Constitutional Law - Equal Protection - A Texas Statute Which Withholds State Funds for the Education of Illegal Alien Children and Permits Local School Districts to Deny Enrollment to Such Children Does Not Further a Substantial State Interest and Therefore Violates the Equal Protection Clause of the Fourteenth Amendment

Michael P. Gallagher

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Civil Rights and Discrimination Commons, Constitutional Law Commons, and the Immigration Law Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol28/iss1/7

This Note is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
CONSTITUTIONAL LAW—EQUAL PROTECTION—A TEXAS STATUTE WHICH WITHHOLDS STATE FUNDS FOR THE EDUCATION OF ILLEGAL ALIEN CHILDREN AND PERMITS LOCAL SCHOOL DISTRICTS TO DENY ENROLLMENT TO SUCH CHILDREN DOES NOT FURTHER A SUBSTANTIAL STATE INTEREST AND THEREFORE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Plyler v. Doe (U.S. 1982)

In 1975, the Texas legislature amended its education laws to withhold from local school districts state funds for the education of children who were not legally admitted into the United States.\(^1\) This amendment also authorized local school districts to deny enrollment in the public schools to such children.\(^2\) On July 21, 1977, acting pursuant to the revised education statute, the Board of Trustees of the Tyler Inde-

---

1. Plyler v. Doe, 102 S. Ct. 2382, 2389 (1982). Section 21.031 of the Texas Educational Code provides in pertinent part as follows:
   (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 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.

2. Section 21.031(c) of the Texas Educational Code provides as follows:
   (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.

TEX. EDUC. CODE ANN. § 21.031 (Vernon 1975). Before its amendment in 1975, § 21.031 provided for state funding and free admission to public schools for all children. \(1\) Id. (prior to amendment). Texas is the only state which has a statute designed to deny illegal alien or "undocumented" children free public education. Wall St. J., June 16, 1982, at 24, col. 2. Children who are not legally admitted into the country are referred to as "undocumented children" because they have neither official documentation of their legal presence in this country, nor any prospects of successfully securing such documentation. See Doe v. Plyler, 458 F. Supp. 569, 574 (E.D. Tex. 1978), aff'd, 628 F.2d 448 (5th Cir. 1980), aff'd, 102 S. Ct. 2382 (1982).
RECENT DEVELOPMENTS

3. See 458 F. Supp. at 574. Tyler ISD is a public school district located in the northeastern part of Texas and is managed by a Board of Trustees. 1871 U.S.C. § 1978, under which the plaintiffs must establish that the defendant's actions were done under color of state law, and that these actions deprived the plaintiffs of a right, privilege, or immunity secured by the Constitution or laws of the United States. See 1871 U.S.C. § 1978 (Supp. III 1979).

4. Id. at 571-72. The Board's policy provided for enrollment of "all qualified students who are citizens of the United States or legally admitted aliens, and who are residents of this school district, fee of tuition charge." Illegal alien children could enroll only "by payment of the full tuition fee." Id. at 572.

5. Id. at 571-72. Suit was brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983, under which the plaintiff must establish that the defendant's actions were done under color of state law, and that these actions deprived the plaintiffs of a right, privilege, or immunity secured by the Constitution or laws of the United States. See 42 U.S.C. § 1983 (Supp. III 1979).

6. 458 F. Supp. at 571 n.1. The effect of the amended statute was a denial of education, for none of the named plaintiff alien children were able to produce documentation of legal status, and none of their parents could afford to pay the $1,000 tuition. Id. at 574-75. Suit was brought in the United States District Court for the Eastern District of Texas. Id. at 572. The minor plaintiffs were represented in their parents as guardians ad litem. Id. at 571 n.1. On September 9, 1977, the State of Texas' oral motion to intervene as a party defendant was granted. Id. at 572. Before trial, the court ordered that the action be maintained as a class action on behalf of all "undocumented school-aged children of Mexican origin residing within the Tyler ISD." Id. at 571 n.1.


8. 458 F. Supp. at 572. The plaintiffs claimed that the Texas statute violated their equal protection rights by denying them the free public education accorded to other children. For the text of the fourteenth amendment, see note 16 supra. The plaintiffs also claimed that the Texas statute was preempted by the federal Immigration and Nationality Act. 458 F. Supp. at 572 (citing 8 U.S.C. § 1101 (1970)).

9. 458 F. Supp. at 571. Injunctive relief was sought pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1978). The plaintiffs filed a motion for a preliminary injunction with their complaint. 458 F. Supp. at 572. The court granted the request for preliminary relief, finding that the plaintiffs had shown a probability of success on the merits of the equal protection issue, and that they would suffer irreparable harm if interim relief were denied. Id.
ment in public schools. The defendants argued in response that the fourteenth amendment’s guarantee of equal protection did not extend to illegal aliens, and, alternatively, that even if it did, the statute constituted economic and social regulation, reviewable only under the most deferential level of equal protection scrutiny. The district court granted the injunction, holding that the equal protection clause applied to illegal aliens and that the Texas statute was a violation of that clause. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed on the equal protection issue.

10. For a discussion of this requirement, see notes 3-4 and accompanying text supra.

11. 458 F. Supp. at 579.

12. Id. The defendants argued that § 21.031 should be reviewed under the deferential rational basis test. Id. For a discussion of the rational basis test, see notes 24-29 and accompanying text infra. The defendants maintained that the purpose of the statute was to enable school districts to use public educational funds “to provide high quality education for United States citizens and lawful residents, instead of sharing it with people who have no right to be in the state at all.” 458 F. Supp. at 579. Additionally, they argued, the statute was designed to protect local educational funds should there be an influx of illegal aliens into Tyler. Id. at 575. As such, the defendants maintained, § 21.031 “easily sati[se]d the long-established rational basis test.” Id. at 579.

