; Leonel J. Castillo, Remarks On Immigration Policy: A Time to Think Small, 44 U. PITT. L. REV. 485, 490 (1983). They include civil disorder, high unemployment, war, rapid population growth, and a poor economy. ASHEGHIAN, supra note 12, at 450; JOANNES ET AL., supra, at 2; MORRIS, supra note 1, at 63-72; Castillo, supra, at 491; Huerta, supra, at 509, 514.
\item 14. See Reardon, supra note 12, at 13 (explaining that inadequate school funds decrease the educational opportunities available to students); Sipchen, supra note 9, at E14 (noting the poor quality of American public education and the need for improved public school systems).
\item 15. See infra § V.
\end{itemize}
Aid to Families with Dependent Children,18 and Medicaid.19 Furthermore, Congress has also enacted a law to prohibit employers from hiring illegal immigrants.20 Congress has justified these exclusions because it believes that such assistance should: (1) be limited to aliens whose residence is validated by federal immigration law; and (2) not place undue burdens on states and localities.21 Because illegal immigrants currently receive free public education, and because the cost to educate illegal immigrants places a substantial economic burden on states and localities,22 Congress should consistently pursue its objectives and enable states to regulate illegal immigration as it affects public education.23

Therefore, this Note asserts that Congress, under its power to regulate immigration, should pass a statute which enables states to prohibit illegal immigrant students from receiving a free public education, and proposes the congressional statute.24 In addition, this Note proposes a model state statute to illustrate how a state may implement Congress' immigration regulation.25 On the surface, the holding in Plyler v. Doe appears detrimental to this proposal because a state would be implementing immigration law.26 However, procedurally, a state would be able to implement such regulation because Congress would have expressly given the states the authority to do so.27 Additionally, the states' interests in protecting the financial stability of public


20. In 1986, Congress passed the Immigration Reform and Control Act (IRCA). For a discussion of IRCA, see infra § III.A.


22. In terms of educating illegal immigrant students, the states and localities are significantly affected because they pay for a substantial portion of public education. Sam Peltzman, The Political Economy of the Decline of American Public Education, 36 J.L. & Econ. 331, 346-47 (1993). See THE UNIVERSAL ALMANAC, supra note 1, at 235 (including a chart of "Public Education Expenditures, 1940-93"). The federal government, on the other hand, contributes only a small percentage. THE UNIVERSAL ALMANAC, supra note 1, at 235; Peltzman, supra, at 346-47.

23. See infra notes 298-315 and accompanying text.

24. See infra § VI.

25. Because states regulate education, a state is the proper entity to create a statute that sets forth public school enrollment and attendance policies. See infra § VI.


27. See infra § VI.
school systems are now significant enough to distinguish between lawful resident students and illegal immigrant students.28

However, before one can understand illegal immigration’s adverse effects on public schools, one must first understand the problem of illegal immigration. Therefore, Section II of this Note will briefly explain the history of immigration law,29 the development of illegal immigration, and some of the problems the Immigration and Naturalization Service (INS) confronts when enforcing immigration law.30 Section III will discuss illegal immigration by further explaining what the federal government has done in attempting to curb the problem,31 and will explain why such solutions have been ineffective.32 Section IV will discuss how illegal immigration has adversely affected the states and public education33 and how the states have reacted to such adversity.34 Then, Section V will explain why the federal government needs to act to relieve the states from their economic burdens and to protect public school systems from financial ruin.35 Finally, Section VI will propose a federal statute that enables states to prohibit illegal immigrant students from receiving a free public education, and a state model statute to demonstrate how a state may implement and enforce the federal regulation.36 These suggestions are meant to function as guidelines for Congress, the INS, the courts, the states, and school districts so that education can be limited to immigrants whose residence is validated by federal immigration law, thereby relieving states and localities from the burden of educating illegal immigrants.

II. THE BACKGROUND OF ILLEGAL IMMIGRATION

The history of the United States is based on immigrants traveling to America to work and make a better life for themselves and their families.37

28. Due to changed circumstances in illegal immigration and overcrowding in public schools, states with large illegal immigrant populations have compelling interests to restrict illegal immigrant students from attending public schools. See infra notes 283, 290-97 and accompanying text.
29. This note, however, does not attempt to discuss the problem of refugees.
30. See infra notes 44-120 and accompanying text.
31. See infra notes 124-63 and accompanying text.
32. See infra notes 142-49, 162-63 and accompanying text. See also Plyler v. Doe, 457 U.S. 202, 237 (1982) (Powell, J., concurring) (stating that the federal government has provided ineffective leadership in terms of illegal immigration).
33. See infra notes 171-246 and accompanying text.
34. See infra notes 247-75 and accompanying text.
35. See infra notes 277-355 and accompanying text.
36. See infra notes 356-73 and accompanying text.
37. ALEJANDRO PORTES & RUBEN G. RUMBAUT, IMMIGRANT AMERICA at xvii (1990); THE PROBLEM OF IMMIGRATION 7 (Steven Anzovin ed., 1985).
For this reason, the United States has maintained a liberal immigration policy.38 At one point, however, the United States began to retract some of its generosity by excluding particular "undesirable" immigrants, and limiting the number of immigrants from certain regions of the world.39 Such restrictions did little to prevent the flow of immigrants, however, and a new phenomenon began: illegal immigration.40 As economic and political conditions deteriorated in other countries, many immigrants could not afford to wait for the United States government to issue them a visa to lawfully enter the country.41 Thus, many immigrants have entered the United States illegally.42 In recent decades, illegal immigration has become a serious problem, and it is one that the federal government is unable to effectively control.43

A. The Federal Government's Plenary Power over Immigration

During the American colonial period, federal legislation regarding immigration was essentially void for two reasons.44 First, for approximately 100 years, it had not been determined whether the Constitution empowered the federal government to regulate immigration.45 Second, the United States favored unrestricted immigration because of the unsettled frontier and the large demand for labor.46 Although the states had their own individual immigration

38. STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY 108 (1992). See George Will, Illegal Immigrants Should Be a Local Concern, PRESS-CITIZEN, Nov. 1, 1994, at A11 (explaining that when Congress ratified the Fourteenth Amendment, and for many decades thereafter, the United States had open borders). See also infra notes 44-46 and accompanying text.

39. See infra notes 64-72 and accompanying text.

40. WEISSBRODT, supra note 1, at 12. See infra note 71 and accompanying text.

41. WEISSBRODT, supra note 1, at 12. See infra note 72 and accompanying text.

42. See supra notes 1, 3 and accompanying text.

43. See infra §§ II.D. - III.B.

44. MORRIS, supra note 1, at 89 (stating that the federal government was inactive regarding immigration laws prior to 1876); WEISSBRODT, supra note 1, at 3; Hiroshi Motomura, The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights, 92 COLUM. L. REV. 1625, 1626 (1992).

45. WEISSBRODT, supra note 1, at 3, 39. See LEGOMSKY, supra note 38, at 7 (explaining that there is no dispositive answer to where the federal government obtains the power to regulate immigration); Spiro, supra note 7, at 122 (discussing foreign relations as a basis for federal control of immigration).

46. WEISSBRODT, supra note 1, at 4. Currently, Americans have a dilemma. On the one hand, the United States wants to keep immigration open, but on the other hand, Americans want to regulate the entry and residence of immigrants. HARWOOD, supra note 1, at 1; MORRIS, supra note 1, at 3, 89 (declaring that these conflicting immigration views have led to "the government's casual approach to enforcement, the fragmented character of the immigration bureaucracy, and the lack of clear and consistent enforcement objectives"); NELSON, supra note 1, at 114 (stating that Americans favor immigration control but lack the time to do anything about illegal immigration); Hull, supra note 1, at 410. In terms of illegal immigration, Brent Nelson claims that the "human flood" will continue to enter the United States as long as American citizens tolerate it. NELSON, supra note 1, at 10.
policies under the Articles of Confederation, the Constitution delegated to the Congress broad power to regulate foreign commerce. However, it was not until 1875 that the United States Supreme Court unanimously held that state regulation of immigration was unconstitutional because it infringed on Congress’ power to control foreign commerce. By the 1880s, the Court decided that Congress had the sole authority to control immigration, a power that is inherent in national sovereignty. Since that decision, the Court has given

Now, however, Americans favor reducing immigration. Send Back Your Tired, supra note 7, at 26. In a 1992 poll, 70% of those Americans questioned said they want immigration reduced. Id.; Hiller, supra note 1, at 495 (91% of Americans want “an all-out effort” to stop illegal immigration). In addition to lost jobs and the high cost of providing illegal immigrants with benefits, terrorism has also affected America’s demand for decreased immigration. George J. Church, A Case of Dumb Luck, TIME, Mar. 15, 1993, at 26. The bombing of the World Trade Center was at the hands of illegal immigrants, including Mohammed A. Salameh, an illegal alien from Jordan, who rented the van that carried the bomb. Id.; Doris Meissner, Putting the “N” Back into INS: Comments on the Immigration and Naturalization Service, 35 VA. J. INT’L L. 1, 2 (1994). But see Steven V. Roberts, Behind the Wire, Dreams Won’t Die, U.S. NEWS & WORLD REP., Sept. 12, 1994, at 8 (claiming that United States immigration policy changes depending on the economy and political conditions in the United States).

47. WEISSBRODT, supra note 1, at 3-4.

48. Id. at 4; Gerety, supra note 7, at 382. See U.S. CONST. art. I, § 8, cl. 3 (providing that Congress shall “regulate Commerce with foreign Nations.”); U.S. CONST. art. I, § 8, cl. 4 (stating that Congress shall “establish an uniform Rule of Naturalization”). For a complete list of the several sources from which Congress obtains the power to regulate immigration, see LEGOMSKY, supra note 38, at 7-22; WEISSBRODT, supra note 1, at 38-43.

49. Henderson v. Mayor of New York, 92 U.S. (2 Otto) 259 (1875); MORRIS, supra note 1, at 90; WEISSBRODT, supra note 1, at 4. Prior to its 1875 decision, the Supreme Court invalidated state immigration regulations in a series of decisions. LEGOMSKY, supra note 38, at 8. In the Passenger Cases, 48 U.S. (7 How.) 283 (1849), the Supreme Court struck down both a New York and a Massachusetts statute that imposed a head tax on specified categories of arriving immigrants. LEGOMSKY, supra note 38, at 8; WEISSBRODT, supra note 1, at 39; Motomura, supra note 44, at 1632. Four of the Justices reasoned that the state actions intruded upon the federal power to regulate foreign commerce. LEGOMSKY, supra note 38, at 8.

50. WEISSBRODT, supra note 1, at 7. In the Head Money Cases, 112 U.S. 580 (1884), the Supreme Court unanimously upheld a federal statute that regulated immigration. LEGOMSKY, supra note 38, at 9; WEISSBRODT, supra note 1, at 39; Motomura, supra note 44, at 1633. The Court reasoned that the statute was an authorized exercise of Congress to regulate foreign commerce. LEGOMSKY, supra note 38, at 9.

51. Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889); HARWOOD, supra note 1, at 2; LEGOMSKY, supra note 38, at 17-18; WEISSBRODT, supra note 1, at 39-40, 42; Hiller, supra note 1, at 500; Hull, supra note 1, at 431; Motomura, supra note 44, at 1633-34; M. Kate Curran, Note, Illegal Aliens, The Social Compact and the Connecticut Constitution, 13 BRIDGEPOR L. REV. 331, 333-34 (1993). For a historical view of the congressional and presidential roles in immigration policy, see MORRIS, supra note 1, at 33-43 (claiming that a partnership between the two branches has developed in regulating immigration).
great deference to Congress' plenary power over immigration.\textsuperscript{52} Thus far, there have been no successful challenges against federal laws excluding classes of immigrants or deported resident aliens.\textsuperscript{53} Therefore, not only does Congress have plenary power over immigration,\textsuperscript{54} it has also received little interference from the Supreme Court in controlling immigration.\textsuperscript{55}

B. Residual State Power

Because the Supreme Court has decided that the federal government may regulate immigration,\textsuperscript{56} the question arises whether states may also legislate in this area. Generally, the states may not regulate immigration because federal law usually preempts state immigration laws under the Supremacy Clause.\textsuperscript{57} However, no federal court, including the Supreme Court, has held that all state

\textsuperscript{52} Plyler v. Doe, 457 U.S. 202, 224-25 (1982); Fiallo v. Bell, 430 U.S. 787, 792 (1977); De Canas v. Bica, 424 U.S. 351, 354 (1976); Kleindienst v. Mandel, 408 U.S. 753, 765-66 (1972). See Graham v. Richardson, 403 U.S. 365, 378 (1971) (stating that the regulation of aliens is "constitutionally entrusted to the Federal Government"); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952), which stated: [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference; Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (holding that the federal government has "broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization"); Oceanic Steam Nav. Co. v. Stranahan, 214 U.S. 320, 325 (1909); WEISSBRODT, supra note 1, at 43-44, 49; Motomura, supra note 44, at 1626. \textit{But see MORRIS, supra note 1, at 44 (explaining that state and local governments are becoming more active participants in forming immigration policy because of their concern regarding the costs of immigrant public services); See generally Increasing Costs of Illegal Immigration: Hearing Before the Senate Committee on Appropriations, 103d Cong., 2d Sess. (1994) (illustrating the states' frustration with the federal government) [hereinafter Increasing Costs Hearing].

\textsuperscript{53} WEISSBRODT, supra note 1, at 43; Hull, supra note 1, at 430 n.86.

\textsuperscript{54} Tong Yue Ting v. United States, 149 U.S. 698 (1893); HARWOOD, supra note 1, at 21; Hull, supra note 1, at 431; Motomura, supra note 44, at 1626; Curran, supra note 51, at 333-34. \textit{See} WEISSBRODT, supra note 1, at 42 (noting that the federal government's limitless authority over immigration stems from an "undefined and undefinable" source). However, according to Hiroshi Motomura, immigration law has reached a point where courts can no longer defer to Congress' plenary power. Motomura, supra note 44, at 1627.

\textsuperscript{55} WEISSBRODT, supra note 1, at 49-50; Motomura, supra note 44, at 1626.

\textsuperscript{56} \textit{See} supra note 50 and accompanying text. \textit{See also} WEISSBRODT, supra note 1, at 38, 42, 44, 49-50 (stating that the Supreme Court has generally upheld federal statutes regulating immigration).

\textsuperscript{57} U.S. CONST. art. VI, cl. 2; WEISSBRODT, supra note 1, at 38, 45-46 (states may not create legislation that "directly impinges" on congressional power). For example, in Hines v. Davidowitz, 312 U.S. 52, 74 (1941), the Supreme Court held that the Federal Alien Registration Act preempted the Pennsylvania alien registration statute. Gerety, supra note 7, at 384.
law concerning immigration is preempted by federal law.58 Whether federal law preempts state immigration law depends on the scope of both the federal and state action.59 Under De Canas v. Bica,60 states may fill in the gaps of federal immigration law so long as the state law does not conflict with federal policy.61 Therefore, Congress’ plenary power over immigration is not so broad as to completely exclude states from regulating immigration.62 Thus, state statutes may withstand federal preemption if they do not conflict with congressional intent, and if they do not regulate an area already controlled by federal law.63

C. Congress Begins to Restrict Immigration

In 1875, through its plenary power, Congress began to prohibit certain “undesirables” from immigrating to the United States, including convicts, prostitutes, diseased persons, paupers, polygamists, the insane, and anarchists.64 In 1882, Congress also passed an Act that imposed a head tax on every immigrant coming to the United States.65 The purpose of the tax was to


59. Legomsky, supra note 38, at 23. See Plyler v. Doe, 457 U.S. 202, 225-26 (1982) (explaining that states only have power to legislate with respect to illegal immigrants if the state furthers a legitimate state goal and if the state legislation conforms to federal objectives); De Canas, 424 U.S. at 351 (upholding a California statute that prohibited the employment of certain undocumented workers); Curran, supra note 51, at 370-71 (explaining that whether a state regulation of aliens is preempted depends on the state government’s interests and the purpose served by the state’s classification of the aliens).

60. 424 U.S. 351 (1976) (holding that a California statute prohibiting illegal aliens from working was not preempted by federal immigration law). Justice Brennan wrote the opinion of the Court, in which all members joined except Justice Stevens, who took no part in the case. Id.

61. Id. at 358; Weissbrodt, supra note 1, at 48; Gerety, supra note 7, at 386.

62. Weissbrodt, supra note 1, at 49. In fact, state and local governments are becoming more active participants in forming immigration policy because of their concern regarding the costs of immigrant public services. Morris, supra note 1, at 44. See generally Increasing Costs Hearing, supra note 52 (discussing the state costs of illegal immigrants). See infra § IV.B.


64. Weissbrodt, supra note 1, at 6-8, 122; Hiller, supra note 1, at 498. Cf. Morris, supra note 1, at 55 (stating that the qualitative restrictions began around 1882). According to Edwin Harwood, illegal immigration did not exist until these restrictions were imposed. Harwood, supra note 1, at 2. For the current list of deportable immigrants, see 8 U.S.C. § 1251 (1994).

65. Weissbrodt, supra note 1, at 7. Until the 1917 Immigration Act, however, Canadians and Mexicans did not have to pay the head tax upon entering the country. Harwood, supra note 1, at 3.
raise revenue to offset administrative costs.\textsuperscript{66} However, Congress also did not want poor immigrants on the government relief rolls; therefore, the head tax had the effect of deterring the poor from immigrating.\textsuperscript{67}

After World War I, the United States favored an isolationist policy and was dissatisfied with the existing quality exclusions.\textsuperscript{68} As a solution, Congress enacted the 1921 Quota Law,\textsuperscript{69} a numerical control that dictated how many immigrants from different regions of the world could immigrate to the United States annually.\textsuperscript{70} However, the new quota system created a new problem: illegal border crossings.\textsuperscript{71} Because the United States only admitted a limited number of immigrants each year, many aliens eager to enter the country chose to circumvent the government’s approval and crossed the border illegally.\textsuperscript{72}

\textbf{D. The Immigration and Naturalization Service}

In 1952, Congress passed the Immigration and Nationality Act (INA),\textsuperscript{73} the cornerstone of current immigration law.\textsuperscript{74} In the INA, Congress has maintained the quota system, but has recalculated the numerical limits several times.