On appeal to the Fifth Circuit, the state argued further that § 21.031 was justified because no “significant gain” would be derived from educating these children to offset the “decrease in the quality of education for citizens and legal aliens,” and because of concern that illegal alien children would spread diseases among the other children. 628 F.2d at 460.

13. 458 F. Supp. at 593. The district court characterized the statute as imposing a total deprivation of education. Id. at 580. Noting that the Supreme Court had not articulated the appropriate standard of review in such a case, the court determined that the following four elements nevertheless occasioned “a close examination” of § 21.031: 1) the benefit denied was education; 2) charging tuition to undocumented children constituted wealth discrimination; 3) the statute penalized children who were without fault; and 4) illegal aliens may be considered a suspect class when a “state acts independently of the federal exclusionary purposes, accepts the presence of the illegal aliens, and then subjects them to discriminatory laws.” See id. at 580-84. Despite this “close examination” by the district court, it nevertheless found it unnecessary to invalidate the law on that basis “since it appear[ed] that defendants have not demonstrated a rational basis for the state law or the local school policy.” Id. at 585.

In addition the district court held that § 21.031 was preempted by federal law, since it “defeats the clear implications of federal laws covering both illegal aliens and [the] education of disadvantaged children.” Id. at 592. First, the court found that the federal government had little interest in imposing punitive measures on illegal aliens, other than as a deterrent. Secondly, the court stated that a denial of education would be “among the additional penalties Congress would be least likely to tolerate.” Id.

14. 628 F.2d at 454-61. The Fifth Circuit agreed with the district court that illegal aliens were entitled to the equal protection of the laws. Id. at 454. This court also found no need to determine what standard of review to apply to § 21.031, since it found the statute failed even to meet the “mere rational basis standard.” Id. at 458. In addition to rejecting the state’s fiscal conservation and deference to the legislature arguments, the circuit court also
The Supreme Court of the United States affirmed, 15 holding that a state statute that withholds state funds for the education of illegal alien children and permits local school districts to deny enrollment to such children does not further a substantial state interest and therefore violates the equal protection clause of the fourteenth amendment. *Plyler v. Doe*, 102 S. Ct. 2382 (1982).

The fourteenth amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." 16 The Supreme Court has held that this rejected the arguments that §21.031 was justified because educating illegal aliens would not result in a gain to the state and that illegal alien children would contaminate other school children with communicable diseases. *Id.* at 460.

However, the circuit court reversed the district court on the preemption issue finding that §21.031 did not conflict with any federal policy. *Id.* at 451-54.

15. Justice Brennan authored the majority opinion and was joined by Justices Marshall, Blackmun, Powell, and Stevens. Justices Marshall, Blackmun, and Powell each filed a concurring opinion as well. Chief Justice Burger filed a dissent in which Justices White, Rehnquist, and O'Connor joined.

*Plyler v. Doe* was heard by the Court in conjunction with Texas v. Certain Named and Unnamed Undocumented Alien Children. 102 S. Ct. 2382 (1982). The companion case challenged the constitutionality of the same revised Texas statute and was a consolidation of various suits brought in the United States District Courts for the Southern, Western, and Northern Districts of Texas, during the years 1978 and 1979. *Id.* at 2390-91. In July of 1980, the District Court for the Southern District of Texas held that §21.031 violated the equal protection clause. 501 F. Supp. 544 (S.D. Tex. 1980). The district court in this case reviewed §21.031 under heightened scrutiny, stating "the absolute deprivation of education should trigger strict judicial scrutiny, particularly when the absolute deprivation is the result of [a] complete inability to pay for the desired benefit." *Id.* at 582. In holding that the statute failed to pass this review, the district court rejected the state's concern for fiscal integrity, stated there was no showing that the exclusion of illegal alien children was necessary to improve education in the state, and held that there was no showing that §21.031 actually furthered any state interest. *Id.* at 582-83. Prior to hearing the appeal from this decision, the Fifth Circuit, in *Doe v. Plyler*, affirmed the invalidation of §21.031 on equal protection grounds. 628 F.2d 448 (5th Cir. 1980). For a discussion of the Fifth Circuit's opinion in *Doe v. Plyler*, see note 14 supra. Relying on that opinion, the Court of Appeals summarily affirmed the district court's ruling and the Supreme Court noted probable jurisdiction and consolidated the cases. 102 S. Ct. at 2390.

16. U.S. Const. amend. XIV, §1. Section 1 of the fourteenth amendment provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.* (emphasis added).
protection extends to legal aliens as well as citizens.\textsuperscript{17} While the equal protection clause does not require that all state laws apply equally to all persons, it does require that persons similarly situated be treated in a similar manner.\textsuperscript{18} In pursuing this requirement of equal protection of the laws, the Supreme Court has applied three levels of review in ruling on the validity of challenged statutes.\textsuperscript{19} These are the rational

\begin{itemize}
  \item \textbf{17.} See, e.g., Graham v. Richardson, 403 U.S. 365 (1971). The Graham Court stated,
  \begin{quote}
    It has long been settled, and it is not disputed here, that the term “person” in this context encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside.
  \end{quote}
  \begin{it}
    Id. See also Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (fourteenth amendment applies “to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality”).
  \end{it}
  
  The term “person” in the due process clause of the fifth and fourteenth amendments, has been interpreted by the Court as guaranteeing due process of law to both legal and illegal aliens. See Mathews v. Diaz, 426 U.S. 67 (1976) (due process clause of fifth and fourteenth amendments apply even to those whose presence in the United States is unlawful, involuntary or transitory); Shaughnessy v. Mezei, 345 U.S. 206 (1953) (legal and illegal aliens may not be expelled without due process). See generally Note, The Equal Treatment of Aliens: Preemption or Equal Protection?, 31 Stan. L. Rev. 1069, 1080 (1979).
  
  \item \textbf{18.} Compare Tigner v. Texas, 310 U.S. 141 (1940) (things different in fact need not be treated in law as though the same) with F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) (“classification[s] must be reasonable, . . . and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation”).
  
basis test,\textsuperscript{20} strict scrutiny,\textsuperscript{21} and so-called intermediate scrutiny.\textsuperscript{22} The initial, and perhaps determinative question in an equal protection case is the standard of review to be applied; this depends upon the class of persons involved and the interests affected by the legislation at issue.\textsuperscript{23}

When a challenged statute or regulation is not based upon a "suspect" classification,\textsuperscript{24} and does not affect "fundamental rights,"\textsuperscript{25} but only "economic" interests,\textsuperscript{26} the Court employs the rational basis test. The rational basis test, the most deferential standard of review, affords the challenged legislation a presumption of constitutionality\textsuperscript{27} and requires only that the law have a legitimate purpose\textsuperscript{28} and a rational relationship to the fulfillment of that purpose.\textsuperscript{29}


20. For a discussion of the rational basis test, see notes 24-29 and accompanying text infra.

21. For a discussion of strict scrutiny review, see notes 30-35 and accompanying text infra.

22. For a discussion of "middle-tier," intermediate scrutiny, see notes 56-66 and accompanying text infra.


24. For a discussion of suspect classifications, see note 34 infra.

25. For a discussion of fundamental rights or interests, see note 33 infra.

26. Interests that are considered economic interests, and which are thus evaluated according to the rational basis standard, include the right to engage in a profession and the right to sell merchandise. See New Orleans v. Dukes, 427 U.S. 297 (1976) (sell merchandise); McGowan v. Maryland, 366 U.S. 420 (1961) (sell merchandise); Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (profession).


29. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (deference given to legislators in choosing means; only requirement is that the means chosen be a rational way to achieve aim). The rational basis test is the most deferential form of review given by the Court in equal protection analysis. See generally J. NOWAK, R. ROTUNDA & J. YOUNG supra note 19, at 524. The Court will not require the legislative body to articulate the purposes behind the legislation; the Court will be satisfied if it can hypothesize a legitimate purpose. See, e.g., United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980); Flemming v. Nestor, 363 U.S. 603, 612 (1960). Under the rational basis test, "[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

It has been suggested that there are actually two strands of rational basis review: one involving almost no review, the Williamson v. Lee Optical standard, and one involving somewhat more, or "rational basis with bite." See Gunther, Newer Equal Protection, supra note 19, at 18-20. Justice
In contrast, the most stringent standard of review, strict scrutiny, carries with it a presumption of unconstitutionality and requires that the challenged legislation be carefully tailored, neither overinclusive nor underinclusive, and necessary to the achievement of a compelling state interest. Strict scrutiny is applied to classifications which affect a "fundamental right" or "interest," or which are based upon a "suspect"

Brennan has criticized the Court for its application of the rational basis test, claiming that in effect it "virtually immunizes social and economic legislative classifications from judicial review." United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 183 (1980) (Brennan, J., dissenting). In his view the rational basis test "is not a toothless one, . . . and will not be satisfied by flimsy or implausible justifications for the legislative classification, proffered after the fact by Government attorneys." Id. at 184 (Brennan, J., dissenting). One commentator has suggested that the new bite in the rational basis test may be the result of discontent with the rigid two-tiered standard of review adhered to by some of the justices, and its accompanying predictable outcomes. See G. Gunther, CONSTITUTIONAL LAW supra note 19, at 671-74; Gunther, Newer Equal Protection, supra note 19, at 17-18. As a result, there is more of a demand that the classification further legitimate purposes, and there have been sporadic hints that the Court might require legislatures to articulate the purposes underlying the law. G. Gunther, CONSTITUTIONAL LAW at 674 n.8. See also McGinnis v. Royster, 410 U.S. 263 (1973). In McGinnis, Justice Powell, speaking for the Court, asked "whether the challenged distinction rationally furthers some legitimate, articulated state purpose." Id. at 270 (emphasis added). In reversing the invalidation of a New York law which denied certain prisoners "good-time" credit toward parole for time spent in presentence confinement, Justice Powell claimed the Court had "supplied no imaginary basis or purpose for this statutory scheme." Id. at 277. But see United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (no requirement that legislature articulate its purposes).

30. See Comment, supra note 19, at 560 n.18. As a result of this presumption, the burden of proof shifts to the state. Id.

31. Legislation is overinclusive when it affects a group larger than that which is necessary to achieve its purpose. See Tussman and tenBroek, supra note 19 at 351. It follows that for such legislation there would be a less detrimental alternative means of achieving the desired purpose. Id. at 351-52. Legislation is underinclusive when it affects a group smaller than that which is necessary to achieve its purpose. Id. at 348. For a discussion of the overinclusive and underinclusive concepts in equal protection analysis, and of the relationship between legislative classifications and their purpose, see Tussman and tenBroek, supra note 19, at 344-53.