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66. MORRIS, supra note 1, at 55; WEISSBRODT, supra note 1, at 7.
67. WEISSBRODT, supra note 1, at 7.
68. LEGOMSKY, supra note 38, at 110; WEISSBRODT, supra note 1, at 10-11.
69. LEGOMSKY, supra note 38, at 110.
70. Id.; MORRIS, supra note 1, at 95; WEISSBRODT, supra note 1, at 11; Lawrence H. Fuchs, Immigration Policy and the Rule of Law, 44 U. Pitt. L. Rev. 433, 433 (1983); Hiller, supra note 1, at 498. The quotas remain part of current immigration law. However, Congress has changed the numerical limits several times since it established the quotas. MORRIS, supra note 1, at 55, 83; WEISSBRODT, supra note 1, at 11-20. See MORRIS, supra note 1, at 53-54, 90 (stating that Congress has imposed the annual ceilings in an arbitrary manner, without basing them on the country’s ability to absorb the new arrivals, and without considering if the INS was capable of carrying out the duties assigned to it); Hiller, supra note 1, at 499 (agreeing that the limits are arbitrary).
71. WEISSBRODT, supra note 1, at 12.
72. Id. See HARWOOD, supra note 1, at 7 (stating that it is no surprise that aliens enter the United States unlawfully because the demand for entry far exceeds the supply of available visas). Visas are an entry document. LEGOMSKY, supra note 38, at 4.
73. Pub. L. No. 82-414, 66 Stat. 166 (codified as amended at 8 U.S.C. §§ 1101-1557(1994)). See generally IMMIGRATION AND NATIONALITY ACT (9th ed. 1992) (including notes and related laws). The INA has been heavily criticized as a complicated law composed of layer upon layer of complex rules, exceptions, and amendments. HARWOOD, supra note 1, at xv, 33-37; LEGOMSKY, supra note 38, at 1. See WEISSBRODT, supra note 1, at 414 (noting that the INA overwhelms the Immigration and Naturalization Service, the agency responsible for implementing the statute). The INA is particularly complicated due to the “barnacled layers of case law that have grown up around the statute over the years.” HARWOOD, supra note 1, at 33. In 1952, the Immigration and Naturalization Service was faced with enforcing this new, complicated law, but Congress did not supplement the Act with additional personnel or funds. WEISSBRODT, supra note 1, at 16.
74. LEGOMSKY, supra note 38, at 112; WEISSBRODT, supra note 1, at 15; Fuchs, supra note 70, at 434.
\end{flushleft}
times.\textsuperscript{75} Congress has also continued the quality control exclusions.\textsuperscript{76} Finally, the INA includes an entrance preference system, prioritizing who may lawfully enter the United States.\textsuperscript{77}

The agency charged with implementing and enforcing immigration law is the Immigration and Naturalization Service (INS).\textsuperscript{78} As a bureau of the Department of Justice,\textsuperscript{79} the INS has two objectives: (1) to provide statutorily eligible aliens with benefits and relief under the INA;\textsuperscript{80} and (2) to enforce the civil and criminal provisions of the Act against alien and citizen violators.\textsuperscript{81} However, it has been difficult for the INS to achieve either of its goals for several years\textsuperscript{82} because the agency lacks both adequate funding\textsuperscript{83} and

\textsuperscript{75} MORRIS, supra note 1, at 55; WEISSBRODT, supra note 1, at 15; Fuchs, supra note 70, at 434.
\textsuperscript{76} See 8 U.S.C. § 1251 (1994) (listing the types of deportable aliens).
\textsuperscript{77} MORRIS, supra note 1, at 95. The system lists the preferences as follows: unmarried children of United States citizens have first preference; spouses and unmarried children of permanent resident aliens receive second preference; workers with "exceptional ability" and professionals have third preference; other relatives of citizens and aliens are granted fourth and fifth preference; needed workers receive sixth preference; and refugees have seventh preference. WEISSBRODT, supra note 1, at 17-18.
\textsuperscript{78} 8 U.S.C. § 1551 (1994); WEISSBRODT, supra note 1, at 61; Hull, supra note 1, at 410. The INS was created in 1891. THE UNIVERSAL ALMANAC, supra note 1, at 111; HARWOOD, supra note 1, at xiv, 2. Prior to June 14, 1940, however, the INS was part of the Department of Labor. WEISSBRODT, supra note 1, at 13.
\textsuperscript{79} 8 U.S.C. § 1551 (1994); THE UNIVERSAL ALMANAC, supra note 1, at 111; LEGOMSKY, supra note 38, at 4; Gerety, supra note 7, at 383.
\textsuperscript{80} HARWOOD, supra note 1, at 26; THE UNIVERSAL ALMANAC, supra note 1, at 111. For a description of the services and benefits immigrants may receive under the INA, see HARWOOD, supra note 1, at 26-37. But see Meissner, supra note 46, at 3-5 (emphasizing the need to focus more on the naturalization aspect of the service).
\textsuperscript{82} The INS complained of increased responsibilities, coupled with insufficient funds, personnel, and facilities as early as the beginning of the 19th century. MORRIS, supra note 1, at 90. Seventy years later, little had changed. In 1977, the Chairman of the Subcommittee on Immigration, Naturalization, and International Law of the House Judiciary Committee, stated that the INS was completely incapable of administering and enforcing the provisions of the INA. Id. at 88. Other members of Congress and numerous General Accounting Office (GAO) reports have also complained that the INS is not properly equipped, overburdened with work, "deeply demoralized," and in a hopeless situation. Id.
\textsuperscript{83} See IRCA Hearing, supra note 81, at 56 (INS Commissioner Nelson asking Congress for financial assistance to implement IRCA); Castillo, supra note 13, at 487; Hiller, supra note 1, at 496, 501; Huerta, supra note 13, at 519; Hull, supra note 1, at 410; Anonymous Interview with INS Special Agent, in Valparaiso, IN, 9-11 (Jan. 26, 1995) (transcript available in Valparaiso University

https://scholar.valpo.edu/vulr/vol30/iss2/11
With more than a million immigrants entering the United States annually, the INS process centers cannot provide INA benefits in a timely manner. Instead, the centers have fallen behind, and have become completely backlogged. In an effort to decrease the numerous back files, the new files are neglected, producing an unending paper chase. The result is an inefficient agency, unable to adequately assist aliens lawfully in the country.

Likewise, the second objective of the INS has also become very difficult to pursue. To enforce immigration law, the INS is responsible for detaining...
and deporting those immigrants who unlawfully enter the United States.91
While many immigrants become illegal by lawfully entering the country with a
visa and overstaying their visas,92 others try to enter the United States
illegally.93 The Border Patrol94 was assembled to prevent unlawful entries
from Canada and, more importantly, Mexico.95 However, trying to catch
every alien illegally crossing almost 3,000 miles of America’s southern border96
is an impossible task.97 Congress has increased Border Patrol
personnel several times over the years, but it has never been completely
effective;98 the number of Border Patrol agents is simply too small compared
to the large number of illegal aliens crossing the border.99

91. See WEISSBRODT, supra note 1, at 128-40 (describing the prehearing procedure for
deporation).
92. HARWOOD, supra note 1, at 9, 29, 192 n.2; Hiller, supra note 1, at 496; Gerald Rosberg,
Discrimination Against the “Nonresident” Alien, 44 U. PITT. L. REV. 399, 406-07 (1983). The
INS calls these immigrants “visa abusers.” HARWOOD, supra note 1, at 9.
93. See Hiller, supra note 1, at 496 (stating that between one and two million people either
cross our borders unlawfully or overstay their visas annually). Immigrants who
cross the border illegally are called “entrants without inspection” (EWIs). HARWOOD, supra note 1, at 2.
94. The Bureau of Immigration, the predecessor to the INS, created the Border Patrol in 1924
to guard the country’s 8,000 miles of land and sea borders. MORRIS, supra note 1, at 107-08;
WEISSBRODT, supra note 1, at 12.
95. HARWOOD, supra note 1, at 8-10, 49, 74; MORRIS, supra note 1, at 107. The Border
Patrol apprehends about 1.25 million illegal aliens each year. Booth, supra note 7, at A1. See
ASHEGHIAN, supra note 12, at 452 (including a graph of the INS border apprehensions from 1960-93).
96. The northern border is also extensive, but the number of illegal crossings through Canada
is relatively low compared to the numbers crossing via Mexico. HARWOOD, supra note 1, at 8-9, 74.
About 40% of all illegal crossings occur at the San Diego-Tijuana border. Pertman, supra note 7,
at 3. The INS detained 1.8 million illegal immigrants at the southern border in 1986, one million
more than in 1985. NELSON, supra note 1, at 7 (citing Sol Sanders, The Coming Troubles, 32
ORBIS: A J. OF WORLD AFF. 55 (1988)). However, Mexicans enter the United States each year
at a rate four times of that which the INS apprehends. Id. In fiscal year 1991, the INS apprehended
1,077,511 immigrants at the southern border. NELSON, supra note 1, at 8 (citing Tim Golden,
Mexican Head North Despite Rules on Jobs, N.Y. TIMES, Dec. 13, 1991, at A20). This number was up
from 1,049,680 in 1990. Id.
from Mexico into the United States is “virtually uncontrollable”); MORRIS, supra note 1, at 106
(explaining that controlling the border is the INS’ most difficult responsibility); Margot Hornblower,
Northern Exposures, TIME, Mar. 6, 1995, at 42 (the border is a facade to many Mexicans, despite
the Border Patrol, guard dogs, and chain-link fences). “They could plant land mines, and it would
never stop people from crossing.” Id. (quoting Sergio Gomez Montero, a Mexican writer).
98. See MORRIS, supra note 1, at 107 (stating that the Border Patrol has never been able to do
its job effectively); INS Special Agent interview, supra note 83, at 7, 18 (noting that the border is
not secure and it probably never will be secure).
99. HARWOOD, supra note 1, at 2-3 (stating that the border is not well protected in most
places); MORRIS, supra note 1, at 9, 106-07; George J. Church, Mexico’s Troubles Are Our
Troubles, TIME, Mar. 6, 1995, at 35 (each year 150,000 to two million legal and illegal aliens cross
the “porous” border) [hereinafter Mexico’s Troubles]; Hiller, supra note 1, at 500; Scott Pendleton,
Texas Weighs Cost of illegals, CHRISTIAN SCI. MONITOR, Apr. 26, 1994, at 3 (quoting Elena
In addition, once inside the United States, aliens can quickly and easily blend in with the different ethnic communities already established. Therefore, if illegal immigrants are not detained upon their entry to the United States, it becomes much more difficult for the INS to locate them once they enter the country. The same is true for the immigrants who overstay their visas. Although the INS has the names of visa abusers, there are too many violators for the INS to locate each one for deportation.

Moreover, each time an illegal alien is detained, an INS agent must process the alien by completing various forms. When immigrants unlawfully enter the United States, the INS drives them back to the border and drops them off. In the case of the Mexican border, however, those aliens may be back

Thompson, who stated that "the border is pretty porous."); Send Back Your Tired, supra note 7, at 26 (explaining that far more illegal aliens cross the Mexican border than the Border Patrol can possibly catch).

Congress has recently allocated more money to place additional Border Patrol agents along the border for the fiscal years of 1995-1999, and to increase the number of agents by 6,000 full-time equivalent agent positions (and necessary support personnel positions) beyond the number of such positions authorized for the Border Patrol as of October 1, 1993. H.R. 3860, 103d Cong., 2d Sess. § 102 (1994). See Meissner, supra note 46, at 2 (discussing the increase in the Border Patrol). But see Patrice Armstrong, Cisneros: U.S. Must Look South, ALBUQUERQUE J., Feb. 1, 1986, at B2 (arguing that there is no way to protect the border).

100. MORRIS, supra note 1, at 80-82. The large population of Cubans in Miami is a prime example of a community where illegal aliens can easily blend in with the population. Miami, however, is just one of many cities where illegal immigrants reside. After completing a comprehensive survey, James P. Allen and Eugene J. Turner, two California State University geographers, determined that 90% of illegal immigrants live in metropolitan areas. NELSON, supra note 1, at 13 (citing Randolph E. Schmid, Most Immigrants Still Settle in Urban Areas, Survey Shows, WASH. POST, Aug. 29, 1988, at A13). See THE UNIVERSAL ALMANAC, supra note 1, at 303 (including a chart of the "Top 20 Metropolitan Areas of Intended Residence For U.S. Immigrants, 1992"); Spiro, supra note 7, at 124 (noting that once an immigrant community is established, family ties and cultural preferences tend to dictate migration patterns).

101. NELSON, supra note 1, at 8.

102. HARWOOD, supra note 1, at 29; MORRIS, supra note 1, at 112-14.

103. MORRIS, supra note 1, at 112-14. See HARWOOD, supra note 1, at xvi (stating that the INS does not have sufficient resources to investigate a fraction of aliens detained, let alone all immigrants unlawfully within the country). Due to the lack of resources, the INS has had to prioritize the different types of immigration violations. For example, the INS views EWIs and visa abusers as less serious violator groups than immigrants who use fraudulent documents to enter the United States, who smuggle aliens or drugs into the country, who counterfeit documents, or who are caught committing other crimes. Id. at 9, 129-30. See also INS Special Agent interview, supra note 83, at 14-15 (explaining that if illegal immigrants are not involved in any criminal activity, such as selling drugs, weapon possession, or murder, the INS basically lets them go. It does not matter that the illegal alien broke the law to come to the United States.).


in the United States within a half hour.106 It is common for aliens entering from Mexico to attempt to cross the border several times a day, until they are successful.107 Yet, whenever they are caught, they must be processed again,108 entangling the Border Patrol in endless paperwork while other illegal immigrants enter uninhibited.109

Finally, and perhaps most importantly, the INS usually enforces immigration law with great leniency.110 Although criminal sanctions exist under immigration law, the sanctions are rarely enforced.111 The civil punishment of deportation is used in a small number of cases compared to the large number of deportable aliens.112 Thus, the sanctions available under immigration law exist more in theory than in practice.113

In conclusion, the INS is unable to accomplish either of its objectives because there are too few agents and too few funds chasing too many

106. HARWOOD, supra note 1, at 41, 57 (stating that Mexicans know they can easily re-enter). See INS Special Agent interview, supra note 83, at 7 (admitting that often, if the INS sends an illegal immigrant back to Mexico, the alien will return to the United States by the following week).

107. HARWOOD, supra note 1, at 52 (stating that the "determined" alien will always get through); Booth, supra note 7, at A1 (stating that many immigrants who cross the border illegally are repeat offenders); Hornblower, supra note 97, at 42 (stating that the border is only a minor inconvenience to those crossing it); Mexico's Troubles, supra note 99, at 35; Pendleton, supra note 99, at 3 (quoting an Austin refugee services director who said that after illegal immigrants are bused to Mexico, they soon make another attempt to get back into the United States).

108. HARWOOD, supra note 1, at 118-19, 124 (performing all the required administrative procedures is an obstacle to the critical enforcement goal—the permanent removal of deportable aliens).

109. INS Special Agent interview, supra note 83, at 19. See Send Back Your Tired, supra note 7, at 26 (explaining that two or three illegal aliens get away for each one who is caught). As a result, INS officers commonly complain that they are "wheel spinning." HARWOOD, supra note 1, at 124.

110. HARWOOD, supra note 1, at xvi, 110-18; MORRIS, supra note 1, at 93 (claiming that some illegal entries have been permitted, even encouraged); Hiller, supra note 1, at 500, 504; Huerta, supra note 13, at 510, 518; Hull, supra note 1, at 432; Rosberg, supra note 92, at 406.

111. See HARWOOD, supra note 1, at xvi, 122-23, 175-77 (discussing how a second raid on a group of stores was called off due to the bad publicity and complaints from the first raid the previous week); MORRIS, supra note 1, at 89, 93; WEISSBRODT, supra note 1, at 330 (explaining that the prosecution of immigration misdemeanors is a low priority for prosecutors and thus rarely occurs); Huerta, supra note 13, at 508; Overhaul, supra note 83, at C20 (Representative Lamar Smith arguing that the INS should more strictly enforce employer sanctions); INS Special Agent interview, supra note 83, at 9-10 (stating that agents are restricted on how many criminal illegal immigrants they can arrest because the INS does not have the money to put them in jail, and that eventually, lack of funds could lead to no arrests).

112. HARWOOD, supra note 1, at xvi.

113. Id.
immigrants.\textsuperscript{114} INS officials claim that if Congress gave the agency sufficient resources, including more personnel and equipment, illegal immigration could be significantly reduced.\textsuperscript{115} Without adequate resources, however, the major executive agency\textsuperscript{116} responsible for enforcing immigration law is largely ineffective.\textsuperscript{117} As a result, millions of aliens are now unlawfully residing in the United States.\textsuperscript{118} In 1986, Congress passed a bill specifically designed to combat the growing illegal immigrant problem.\textsuperscript{119} However, it too has been ineffective in controlling illegal immigration.\textsuperscript{120}

III. ATTEMPTED CONGRESSIONAL SOLUTIONS TO ILLEGAL IMMIGRATION

The federal government has twice tried to decrease illegal immigration in the United States through legislation. First, with the Immigration Reform and Control Act of 1986 (IRCA), Congress directly addressed the problem by restricting employment to illegal aliens, the principal force behind illegal immigration.\textsuperscript{121} Second, Congress hoped to indirectly decrease illegal

\textsuperscript{114} See Morris, supra note 1, at 91, 108, 111, 130-31 (blaming Congress and the executive branch because they have shown little interest in solving the administrative problems that have adversely affected the INS and other immigration agencies); Nelson, supra note 1, at 114 (claiming that real immigration control entails effective border management and a decrease in the annual quota to 200,000 at the most); Weissbrodt, supra note 1, at 22 (stating that the INS has struggled to combat illegal immigration with inadequate resources).

\textsuperscript{115} Morris, supra note 1, at 109. See INS Special Agent interview, supra note 83, at 10-11 (explaining that the INS still identifies people strictly by name and date of birth while the FBI and the Justice Department identify people using fingerprint and eye retina scans). See also Nelson, supra note 1, at 106 (stating that the American people must convince Congress that controlling immigration and effectively patrolling the borders are essential for the good of the United States in both the long and short run).

\textsuperscript{116} Another agency involved with immigration is the Executive Office for Immigration Review. Legomsky, supra note 38, at 5; Weissbrodt, supra note 1, at 63. This agency has several sub-agencies, including the Office of the Chief Immigration Judge and the Board of Immigration Appeals (BIA). Legomsky, supra note 38, at 5; Gerety, supra note 7, at 383. Within the Office of the Chief Immigration Judge, immigration judges hold formal evidentiary hearings for several types of disputes, including exclusion hearings, where immigrants challenge denials of admission at ports of entry. Legomsky, supra note 38, at 5. The BIA hears a variety of cases, including appeals from the decisions of the immigration judges. Id. An alien may also seek judicial review of the BIA decision in the Court of Appeals. Id. at 6.

\textsuperscript{117} See Harwood, supra note 1, at 1 (explaining that Americans believe the United States is unable to control illegal immigration because we are unable to control our borders); Morris, supra note 1, at 85; INS Special Agent interview, supra note 83, at 8 (stating that the INS is doing poorly at combating illegal immigration).

\textsuperscript{118} Morris, supra note 1, at 88-89 (explaining that the large illegal immigrant population is evidence of the inadequacies of the INS). See Stamets, supra note 85, at A1 (stating that seven million illegal immigrants now reside in this country).

\textsuperscript{119} See infra § III.A. (discussing the Immigration Reform and Control Act of 1986).

\textsuperscript{120} See infra notes 142-49 and accompanying text.

\textsuperscript{121} See supra note 13 and infra note 128 and accompanying text.
immigration from Mexico when it enacted the North American Free Trade Agreement (NAFTA). While it is too early to determine if NAFTA will decrease illegal immigration, immigration officials have concluded that IRCA is a failure.

A. The Immigration Reform and Control Act of 1986

Americans became very concerned about illegal immigration during the 1970s, when the number of immigrants grew rapidly. The public’s fears stimulated governmental interest, and the House Judiciary Subcommittee started a series of hearings to discuss the control of illegal immigration in 1971. The committee issued a report in 1975 recommending employer sanctions as a means of combating the uncontrolled flow of illegal immigrants. The committee opined that sanctions would remove the economic incentive of employing illegal aliens, which was the major cause of illegal entries from other countries. However, the Simpson-Mazzoli Immigration Reform Bill was not introduced in Congress until 1982. The bill then came under attack from numerous groups, including the business community, immigrant groups, and other members of Congress. After much

122. See infra notes 150-61 and accompanying text.
123. See infra notes 142-49 and accompanying text.
125. Arp, supra note 124, at 46 (quoting P.R. EHRLICH, THE GOLDEN DOOR: INTERNATIONAL MIGRATION, MEXICO, AND THE UNITED STATES (1979)).
126. Id. at 47; See Fuchs, supra note 70, at 436-46 (discussing the role of the Select Commission on Immigration and Refugee Policy in forming IRCA).
127. ASHEGHIAN, supra note 12, at 450; Huerta, supra note 13, at 507; Arp, supra note 124, at 47.
128. ASHEGHIAN, supra note 12, at 450; Huerta, supra note 13, at 507; Arp, supra note 124, at 47. But see Overhaul, supra note 83, at C20 (quoting Representative Lamar Smith who stated that both jobs and benefits are “twin magnets” for immigrants and until they are dealt with, illegal immigration will not cease).
129. Arp, supra note 124, at 51.
130. MORRIS, supra note 1, at 31-32.
131. Members of immigrant groups see “themselves as beneficiaries of laws that promote immigration and they have sought to preserve the same benefits for their fellow nationals who might wish to immigrate.” MORRIS, supra note 1, at 29. For a discussion of the interest groups commonly involved with immigration legislation, see id. at 27-33.
132. Arp, supra note 124, at 52.
compromising, stalling, and voting in Congress, the bill passed. President Ronald Reagan finally signed the Immigration Reform and Control Act into law on November 6, 1986, fifteen years after Congress began hearings on the matter.