33. See Gunther, Newer Equal Protection, supra note 19, at 8. Various rights have been recognized by the Court as fundamental in the equal protection context. See, e.g., Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (first amendment right); Dunn v. Blumstein, 405 U.S. 330 (1972) (right to participate in elections); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel); Sherbert v. Verner, 374 U.S. 398 (1963) (right to the free
classification, such as race or national origin. The Supreme Court's prior decisions offer some guidance on whether classifications based upon alienage, or affecting education, are deserving of strict scrutiny.

In San Antonio Independent School District v. Rodriguez, the Court declined the opportunity to treat education as a fundamental exercise of religion; Bates v. City of Little Rock, 361 U.S. 516 (1960) (right of association); Griffin v. Illinois, 351 U.S. 12 (1956) (right to a criminal appeal); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreation). The terms fundamental rights and fundamental interests were used interchangeably by the Warren Court, which extended strict scrutiny review to interests for which there was no express constitutional provision. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (right to vote in local elections); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote in state elections); Grifin v. Illinois, 351 U.S. 12 (1956) (right to appeal criminal conviction). See generally Bice, supra note 19, at 695-97. However the present Court has made it clear that it will limit the fundamental rights brand of strict scrutiny in equal protection analysis to those rights which are explicitly or implicitly guaranteed by the Constitution. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). For a further discussion of Rodriguez, see notes 36-39 and accompanying text infra. Prior to Rodriguez, the Court had given hints that the list of fundamental rights was not going to grow. See, e.g., Lindsey v. Normet, 405 U.S. 56 (1972) (housing not a fundamental interest); Richardson v. Belcher, 404 U.S. 78 (1971) (allocations of welfare benefits not subject to strict scrutiny). Gunther refers to this as the "thus far and no further" approach of the Burger Court. See Gunther, Newer Equal Protection, supra note 19, at 12-16.

34. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944). The term "suspect" originated in Korematsu, in which the Court stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." Id. at 216. The strict treatment given by the Court to suspect classifications has its foundations in footnote 4 of Justice Stone's majority opinion in United States v. Carolene Prods. Co., 304 U.S. 144, 152-55 n.4 (1938). In Carolene Products, the Court deferred to Congress, and upheld a federal prohibition against the interstate shipment of "filled milk," under the rational basis test. Id. at 154. However, Justice Stone was careful to point out that, in determining the proper scope of judicial intervention in this case, the Court had no need to inquire inter alia "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Id. at 154 n.4 (emphasis added). See generally G. GUNther, CONSTITUTIONAL LAW, supra note 19, at 541-43.


36. 411 U.S. 1 (1973). Rodriguez involved a challenge to the Texas system of financing public education primarily through local property taxes, and the
right because it found that education was not “explicitly or implicitly guaranteed by the Constitution.”

The Court therefore reviewed this classification under the deferential standard of “whether it rationally further[ed] some legitimate, articulated state purpose.”

The Rodriguez Court, however, noted that it was not faced with an absolute denial of education, but rather with alleged relative differences in the quality of education among Texas school districts.

resultant disparity of school funds in each district depending on local property wealth. Id. at 4-17. Plaintiffs argued that the Court should subject these laws to strict scrutiny because they affected education, a fundamental interest, and were based on wealth, a suspect classification. Id. at 17.

For a description of the rational basis test, see notes 24-29 and accompanying text supra.

Justice Marshall, in a dissenting opinion, argued that education was a fundamental interest. Id. at 70-133 (Marshall, J., dissenting). Justice Marshall reasoned that the determination of whether particular interests, not explicitly mentioned in the Constitution, were fundamental should depend on “the extent to which constitutionally guaranteed rights are dependent on [those particular] interests not mentioned in the Constitution.” Id. at 102 (Marshall, J., dissenting). Marshall therefore concluded that education was a fundamental interest, entitled to heightened scrutiny, because of “the close relationship between education and some of our most basic constitutional values.” Id. at 111 (Marshall, J., dissenting). Justice Marshall also took issue with the majority’s assertion that equal protection challenges fall into discrete categories which determine the appropriate level of review. Id. at 98 (Marshall, J., dissenting). For a discussion of the Court’s traditional standards of review in equal protection cases, see notes 19-35 & 56-66 and accompanying text supra. Instead, he asserted that in the past the Court had actually applied a “sliding-scale” in determining the appropriate level of review, based upon “the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.” 411 U.S. at 98-99 (Marshall, J., dissenting).

Justice Marshall originally expressed dissatisfaction with the Court’s rigid two-tiered approach in Dandridge v. Williams, 397 U.S. 471 (1970). In a dissenting opinion, he described a three-pronged test for determining the proper level of review, based on “the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.” Id. at 520-21 (Marshall, J., dissenting).
RECENT DEVELOPMENTS

The Court, in *Graham v. Richardson*, 40 held that alienage is a suspect classification, 41 but alienage classifications have received varied treatment by the Court since that time. 42 *Graham* dealt with Arizona and Pennsylvania statutes which conditioned eligibility for welfare benefits upon citizenship, or upon residency in the United States for a specified number of years. 43 The Court held that aliens were a suspect class, "for whom . . . heightened judicial solicitude is appropriate." 44 The Court rejected the states' argument that they had a "special public interest" in making their limited resources available to its citizens rather than to aliens, 46 and therefore invalidated the statutes. 48

Two years later, however, in *Sugarman v. Dougall*, 47 the Court gave notice that it was not going to subject all alienage classifications to strict scrutiny. 48 Although in *Dougall* the Court did engage in a heightened review, 49 the Court stated "our scrutiny will not be so demanding where