The most important aspect of IRCA is employer sanctions, which make it illegal for employers to knowingly hire, recruit, or refer undocumented workers for a fee. The law requires employers to issue a signed statement that they have checked a potential employee's documents of identification

133. Id. at 52-54. For example, after the opposition added 300 amendments to the bill, the House version of the Immigration Reform and Control Act was still not considered. Id. at 52. See WEISSBRODT, supra note 1, at 22 (noting that IRCA was not easily adopted); Castillo, supra note 13, at 485-93 (discussing the delays in the passage of IRCA and some possible solutions).


136. The number of years it took to pass IRCA is significant because it is proof of how slowly immigration legislation moves through Congress. In the meantime, the illegal immigrant population greatly increases each year that the corresponding legislation is delayed in Congress. See Fuchs, supra note 70, at 433 (stating that overhauling immigration reform occurs infrequently because Americans have such strong emotions regarding the issue). Prior to IRCA, it had been 34 years since Congress had enacted major immigration reform. WEISSBRODT, supra note 1, at 22.

137. IRCA also contained two other important provisions. First, it was to give permanent resident status, or "amnesty," to undocumented aliens who could prove that they resided within the United States since January 1, 1978. ASHEGHIAN, supra note 12, at 455-56; JOANNES ET AL., supra note 13, at xiii-xiv, 61-78; WEISSBRODT, supra note 1, at 24-26; Huerta, supra note 13, at 517-18; Arp, supra note 124, at 52. The purpose of the amnesty program was to remove a large number of illegal aliens from the illegal population by granting them legal status. Id. at 53. Second, the measure offered an expanded program for needed agricultural workers. JOANNES ET AL., supra note 13, at xiv; WEISSBRODT, supra note 1, at 27-28; Arp, supra note 124, at 52.

Consequently, the amnesty program proved to be a failure at decreasing the illegal population. WEISSBRODT, supra note 1, at 30-31. When the program began in May 1987, immigration officials predicted that between two million and four million people would register by the May 1988 deadline. Id.; Jason DeParle, Why Amnesty Failed, WASH. MONTHLY, Apr. 1988, at 11-16. By March 1988, however, only one million people had come forward, and officials continually deflated their final prediction to 1.35 million as of April, 1988. WEISSBRODT, supra note 1, at 30. The amnesty program was unsuccessful because: (1) many illegal immigrants eligible for legalization were unaware that such an opportunity existed; (2) those immigrants that did know of the program did not trust the INS and feared deportation if they applied for legalization; (3) potential applicants feared that their family members who arrived after the cutoff date would be deported; (4) eligible immigrants who spent so many years avoiding paper trails prior to IRCA could not suddenly obtain documentation proving that they had lived here for the required amount of time; (5) confusion about qualification existed; and (6) the application was cost-prohibitive. Arp, supra note 124, at 63-65, 75, 87-90, 93-96; DeParle, supra, at 11.

138. ASHEGHIAN, supra note 12, at 455; JOANNES ET AL., supra note 13, at 1-3; WEISSBRODT, supra note 1, at 23, 355-56; Hiller, supra note 1, at 502; Huerta, supra note 13, at 507; Arp, supra note 124, at 55.

139. Acceptable documents include birth certificates, passports, social security cards, and certificates of citizenship. Huerta, supra note 13, at 507; Arp, supra note 124, at 55, 87.

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before hiring them. Employers who disobey the law may be subject to fines and imprisonment for up to six months. Many employers resented the new law and the added burden of seeking out illegal aliens for the INS by checking every potential employee's papers. As a result, many employers either have not thoroughly checked employee credentials, or have disregarded the law.

140. Overhaul, supra note 83, at C20; Arp, supra note 124, at 55. Currently, however, the Republican leaders of Congress are pushing to reform the procedures that employers use to verify potential employees' work status. Change in Employer Sanctions, supra note 7, at A45; Overhaul, supra note 83, at C20. Instead of employers reviewing a variety of documents to determine an employee's work eligibility, Senator Alan Simpson introduced an immigration control bill that included a new verification system. Change in Employer Sanctions, supra note 7, at A45; Overhaul, supra note 83, at C20. This system would use data from the Social Security Administration and the INS to verify an employee's status, thus relieving employers of their responsibilities. Change in Employer Sanctions, supra note 7, at A45; Overhaul, supra note 83, at C20.

Because cost estimates of the new verification system range from $3 billion to $6 billion, opponents of the system claim that it is cost-prohibitive. Overhaul, supra note 83, at C20. However, Representative Lamar Smith, the new chairman of the House Judiciary Subcommittee on Immigration and Claims, stated that the cost of the system is only a fraction of the cost of illegal immigrants. Id.

141. ASHEGHIAN, supra note 12, at 455; WEISSBRODT, supra note 1, at 23; Arp, supra note 124, at 55. See JOANNES ET AL., supra note 13, at 10 (explaining how the fines are imposed).

142. Susan H. Welin, Note, The Effect of Employer Sanctions on Employment Discrimination and Illegal Immigration, 9 B.C. THIRD WORLD L.J. 249, 249-50 (1989); Arp, supra note 124, at 59-60 (quoting M.S. Zatz, Class, Ethnicity, and Immigration: An Analysis of the 1984 House Debate on the Simpson-Mazzoli Bill, Presentation at the Annual Meeting of the Law and Society Association (1986)). See HARWOOD, supra note 1, at 186 (predicting that employers would have difficulty properly implementing IRCA); Castillo, supra note 13, at 486 (anticipating that the employer sanctions would be unenforceable); Huerta, supra note 13, at 508 (stating that employer sanctions will not reduce illegal immigration).

143. HARWOOD, supra note 1, at 186 (stating that the INS cannot expect employers to be able to detect fraudulent documents); Huerta, supra note 13, at 511.

A second problem that emerges when employers review documents is discrimination. HARWOOD, supra note 1, at 186; WEISSBRODT, supra note 1, at 23-24, 30; Huerta, supra note 13, at 508, 512-13. Hispanic and other civil rights organizations complained that the IRCA sanctions would discriminate against foreign-looking job applicants. Arp, supra note 124, at 53. But see IRCA Hearing, supra note 81, at 47 (INS Commissioner Nelson recommending that employers not fire current employees or decline to hire new ones because they appear foreign); Hiller, supra note 1, at 502 (stating that the sanctions do not allow employers to discriminate). Nevertheless, the AFL-CIO has denounced the sanctions because it claims that they have in fact caused employers to discriminate against people who look foreign. Overhaul, supra note 83, at C20.

The United States Commission for Immigration Reform believes that the new proposed verification system would eliminate such discrimination against employees who are really citizens or authorized aliens but appear foreign or have foreign sounding names. Id. See also WEISSBRODT, supra note 1, at 30. But see Change in Employer Sanctions, supra note 7, at A45 (noting that Representative Bill Richardson opposes the new registry because he claims it will lead to more discrimination).
altogether. 144

A second problem with IRCA's employer sanctions is that it is very easy for illegal aliens to obtain false documentation. 145 With a large black market for fraudulent documents, 146 many illegal aliens can continue to live and work in the United States without their employers or the INS knowing of their illegal status. 147 Thus, Congress' attempt to combat illegal immigration, by drying up the employment pool that attracts illegal immigrants to the United States, has ultimately proved ineffective. 148 Therefore, numerous opportunities still exist for illegal aliens to work, and unlawful entries into the United States

144. ASHEGHIAN, supra note 12, at 456-57; WEISSBRODT, supra note 1, at 30; Huerta, supra note 13, at 511; Underclass Status, CQ RESEARCHER, Apr. 24, 1992, at 374. See also HARWOOD, supra note 1, at 17 (many groups benefit financially from illegal immigration, including ranchers, landscaping and construction contractors, garment manufacturers, and restaurant owners, because illegal immigrants are cheap labor and are reliable workers); Arp, supra note 124, at 50 (seeking out undocumented workers was counterproductive for growers or clothing manufacturers, who were enjoying a surplus of foreign labor, because it disturbed an existing relationship which profited them); Huerta, supra note 13, at 509-10 (particular business sectors are highly dependent on illegal alien labor); Hull, supra note 1, at 410.

In addition to American employers disregarding IRCA, undocumented aliens were also skeptical of the law. "There is a growing sense of apathy toward the law as undocumented immigrants see that other 'illegals' continue to get jobs." NELSON, supra note 1, at 7 (quoting A.S. Ross, New Law Fails to Stem Flow of Aliens, S.F. EXAMINER, May 1, 1988, at A1). But see JOANNES ET AL., supra note 13, at 168 (warning employers not to ignore IRCA because the INS will eventually detect them).

145. See IRCA Hearing, supra note 81, at 53 (INS Commissioner Nelson discussing the concern regarding fraudulent documents); JOANNES ET AL., supra note 13, at 15-16 (instructing employers on how to handle false documents); Arp, supra note 124, at 57 (explaining that one of the reasons why groups opposed the passage of IRCA was because it would create a demand for fraudulent documents); Overhaul, supra note 83, at C20 (noting a widespread use of fraudulent documents to secure jobs); INS Special Agent interview, supra note 83, at 20-21. For the criminal sanction regarding fraud, see 18 U.S.C. § 1546 (1994).

146. The INS estimates that 50% of illegal immigrants use fraudulent documents to obtain jobs or federal benefits. Overhaul, supra note 83, at C20; Interview with INS Special Agent, supra note 83, at 20-21. For a discussion of immigration fraud, see HARWOOD, supra note 1, at 143-67.

147. See Change in Employer Sanctions, supra note 7, at A45 (explaining that the forgeries appear so real that employers cannot distinguish between legitimate documents and fraudulent ones). But see IRCA Hearing, supra note 81, at 49 (INS Commissioner Nelson warning potential legalization applicants not to attempt to prove residence by using false documents). "Documentation will be checked closely. Fraud could result in penalties, including ineligibility to legalize, deportation, fines and imprisonment." Id.

148. ASHEGHIAN, supra note 12, at 456; Huerta, supra note 13, at 508; Overhaul, supra note 83, at C20 ("The current employer sanctions system has not worked.") (quoting Representative Lamar Smith, the new chairman of the House Judiciary Subcommittee on Immigration and Claims). For further discussion of the problems involved with IRCA, see HARWOOD, supra note 1, at 185-92.
continue.  

B. The North American Free Trade Agreement

Although illegal immigration was not the principal reason Congress passed the North American Free Trade Agreement,\(^{150}\) it was a factor nonetheless.\(^{151}\) Mexico is the largest source of illegal immigrants in the United States,\(^ {152}\) partly because of its close proximity,\(^ {153}\) but more importantly because Mexico is, in many respects, a developing country.\(^ {154}\) However, under the economic

149. See ASHEOHIAN, supra note 12, at 457 (stating that illegal immigration has increased in California); HAKWOOD, supra note 1, at 189 (declaring that instead of decreasing illegal immigration, IRA would further complicate the INS' "enforcement crisis").

150. NAFTA is a trade agreement between Canada, the United States, and Mexico. ASHEOHIAN, supra note 12, at 9, 199-203; DENNIS R. APPLEYARD & ALFRED J. FIELD, JR., INTERNATIONAL ECONOMICS 463 (1992). The passage of NAFTA created the largest free trade union in the world, including a combined population of more than 350 million people and an annual GNP of six trillion dollars. ASHEOHIAN, supra note 12, at 200; APPLEYARD & FIELD, supra, at 463.

151. President's Message to the Congress Transmitting the NAFTA Legislation, 29 WEEKLY COMP. PRES. DOCs. 2255 (Nov. 3, 1993) [hereinafter President's Message]; ASHEOHIAN, supra note 12, at 450; MORRIS, supra note 1, at 84-85 (stating that analysts have suggested that the United States address the economic problems in countries like Mexico because it is these problems that cause so many migrants to come to the United States); Frances Lee Ansley, North American Free Trade Agreement: The Public Debate, 22 GA. J. INT'L & COMP. L. 329, 467-68 (1992) (explaining that an economic negotiation between the United States and Mexico could not realistically avoid the sensitive issue of illegal immigration); Helene Cooper, They're Still Coming, WALL ST. J., Oct. 28, 1994, at R11; Kyle McCullough, All About NAFTA, TIME, Dec. 6, 1993, at 8. Contra Send Back Your Tired, supra note 7, at 26 (stating that NAFTA does not address immigration).

152. HAKWOOD, supra note 1, at 7; MORRIS, supra note 1, at 78; THE UNIVERSAL ALMANAC, supra note 1, at 302-03. See MORRIS, supra note 1, at 33 (stating that illegal immigration has been a "continuous source of tension" between the United States and Mexico).

153. See MORRIS, supra note 1, at 80 (explaining that five of the top ten source countries for lawful immigration and nine of the top ten for unlawful immigration to the United States are nearby countries).

154. Mexico resembles a developing nation for several reasons. First, it has a booming population. NELSON, supra note 1, at 9; Hiller, supra note 1, at 497. Second, Mexico's capital is the largest city in the world. THE UNIVERSAL ALMANAC, supra note 1, at 334. In 1990, Mexico City had a population of 20.2 million people. Id. Third, the Mexican government cannot manage its unemployment rate. NELSON, supra note 1, at 9; Hiller, supra note 1, at 497. See MORRIS, supra note 1, at 66 (explaining that developing nations usually have rapid population growth, high unemployment rates, and low wages, all of which increase migration pressure). Mexico must create jobs for its citizens at a rate two-and-one-half times greater than that of the United States. NELSON, supra note 1, at 9; Hiller, supra note 1, at 497. Therefore, the Mexican government benefits when so many of its nationals go to the United States to find work because there are fewer Mexican citizens for whom the Mexican government must create jobs. See MORRIS, supra note 1, at 33 (explaining that Mexico commands the United States Congress to acknowledge and react to the complicated economic problems that cause Mexicans to migrate to the United States).
theory of free trade,\textsuperscript{155} illegal immigration from Mexico would decrease.\textsuperscript{156} This theory is based on the premise that when free trade occurs between two countries, the countries' costs of labor will eventually equalize.\textsuperscript{157} Currently, there is a large disparity between minimum wage in the United States and Mexico.\textsuperscript{158} Following this economic theory, American wages would fall as Mexican wages rise.\textsuperscript{159} In that case, Mexican workers would no longer have an incentive to come to the United States illegally to find jobs and better salaries.\textsuperscript{160} Instead, they could stay in Mexico, earn decent wages, and illegal immigration would decrease.\textsuperscript{161}

However, even assuming this theory of economic equalization will materialize, it will take several more years before Congress can determine if free trade has decreased illegal immigration.\textsuperscript{162} In the meantime, as long as the Mexican economy remains weak and unemployment remains high, Mexican immigrants will continue to come to the United States illegally to find work and better salaries, thereby perpetuating the problem of illegal immigration.\textsuperscript{163}

\textsuperscript{155} The economic theory of free trade is called the Heckscher-Ohlin Theorem. \textit{Appleyard \\& Field}, supra note 150, at 161-75.

\textsuperscript{156} Ansley, supra note 151, at 467-68. See Cooper, supra note 151, at R11 (explaining that NAFTA may decrease Mexican immigration in the long run, but not in the short run).

\textsuperscript{157} ASHEGHIAN, supra note 12, at 453. Labor equalization is a part of the Factor Price Equalization Theorem. See \textit{Appleyard \\& Field}, supra note 150, at 169-73.


\textsuperscript{159} See \textit{Appleyard \\& Field}, supra note 150, at 172-74 (describing how factor prices, including wages, equalize); ASHEGHIAN, supra note 12, at 453 (explaining that the wages will rise in Mexico and fall in the United States until the differential is eliminated).

\textsuperscript{160} ASHEGHIAN, supra note 12, at 450. See Pertman, supra note 7, at 3. “When people lose their jobs and can't support their families, they look for other options... and very often that means they look to the United States.” \textit{Id.} (quoting Tom Saenz, an attorney with the Mexican American Legal Defense Education Fund in Los Angeles).

\textsuperscript{161} ASHEGHIAN, supra note 12, at 450; Ansley, supra note 151, at 467-68; \textit{Avoid Knee-Jerk Responses to Immigration Problems}, USA TODAY, Aug. 20, 1993, at 12A [hereinafter Knee-Jerk Responses]; Cooper, supra note 151, at R11. See also George J. Church, \textit{It’s Just That Close, Time}, Nov. 15, 1993, at 38 (explaining that NAFTA would discourage illegal aliens from flooding into states like California and Texas); \textit{Mexico's Troubles}, supra note 99, at 35 (stating that the number of Mexicans migrating to the United States varies, depending on the ability to obtain work in Mexico).

\textsuperscript{162} \textit{Nelson}, supra note 1, at 29. See Cooper, supra note 151, at R11 (noting that it is far too soon to determine if NAFTA has affected migration patterns); Tim Golden, \textit{Mexicans Head North Despite Rules on Jobs, N.Y. Times}, Dec. 13, 1991, at A20 (stating that it takes 10 to 20 years for free trade to visibly affect immigration).

\textsuperscript{163} Cooper, supra note 151, at R11. When the Mexican peso fell in December 1994, American immigration officials feared that illegal immigration to the United States would increase. \textit{See Pertman, supra note 7, at 3}. In reaction to Mexico's economic crisis, the United States is helping to provide its neighbor with a $50 billion rescue package. Michael Elliott, \textit{Why the Mexican Crisis Matters}, \textit{Newsweek}, Feb. 13, 1995, at 28. \textit{See Mexico's Troubles, supra note 99, at 34
In conclusion, illegal immigration has worsened,164 despite the recent efforts of the INS and Congress to curb the problem.165 As a result, there are an estimated seven million illegal aliens currently residing in the United States,166 and they have begun to adversely affect state economies.167 Although immigration is a federal issue and the federal government is affected by illegal immigration, it is the states that incur a substantial financial burden from illegal immigration, because the states must pay to educate illegal immigrant students, provide illegal aliens with health care, and incarcerate them if they commit a crime.168 However, the states with particularly large illegal immigrant populations are affected the most.169 Since the 1970s, these states have independently tried to relieve themselves of this heavy economic burden, placed on them by an ineffective federal government, by excluding illegal immigrants from public benefits.170

IV. FINANCIALLY BURDENED STATES SEARCH FOR RELIEF

As illegal immigration has increased and the federal government has been unable to effectively combat the problem, some states have alternatively tried to solve the problem by themselves.171 In the mid-1970s, Texas passed a law (explaining that the $20 billion from the United States, combined with aid from other countries and the International Monetary Fund, will bring the total to $52 billion). However, in exchange for the loan, the United States wants cooperation from the Mexican government regarding illegal immigration. Elliot, supra, at 29. See No Fair-Weather Amigos Wanted Here, CHI. TRIB., Jan. 15, 1995, § 4, at 2 (noting that if the United States does nothing to help Mexico, more Mexicans will immigrate illegally to the United States). But see Mexico's Troubles, supra note 99, at 34 (claiming that this loan will only lead to further the Mexican recession with increasing unemployment and more illegal immigration to the United States).

164. See Stamets, supra note 85, at A1 (noting that IRCA's amnesty program did not work to decrease the illegal immigrant population, and now four million more immigrants reside in the United States illegally); Welin, supra note 142, at 250 (explaining that provisions of IRCA encourage illegal immigration).

165. Send Back Your Tired, supra note 7, at 26.

166. Stamets, supra note 85, at A1.

167. States with large illegal immigrant populations have spent millions of dollars for illegal immigrant benefits and are now suing the federal government for reimbursement of these costs. See infra § IV.B.1.

168. See generally Increasing Costs Hearing, supra note 52 (discussing these expenditures). See also Livingston, supra note 124, at 618 (stating that it is primarily the states that must bear the burden of illegal immigration and its significant socioeconomic costs); Spiro, supra note 7, at 121 (noting that immigration is now mostly a state concern).

169. See infra § IV.

170. See infra § IV.

171. Spiro, supra note 7, at 123. See infra notes 178-273 and accompanying text.
that required illegal immigrants to pay tuition upon enrolling in public schools. 172 However, the Supreme Court struck down the statute as a violation of the Equal Protection Clause. 173 As a result, the Supreme Court has required the states to educate illegal immigrant students. 174 In addition, states must also provide illegal aliens with public health care and detain them if they commit a crime. 175 Very recently, however, states with large illegal immigrant populations claimed that they could no longer bear such costly services, and they have sued the federal government for reimbursement. 176 Furthermore, California passed a referendum to restrict illegal aliens from receiving these benefits. 177

A. Plyler v. Doe

In 1975, Texas passed a statute prohibiting illegal immigrant students from receiving a free public education. 178 Two years later, a class action was


173. Plyler, 457 U.S. at 230. See also infra notes 178-243 and accompanying text.


175. See infra note 257 and accompanying text.

176. See infra notes 249-59 and accompanying text (discussing the states' lawsuits).

177. See infra notes 260-73 and accompanying text (discussing Proposition 187).

178. Plyler v. Doe, 457 U.S. 202, 205 (1982); Hull, supra note 1, at 413; Livingston, supra note 124, at 599; Perry, supra note 63, at 330; John F. Casey, Comment, Plyler v. Doe: The Quasi Fundamental Right Emerges in Equal Protection Analysis, 19 NEW ENG. L. REV. 151, 159 (1983); Durst, supra note 172, at 433. The Texas statute provided 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 school district.


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brought against the state on behalf of illegal immigrant school-age children living in Texas.\textsuperscript{179} The United States District Court for the Eastern District of Texas held that the statute violated the Equal Protection Clause of the Fourteenth Amendment, and alternatively, that the Texas law was preempted by federal law.\textsuperscript{180} The Fifth Circuit Court of Appeals affirmed the district court's decision that the statute violated the Equal Protection Clause, but did not agree with the lower court's alternative holding that the statute was preempted.\textsuperscript{181} In 1981,\textsuperscript{182} the case reached the Supreme Court,\textsuperscript{183} which also held that the

\textsuperscript{179} Plyler, 457 U.S. at 206; Hull, supra note 1, at 414; Casey, supra note 178, at 160; Durst, supra note 172, at 434. The Supreme Court extended the right to due process of law under the Fifth Amendment to illegal aliens in Wong Wing v. United States, 163 U.S. 228, 238 (1896). Consequently, none of the schoolchildren involved in Plyler, nor their parents, were in the process of obtaining lawful permanent residence. Doe v. Plyler, 458 F. Supp. 569, 575 n.6 (E.D. Tex. 1978); Durst, supra note 172, at 434 n.14.

\textsuperscript{180} Plyler, 458 F. Supp. at 592-93; Hull, supra note 1, at 414; Casey, supra note 178, at 160-61; Durst, supra note 172, at 436, 438. The Fourteenth Amendment provides, in pertinent part, "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Congress enacted the Fourteenth Amendment after the Civil War to secure the freedom and equal protection of former slaves. GERALD GUNther, CONSTITUTIONAL LAW 676 (10th ed. 1980); WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 342 (7th ed. 1991). See also Slaughter-House Cases, 83 U.S. 36, 81 (1872) (explaining that the primary purpose of the Fourteenth Amendment was to protect blacks from discriminatory state laws). However, the Supreme Court has interpreted the Equal Protection Clause to be a general restraint on intentional discriminatory classifications, including race, gender, and alienage. GUNther, supra, at 676; LOCKHART ET AL., supra, at 1221-1359; Jack A. Kramer, Note, Vouching for Federal Educational Choice: If You Pay Them, They Will Come, 29 VAL. U. L. REV 1005, 1040 (1995). See Mississippi Univ. For Women v. Hogan, 458 U.S. 718, 724 (1982) (invalidating a state university policy that limited enrollment in its nursing program to women only); Graham v. Richardson, 403 U.S. 365, 372 (1971) (invalidating a state welfare law which excluded legal aliens from receiving benefits); Loving v. Virginia, 388 U.S. 1, 11 (1967) (holding that race classifications are subjected to the strictest scrutiny).

*While the Equal Protection Clause of the Fourteenth Amendment only applies to the states,* the Supreme Court held that the Due Process Clause of the Fifth Amendment has an equal protection element that applies to the federal government. Kramer, supra, at 1040 n.233. See Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that the Due Process Clause of the Fifth Amendment prohibits the federal government from discriminating between individuals or groups). In spite of such interpretation, under its equal protection analysis, the Supreme Court has given Congress deference in some areas, particularly immigration. See Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) (concluding that Congress may exclude illegal immigrants from receiving federal medical insurance because Congress has plenary power to regulate immigration).

\textsuperscript{181} Doe v. Plyler, 628 F.2d 448, 450, 461 (1980); Casey, supra note 178, at 161; Durst, supra note 172, at 439.

\textsuperscript{182} The dates are significant because even though the Court decided the case in 1982, the case was first argued in the district court in 1977. Between 1977 and 1995, the illegal immigration problem has grown significantly enough that circumstances have changed. See infra notes 290-97 and accompanying text.
Texas statute violated the Equal Protection Clause of the Fourteenth Amendment.184

1. The Majority Opinion

Writing the majority opinion, Justice Brennan first addressed the issue of whether illegal immigrants have an Equal Protection right to receive a free public education under the Fourteenth Amendment.185 The Court rejected the argument that illegal immigrants are not "persons" of the state because they are in the United States unlawfully.186 Instead, the Court concluded that regardless of a person's status under immigration law, an illegal alien is still a person, and is guaranteed Equal Protection under the Fourteenth Amendment.187 The Court also rejected the state's argument that people who entered the United States unlawfully are not "within the jurisdiction" of a state.188 By examining the legislative history of Section One of the Fourteenth Amendment, the Court concluded that Congress intended the jurisdictional phrase to be broad.189 The


184. Plyler, 457 U.S. at 230; Frank R. Kemper & Jim Walsh, The Educator's Guide to Texas School Law 36 (3d ed. 1994); Judith Lichtenberg, Within the Pale: Aliens, Illegal Aliens, and Equal Protection, 44 U. Pitt. L. Rev. 351, 351 (1983); Livingston, supra note 124, at 599; David A. Martin, Due Process and Membership in the National Community: Political Asylum and Beyond, 44 U. Pitt. L. Rev. 165, 203 (1983). See Durst, supra note 172, at 431 (stating that Plyler was the Court's first express recognition of illegal immigrants' right to equal protection). The Supreme Court did not, however, decide whether federal law preempted the Texas state law. See Durst, supra note 172, at 442-43 (stating that the Court "refused" to decide the preemption issue).

185. Plyler, 457 U.S. at 210. The state argued that because illegal immigrants are in the United States unlawfully, they are not "persons within the jurisdiction" of the state of Texas. Id. Therefore, appellants stated that they have no equal protection right under Texas law. Id.

186. Plyler, 457 U.S. at 210; Hull, supra note 1, at 417-18; Perry, supra note 63, at 330-31.

187. Plyler, 457 U.S. at 210; Hull, supra note 1, at 409, 417-18; Lichtenberg, supra note 184, at 370; Casey, supra note 178, at 163; Durst, supra note 172, at 443, 470. During the congressional debates of the Fourteenth Amendment, the framers expressly stated that the "equal protection of the laws" was to apply to "all persons, whether citizens or others" present in the United States. Cong. Globe, 39th Cong., 1st Sess., 2766 (1866) (remarks of Sen. Howard). See also Mathews v. Diaz, 426 U.S. 67, 77 (1976) (stating that even transients are entitled to the protection of the Fifth and Fourteenth Amendments); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that the Equal Protection Clause protects all persons physically present within the territory of any state). But see Livingston, supra note 124, at 624 (arguing that equal protection alone does not protect illegal immigrants from their poor judgment to immigrate illegally; instead, a fundamental right or a suspect class must exist to protect immigrants).


189. Id. at 214 (stating that Congress meant for the Equal Protection Clause to apply to immigrants). The Court explained that the Fourteenth Amendment protects citizen and "stranger" alike in "every corner of a State's territory." Id. at 215. Therefore, the Court reasoned that as soon
Court reasoned that because the phrase was broad, illegal aliens are within a state's jurisdiction, and the Fourteenth Amendment is applicable to them.\textsuperscript{190}

Next, the Court analyzed which standard of review would be appropriate to examine the Texas statute.\textsuperscript{191} Generally, when reviewing an alien classification statute, the proper standard of review depends on three factors: (1) the creator of the classification; (2) the governmental interests; and (3) the purpose of the classification.\textsuperscript{192} Because Congress has plenary power over immigration,\textsuperscript{193} the Court uses a rational basis test\textsuperscript{194} with federal alien classifications.\textsuperscript{195} However, in \textit{Plyler}, Texas created the classification, not Congress. Thus, based on the first factor, the Court reviewed the Texas statute more strictly than a federal statute because states have no express constitutional power to create immigration law.\textsuperscript{196}

When reviewing a state classification, the Supreme Court has reserved strict scrutiny for cases involving a fundamental right or a suspect class.\textsuperscript{197} Absent

\begin{footnotesize}
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\item[190.] \textit{Id.} But see Pete Wilson, \textit{Crack Down On Illegals}, USA TODAY, Aug. 20, 1993, at A12 (stating that the Fourteenth Amendment was not meant to reward illegal aliens) [hereinafter \textit{Crack Down}].
\item[191.] \textit{Plyler}, 457 U.S. at 215-24; Hull, \textit{supra} note 1, at 423; Durst, \textit{supra} note 172, at 470. Prior to \textit{Plyler}, the Court had not established a uniform standard to be applied to all alien classifications. Rosberg, \textit{supra} note 92, at 401; Curran, \textit{supra} note 51, at 370.
\item[192.] \textit{WEISSBRODT}, \textit{supra} note 1, at 276; Curran, \textit{supra} note 51, at 370.
\item[193.] See \textit{supra} notes 50-55 and accompanying text.
\item[194.] Under the rational basis test, a statute will be held constitutional if the challenged classification is reasonably related to a legitimate state interest. Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985); New Orleans v. Dukes, 427 U.S. 297, 303 (1976); JOHN E. NOWAK \& RONALD D. ROTUNDA, \textit{CONSTITUTIONAL LAW} 574-75 (4th ed. 1991); Hull, \textit{supra} note 1, at 418; Lichtenberg, \textit{supra} note 184, at 352, 353; Livingston, \textit{supra} note 124, at 613-14. For a more thorough explanation of this deferential standard of judicial review, see LOCKHART ET AL., \textit{supra} note 180, at 1203-20.
\item[195.] Curran, \textit{supra} note 51, at 370. The Supreme Court has also applied the rational basis test to those state classifications created to protect the political community. \textit{Id.}; Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982). On the other hand, the Court applies strict scrutiny to state classifications used to distribute economic benefits. Graham v. Richardson, 403 U.S. 365, 372-74 (1971); Curran, \textit{supra} note 51, at 371.
\item[196.] See \textit{supra} notes 56-63 and accompanying text.
\item[197.] Plyler v. Doe, 457 U.S. 202, 239 n.2 (1982) (Powell, J., concurring); LOCKHART ET AL., \textit{supra} note 180, at 411; NOWAK \& ROTUNDA, \textit{supra} note 194, at 575; Hull, \textit{supra} note 1, at 426; Lichtenberg, \textit{supra} note 184, at 351; Livingston, \textit{supra} note 124, at 601-02; Durst, \textit{supra} note 172, at 453-54, 458. Under strict scrutiny, a state must have a compelling interest before the Court will find a state statute to be constitutional. Cleburne, 473 U.S. at 440; Washington v. Davis, 426 U.S. 229, 242 (1976); NOWAK \& ROTUNDA, \textit{supra} note 194, at 569, 575-76; Hull, \textit{supra} note 1, at 419; Lichtenberg, \textit{supra} note 184, at 351; Casey, \textit{supra} note 178, at 151; Durst, \textit{supra} note 172, at 454.
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either, the general rule is that the Court uses a rational basis standard to review a classification.\footnote{198} Because education is not a fundamental right,\footnote{199} and illegal immigrants are not a suspect class,\footnote{200} the Court did not use a strict standard of review in 

\textit{Plyler}.\footnote{201} However, the Court did not use the rational basis standard either because the Court believed it was an inappropriate standard based on the facts of the case.\footnote{202} Instead, the majority diverted from the general rule, and created a new intermediate level of scrutiny.\footnote{203} Under this standard, to be constitutional, a classification must rationally further a substantial interest.\footnote{204} The Court's justification for using the new standard was based on

\begin{quote}
A fundamental right is a right that is essential to maintain life, liberty, and property. NOWAK \& ROTUNDA, supra note 194, at 388. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 34 n.74 (1973) (stating that fundamental rights are those rights expressly granted by the Constitution or those fundamental guarantees implicitly protected by the Constitution).

Suspect classifications arise when a statute classifies by race, gender, alienage, or national origin. \textit{Cleburne}, 473 U.S. at 440; \textit{Lichtenberg}, supra note 184, at 363.

\footnote{198} \textit{Cleburne}, 473 U.S. at 440; \textit{Dukes}, 427 U.S. at 303; NOWAK \& ROTUNDA, supra note 194, at 574-75; \textit{Lichtenberg}, supra note 184, at 352; \textit{Perry}, supra note 63, at 337; \textit{Casey}, supra note 178, at 151; \textit{Durst}, supra note 172, at 455.

\footnote{199} \textit{Plyler}, 457 U.S. at 221, 223; \textit{Rodriguez}, 411 U.S. at 35; WEISSBRODT, supra note 1, at 313; \textit{Gerety}, supra note 7, at 395; \textit{Hull}, supra note 1, at 420; \textit{Lichtenberg}, supra note 184, at 363; \textit{Livingston}, supra note 124, at 602; \textit{Perry}, supra note 63, at 335; \textit{Rosberg}, supra note 92, at 402. \textit{But see Plyler}, 457 U.S. at 231-32 (Blackmun, J., concurring) (expressing the opinion that equal protection does not involve fundamental interests); \textit{Perry}, supra note 63, at 336 (stating that fundamental rights are not part of equal protection analysis).

\footnote{200} \textit{Plyler}, 457 U.S. at 219 n.19, 223 (explaining that illegal aliens are not a suspect class because their unlawful presence in the United States is not a "constitutional irrelevancy"); WEISSBRODT, supra note 1, at 313; \textit{Gerety}, supra note 7, at 395; \textit{Hull}, supra note 1, at 420; \textit{Lichtenberg}, supra note 184, at 363; \textit{Livingston}, supra note 124, at 602; \textit{Perry}, supra note 63, at 335; \textit{Rosberg}, supra note 92, at 402. \textit{But see Graham v. Richardson}, 403 U.S. 365, 374-75 (1971) (holding that the Court would strictly scrutinize statutes which discriminated against lawful resident aliens).

\footnote{201} \textit{Plyler}, 457 U.S. at 223; \textit{Lichtenberg}, supra note 184, at 351; \textit{Perry}, supra note 63, at 335; \textit{Durst}, supra note 172, at 470.

\footnote{202} \textit{Plyler} v. Doe, 457 U.S. 202, 216 (1982) (stating that the Court would be unfaithful to its "obligations under the Fourteenth Amendment" if it applied the relaxed standard). See \textit{Durst}, supra note 172, at 470 (stating that the majority "refused" to use the rational basis test).

\footnote{203} \textit{Plyler}, 457 U.S. at 218 n.16, 224; \textit{Hull}, supra note 1, at 423; \textit{Livingston}, supra note 124, at 599; Stanley Mailman, \textit{California's Proposition 187 and Its Lessons}, N.Y.L.J., Jan. 3, 1995, at 3 n.14; \textit{Perry}, supra note 63, at 337 (stating that the Court "changed the rules" in \textit{Plyler}); \textit{Rosberg}, supra note 92, at 402; \textit{Casey}, supra note 178, at 151, 157, 165; \textit{Durst}, supra note 172, at 471. See \textit{Gerety}, supra note 7, at 398 (suggesting that there are several standards between rationality and suspect classification); \textit{Lichtenberg}, supra note 184, at 370 (supporting the intermediate standard because there are more than two standards to equal protection); \textit{Livingston}, supra note 124, at 602 (explaining that gender based classifications usually receive intermediate judicial scrutiny). \textit{But see id.} at 602 (stating that the suspect characteristics test for heightened judicial scrutiny is very imprecise).

\footnote{204} \textit{Plyler}, 457 U.S. at 224; NOWAK \& ROTUNDA, supra note 194, at 576; \textit{Hull}, supra note 1, at 424, 426; \textit{Lichtenberg}, supra note 184, at 370-71; \textit{Livingston}, supra note 124, at 600, 617; \textit{Perry}, supra note 63, at 337; \textit{Rosberg}, supra note 92, at 402; \textit{Casey}, supra note 178, at 152; \textit{Durst}, supra note 172, at 471.}
two factors.

First, Justice Brennan claimed that it was unfair to punish illegal immigrant children for the actions of their parents.205 To do so, reasoned the majority, would be to defy the “fundamental conceptions of justice.”206 Second, the majority reasoned that although education is not a fundamental right, it is extremely important207 because a child would not succeed in life without an education.208 Therefore, the majority explained that if a state statute excludes illegal immigrant children from a free public education, but grants the same to other children within the state, the state must justify the classification by showing that the statute substantially further an important state interest.209 To determine whether the Texas statute withstood the intermediate scrutiny, the Court next examined the state’s interests.210 The state’s primary justification for singling out illegal aliens was that distinguishing between legal and illegal immigrants was consistent with Congress’ disapproval of illegal immigration in the United States and consistent with immigration law in general.211 Although the majority noted that states may make laws that conform to federal objectives, the Court could not find an explicit congressional statement excluding illegal

205. Plyer, 457 U.S. at 220 (stating that the children “can affect neither their parents’ conduct nor their own status.” (citingTrimble v. Gordon, 430 U.S. 762, 770 (1977))); Kemeter & Walsh, supra note 184, at 36; Weissbrodt, supra note 1, at 313; Hull, supra note 1, at 420; Lichtenberg, supra note 184, at 374-75; Livingston, supra note 124, at 600; Perry, supra note 63, at 340, 342; Casey, supra note 178, at 166; Durst, supra note 172, at 471; Peter H. King, They Kept Coming, L.A. Times, Nov. 9, 1994, at A3 (explaining that some Californians voted against Proposition 187 claiming students should not suffer because their parents brought them here); Will, supra note 38, at A11. But see Plyer, 457 U.S. at 245 (dissenting opinion) (stating that “the Equal Protection Clause does not preclude legislators from classifying among persons on the basis of factors and characteristics over which individuals may be said to lack ‘control.’”); Perry, supra note 63, at 340 (arguing that Texas can view the illegal entry into the United States as something contrary to the state’s attempt to fulfill the demands of the citizens of the state community).

206. Plyer, 457 U.S. at 220.

207. Plyer v. Doe, 457 U.S. 202, 221 (1982) (citing Meyer v. Nebraska, 262 U.S. 390, 400 (1923)); Hull, supra note 1, at 421; Livingston, supra note 124, at 600; Perry, supra note 63, at 340; Casey, supra note 178, at 166. But see Livingston, supra note 124, at 605 (stating that even though the majority held that education is not a fundamental right, its use of intermediate scrutiny “bled its rhetoric.”).