41. For a discussion of *Graham*, see notes 43-46 and accompanying text infra.
42. For a further discussion of the Court's treatment of alienage classifications in equal protection analysis, see notes 43-55 and accompanying text infra. See generally Comment, *supra* note 19, at 569-74.
43. 403 U.S. at 367-70. The Arizona statute limited assistance to those who were United States citizens or had resided in the United States for a total of 15 years. *Id.* at 367. The Pennsylvania statute limited assistance to those needy persons who qualified for federally supported programs or who were United States citizens. *Id.* at 368.
44. *Id.* at 372. The *Graham* Court stated that "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." *Id.* (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152-53, n.A. (1938)). For a discussion of footnote 4 in *Carolene Products*, see note 34 *supra*. This rationale has been criticized by one commentator:

[Strict scrutiny of alienage [classifications] must fairly be said to rest on a judicially created notion that aliens may not be disadvantaged because of their status as noncitizens. In light of the constitutional provisions which specify citizenship as a requirement for eligibility, it is difficult to say that the text and history of the Constitution require that classifications based on citizenship be treated as suspect.

Bice, *supra* note 19, at 695.
45. 403 U.S. at 372-76. The Court stated that concern for fiscal integrity was not compelling enough to justify the challenged classification. *Id.* at 374-75 (citing Shapiro v. Thompson, 394 U.S. 618 (1969)). For a discussion of compelling state interests, see note 52 *supra*.
46. 403 U.S. at 372-76. For a discussion of the statutes involved in *Graham*, see note 43 and accompanying text *supra*.
47. 418 U.S. 634 (1974). *Dougall* involved a challenge to a New York Civil Service Law that prevented non-citizens from holding competitive positions in the state civil service. *Id.* at 635.
48. *Id.* at 648. For a discussion of the development of the so-called "Dougall exception," see notes 49-50 and accompanying text *infra*. For a review of strict scrutiny as applied to alienage classifications, see notes 40-46 and accompanying text *supra*.
49. 418 U.S. at 642. The Court stated "classifications based on alienage are 'subject to close judicial scrutiny.'" *Id.* (citing *Graham* v. Richardson,
we deal with matters resting firmly within a State's constitutional prerogatives."

Based on this exception to strict scrutiny for alienage classifications, known as the Dougall or political function exception, the Court has used the rational basis test to uphold state legislation barring non-citizens from employment as state troopers, public school

403 U.S. §65 (1971); Carolee Prods. Co., 304 U.S. 144, 152-55 n.4 (1938)).

However, the Dougall Court required that the State's interest be substantial, not compelling. Id. This change in language indicates that the level of the Court's review, although heightened, was an intermediate one, and not the strict standard called for in Graham. See generally Tribe, supra note 19, at 1089. For a discussion of the Court's intermediate standard of review in equal protection analysis, see notes 56-66 and accompanying text infra. For a discussion of the level of review in Graham, see notes 40-46 and accompanying text supra. The Dougall court recognized "a state's interest in establishing its own form of government, . . . in limiting participation in that government to those who are within "the basic conception of a political community," and in defining its own political community. 413 U.S. at 642-43 (citing Dunn v. Blumstein, 405 U.S. 330, 334 (1972)). Although the Dougall Court found this interest a substantial one, it held that the state law was not "precisely drawn in light of [its] acknowledged purpose." Id. at 645. The Court thereby found the overinclusive statute unconstitutional. Id. at 646. For a discussion of overinclusiveness, see note 31 supra.

50. 413 U.S. at 648. In the final section of its opinion, the Court stated: [W]e [do not] hold that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office. . . .

Such power inheres in the State by virtue of its obligation . . . "to preserve the basic conception of a political community." . . . [T]his power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.

Id. at 647 (citations omitted). The Court concluded with the prophecy that "[a] restriction on the employment of noncitizens, narrowly confined, could have particular relevance to this important state responsibility, for alienage itself is a factor that reasonably could be employed in defining 'political community.'" Id. at 649.

Subsequent cases continued to treat alienage classifications as inherently suspect and thus subject to heightened scrutiny. See, e.g., Nyquist v. Mauclet, 432 U.S. 1 (1977) (invalidating law which granted aid for higher education only to citizens and resident aliens who were or would be applying for citizenship); Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) (invalidating Puerto Rican statute which permitted only United States citizens to practice as civil engineers); In re Griffiths, 413 U.S. 717 (1973) (invalidating state court regulation which prevented non-citizens from taking state bar examination). In Nyquist, the Court stated that the challenged law must further "legitimate and substantial" state interests and that the law must be necessary and precisely drawn. 432 U.S. at 7 (quoting Examining Bd. v. Flores de Otero, 426 U.S. 572, 605 (1976) and citing In re Griffiths, 413 U.S. 717, 721-22 (1973)).

51. For a discussion of the Dougall exception, see notes 49-50 and accompanying text supra.

52. See Foley v. Connellie, 435 U.S. 291 (1978). In Foley, the Court upheld a New York statute that allowed only United States citizens to become members of the state police force. Id. at 299-300. See N.Y. Exec. Law §215(3) (McKinney 1972 & Supp. 1978). The Court began its analysis by stating that "we have never suggested that such legislation is inherently in-
teachers,\textsuperscript{53} and probation officers.\textsuperscript{54} The Court has also indicated that because of federal power in the immigration area, federal legislation impacting aliens as a class will be subject to a lesser standard of review than will identical state legislation.\textsuperscript{55}

valid, nor have we held that all limitations on aliens are suspect." 435 U.S. at 204 (citing Sugarman v. Dougall, 413 U.S. 634 (1973)). For a discussion of Dougall, see notes 47-50 and accompanying text supra. The Foley Court held that in matters concerning a state's political process, which are "firmly within a state's constitutional prerogative," the state need only show that the classification bore a rational relation to the "interest sought to be protected." 435 U.S. at 296 (citing Sugarman v. Dougall, 413 U.S. 634, 645 (1973)). For a discussion of the rational basis test, see notes 24-29 and accompanying text supra. In reviewing cases such as this, the Court stated it must examine the right or interest which is being classified, "to determine whether it involves discretionary decision making, or execution of policy, which substantially affects members of the political community." 435 U.S. at 296. The Court concluded that "[i]n short, it would be as anomalous to conclude that citizens may be subject to the broad discretionary powers of non-citizen police officers as it would be to say that judicial officers and jurors with power to judge citizens can be aliens," and, therefore, upheld the statute. \textit{Id.} at 299-300.