208. Plyer, 457 U.S. at 223 (citing Brown v. Board of Education, 347 U.S. 483, 493 (1954)); Gerety, supra note 7, at 379; Hull, supra note 1, at 421; Lichtenberg, supra note 184, at 371, 373; Casey, supra note 178, at 166; Durst, supra note 172, at 471. But see Livingston, supra note 124, at 605-06 (explaining that because illegal aliens are not a suspect class, the majority had to give education “fundamental” status to justify its heightened scrutiny); Id. at 607 (stating that “fundamental rights are far too important to the individual to be premised on a reasonless foundation”).


210. Id. at 224-30.

211. Id. at 224-26; Hull, supra note 1, at 422; Lichtenberg, supra note 184, at 357; Durst, supra note 172, at 436, 471.
immigrant children from American schools. Thus, the Court rejected the state’s first justification.

Second, the state argued that it had a substantial interest in preserving the state’s limited resources for educating its lawful residents. However, the Court stated that such a concern, by itself, was insufficient to justify Texas’ classification. Likewise, the Court rejected the state’s justification that it had an interest in protecting itself from an influx of illegal immigrants. The Court explained that no evidence existed in the record to show that illegal immigration placed a burden on the Texas economy. In addition, the majority reasoned that because illegal immigrants do not come to the United States for a free public education, the statute was a poor attempt to combat illegal immigration, especially compared to the alternative solution of excluding illegal aliens from employment.

Finally, Texas argued that excluding illegal immigrant children was appropriate because they prohibit the state from providing its lawful residents

212. Plyler v. Doe, 457 U.S. 202, 224-25 (1982); Hull, supra note 1, at 423, 426. See Gerety, supra note 7, at 383 (explaining that the Reagan Administration stated it had no interest in the Texas statute); Hull, supra note 1, at 416 (revealing that the Reagan Administration “abandoned” President Carter’s support of the statute because although it did not want to offend the growing Mexican-American constituency, it also could not reject political allies who supported the Texas Law). Recently, however, a bill was introduced by a U.S. Representative from California in response to the majority’s statement. Bill Would Allow States to End Education of Illegal Immigrants, CAL. SPECIAL EDUC. ALERT, May 1995, available in LEXIS, Nexis Library, Curnws File. The bill, H.R. 1377, would permit states to deny free public education to illegal immigrants. Id. The U.S. Representative stated, “It is my intention to take Justice Brennan up on his invitation to enact the congressional policy.” Id.

213. Plyler, 457 U.S. at 225; Hull, supra note 1, at 423.

214. Plyler, 457 U.S. at 227; Gerety, supra note 7, at 387-96; Hull, supra note 1, at 424; Lichtenberg, supra note 184, at 353, 357; Livingston, supra note 124, at 614; Perry, supra note 63, at 343. See Durst, supra note 172, at 435 (expressing Texas’ contention that the special educational needs of the illegal immigrant students caused “severe hardships for the already overburdened school system”).

215. Plyler, 457 U.S. at 227; KEMERER & WALSH, supra note 184, at 36; Lichtenberg, supra note 184, at 353-54.

216. Plyler, 457 U.S. at 228; KEMERER & WALSH, supra note 184, at 36; Durst, supra note 172, at 472.


218. Id. at 228-29; Hull, supra note 1, at 425; Durst, supra note 172, at 472. But see Livingston, supra note 124, at 620 (noting that the Plyler majority incorrectly presumed that the intermediate standard requires a state to choose the best means of regulating illegal immigration). Livingston further argued that the Plyler majority was wrong in presuming that restricting illegal aliens from employment would better reduce illegal immigration than prohibition of free education because employer sanctions are unenforceable. Id. at 621 n.127.
with a high-quality education.\textsuperscript{219} Again, the majority stated that it could find no evidence in the record to support the claim that the overall quality of a Texas education would improve if illegal immigrants were excluded from Texas schools.\textsuperscript{220} Justice Brennan explained that even if excluding a number of students from the schools would result in an improved quality of education, a state would have to show why the targeted group was the proper one for exclusion.\textsuperscript{221} According to the majority, however, illegal immigrant children were not an appropriate target because they were no different than legal resident children in terms of educational cost and need.\textsuperscript{222} In conclusion, the majority held that the Texas statute violated the Equal Protection Clause of the Fourteenth Amendment because the alien classification did not further a substantial state interest.\textsuperscript{223}

2. The Dissenting Opinion

Chief Justice Burger, joined by Justices White, Rehnquist, and O’Connor, dissented from the majority’s holding.\textsuperscript{224} Even though the Chief Justice agreed with the notion that children should receive an elementary education, he argued that the majority had exceeded its authority in its decision.\textsuperscript{225} The dissent explained that the Constitution vests in Congress the power to make policy, and stated that the majority violated the Separation of Powers Doctrine when it ruled


\textsuperscript{220} Plyler, 457 U.S. at 229.

\textsuperscript{221} Id.


\textsuperscript{223} Plyler, 457 U.S. at 230; Livingston, \textit{supra} note 124, at 600.

\textsuperscript{224} Plyler, 457 U.S. at 242. See Hull, \textit{supra} note 1, at 417 (stating that the dissent assaulted the majority’s opinion with “uncommon vehemence”); Durst, \textit{supra} note 172, at 443 (explaining that the four separate opinions and the five contradictory interpretations of equal protection in \textit{Plyler} decrease the precedential value of the case).

\textsuperscript{225} Plyler, 457 U.S. at 242 (stating that the majority does not try to hide the fact that it was attempting to make up for Congress’ ineffective leadership in illegal immigration); Hull, \textit{supra} note 1, at 427; Will, \textit{supra} note 38, at A11. See Perry, \textit{supra} note 63, at 329, 340-41 (explaining that the Court’s decision was unjustified and definitely activist in nature); Hull, \textit{supra} note 1, at 430 (claiming that the Court took an activist role in deciding \textit{Plyler}).
that illegal immigrant children must receive a free public education.226 The Chief Justice explained that the Court does not have the power to strike down a statute simply because the statute does not comport with the majority's vision of a desirable social policy.227 He charged Congress, rather than the Supreme Court, with addressing the problems that result from illegal immigration.228

In addition, the Chief Justice criticized the majority for "creating" an intermediate standard of review to evaluate the Texas statute.229 The dissent emphasized that the Court could not use a higher standard because education is not a fundamental right230 and illegal immigrants are not a suspect class.231 Furthermore, the Chief Justice stated that the majority abused the Fourteenth Amendment when it adjusted the level of judicial review to fit its view of the

226. Plyler, 457 U.S. at 242 (explaining that the Court "trespassed" on the authority of Congress and the President when it assumed a policymaking role "as the Court does today."). See Will, supra note 38, at A11 (explaining that "imperial judges" turn courts into legislatures whenever they label unconstitutional what they view as unfair or unwise).

227. Plyler v. Doe, 457 U.S. 202, 242 (1982) (stating that the Constitution did not grant the Court the authority to invalidate laws because they do not meet the Court's "standards of desirable social policy, 'wisdom,' or 'common sense.'") (citing TVA v. Hill, 437 U.S. 153, 194-95 (1978)); Hull, supra note 1, at 427; Perry, supra note 63, at 344. See Will, supra note 38, at A11 (claiming that Justice Brennan "always thought he had a right to impose social policies he considered correct"). The dissent further argued that "it is not the function of the Judiciary to provide 'effective leadership' simply because the political branches of government fail to do so." Plyler, 457 U.S. at 243; Perry, supra note 63, at 344. See Livingston, supra note 124, at 601 (stating that even after the Court made this policy decision, the Court still failed to resolve the socioeconomic problems that result from illegal immigration).

228. Plyler, 457 U.S. at 253; Hull, supra note 1, at 427, 428; Livingston, supra note 124, at 601. See Plyler, at 225 (majority opinion) (stating that the Court has learned to defer to Congress' judgment regarding immigration policy (citing Mathews v. Diaz, 426 U.S. 67, 81 (1976); Id. at 238 n.1 (Powell, J., concurring) (stating that "[t]he Court has traditionally shown great deference to federal authority over immigration . . ."); Fiallo v. Bell, 430 U.S. 787, 792 (1977) (emphasizing the importance of the limited scope of judicial review of immigration legislation); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (explaining that policies involving aliens are largely immune from judicial interference because they are exclusively entrusted to the political branches). The Plyler dissent further stated that instead of the Court trying to do Congress' job, the Court should defer to Congress, "unpalatable as that may be to some." Plyler, 457 U.S. at 254.

229. Plyler, 457 U.S. at 244-48. See Livingston, supra note 124, at 601 (explaining that the majority only created more confusion in equal protection analysis when it created the intermediate standard); Perry, supra note 63, at 329, 339 (stating that Plyler added confusion to earlier equal protection cases when it added a fourth standard of review); Durst, supra note 172, at 432 (criticizing the Court's inconsistent and limited view of equal protection).

230. Plyler, 457 U.S. at 247. "The importance of education is beyond dispute. Yet we have held repeatedly that the importance of a governmental service does not elevate it to the status of a 'fundamental right' for purposes of equal protection analysis." Id. See Livingston, supra note 124, at 606-07 (noting that a right is either fundamental or it is not, and if it is not, heightened scrutiny should not be used).

231. Plyler, 457 U.S. at 244 (majority opinion) (explaining that illegal aliens are not a suspect class because their unlawful presence in the United States is not a "constitutional irrelevancy").
important social interest.\textsuperscript{232} Justice Brennan believed a special level of review was appropriate due to the children’s lack of control over their immigration status.\textsuperscript{233} However, Chief Justice Burger refuted the majority’s rationalization by explaining that the Equal Protection Clause does not prevent state legislatures from creating classifications based on factors beyond a person’s control.\textsuperscript{234} Moreover, the dissent argued that although education is important, it should not affect the level of scrutiny that the Court uses.\textsuperscript{235} Chief Justice Burger stated that the majority should have reviewed the statute under the rational basis standard.\textsuperscript{236} Under a rational basis standard, the Court needed only to determine whether the legislative classification was rationally related to a legitimate state interest.\textsuperscript{237}

The dissent then concluded that the Texas classification was in fact related

\textsuperscript{232} Plyler v. Doe, 457 U.S. 202, 243-44 (1982) (criticizing the majority’s opinion as a perfect example of an “unabashedly result-oriented approach”). See Perry, infra note 63, at 338 (stating that it would be “naive” to think the majority would have created the new intermediate standard if it could have reached the same result with the rational basis test). “[B]y patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of this case.” Plyler, 457 U.S. at 244. See Hull, supra note 1, at 429 (arguing that the Chief Justice was correct in stating that the majority’s opinion was result-oriented). Because the majority opinion was so fact specific, the dissent stated that the opinion would be inapplicable to future cases. Plyler, 457 U.S. at 243; Gerety, supra note 7, at 398; Hull, supra note 1, at 409, 429.


234. Id. at 245 n.5 (arguing that illegal immigrants lack control over their illegal residence in the United States just as lawfully resident children have no control over the school district in which their parents reside); Livingston, supra note 124, at 600. The dissent further explained that the purpose of the Equal Protection Clause is to protect people from “arbitrary and irrational classifications,” and “invidious discrimination stemming from prejudice and hostility; it is not an all-encompassing ‘equalizer’ designed to eradicate every distinction for which persons are not ‘responsible.’” Plyler, 457 U.S. at 245.

235. Plyler, 457 U.S. at 244, 247 n.8 (By stringing together quotations from various cases addressing a variety of issues, the Court turned education into a “quasi-fundamental right”). “The Equal Protection Clause guarantees similar treatment of similarly situated persons, but it does not mandate a constitutional hierarchy of governmental services.” Id. at 248. “[T]o the extent this Court raises or lowers the degree of ‘judicial scrutiny’ in equal protection cases according to a transient Court majority’s view of the societal importance of the interest affected, we ‘assume’ a legislative role and one for which the Court lacks both authority and competence.” Id. (citing Justice Powell in San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)); Livingston, supra note 124, at 600. See Perry, supra note 63, at 336 (claiming that the Texas statute was not problematic on the basis of classification or the interest in education).

236. Plyler, 457 U.S. at 248; Hull, supra note 1, at 427; Livingston, supra note 124, at 600, 601 (adding that the statute should have been upheld under the majority’s intermediate scrutiny); Perry, supra note 63, at 338. See also San Antonio Indep. Sch. Dist., 411 U.S. at 1 (expressly rejecting the notion that state legislation regarding public education is subject to special scrutiny under the Equal Protection Clause).

to an important state interest. First, the Chief Justice argued that conserving a limited state budget was a legitimate objective. He explained that public education is very expensive, and as a result of the majority’s holding, the states and local school districts would incur a large financial burden. Second, Texas’ classification was consistent not only with Congress’ regulation of illegal immigration, but also with the fact that Congress itself had excluded illegal immigrants from several social benefit programs. Finally, the dissent argued that states do not have the same obligation to provide benefits for people unlawfully within a state as they do for people residing lawfully within a state. Therefore, the dissent concluded that because the Constitution does not require states to educate illegal immigrant students, a state may rationally exclude illegal immigrant students from a free public education, so that the state may spend its limited funds on its own lawful residents.

B. The Impact of an Ineffective Federal Government and Plyler v. Doe on the States

The Supreme Court’s decision in Plyler v. Doe, coupled with a rising population of illegal immigrants, have placed a substantial economic burden on some states. In addition to providing illegal immigrants with a free public education, states must also provide them with public health care and incarcerate

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238. Plyler, 457 U.S. at 252-53. See Perry, supra note 63, at 338 (arguing that the state interest was legitimate).

239. Plyler, 457 U.S. at 249; Livingston, supra note 124, at 600, 614; Durst, supra note 172, at 474.

240. Plyler, 457 U.S. at 252; Hull, supra note 1, at 427.


242. Plyler, 457 U.S. at 250-51 (stating that the majority gave no explanation as to why a state should not consider the factor of unlawful residence in the United States when allocating its resources to its residents); Lichtenberg, supra note 184, at 371-72. See Vlandis v. Kline, 412 U.S. 441, 452-54 (1973) (concluding that a state has a legitimate interest in maintaining the quality of its schools and the right of its own lawful residents to attend the schools); Bruce Fein, Curbing Immigration Plugs the Dollar Drain, N.J.L.J., Dec. 5, 1994, at 24 (“The billions born outside the United States enjoy no moral entitlement to [a free public education] here, based on their craftiness in evading criminal prohibitions on illegal entry.”).

243. Plyler, 457 U.S. at 244, 252; Livingston, supra note 124, at 600. See Fein, supra note 242, at 21 (stating that the Plyler decision was “ill-reasoned and ripe for overruling”).

244. See Gerety, supra note 7, at 387 (stating that illegal immigrants have a substantial impact on Florida, California, New York, and Texas in terms of education); Will, supra note 38, at A11 (discussing the damage Justice Brennan and the Supreme Court have done to the states). See also Livingston, supra note 124, at 619 (explaining that Congress has failed to act because the few affected states are foreclosed from taking legislative action when they are outnumbered by the northern states, which have little incentive to spend funds to prevent illegal immigration because it is not their problem).
them if they commit a crime. Thus, however, states with large illegal immigrant populations can no longer afford to give these benefits to so many illegal aliens. Thus, they are asking the federal government to reimburse them for the costs of providing illegal immigrants with these benefits. In addition, California citizens have passed an initiative to end the illegal immigrants’ benefits.

1. States Sue the Federal Government

The states of California, Arizona, New York, Texas, and

245. *See generally Increasing Costs Hearing, supra* note 52 (discussing the high costs of benefits for illegal immigrants).

246. *See infra* notes 249-59 and accompanying text. *But see* INS Special Agent interview, *supra* note 83, at 30-31 (explaining that eventually, other states will be similarly afflicted with high illegal immigrant costs if illegal immigration goes unchecked).

247. Jenifer M. Bosco, *Note, Undocumented Immigrants, Economic Justice, and Welfare Reform in California*, 8 GEO. IMMIGR. L.J. 71, 73 (1994). *See Livingston, supra* note 124, at 619-20 (arguing that states should be able to tell Congress that they cannot afford to and will no longer pay for Congress’ legislative inaction).

248. *See Will, supra* note 38, at A11 (noting that there would probably be no Proposition 187 if officials in Sacramento were not corrupted by the judicial activism used in *Philer v. Doe*). *See also infra* notes 260-73 and accompanying text (discussing Proposition 187).

249. California pays more than $3.5 billion a year to provide illegal immigrants with public services. Jim Specht, *Wilson: California Will Sue U.S. Over Illegal Immigrants*, GANNETT NEWS SERVICE, Mar. 17, 1994. Governor Pete Wilson has filed suit against the federal government, seeking $377 million to offset the 1994 cost of imprisoning 16,700 illegal aliens convicted of felonies in California. Glenn Urges White House to Clarify Stance on Unfunded Federal Mandates, DAILY REP. FOR EXECUTIVES, Apr. 29, 1994, at A81 [hereinafter Glenn Urges White House]. In anticipation of California’s lawsuit, President Clinton requested from Congress a $350 million amendment to the 1995 budget to help states pay for imprisoning illegal immigrants. *Id.* “It is terribly, intolerably unfair” that Washington forces states to pay for services to illegal immigrants “that we can’t afford to provide to our own residents.” *Border Governors: Illegal Alien Problem Getting Desperate, LEGAL INTELLIGENCER*, June 24, 1994, at 7 (quoting Pete Wilson at a Senate Appropriations Committee Hearing) [hereinafter Border Governors]. *See also* Steve Albert, *Wilson’s Immigration Suit Is Given Little Chance, RECORDER*, Apr. 26, 1994, at 3 [hereinafter Wilson’s Immigration Suit]. *But see* Bosco, *supra* note 247, at 73 (stating that Governor Wilson was receiving more publicity than results when he directly approached the federal government).


251. Initially, New York was reluctant to sue the federal government for the costs of illegal immigrants. Deborah Sntag, *New York Officials Welcome Immigrants, Legal or Illegal*, N.Y. TIMES, June 10, 1994, at A1. However, Governor Mario Cuomo sought the federal government’s assistance because it could no longer afford to pay such a large share of the costs of illegal immigration. *Increasing Costs Hearing, supra* note 52, at 7; Gayle Hanson, *Illegal Aliens Strain an Ailing U.S. System*, WASH. TIMES, Apr. 12, 1994, at A5.

Florida\textsuperscript{253} are currently suing the federal government for the costs of illegal immigration in their states.\textsuperscript{254} These states argue that it is the federal government’s responsibility to make and enforce immigration law.\textsuperscript{255} However, with so many illegal aliens in the United States, the states claim that it is obvious the federal government is not fulfilling its obligation.\textsuperscript{256} The states argue that if the federal government were doing its job properly, there would not be so many illegal aliens; and the states would not have to spend the taxpayers’ money to educate them, give them health care, and incarcerate

$1.34\text{ billion.} \quad \text{Id. Cf. Pendleton, supra note 99, at 3 (stating that Texas spends$166 million each year on its 550,000 illegal immigrants).}$

In terms of education, “Hispanic Texans who live along the border are angry that their ever-mounting property taxes pay to educate illegal immigrants. . . .” \textit{Id.} (quoting state Representative Henry Cuellar who represents the border City of Laredo). In Brownsville, “[W]e see the cars cross [the border] daily, drop off their kids at school, and then go back. . . .” \textit{Id.} (quoting Joe Garcia, chief of staff for state Senator Eddie Lucio). “[Garcia] estimates that the 40,000-student Brownsville school district pays $20 million annually to educate children who don’t live there or who live illegally.” \textit{Id.} “‘It’s depriving their [own] children of an education.’” \textit{Id.} (quoting Senator Lucio’s administrative assistant, Paul Cowen).

253. Each year, 340,000 illegal immigrants enter Florida each year. Stamets, supra note 85, at A1. In Chiles v. United States, No. 94-0676CV, Florida Governor Lawton Chiles requested $1.5 billion from the federal government to pay for illegal immigration costs in his state. \textit{N.Y.L.J.}, Dec. 21, 1994, at 1. \textit{See also Wilson’s Immigration Suit, supra note 249, at 3; Booth, supra note 7, at A1; Elder & Hunter, supra note 252, at 1; Glenn Urges White House, supra note 249, at A81; Pendleton, supra note 99, at 3; Rohrer, supra note 1, at A12.}

254. \textit{See Mailman, supra note 203, at 3 (claiming that the United States should strictly enforce immigration law); Rorie Sherman, Immigration Suits Gain Critical Mass, NAT’L L.J., June 13, 1994, at A6. Providing services for illegal immigrants costs the United States almost six billion dollars. Specht, supra note 249; \textit{Eye On America, supra note 2.}}

However, on December 20, 1994, U.S. District Judge Edward B. Davis dismissed the Florida suit against the federal government. \textit{N.Y.L.J.}, Dec. 21, 1994, at 1. The judge reasoned that he did not have the power to order the federal government to pay Florida. \textit{Id.} Although he sympathized with Florida’s “tremendous financial burden,” he added that the conflict was political, not legal. \textit{Id.} Nevertheless, Governor Chiles promised that he would go to the United States Supreme Court if necessary. \textit{Here are Highlights from 1994, MED. \& HEALTH, Jan. 2, 1995, at 32 [hereinafter \textit{Highlights From 1994}].}

On February 13, 1995, the California suit was also dismissed. Richard C. Reuben, \textit{The New Federalism, 81 A.B.A. J. April, 1995 at 76. However, the state is appealing the decision. Id.}

255. Specht, supra note 249.

256. Booth, supra note 7, at A1; Pendleton, supra note 99, at 3; Specht, supra note 249; Van Der Werf, supra note 84, at A1. \textit{See Hull, supra note 1, at 415-16 (quoting the Texas State’s Attorney General).} “‘[T]t was the ‘height of hypocrisy’ for Congress to refuse to finance the education of undocumented children, who were here in the first place because the federal government was unable or unwilling to enforce its immigration laws.’” \textit{Id. See also Livingston, supra note 124, at 617 (stating that an inactive Congress has failed to effectively enforce federal immigration law).}
them. Instead, these states believe that they have a greater obligation to allocate such services to American citizens and to immigrants residing in the United States legally. Therefore, the states claim that the federal government should compensate them because these expenses are a result of the federal government's ineffectiveness.

2. Proposition 187

In addition to suing the federal government, California citizens have decided to independently restrict illegal immigrants from receiving these costly public benefits. On November 8, 1994, California voted in favor of

257. See Knee-Jerk Responses, supra note 161, at A12 (criticizing Congress for imposing immigrant-related mandates on the states and not paying for them); Booth, supra note 7, at A1 (claiming that Florida citizens should not have to subsidize illegal immigration or tolerate the continued failure of the federal government to enforce the law) (quoting Governor Lawton Chiles). Rohter, supra note 1, at A12 (declaring that if the federal government wishes to continue a humanitarian foreign policy that encourages immigration and refugee admissions, then it must financially support the immigrant population that arrives) (quoting the Governors of Florida, New York, Texas, California, and Illinois in a letter written to President Clinton in January 1993). Daniel M. Weintraub, Wilson to Sue U.S. on Inmate Immigrants, L.A. TIMES, Apr. 26, 1994, at A3. "If the federal government were held accountable, they would quickly discover that the cost of ignoring the real and explosively growing problem of illegal immigration is far greater than the cost of fixing it. . . ." Id.

258. See Specht, supra note 249 ("That's billions of dollars that we can't spend improving our schools, putting more police on our streets or providing better health care for our citizens.") (quoting Governor Pete Wilson discussing California's cost of illegal immigrants); Prop 187 II, HEALTH LEGIS. & REG., Jan. 4, 1995 ("If they're not citizens, why should they be our responsibility?") (quoting an aide to Representative Clay Shaw, chair of the Ways & Means Human Resources Subcommittee). But see generally Peter L. Reich, Public Benefits for Undocumented Aliens: State Law Into the Breach Once More, 21 N.M. L. REV. 219 (1991) (arguing that states should offer public assistance to illegal immigrants because the federal government does not).

259. See Booth, supra note 7, at A1 ("If the United States government chooses to selectively enforce the law, it has a corresponding obligation to incur the costs associated with this selective enforcement.") (quoting Governor Lawton Chiles); Specht, supra note 249 ("Because the federal government let the illegal immigrants in, and the services provided are required by Congress or federal court decisions, the federal government should be forced to pay for them. . . .").

260. See Send Back Your Tired, supra note 7, at 26 (California Assemblyman Richard Mountjoy explaining that because California cannot stop illegal immigrants from coming, the benefits of coming here must be stopped). An estimated 1.7 million illegal immigrants live in California, which is 52% of all illegal aliens in the United States. Booth, supra note 7, at A1; Herschensohn, supra note 1, at A20. Illegal immigrants enter the state about 2000 times a night. Id.

A California family of four has to pay $400 a year for illegal immigrants' benefits. Border Governors, supra note 249, at 7. For California as a whole, illegal immigrants cost three billion dollars a year. Booth, supra note 7, at A1. Cf. Van Der Werf, supra note 84, at A1 (stating that California taxpayers pay $2.3 billion per year to provide illegal aliens with public services). As a result, some legal California residents receive no services so that illegal residents can be served. Id.
Proposition 187. Also known as "Save Our State," this initiative: (1) makes it illegal to produce or use fraudulent documents to obtain a job or welfare benefits; (2) requires that every person who has been arrested for a crime to reveal his legal status; (3) prohibits publicly-funded health care facilities from providing free services for illegal aliens, except for

263. Proposition 187 §§ 2, 3, Nov. 8, 1994 (California) [hereinafter Proposition 187].
265. Proposition 187, supra note 263, § 6. Such benefits cost the California taxpayers over $900 million in 1993, an increase of 1800% over the previous five years. SAVE OUR STATE, PROPOSITION 187: THE FICTION AND THE FACTS 3 (1994). In 1993 alone, 322,000 illegal immigrants received free public health care in California. Id. Moreover, 70% of all births in Los Angeles county public hospitals are to illegal immigrant mothers. Herschensohn, supra note 1, at A20; Border Governors, supra note 249, at 7 (stating that two-thirds of all babies born in Los Angeles County public hospitals belong to illegal immigrant mothers); Crack Down, supra note 190, at A12. See also NELSON, supra note 1, at 5 (stating that 80% of the population increase in Los Angeles is among Latinos and Asians). Cf. Van Der Werf, supra note 84, at A1 (stating that at least 300 babies are born each month to illegal immigrant parents in Arizona). See also THE UNIVERSAL ALMANAC, supra note 1, at 302 (stating that immigration will likely add more to the United States population than will natural increases); MORRIS, supra note 1, at 28-29 (discussing how the group Zero Population Growth believes that illegal immigration will cause developed nations to experience population growth similar to that of less developed nations).

Consequently, Governor Pete Wilson suggested that an amendment be added to the U.S. Constitution to prevent illegal alien mothers from crossing the border to give birth to a child who then is a U.S. citizen because he or she is born on U.S. territory. BOSCO, supra note 247, at 74; Note, The Birthright Citizenship Amendment: A Threat to Equality, 107 HARV. L. REV. 1026, 1026 (1994) [hereinafter Birthright Citizenship Amendment]; Booth, supra note 7, at A1; Rohter, supra note 1, at A12; Crack Down, supra note 190, at A12; INS Special Agent interview, supra note 83, at 5-6 (stating that such an amendment is a good idea because it takes care of several of the Proposition 187 issues - specifically that non-U.S. citizens are not entitled to the benefits). But see Knee-Jerk Responses, supra note 161, at A12 (claiming that Governor Pete Wilson is blaming illegal immigrants because they are an easy target). Even some Hispanic Texans support the Amendment. Pendleton, supra note 99, at 3. See U.S. CONST. amend. XIV, § 1.

When a child turns 18, he or she may legally bring to the United States those immediate family members who were originally illegal immigrants. Peter J. Riga, Illegal Immigration Needs a Constitutional Fix, NAT'L L.J., Nov. 21, 1994, at A20. Before the child reaches 18, the parent(s) may be deported but the child may not. NELSON, supra note 1, at 8. However, action leading to the parent's deportation usually does not occur. Id.

The United States is the only country in the world that permits citizenship by territory; other nations have always defined citizenship exclusively by the status of one's parents. Riga, supra, at A20. The reason a territorial citizenship was incorporated into the Fourteenth Amendment was so that former slaves could become U.S. citizens, a concern which is no longer relevant. Id.

Representative Elton Gallegly of California and 12 other Congress members sponsored a constitutional amendment that would repeal the current Citizenship Clause and replace it with the language of: "All persons born in the United States . . . of mothers who are citizens or legal residents of the United States . . . are citizens of the United States . . ." H.R.J. Res. 129,
emergency care, as required by federal law; \textsuperscript{266} (4) permits only citizens and legal residents of California to receive a public education and requires all students enrolling in school to show identification; \textsuperscript{267} and (5) prohibits welfare payments to illegal aliens. \textsuperscript{268} Furthermore, as public officials implement these restrictions, Proposition 187 requires them to notify the INS whenever they discover illegal aliens. \textsuperscript{269}

The day after the initiative passed by a vote of 59.2\% to 40.2\%, \textsuperscript{270} the implementation of Proposition 187 was blocked by temporary restraining orders, lawsuits, and an executive order. \textsuperscript{271} Opponents of Proposition 187 claim that federal law preempts the California law because only Congress has the authority to create immigration law, and the states do not have such authority. \textsuperscript{272} Furthermore, Proposition 187 critics claim that Section Seven is unconstitutional because it violates the 1982 Supreme Court decision in \textit{Plyler v. Doe}. \textsuperscript{273}

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103d Cong., 1st Sess. (1993). \textit{But see generally Birthright Citizenship Amendment, supra} (stating that such an amendment would compromise American ideals and equality).


267. Proposition 187, supra note 263, §§ 7-8. Any student who cannot show legal status will have 90 days to make a transition back to his or her home country. \textit{Id.} § 7(f). Educating illegal immigrants costs California taxpayers $1.5 billion each year. Herschensohn, supra note 1, at A20. Because of such high costs, California had to cut back on the quality of public education for its legal residents. \textit{Id.} “Since 1980, the state’s public education system has fallen from the top 10 states to the bottom 10.” \textit{Id. Cf.} Reardon, supra note 12, at 12.


272. \textit{See supra} notes 44-63 and accompanying text. \textit{But see Proposition 187 Copycats, Nat’l L.J., June 19, 1995, at A24 (stating that bills and ballot initiatives that shadow Proposition 187 are “snowballing” in many states).}

273. 457 U.S. 202 (1982). \textit{See Martineau, supra} note 269, at 9 (stating that the U.S. District Judge invalidated the initiative’s education ban because it was inconsistent with \textit{Plyler}). However, it has been acknowledged that the purpose of Proposition 187’s education provision was to directly appeal to the U.S. Supreme Court to revisit the \textit{Plyler} decision. \textit{Id. See also} Mark S. Pulliam, \textit{Special Interests Continue Legal Assault Against Prop 187, LEGAL OPINION LETTER, Feb. 2, 1996}

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As illegal immigration has become more problematic for states with large illegal alien populations, these states have been forced to proceed with their own agendas.\textsuperscript{274} States such as California and Texas can no longer afford to pay for the federal government's ineffective enforcement of immigration law.\textsuperscript{275} The ideal solution, of course, would be to end illegal immigration. However, due to the socioeconomic forces behind illegal immigration, such a solution is difficult to achieve.\textsuperscript{276} In the meantime, however, Congress needs to relieve the states and the public school systems from their substantial economic burden.

V. CONGRESSIONAL RELIEF FOR THE STATES AND PUBLIC SCHOOLS

Although Plyler \textit{v. Doe} requires states to educate illegal immigrants, the Supreme Court has upheld statutes that prohibit illegal aliens from receiving other public benefits.\textsuperscript{277} In \textit{Mathews v. Diaz},\textsuperscript{278} the Court examined the issue of whether Congress may discriminate in favor of citizens and against immigrants when it provides federal medical insurance.\textsuperscript{279} The Court held that depriving illegal aliens from the insurance was not a deprivation of liberty or property without due process of law, and thus was constitutional.\textsuperscript{280} The Court reasoned that even though all aliens are protected by the Due Process Clause, all aliens are not entitled to receive each and every benefit that citizens receive.\textsuperscript{281} The Court stated that "certainly" an illegal alien does not have a

\begin{footnotesize}
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\item 274. See Will, \textit{supra} note 38, at A11 (explaining that California citizens are trying to reclaim a right of self-determination).
\item 276. See \textit{supra} note 13 and accompanying text.
\item 277. See \textit{infra} notes 298-303 and accompanying text.
\item 278. 426 U.S. 67 (1976).
\item 279. Id. at 74. The insurance program is the Medicare Part B supplemental medical insurance program, established by the Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620. The appellees challenged 42 U.S.C. § 1395o (2) (1970), which grants federal medical insurance to resident citizens who are 65 or older but denies eligibility to similar immigrants, unless they received permanent resident status and have also resided in the United States for at least five years. \textit{Mathews,} 426 U.S. at 70. Appellees argued that Congress deprived them of liberty and property without due process of law. \textit{Id.} at 71.
\item 280. \textit{Id.} at 87.
\item 281. \textit{Id.} at 78-79. For example, the protection of privileges and immunities only applies to citizens. U.S. CONST. art. IV, § 2, cl. 1; U.S. CONST. amend. XIV, § 1; Gerety, \textit{supra} note 7, at 392. Only citizens have the right to vote. U.S. CONST. amend. XV, XIX, XXIV, XXVI; Gerety, \textit{supra} note 7, at 392. Representatives of Congress must be citizens for seven years. U.S. CONST. art. I, § 2, cl. 2; Gerety, \textit{supra} note 7, at 392. Senators must be citizens for nine years. U.S. CONST. art. I, § 3, cl. 3; Gerety, \textit{supra} note 7, at 392. Furthermore, the President must be a "natural born citizen." U.S. CONST. art. II, § 1, cl. 5; Gerety, \textit{supra} note 7, at 392.

The Court further explained that Congress has no constitutional obligation to provide all immigrants with the same benefits given to citizens. \textit{Mathews,} 426 U.S. at 82.
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constitutional right to welfare benefits that a sovereign government conscientiously offers to its own citizens and "some of its guests."282 Finally, the Court explained that because the political branches need flexibility to react to changing political and economic circumstances, the Court should not interfere with such political decisions.283

Therefore, according to Mathews, Congress may likewise enable the states to decide that illegal immigrant students should not be entitled to receive the same benefits that citizens and lawful resident students receive, namely a free public education.284 Moreover, Congress needs flexibility to respond to the changing political and economic circumstances of illegal immigration.285 Because illegal immigrant students are overcrowding classrooms and affecting the quality of education, Congress should respond to the economic burden on the states and public school systems that has emerged from the changing circumstances of illegal immigration.286 Thus, Mathews supports such a proposal.

A. Congress Should Relieve the States and Public Schools of their Financial Burden

The majority in Plyler stated that in terms of illegal immigration, Congress has never legislated in the area of public education.287 However, Congress should legislate in this area because Plyler has exacerbated, rather than resolved, the problems that stem from illegal immigration.288 Furthermore, such regulation is justified when: (1) changed circumstances exist because illegal

282. Mathews v. Diaz, 426 U.S. 67, 80 (1976). Furthermore, the Court stated that even if the resident requirements were removed from the medical insurance, Congress would certainly require that the immigrants at least be lawfully within the United States. Id. at 82. See Hull, supra note 1, at 412 (explaining that a state is also not obligated to grant benefits to illegal aliens); Rosberg, supra note 92, at 406 (stating that illegal aliens, by definition, should be excluded from public benefits because they are not lawfully within the United States).

283. Mathews, 426 U.S. at 81. The Court also stated that it is not "political hypocrisy" to conclude that the Fourteenth Amendment's limits on state authority is different from the Amendment's reach over Congress' power to regulate immigration. Id. at 86-87.

284. See id. at 83 (holding that Congress may reasonably distinguish between lawful residents and illegal aliens when providing benefits); Rosberg, supra note 92, at 400 (explaining that the federal government can exclude aliens from almost any benefit it chooses).

285. See Mathews, 426 U.S. at 81.

286. See infra notes 290-97 and accompanying text.

287. Plyler v. Doe, 457 U.S. 202, 226 (1982). See also Gerety, supra note 7, at 387 (stating that Congress has never governed the enrollment of aliens in public or private elementary schools).

288. See Hull, supra note 1, at 430 (stating that the holding in Plyler does not preclude, and in fact invites, congressional action that would "effectively resurrect" the Texas statute). "The Court suggested throughout Plyler that Congress could either forbid undocumented children from attending public schools, or authorize states to exclude them at will." Id.
immigration has reached a critical level; (2) illegal immigrants have already been restricted from several public benefits; and (3) society's interest in receiving a high quality public education outweighs illegal immigrant students' interest in receiving a free public education in the United States.\(^{289}\)

1. Changed Circumstances

Illegal immigration is a much greater problem now than it was in the 1970s.\(^{290}\) When the Plyler suit was initiated in 1977, an estimated 3.5 million illegal immigrants lived in the United States.\(^{291}\) Eighteen years later, an estimated seven million illegal aliens resided in the United States.\(^{292}\) An estimated 120,000 illegal immigrants were attending Texas public schools in 1980.\(^{293}\) However, 400,000 illegal immigrant students currently attend California public schools.\(^{294}\) This number is thirty times greater than the number of illegal immigrant students that were attending Texas schools in 1975.\(^{295}\) Because of the tremendous illegal immigrant population now present in the United States, a handful of states must spend a substantial amount of money to educate illegal immigrant students.\(^{296}\) Therefore, under Matthews, Congress should relieve the states and public school systems from their undue financial burden resulting from changed circumstances in illegal immigration.\(^{297}\)

289. See infra notes 290-338 and accompanying text.

290. During the 1970s, INS apprehensions of illegal aliens never exceeded one million in any given year. ASHEGHIAN, supra note 12, at 452. After 1980, however, the number of INS apprehensions never dropped below one million. Id.


294. See Raine, supra note 262, at A1 (stating that there are an estimated 400,000 illegal immigrant children in California); Paul Feldman, Texas Case Loons over Prop. 187's Legal Future, L.A. TIMES, Oct. 23, 1994, at A21 (noting that more than 300,000 students would be expelled).

295. Feldman, supra note 294, at A21. See Dan Stein, Yes: The Supreme Court Must Re-Evaluate Existing Law, 81 A.B.A. J. 42 (Feb. 1995) (stating that "it is not inconceivable that, based on present circumstances in California and the addition of new federal measures to enforce immigration laws ... the current Court might reach a different conclusion [than the Plyler Court did]).

296. For example, Illinois spent $101.9 million to educate illegal immigrant students in 1992. Increasing Costs Hearing, supra note 52, at 5. See supra notes 249-54, 267 and accompanying text.

2. Illegal Immigrants Are Already Excluded from a Variety of Benefits

Congress has already determined that American citizens and lawful alien residents are the proper recipients for several federal benefits, while illegal aliens are not.298 Congress currently prohibits illegal aliens from receiving food stamps,299 legal services,300 Supplemental Security Income (SSI),301 Aid to Families with Dependent Children (AFDC),302 and Medicaid.303 Furthermore, Congress enacted IRCA to prohibit employers from hiring illegal immigrants.304 Congress created these restrictions because it believed that: “(1) assistance should be limited to aliens whose residence is authorized by federal immigration law,”305 and (2) assistance to aliens should avoid undue

be given “ample latitude to ‘adapt their rules and policies to the demands of changing circumstances.’”) (quoting Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968)); Munn v. Illinois, 94 U.S. 113, 134 (1876) (holding that the purpose of statutes is to remedy flaws in the common law as they develop, and to adjust the law to the changes of time and circumstances); Davila-Bardales v. INS, 27 F.3d 1, 5 (1st Cir. 1994) (explaining that agencies have significant freedom to “refine, reformulate, and even reverse” their decisions when changing circumstances exist); Yepes-Prado v. INS, 10 F.3d 1363, 1370 (9th Cir. 1993) (stating that agencies have substantial latitude in shaping their practices to meet changed circumstances); NLRB v. Kostel Corp., 440 F.2d 347, 350 (7th Cir. 1971) (holding that the doctrine of stare decisis does not obligate the NLRB to follow old policies and standards that do not meet changing conditions).