53. See Ambach v. Norwich, 441 U.S. 68 (1979). In \textit{Ambach}, the Court used the rational basis test to uphold a New York statute which limited the issuance of teaching certificates to citizens or to non-citizens who had manifested an intention to apply for citizenship. \textit{Id.} at 81. For a discussion of the rational basis test, see notes 24-29 and accompanying text supra. The \textit{Ambach} Court likened public education to the governmental function of police recognized in Foley, stating that both functions fulfill a "fundamental obligation of government to its constituency," and concluded that public school teachers performed a task that went "to the heart of representative government." 441 U.S. at 75-76. In so concluding the Court emphasized the role of public education "in the preparation of individuals for participation as citizens," and the "degree of responsibility and discretion teachers possess in fulfilling that role." \textit{Id.} at 75. Thus, public school teachers were held to qualify as participating directly in the governmental process.

54. See Cabell v. Chavez-Salido, 102 S. Ct. 735, 739 (1982). In \textit{Cabell} the Court upheld a law which required probation officers to be U.S. citizens, stating that "although citizenship is not a relevant ground for the distribution of economic benefits, it is a relevant ground for determining membership in the political community." \textit{Id.}

55. See, e.g., Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) ("overriding national interests may provide a justification for a citizenship requirement in the federal civil service [though] an identical requirement may not be enforced by a State."); Mathews v. Díaz, 426 U.S. 67 (1976) (conditioning participation in federal medicare programs on an alien's admission to the United States as a permanent resident, and continuous residence in this country for five years, upheld on basis of broad congressional "power over naturalization and immigration.").

There is some confusion as to whether the Court's alienage cases have been decided on equal protection or preemption grounds. See Note, \textit{The Equal Treatment of Aliens}, supra note 18, 1069-91. This commentator argues that despite the Court's language to the contrary, these cases were actually decided on preemption grounds. \textit{Id.} at 1070. The argument is that "as the federal government, through the immigration scheme, 'invites' resident aliens to enter the country as permanent residents free of restrictions—on an equality of legal privileges with all citizens—it is not for the states to alter the terms of immigration with new burdens." \textit{Id.} (footnote omitted). \textit{Foley} and \textit{Ambach} are
The third standard of review applied by the Court, intermediate scrutiny, requires that a challenged statute be "substantially related" to "important governmental objectives." This standard has been applied in equal protection cases, when the interests affected are considered important, but not fundamental, and the classification in the statute is sensitive, but not suspect. The leading case applying the intermediate standard of review is Craig v. Boren. The Craig Court dealt consistent with this theory; "since the federal government does not admit resident aliens to the political community—admission does not confer citizenship—the states may exclude resident aliens from state political offices and functions without offending federal power." Id. (emphasis supplied). This commentator also states that "since the federal government does not admit illegal or non-immigrant aliens to the country with any assurance of equal treatment, the states have greater freedom to restrict these classes of aliens without infringing on federal regulation of immigration." Id. If state classifications based on illegal alien status are to be upheld, this commentator suggests that it must be on a preemption basis, for they could not survive strict scrutiny. Id. at 1081. See also DeCanas v. Bica, 424 U.S. 551 (1976). In DeCanas, the Court dealt with a California statute that prohibited the knowing employment of illegal aliens. Id. at 352. The Court concluded that since the subject matter of the statute involved the state police power, and since there was no contrary congressional intent, the exclusive federal power to regulate immigration did not require that this statute be preempted. Id. at 354-65.

56. See, e.g., Craig v. Boren, 429 U.S. 190 (1976). For a discussion of Craig, see notes 59-62 and accompanying text infra. See generally Bice, supra note 19 at 702-05. This intermediate test differs from the rational basis test in that the interests furthered must be important, rather than simply legitimate, and the classification must be substantially related to those interests, as opposed to just rationally related. See, e.g., Craig v. Boren, 429 U.S. 190, 197 (1976). Although the classification must be substantially related to an important state interest, it need not be the least detrimental alternative. See Bice, supra note 19, at 702-03. Further, though the government's objectives must be important, they need not be compelling. Id. at 703. One commentator describes this "new" test as a "balancing analysis, one which weighs the importance of governmental goals and the extent to which they are advanced against the burdens engendered by the classification." Id. For a further discussion of intermediate standard of review, see notes 57-66 and accompanying text infra.


58. See, e.g., Trimble v. Gordon, 430 U.S. 762 (1977) (illegitimacy); Reed v. Reed, 404 U.S. 71 (1971) (gender). See also L. Tribe, supra note 19, at 1090; Fox, supra note 19, at 533. In some cases, the Court has used an intermediate level of review when an important interest of a sensitive class has been infringed upon. See, e.g., United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (food stamps denied to households containing unrelated members); Stanley v. Illinois, 405 U.S. 645 (1972) (child custody denied to unwed fathers). See also L. Tribe, supra note 19, at 1090-91, n.10.