298. See Plyler v. Doe, 457 U.S. 202, 250 (1982) (Burger, C.J., dissenting) (emphasizing the fact that the federal government has already justified the exclusion of illegal immigrants from several welfare programs); Hull, supra note 1, at 410 (stating that the United States restricts illegal aliens from almost every public benefit that it provides lawful residents). See also Rosberg, supra note 92, at 406 (arguing that, like Congress, states should also be able to exclude illegal aliens from benefits so long as the state bases the classification on residence and not on citizenship).

299. 7 C.F.R. § 273.4(a) (1988); Plyler, 457 U.S. at 251 (Burger, C.J., dissenting); WEISSBRODT, supra note 1, at 315-16; Calvo, supra note 16, at 407; Dellios, supra note 16, at 4.


304. See discussion of IRAHearing supra notes 124-49 and accompanying text.

305. Calvo, supra note 16, at 421. See H.R. REP. No. 727, 99th Cong., 2d Sess. 111 (1986) (explaining that Congress did not intend to reward illegal immigrants with those benefits given to citizens and lawful residents); Fein, supra note 242 (stating that excluding illegal immigrants from benefits is consistent with the national interest of combatting illegal immigration).
burdens on states and localities. In terms of the latter objective, the federal government realized that it has exclusive jurisdiction over immigration law and that the states cannot alter that law. Nevertheless, the states must bear the economic and social costs of the federal law if the federal government does not help them preserve the health and welfare of their residents. To conform to these federal objectives, Congress should enable states to regulate illegal immigrant students in public schools. Although a public education is not an assistance program like food stamps and SSI, education is a benefit nonetheless. Despite the fact that illegal immigrants may primarily come to the United States for employment, the sheer number of illegal immigrant students in public schools is evidence enough that their parents value a free public education. Although denying an illegal immigrant student an

306. Calvo, supra note 16, at 421, 424. See Weissbrodt, supra note 1, at 27 (explaining that IRCA disqualified newly legalized aliens from federal welfare benefits for five years to avoid imposing adverse economic effects on the states). The states are affected financially because they must administer the benefits under federally funded plans. Id. at 316.

307. See supra notes 50-55 and accompanying text.


309. Id. In fact, there is a provision in IRCA that permits states to exclude illegal immigrants from financial and medical public assistance programs so long as the state restrictions mirror the federal restrictions established by IRCA. 8 U.S.C. § 1255a(6)(A)(B) (1994). See supra § IV.B.

310. See Plyler v. Doe, 457 U.S. 202, 233 n.2 (1982) (Blackmun, J., concurring) (claiming that education is a benefit); Id. at 237 (Powell, J., concurring) (stating that immigrants may come to the United States illegally because they are attracted to other benefits, in addition to employment); Id. at 249 n.10 (Burger, J., dissenting) who argued:

It blinks reality to maintain that the availability of governmental services such as education plays no role in an alien family's decision to enter, or remain in, this country; certainly, the availability of a free bilingual public education might well influence an alien to bring his children rather than travel alone for better job opportunities. See Fein, supra note 242, at 24 ("Only a handful of stone-hearted parents would smuggle their children into the United States to be greeted by government viciousness."); Livingston, supra note 124, at 623 (noting that a free education is an incentive to immigrate illegally). If a state could deny free education to illegal alien students, that state would be marginally less attractive to potential immigrants. Id.; INS Special Agent interview, supra note 83, at 15-16 (noting that a free education is a benefit). In August of 1993, Governor Pete Wilson sent an open letter to President Clinton asking to end "the insanity" of encouraging illegal immigration in the form of educational and social services. Booth, supra note 7, at A1.

311. See supra note 128 and accompanying text. See also Livingston, supra note 124, at 615 (arguing that a state legislature may deny free public education to illegal aliens and that it is irrelevant that a state law prohibiting employment of illegal immigrants would be more successful at combating illegal immigration).

312. California, for example, educates 400,000 illegal immigrant students. Feldman, supra note 294, at A1; Raine, supra note 262, at A1. In Illinois, 16,821 illegal immigrant students attend public schools. Increasing Costs Hearing, supra note 52, at 5. See Livingston, supra note 124, at 615 (stating that the Plyler statute prohibiting illegal immigrants from receiving a free public education did have some negative effect on the immigration decision); Stein, supra note 295, at 42 (noting that the result in Plyler "has acted as a magnet reinforcing the flow of Mexican immigrants, packing inner-city schools); INS Special Agent interview, supra note 83, at 20 (explaining how
education may be detrimental to the student's future, it is no more drastic than denying a child's family food stamps or AFDC, which may be the only means of subsistence for a child.\textsuperscript{313} Therefore, Congress' exclusion of illegal aliens from these essential welfare programs has a greater impact on the lives of illegal immigrant children than exclusion from public schools.\textsuperscript{314} For this reason, Congress should permit states to conform to federal policy.\textsuperscript{315} Because the federal mandate to educate illegal immigrant students imposes an undue burden on the states and localities, Congress should empower the states to regulate illegal immigrants in public schools based on the same justifications that Congress uses to exclude illegal immigrants from federal welfare benefits.

3. The Compelling State Interest Outweighs the Illegal Immigrant Students' Interest

It is true that excluding illegal immigrant students from public schools would, in effect, punish the students for the actions of their parents.\textsuperscript{316} However, the competing policy interests of the states and the public school systems in relieving themselves of their heavy financial burden outweighs the illegal immigrant students' interest in receiving a free public education.\textsuperscript{317} First, the states have a greater obligation to provide their own citizens and lawful resident students with a public education than they do to provide illegal

excluding illegal immigrant students from school would help decrease illegal immigration).

\textsuperscript{313} See William J. Brennan, Jr., \textit{Reason, Passion, and the Progress of the Law}, 10 Cardozo L. Rev. 3, 21 (1988) (including appellees' brief from Goldberg \textit{v.} Kelly, 397 U.S. 254 (1970), which found that the appellees' entitlement to AFDC was terminated).

After termination, Angela Valez and her four young children were evicted for non-payment of rent and forced to live in one small room of a relative's already crowded apartment. The children had little to eat during the four months it took for the Department to correct its error. Esther Lett and her four children live on the handouts of impoverished neighbors; within two weeks all five required hospital treatment because of the inadequacy of their diet. Soon after, Esther Lett fainted in a welfare center while seeking an emergency food payment of $15 to feed herself and her children for three days. Pearl Frye and her eight children 'had gone hungry,' living on peanut butter and jelly sandwiches and rice supplied by friends who were also dependent on public assistance. . . .

\textit{Id.}


\textsuperscript{315} See \textit{id.} at 225 (explaining that states have power to legislate with respect to illegal immigrants if the state legislation conforms to federal objectives). See also \textit{supra} note 63 and accompanying text.

\textsuperscript{316} See \textit{supra} note 205 and accompanying text.

\textsuperscript{317} See Lichtenberg, \textit{supra} note 184, at 354 (noting the widely held view that the claims of illegal immigrants have less weight than those of citizens or lawful residents); Will, \textit{supra} note 38, at A11 (stating that the combination of federalism and popular government justify Californians' right to decide how to allocate their increasingly scarce resources).
immigrants with such a benefit.\(^{318}\)

Second, the children of the taxpayers are unfairly affected because the quality of their education decreases.\(^{319}\) When schools must educate illegal immigrants, in addition to American citizens and lawful resident students, state education funds are diluted among a larger number of students.\(^{320}\) With more students, a state must hire additional teachers, particularly bilingual ones.\(^{321}\)

\(^{318}\) See Melita Marie Garza, United Front Planned Against a Local Version of Proposition 187, CHI. TRIB., Nov. 23, 1994, at 5 (discussing Representative Phil Crane's support for a Proposition 187 in Illinois). Representative Crane explained that it is not the taxpayers' responsibility to pay for benefits for illegal aliens. Id. See also Will, supra note 38, at A11 (explaining that Proposition 187 concerns how state policy should regard violators of the national law). See supra note 242 and accompanying text.

\(^{319}\) See William Sander, Testing, Testing, 1-2-3, CHI. TRIB., Mar. 8, 1995, \& 1, at 15 (stating that the quality of public education in California has decreased); Jordan, supra note 7, at 17 (noting that the quality of Boston public schools is "miserable"). California ranks 49th in national fourth grade reading tests and 36th on its high school graduation rate. Sander, supra, at 15. Moreover, California SAT scores have decreased by more than 60 points over the past 20 years. Id. See also Daryl Kelley, Student District-Hopping Costs Compton $5 Million, L.A. TIMES, Feb. 24, 1985, \& 9, at 1 (explaining that students are transferring into different school districts by giving false addresses to receive a better education). "[P]arents will sell their souls for quality education." Id. (quoting Los Angeles school superintendent). Between 1981 and 1985, the Lynwood district enrollment jumped from 10,000 to 12,800, reflecting a rapid increase in the Latino population in Los Angeles. Id. See also Sipchen, supra note 9, at E14 (explaining that after more than 600,000 students drop out of American public schools each year, only 5% of those students who complete high school are prepared to do college work).

States with large illegal immigrant populations ranked poorly in the percentage of students who completed high school. See THE UNIVERSAL ALMANAC, supra note 1, at 237 (including the chart "Educational Attainment by State, 1992\(^{-}\)93"). In 1992, California ranked 35th; Texas was 39th; Florida ranked 32d; New York was 36th; and Illinois ranked 28th. Id. In the Jersey City public school system, 55% of the students drop out before graduation. Grube, supra note 2, at 50. Of the 45% who remain in school, only about 40% pass a high school proficiency test required to graduate. Id. Thus, in Jersey City, only 16% of the students earn a diploma per year. Id.

\(^{320}\) Not by coincidence, states with the largest illegal immigrant populations are the same states with the highest enrollments in public schools. See THE UNIVERSAL ALMANAC, supra note 1, at 236 (including the chart "How the States Rank in Public Education, 1992-93\(^{-}\)93"). Those states, however, are far from the top of the list in expenditures per pupil. Id. In the 1992-93 school year, California had the highest student enrollment in the country, but ranked 37th in expenditures per student. Id. Texas had the second highest enrollment, but ranked 38th in expenditures per student. Id. Florida was fourth in enrollment, but 27th in expenditures per student. Id. Illinois ranked fifth in enrollment, but was 31st in expenditures per student. Id. New York was an exception, however. It ranked third in enrollment and fourth in expenditures per student. Id.

However, in 1993, California ranked 28th in expenditures per student. Reardon, supra note 12, at 12. Florida ranked 23d; Illinois ranked 22d; Texas was 25th; and New York was third. Id.

\(^{321}\) Dade County, home of Miami, Florida, spends $200 million to teach English as a second language. Booth, supra note 7, at A1. As of 1993, 60% of Dade county residents were Spanish speaking. Send Back Your Tired, supra note 7, at 26. See Livingston, supra note 124, at 616 n.97 (noting that without illegal alien students, the Plyler school system could save large sums of money by deleting costly special education programs such as bilingual classes). But see Mark Stevens,
because many illegal immigrant students speak little or no English.\textsuperscript{322} School districts must also buy more textbooks, and pay for more school lunches.\textsuperscript{323} However, with limited state budgets, many school districts are forced to sacrifice these essential items.\textsuperscript{324} As a result, the burden shifts to the students because they are crammed into classrooms,\textsuperscript{325} they have a limited number of

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  \item Bilingual Burnout Rampant: Teachers Frustrated By Heavy Workload, \textsc{Denv. Post}, Nov. 14, 1994, at A1 (stating that the Latino Education Coalition in Denver link Hispanic students’ low academic achievement to the poor quality of the bilingual program).

   In Denver, public schools pay a qualified bilingual teacher an extra $500 after one year, and $800 after two years of teaching bilingual classes. \textsc{Stevens}, supra note 321, at A1. However, other school districts in the United States pay bilingual teachers between $2500 and $5000 per year. \textit{Id.}

   As a result, some bilingual teachers in Denver public schools are transferring to regular classrooms because they are tired of doing twice the work for minimal extra wages. \textit{Id.}

   The federal government mandated bilingual education in 1968 under Title VII. \textsc{Nelson}, supra note 1, at 16. By 1988, \textsc{California’s state superintendent of schools reported that 600,000 students were enrolled in bilingual education programs. \textit{Id.} at 5. In the same year, the Select Committee on Education recommended to the Texas state legislature that Spanish become a required subject in public schools. \textit{Id.} at 23. Likewise, an elementary school in Santa Monica, California required its students to learn Spanish even if English was their first language. \textit{Id.}

   According to \textsc{Brent Nelson}, however, if bilingualism is widely accepted, the United States may well face the problems of language division currently experienced in Canada. \textit{Id.} at 16-17. \textit{See also} \textsc{Morris}, supra note 1, at 12-13 (discussing how James Madison feared that immigrant groups who often “cling to their language” would contribute to cultural fragmentation (quoting \textsc{William S. Bernard, American Immigrant Policy: A Reappraisal 61} (1950))). In reaction to the strong bilingual movement, 17 states have passed laws recognizing English as the state’s official language. \textsc{Nelson, supra note 1, at 20. However, Spanish has legal status in New Mexico. \textit{Id.} at 21.

   323. \textsc{Livingston, supra note 124, at 618. In Plyler, Texas stated that the total cost of educating a “needy Mexican child” was $1,740.41, approximately $400 to $500 more than the cost of educating an “average” student. Doe v. Plyler, 458 F. Supp. 569, 577 (E.D. Tex. 1978); Durst, supra note 172, at 435 n.21. This cost included free breakfast, lunch, clothing programs, and bilingual education. \textsc{Plyler, 458 F. Supp. at 577; Durst, supra note 172, at 435 n.21, 437. The federal government spends an annual $4.7 billion to feed 25 million school children at 92,000 schools. \textsc{Carole Sugarman, Let’s Do School Lunch, Wash. Post, Mar. 16, 1994, at E1. See generally Howard Godfrey & Richard M. Conboy, Cost Control In North Carolina Public Schools, Gov’t Fin. Rev., Aug. 1994, at 27 (discussing the various costs of maintaining a public school).

   324. Godfrey & Conboy, supra note 323, at 27; Farrow, supra note 2, at N3. \textit{See} \textsc{Reardon, supra note 12, at 13 (illustrating that teachers have to double as nurses in poor public schools).

   325. \textsc{Grube, supra note 2, at 50. See} \textsc{Hardesty, supra note 2, at 3} (stating that classrooms are overcrowded, teachers are overburdened, and test scores have decreased).
Furthermore, poor schools must also forego other items such as computers and lab equipment.\textsuperscript{329} Certainly, school systems need to protect their financial stability when so much technology is being introduced into society and into the wealthier schools.\textsuperscript{330} For example, Ohio Governor George Voinovich, is planning to wire every classroom in the state for two-way interactive classes, using personal computers equipped with CD-ROM information banks.\textsuperscript{331} Such equipment is costly\textsuperscript{332} and poor, overcrowded schools cannot compete with richer, well-equipped schools.\textsuperscript{333} Thus, it is more likely than not that the academic performance of the students in the overcrowded schools will decrease

\textsuperscript{326} Grube, supra note 2, at 50. See Alan Lupo, \textit{Same Old ‘BPS’ at Boston Schools}, BOSTON GLOBE, Dec. 6, 1992, at 2 (explaining that teachers must frequently work with few supplies, if any). See also Livingston, supra note 124, at 616 n.98. The quality of education varies directly with the amount of money spent on it for basic expenses such as facilities, books, and the number of teachers. \textit{Id.} However, even these expenses eventually reach a peak, at which point diminishing returns in educational quality are encountered. \textit{Id.}

\textsuperscript{327} See Farrow, supra note 2, at N3 (explaining that small classes permit teachers to adapt instruction to a student’s abilities); see also Reardon, supra note 12, at 13 (noting that students must often use classrooms in poor public schools for multiple purposes). For example, students may have to use a library as a classroom and a cafeteria. \textit{Id.}

\textsuperscript{328} Farrow, supra note 2, at N3; Harris, supra note 2, at B5; Reardon, supra note 12, at 12. See Grube, supra note 2, at 50 (explaining that, in New York City, even if students do not have grades to advance to the next grade, only one student may be held back because the classrooms are overcrowded); Livingston, supra note 124, at 616 (noting that denying illegal alien students the right to a free public education might have a beneficial effect on the quality of public education). See supra note 2, 4 and accompanying text.

\textsuperscript{329} Grube, supra note 2, at 50. See Reardon, supra note 12, at 12 (noting that while students in wealthy school districts receive a “lavish” education, including word-processing classes, other districts barely have the essential items to teach); Federal Mandates, supra note 275, at A25 (noting that California could put a computer on every “fifth-grader’s” desk with the more than $1 billion California taxpayers spend to educate illegal immigrant students).

\textsuperscript{330} See Sipchen, supra note 9, at E14 (stating that the United States creates more jobs for “hamburger flippers than nuclear physicists”). \textit{See also Max Jennings, High-Tech Plan a Plus for Ohio Schools,} DAYTON DAILY NEWS, June 12, 1994, at B8 (noting that personal computers are an indispensable tool in the education process); Reardon, supra note 12, at 13 (noting that the wealthier schools have high quality teachers, elaborate science labs, state-of-the-art computers, and better test scores).

\textsuperscript{331} Jennings, supra note 330, at B8.

\textsuperscript{332} The Voinovich plan costs $50 million to wire the classrooms, $45 million to place personal computers into the classrooms of the poorer school districts, and additional money to train the teachers to use the technology. \textit{Id.}

\textsuperscript{333} Reardon, supra note 12, at 12. See Godfrey & Conboy, supra note 323, at 27 (noting that the costs for maintenance contracts and insurance coverage must also be considered when public schools purchase equipment).
because they have less access to such valuable learning tools.\textsuperscript{334}

Because the quality of education is decreasing as a result of overcrowding and limited school budgets, Congress should pass an enabling statute that permits states to prohibit illegal immigrants from enrolling in and attending public schools.\textsuperscript{335} Although the states have the police power to regulate education,\textsuperscript{336} Congress has plenary power to regulate immigration.\textsuperscript{337} Through an enabling statute, Congress should delegate a portion of its immigration authority to the states, thus allowing the states to regulate illegal immigrants in public schools as each state sees fit.\textsuperscript{338} Therefore, the power to police education remains with the states. However they would have the additional approval from Congress to distinguish between legal and illegal immigrant students.