59. 429 U.S. 190 (1976). For a further discussion of Craig, see notes 60-62 and accompanying text infra. Craig is generally recognized and cited as the leading intermediate scrutiny case. See Bice, supra note 19, at 702-05.
with a gender-based classification in an Oklahoma statute which prohibited the sale of non-intoxicating 3.2% beer to males under the age of twenty-one, while allowing such sales to females over eighteen years of age. In striking down the statute, the Court recognized the state's important objective, traffic safety, but held that the statute was not substantially related to that purpose.

An intermediate standard of review has also recently been applied to classifications based on illegitimacy. In Lalli v. Lalli, the most

60. 429 U.S. at 191-92. In earlier years, the Court applied the rational basis test to equal protection challenges based on gender classifications. See, e.g., Goesart v. Cleary, 335 U.S. 464 (1948) (deference given to legislature in gender-based legislation). Then the Court shifted its stance, and began to scrutinize such statutes more closely. See, e.g., Reed v. Reed, 404 U.S. 71 (1971) (rational basis test used, but gender-based statute invalidated). Next, the Court shifted its stance even further, and indicated that it would apply strict judicial scrutiny to sex classifications. See Frontiero v. Richardson, 411 U.S. 677, 688 (1973) ("[w]e can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."). However, the Court retreated from the Frontiero position in Craig v. Boren, and appears to have settled upon an intermediate level of scrutiny in gender classification cases. See L. Tribe, supra note 19, at 1063-66. For a further discussion of Craig, see notes 61-62 and accompanying text infra.

61. 429 U.S. at 191-92. Reviewing the statute, the Court stated that "to withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of these objectives." Id. at 197 (emphasis added).

62. Id. at 199-204. The Court was skeptical of the statistical evidence advanced by the state, but even accepting it as true, stated that "if maleness is to serve as a proxy for drinking and driving, a correlation of 2% [of males in the 18 to 20-year-old age group, arrested for driving while intoxicated] must be considered an unduly tenuous 'fit.'" Id. at 201-02. The Court further pointed out that because the statute in question only prohibited the sale of 3.2% beer to 18 to 20-year-old males, "and not their drinking the beverage once acquired (even after purchase by their 18-20-year-old female companions), the relationship between gender and traffic safety becomes far too tenuous." Id. at 204 (emphasis added).


63. See L. Tribe, supra note 19, at 1057-60, 1089. In its treatment of classifications based on illegitimacy, the Court has been both unpredictable in its results, and inarticulate as to the degree of scrutiny it has employed. See G. Gunther, Constitutional Law, supra note 19, at 897-98. In the early illegitimacy cases, the Court purported to apply the rational basis test. However, the varying outcomes of the cases indicate that varying degrees of scrutiny were actually employed. Id. Levy v. Louisiana, 391 U.S. 68 (1968), dealt with a law which denied to unacknowledged illegitimate children the right to recovery for the wrongful death of a parent. The Court stated that the rational basis test was appropriate, but nevertheless emphasized its sensitivity to invidious classifications and invalidated the law. Id. at 71-72. Labine v. Vincent, 401 U.S. 532 (1971), involved a law which excluded acknowledged illegitimate children from sharing in the distribution of the parent's estate with legitimate children. The Court applied minimal review and upheld the
recent in this line of cases, the Court stated that classifications based on illegitimacy must be "substantially related to permissible state interests," but nevertheless upheld the challenged statute.

Against this background, the Supreme Court analyzed whether the challenged Texas statute violated the equal protection clause. The Court began its analysis by holding for the first time that illegal aliens are persons within the meaning of the equal protection clause, and are thus entitled to its guarantees. Relying on prior rulings which held that illegal aliens were persons entitled to the protection of due process, the Court concluded that both the due process and equal protection law. See id. at 535-40. In Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), a state workmen's compensation law which deprived illegitimate children from recovery for the death of their father was struck down with the Court applying a stricter scrutiny similar to that used in Levy. Id. at 167-76. Mathews v. Lucas, 427 U.S. 495 (1976), dealt with a provision of the Social Security Act which worked to the detriment of some illegitimates. Although the Court acknowledged that illegitimates were without fault with respect to their status and that the Court's review was not "toothless," this provision was upheld. Id. at 503-16. Finally, Trimble v. Gordon, 430 U.S. 762 (1977), involved a law which barred illegitimate children from inheriting from a parent. The Court stated that, although classifications based on illegitimacy do not receive strict scrutiny, the review should not be "toothless," and invalidated the law. Id. at 767-76.


65. Id. at 265.

66. Id. at 275-76. In Lalli, the challenged legislation was a New York statute that conditioned the disposition of a father's estate to his dependents, on the dependents' legitimacy. Id. at 261. The Court found that the statute was substantially related to the State's "substantial" interest in maintaining the orderly disposition of estates. Id. at 275-76.

67. For a discussion of the challenged statute, see notes 1-2 and accompanying text supra.

68. 102 S. Ct. 2382. Although the plaintiffs also continued to argue that § 21.031 was preempted by federal law, the Court stated it had no need to reach this issue, in light of its holding on the equal protection issue. Id. at 2391 n.8. For a discussion of the Court's holding, see notes 69-94 and accompanying text infra. Nevertheless, the majority did treat this issue, in response to one of the arguments made by the State. For a discussion thereof, see notes 85-86 and accompanying text infra.