B. Constitutionality of Congressional Action

A federal statute enabling states to regulate illegal immigrants in public schools is constitutional for several reasons. First, Congress has plenary power to regulate immigration.\textsuperscript{339} Therefore, a federal court would give greater deference to a federal statute, as opposed to a state law.\textsuperscript{340} Second, the

\begin{enumerate}
\item Reardon, supra note 12, at 13. See Moseley-Braun, supra note 2, at 22 (explaining that on standardized achievement tests students in poor school facilities score 5.5 percentage points below those in schools in fair condition, and 11 percentage points below those in schools in excellent condition).
\item See Kelley, supra note 319, at 1 ("What we have to do is improve the quality of education . . .") (quoting the superintendent of the Los Angeles county Lynwood school district).
\item KEMERER & WALSH, supra note 184, at 1. Education is a state function because the Constitution does not specifically delegate to Congress the power to regulate education. Id. See U.S. CONST. amend. X, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
\item See supra notes 50-55 and accompanying text.
\item Although education is regulated by the states, the Tenth Amendment does not render Congress powerless to allow states to prohibit illegal immigrants from attending public schools. See New York v. United States, 505 U.S. 144 (1992). In New York, Congress enacted the Low-Level Radioactive Waste Policy Amendment Act of 1985, requiring states to either dispose of radioactive waste produced within their state, or take title to the waste. Id. at 2415. The Supreme Court invalidated the "take title" provision because Congress cannot require the states to legislate. Id. at 2417-18. The Court explained that if an interest exists that is compelling enough to cause Congress to legislate, Congress must do so directly; it may not force the states to legislate. Id. at 2418. Kramer, supra note 180, at 1026 n.125. Because a federal enabling statute permits, but does not require, states to restrict illegal immigrants from enrolling in public schools, such a statute complies with New York.
\item See supra notes 50-55 and accompanying text.
\item See Livingston, supra note 124, at 608, 627 (noting that the Supreme Court has deferred to Congress regarding immigration legislation). See also supra notes 52-55, 193-95, 228 and accompanying text.
\end{enumerate}
political branches of the federal government have the authority to adapt regulations and policies to changing circumstances which clearly exist within illegal immigration. Therefore, a federal court should defer to Congress because the courts are ill-suited to examine such a difficult policy decision.

Third, if a federal court should examine the federal statute despite the policy issue involved, the court should apply the rational basis test because it is a federal immigration statute. Under the rational basis test, the statute need only be rationally related to a legitimate government interest. The federal government, in fact, has a compelling interest in: (1) upholding immigration law; (2) combatting illegal immigration; (3) granting a free public education to those aliens whose residence is authorized by federal immigration law; and (4) relieving the states and public school systems from undue economic burdens caused by the federal government's own ineffectiveness. These interests substantially outweigh an illegal immigrant's interest in receiving a free public education. Furthermore, by allowing states to distinguish between legal and illegal immigrants, the federal statute is a rational means to pursue those government interests. Thus, a federal enabling statute has a rational basis and does not violate the Equal Protection Clause.

C. Constitutionality of a State Statute

After Congress delegates a portion of its immigration authority to the states to regulate illegal immigrants in public schools, a state may then legislate and implement a state statute that precludes illegal immigrant students from enrolling in and attending public schools. Although the Plyler holding appears detrimental to such a statute, procedurally a state could implement such a regulation because Congress would have expressly given the states the authority to do so. In Plyler, Texas argued that section 21.031 was consistent with Congress' disapproval of illegal immigrants residing in the United States and with immigration law in general. The Court stated that while it "must be

341. See supra notes 283, 297 and accompanying text.
342. See supra notes 290-95 and accompanying text.
343. See Livingston, supra note 124, at 601 (stating that judicial restraint is especially necessary because of the political, social, and economic elements involved).
344. See supra notes 52-55, 193-95 and accompanying text. See also Livingston, supra note 124, at 627 (explaining that when Congress expressly mandates a rule, it is presumed that the rule is rationally based).
345. See supra note 194 and accompanying text.
346. Livingston, supra note 124, at 630.
347. See Plyler v. Doe, 457 U.S. 202, 226 (1982) (noting that state authority regarding the regulation of illegal immigrants might be augmented if the undocumented status was "coupled with some articulable federal policy"); Livingston, supra note 124, at 601 n.20.
attentive to congressional policy," it could find no congressional policy scheme that "might weigh significantly in arriving at an equal protection balance" regarding the states' authority to prohibit illegal immigrants from attending public schools.\footnote{Id. at 224-25. See Will, supra note 38, at A11 (stating that Justice Brennan was inattentive).} Enacting a federal enabling statute, however, would provide the necessary congressional policy scheme, and would give "significant weight" to validate a state immigration statute.\footnote{See Livingston, supra note 124, at 626 (explaining that the Plyler Court noted that state regulation of illegal immigration coupled with express congressional authorization may receive a more deferential standard of review).}

Furthermore, due to changed circumstances in illegal immigration and the overcrowding in public schools, states with large illegal immigrant populations currently do have a substantial interest in relieving themselves of the significant economic burden that the federal government and Plyler have placed upon them. Thus, if a court were to examine a state statute that restricted illegal immigrant students from attending public schools after receiving the federal authority to do so, the state classification would withstand heightened judicial scrutiny.\footnote{But see Livingston, supra note 124, at 603-13 (arguing that the intermediate standard of review is inappropriate for the following reasons: illegal aliens lack the requisite class characteristics; education is not a fundamental right; public schools are in the realm of state control and therefore are entitled to greater judicial deference; illegal aliens are not similarly situated with citizens; and, the innocence of illegal alien children does not require special judicial attention).} States with large illegal immigrant populations have compelling interests in: (1) alleviating a substantial economic burden within public school systems; (2) granting a free public education to those aliens whose residence is authorized by federal immigration law; and (3) maintaining a high-quality public education. These interests substantially outweigh an illegal immigrant's interest in receiving a free public education. Therefore, such a statute does not violate the Equal Protection Clause and would survive heightened judicial scrutiny because the classification substantially furthers important state interests.\footnote{See also Mathews v. Diaz, 426 U.S. 67 (1976) (holding that it is permissible to distinguish between aliens and citizens).}

D. Conclusion

If states are to provide a high quality education to students, it is essential that Congress consider the fact that illegal immigrant students are placing a substantial burden on public schools.\footnote{See supra notes 2, 4, 319-34 and accompanying text.} In doing so, Congress needs to reflect upon the continual growth of the illegal immigrant population in the United States, and the effect that such growth has on public schools and the states, two
entities which are currently incapable of regulating immigration. Therefore, Congress should recognize that it is the only body capable of granting relief to the states.

Therefore, Congress should empower the states to regulate illegal immigration with respect to education. The following section proposes a federal enabling statute so that Congress may delegate a portion of its immigration authority to the states. In addition, the section offers a model state statute to demonstrate how a state may implement Congress' delegation.

VI. PROPOSED FEDERAL ENABLING STATUTE AND STATE MODEL STATUTE

Thus far, no federal law has addressed the issue of illegal immigrant students attending public schools. Although various presidential administrations have taken different views of the Texas statute invalidated in Plyler v. Doe, Congress has permitted the Supreme Court decision to stand. Thirteen years after the Court's decision, however, illegal immigration continues to burden several states and public schools. Congress can no longer ignore the ill effects that illegal immigration and Plyler have on public school systems. Therefore, it is time for Congress to act.

To release states from the economic burden of the federal education mandate, Congress should enact a federal statute that enables states to regulate the enrollment and attendance of illegal immigrant students in public schools. By implementing such a statute, Congress would grant authority to the states to restrict illegal immigrant students from receiving a free public education. Cloaked with this authority, a state may then create legislation to address any illegal immigration problem a state may have within its own schools.

As a state legislates to restrict illegal immigrant students from attending public schools, a state legislature must clearly establish who is entitled to enroll in public schools, and who is not; how a school official can distinguish between those students who may enroll and those who may not, in a non-discriminatory manner; and how such a restriction will be enforced. The proposed state statute recommends that states require proof of legal residency within the United States before students may enroll in school. If students cannot prove their legal status,

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354. See supra note 57 and accompanying text.
355. See supra notes 50-55 and accompanying text.
356. See supra note 212 and accompanying text.
357. See supra note 212 and accompanying text.
358. See supra notes 2, 4, 249-73, 319-34 and accompanying text.
359. See Federal Mandates, supra note 275, at A25 (noting that Governor Pete Wilson argued that the states need "dramatic" congressional action that frees states from federal immigrant mandates).
this statute suggests that the school superintendent report undocumented students’ names to the INS so that the INS can confirm or deny their illegal status, or indicate that the INS has given express permission for students to reside in the United States. Although a state cannot require the INS, a federal agency, to act, it is critical that a state require school districts to cooperate with the INS by reporting to the agency the names of undocumented students. If school officials only prohibit undocumented students from enrolling, but do not report their names to the INS, the students will be out of school, yet remain unlawfully in the country. A likely result would be an increase in gang activity and juvenile crime.\textsuperscript{360} Instead, school officials must complete the process and report the names to the INS so that the illegal immigrants may be deported, as the law requires.\textsuperscript{361} Finally, to enforce the restriction, this statute suggests that the state withdraw a percentage of its annual education funds from school districts for each violation of the statute. Realizing that school officials may be reluctant to ask students for documentation or may be disheartened to turn away an undocumented student, the purpose of removing funds is to encourage school officials to comply with this statute.\textsuperscript{362}

**Federal Enabling Statute**

**Chapter 1: Definitions**

As used in this statute, the following definitions apply:

(1) *Illegal immigrant*: Any person physically residing within the United States territory who:

(a) is not a citizen, national, or lawfully admitted permanent resident of the United States, or is unauthorized under federal law to be present in the United States; and

(b) has either lawfully entered the United States with a visa and violated the provisions of the visa, or unlawfully entered the United States.

(2) *Public School*: Any government funded educational institution, including, but not limited to, elementary schools, secondary schools, trade schools, apprentice programs, special education programs, and distributive

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\textsuperscript{360} INS Special Agent interview, *supra* note 83, at 28 (explaining that students who are not in school are prime candidates to become gang members).


\textsuperscript{362} See Livingston, *supra* note 124, at 623 (explaining that it is in the financial interest of local school districts to comply with such legislation or they will have less money to spend per student if they continue to freely educate illegal immigrant students).
education.

(3) State: The District of Columbia, Puerto Rico, Guam, and the Virgin Islands, in addition to the fifty (50) territories of the United States.

(4) Student: Any person who attends a public school.

Chapter 2: Empowering the States to Regulate Illegal Immigrant Students in Public Schools

The states of this Nation shall have the federal statutory authority to regulate the enrollment and attendance of, including the restriction or prohibition of, illegal immigrant students in public schools.

Comment: This statute recognizes that while states are unable to regulate immigration generally, the states and public school systems with large illegal immigrant populations are in dire need of federal relief from the adverse effects of illegal immigration. Although the Supreme Court held in *Plyler v. Doe* that illegal immigrant students have a right to receive a free public education, the economic and political circumstances have changed since the case began in 1977. The illegal immigration population in the United States has reached a critical level and it is adversely affecting the quality of public education. The unusually high cost of educating illegal immigrant students and the overcrowded classrooms are indications that the states, not the federal government, are the proper entities to regulate illegal immigrants in public schools.

STATE MODEL STATUTE GOVERNING ILLEGAL IMMIGRANTS IN PUBLIC SCHOOLS

Chapter 1: Definitions

As used in this statute, the following definitions apply:

(1) *Alien*: Any person not a citizen or national of the United States.

(2) *Certificate of Naturalization*: A document issued by the Immigration and Naturalization Service to naturalized United States citizens.

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363. See *supra* notes 56-63 and accompanying text.
364. See *supra* notes 2, 4, 7, 249-73, 319-34 and accompanying text.
365. See *supra* notes 290-95 and accompanying text.
366. See *supra* notes 1, 4, 7, 319-34 and accompanying text.
(3) Certificate of United States Citizenship: A document issued by the Immigration and Naturalization Service to individuals who derived citizenship through parental naturalization; acquired citizenship at birth abroad through a United States parent or parents; or who acquired citizenship through application by United States citizen adoptive parents.

(4) Citizen: Any person who was born within the United States, born to an American citizen, or naturalized.

(5) Illegal Immigrant: Any person physically within the United States territory who:

(a) is not a citizen, national or lawfully admitted permanent resident of the United States, or is unauthorized under federal law to be present in the United States; and

(b) has either lawfully entered the United States with a visa and violated the provisions of the visa, or unlawfully entered the United States.

(6) Immigration and Naturalization Service: The Department of Justice agency charged with enforcing immigration law, including the processing of lawful immigrants and the deportation of excludable immigrants.

(7) Lawfully Admitted Permanent Resident: The status of having been lawfully accorded the privileges of residing permanently in the United States as an immigrant in accordance with the immigration laws.

(8) Public School: Any government funded educational institution, including, but not limited to, elementary schools, secondary schools, trade schools, apprentice programs, special education programs, and distributive education programs.

(9) Student: Any person who attends a public school.

(10) Superintendent: The chief executive officer of a school system.

(11) Unlawful Entry: Any entrance of an alien into the United States either through a port or across a border, from a foreign port or place, without a visa or express permission from the Immigration and Naturalization Service.

(12) Verification System: The Immigration and Naturalization Service's computerized listing of aliens and their immigration status.
(13) Visa: A document issued by the Immigration and Naturalization Service that permits immigrants to reside in the United States for a temporary period of time.

Chapter 2: Exclusion of Illegal Immigrants from Public Schools.367

(1) No public school shall admit, enroll, or allow the attendance of any student who is not a:

(a) United States citizen;
(b) lawfully admitted permanent resident; or
(c) person authorized under federal law to be present in the United States.

(2) Each school district shall require every public school within the district to verify the legal status of each student upon enrollment into the school.

(3) To verify legal status, every student must present a valid:

(a) Original or certified copy of a birth certificate issued by a state, county, or municipal authority bearing an official seal; or
(b) Certificate of Naturalization; or
(c) Certificate of United States Citizenship; or
(d) Green Card; or
(e) Social Security card; or
(f) Visa issued by the Immigration and Naturalization Service.

Comment: This chapter recognizes the ever-increasing number of illegal immigrant students in public schools,368 and their adverse effect on the quality of public education.369 While some states, such as North Dakota,370 may have no intention to restrict illegal immigrants from attending public schools because they do not have an illegal immigration problem, other states like California and Texas would likely prohibit illegal immigrants from enrolling in

367. See Debbie Graves, Tuition Break OK'd for Mexican Citizens, AUSTIN AM.-STATESMAN, May 31, 1987, at B2 (explaining that illegal immigrants receive in-state tuition). In addition to excluding illegal immigrant students from public schools, the author also suggests that illegal immigrants be barred from attending public colleges and universities in a similar fashion. However, discussion of such a proposition is beyond the scope of this note.
368. See supra notes 293-95 and accompanying text.
369. See supra notes 319-34 and accompanying text.
370. The United States Census Bureau estimates that there are zero illegal immigrants in North Dakota. Fernandez interview, supra note 1.
public schools. This portion of the statute is illustrative of how a state, choosing to exclude illegal immigrant students, may clearly establish who is entitled to enroll in public schools, and who is restricted. Furthermore, this provision establishes how a school official may distinguish between those students who may enroll and those who may not. Because a school official could discriminate against students by asking only those students who "look" foreign or who "sound" foreign for documentation, it is critical that a school official verify the legal status of every student who enrolls in school.

Chapter 3: The Immigration and Naturalization Service

(1) If any student cannot show, within ten (10) work days from the date of enrollment, that he or she meets one of the three criteria referred to in chapter 2, section (1) above, the superintendent of the school district shall report, by mail or fax, the student’s name to its Immigration and Naturalization Service district office within five (5) workdays from the student’s tenth (10th) and final verification day.

(2) Upon receiving a student’s name from a superintendent, the Immigration and Naturalization Service may verify the status of the student with the Immigration and Naturalization Service verification system.

(3) After verifying the student’s immigration status, the Immigration and Naturalization Service may notify the school superintendent of the student’s official status within ten (10) workdays of receiving the name.

(a) If the Immigration and Naturalization Service determines that a student meets one of the three requirements in chapter 2, section (1) above, the superintendent shall enroll the student in school.
(b) If the Immigration and Naturalization Service determines that a student does not meet one of the three requirements in chapter 2, section (1) above, the superintendent shall not admit, or allow the attendance of the student in school.

Comment: This chapter recognizes that students may forget to bring to school the proper documentation, or may be unaware that such documentation is required to enroll in school. Thus, the ten days permit students to return to school with the documents at a later date.

More importantly, this chapter realizes that schools must work in

371. California and Texas have already tried to regulate illegal immigrant students in public schools. See supra § IV.A. and B.2.
372. See supra note 143 and accompanying text.

https://scholar.valpo.edu/vulr/vol30/iss2/11
conjunction with the Immigration and Naturalization Service (INS) to restrict students residing here unlawfully from receiving a free public education. If school officials simply preclude undocumented students from attending school, but do not notify the INS of their unlawful presence, many students will be out on the streets, vulnerable to gangs. On the other hand, if the INS is aware of these students' unlawful presence, the INS may deport them under federal immigration law.

Finally, this chapter permits those students who are undergoing a change in immigration status to enroll in school. Because such students may not have the proper documentation while the INS processes their applications, the INS may notify a school of such pending status after the agency examines its records.

Chapter 4: Notifying the Parent or Guardian

(1) If the Immigration and Naturalization Service verifies that a student does not comply with one of the three requirements in chapter 2, section (1) above, the superintendent shall notify, in writing, and in the appropriate language, the parent, guardian, or adult with whom the student lives, that the student may no longer attend a public school unless the immigration status of the student changes to comply with the requirements provided in chapter 2, section (1) above, within ninety (90) calendar days from the date of notice. The student may attend school during the ninety (90) days if, and only if, the student has applied for a change of status to comply with the requirement provided in chapter 2, section (1) above.

Comment: This chapter, recognizing that illegal immigrant students should be prohibited from attending public schools, requires schools to notify the adult responsible for the student so that the adult is aware of the student’s restricted attendance. Further, this chapter realizes that illegal immigrant students may not be living with their parents, or even with guardians. Thus, the language is meant to be broad to encompass any adult who may be responsible for illegal alien students.

This chapter additionally emphasizes the distinction between who is entitled to enroll in public schools, and who is restricted. While illegal immigrant students may not enroll in or attend public schools, those students who have applied for a change of immigration status may attend school because they have begun the process of becoming a student who complies with chapter 2, section (1) above.

Chapter 5: Violation of this Statute

§ 1 (1) Any student who fails to prove his or her legal status upon enrolling in
public school shall be refused admittance by a superintendent for failing to obey this statute.

(2) Any school official who fails to request from an enrolling student documentation regarding a student's legal status, according to chapter 2, sections (2) and (3) of this statute, commits a violation of this statute.

(3) Any superintendent who fails to report to the Immigration and Naturalization Service a name of a student unable to prove his or her legal status, according to chapter 2, sections (1) and (3) and chapter 3, section (1) of this statute, commits a violation of this statute.

(4) Any superintendent who admits a student who is unable to prove his or her legal status, and whom the Immigration and Naturalization Service has verified as being an illegal immigrant, violates chapter 3, section (3)(b) of this statute.

§ 2. For each violation of this statute that a school commits per year, the state shall have the power to withdraw from the school one percent (1%) of its annual state education funds, not to exceed ten percent (10%) in one year.

Comment: This chapter encourages both students and school officials to comply with the state law. Recognizing that school officials may be reluctant to ask students for documents and unwilling to prohibit students from attending school, 373 the withdrawal of funds is intended as an enforcement mechanism of this statute.

VII. CONCLUSION

Illegal immigration has become a serious problem in the United States because the federal government has been ineffective at enforcing immigration law. In the meantime, Plyler v. Doe has forced the states to pay for such ineffectiveness by requiring states to educate illegal immigrant students. However, states with large illegal immigrant populations can no longer afford to educate these students. More importantly, the quality of public education in these states is deteriorating. As a result, some states have independently tried to free themselves and the public school systems from this substantial economic burden, but their efforts have been frustrated. Thus, it is time for Congress to relieve these states and public school systems from economic ruin by enabling

373. See Gail Diane Cox, California Law on Aliens Spurs Disobedience, Nat’l L.J., Dec. 12, 1994, at A6 (explaining that school officials have no intention of complying with Proposition 187 by excluding students from school); INS Special Agent interview, supra note 83, at 16-17 (offering doubt that teachers would turn in the names of suspected illegal immigrant students).
the states to regulate the enrollment and attendance of illegal immigrant students in public schools. Through delegating a portion of its immigration power to the states, Congress can constitutionally grant the needed relief to these states and public school systems so that they may spend their limited funds to rebuild their schools and increase the quality of public education.

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