69. 102 S. Ct. at 2391. The Court rejected the State's argument that the words "within its jurisdiction" following "person" excluded illegal aliens from the protection of the equal protection clause. Id. For the language of the clause, see note 16 supra. The Court responded that "[n]either our cases nor the logic of the Fourteenth Amendment supports that constricting construction of the phrase 'within its jurisdiction.'" 102 S. Ct. at 2392. On this point, all nine Justices agreed. See id. at 2408 (Burger, C.J., dissenting).

70. 102 S. Ct. 2391-92 (citing Mathews v. Diaz, 426 U.S. 67, 72 (1976); Shaughnessy v. Merri, 345 U.S. 206, 212 (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 555, 369 (1886)). For a further discussion of the Court's treatment of the term "person," see note 71 and accompanying text infra.
clauses were meant to apply to the same classes of persons—those within a state's boundaries.\(^71\)

The Court then faced the question of what standard of equal protection review to apply to the Texas law.\(^72\) Initially, the Court sought to determine whether the plaintiffs in this case constituted a suspect class.\(^73\) Although acknowledging that illegal aliens comprise an "underclass" in our society,\(^74\) the Court pointed out that their status was a result of their own voluntary illegal action, which could not be considered a "constitutional irrelevancy."\(^75\) Thus, the Plyler Court rejected

\(^{71}\) 102 S. Ct. at 2992. The Court concluded that both the due process clause and the equal protection clause were intended "to protect an identical class of persons, and to reach every exercise of State authority." Id. The Court stated that "within its jurisdiction" simply refers to the fact that a state can only afford equal protection of its laws where those laws operate. Id. at 2393 (quoting Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 350 (1938)). The Court rejected the State's notion that due process "is somehow of greater stature than 'equal protection.'" Id. at 2393. The Court also referred to the legislative debate on § 1 of the fourteenth amendment, noting that "it appears from those debates that Congress, by using the phrase 'person within its jurisdiction,' sought expressly to ensure that the equal protection of the laws was provided to the alien population." Id. at 2393 (citing remarks of Rep. Bingham and Sen. Howard, CONG. GLOBE, 39th Cong., 1st Sess. 1053, 1090, & 2766 (1865)).

\(^{72}\) 102 S. Ct. at 2395. The Court stated that although "most forms of state action" need only bear a "fair relationship to a legitimate public purpose, . . . classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right' . . . [must be] precisely tailored to serve a compelling governmental interest." Id. at 2394-95 (footnotes omitted). Furthermore, the Court stated:

[Cl]ertain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.

Id. at 2395 (citing Craig v. Boren, 429 U.S. 190 (1976); Lalli v. Lalli, 439 U.S. 259 (1978)). For a discussion of Craig and Lalli and the different standards of review applied to equal protection challenges by the Court, see notes 19-35 & 56-66 and accompanying text supra.

\(^{73}\) 102 S. Ct. 2395-97. For a discussion of suspect classes in equal protection analysis, see note 34 supra.

\(^{74}\) 102 S. Ct. at 2395. The Court cited the failure to enforce immigration laws and the failure to prevent the employment of illegal aliens, as reasons for the creation of this underclass, which is "encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents." Id. The Court stated that this resulted in "difficult problems for a Nation that prides itself on adherence to principles of equality under the law." Id. at 2396.

\(^{75}\) Id. at 2396 n.19. The Court noted that, unlike other suspect classes, entry into this class is both voluntary and a crime. Id. (citing DeCanas v. Bica, 424 U.S. 351 (1976)). For a discussion of DeCanas v. Bica, see note 55 supra.
the plaintiffs' claim that illegal aliens constitute a suspect class. However, the Court stated, illegal alien children "are special members of the underclass," because "legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."

Turning to the fundamental interest strand of equal protection scrutiny, Justice Brennan, relying on San Antonio Independent School District v. Rodriguez, stated that "education was not a 'right' granted to individuals by the Constitution." However, he cautioned that "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." The Court carefully examined the pivotal role of education in our society, and the detrimental effects to this class of plaintiffs and on the nation in general that would be occasioned by a denial of education. These factors, combined with

76. 102 S. Ct. at 2396 n.19, 2398.

77. Id. at 2396. The Court stated the children were special because they could "affect neither their parents' conduct nor their own status." Id. (citing Trimble v. Gordon, 430 U.S. 762, 770 (1977)). The Court emphasized that the Texas statute imposed its "discriminatory burden" upon children who, like illegitimate children, were placed in a classification without fault of their own. Id. at 2397. For a discussion of Trimble and the Court's analysis of illegitimacy classifications in equal protection analysis, see notes 63-66 and accompanying text supra.

78. 102 S. Ct. at 2396 (citing Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972)). As a result, the Court stated that it had difficulty perceiving a rational justification for punishing these children "for their presence" in the country, yet this was "precisely the effect" of the Texas statute. Id. at 2397.

79. For a discussion of Rodriguez, see notes 9-39 and accompanying text supra.

80. 102 S. Ct. at 2397. Justice Brennan noted that since education is not a right guaranteed by the Constitution, it cannot be considered fundamental for equal protection analysis. Id. at 2398. For a discussion of fundamental rights, see note 33 supra.

81. 102 S. Ct. at 2397. The Court went on to state that "[b]oth the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction." Id.

82. Id. at 2397-98. The majority stressed its belief that education is vital to the maintenance of the democratic system and to effective participation in the system by its citizens. Id. (citing Ambach v. Norwich, 441 U.S. 68, 76 (1979); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Abington School Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan J., concurring); Meyer v. Nebraska, 262 U.S. 390, 400 (1923)). In addition, the majority further noted the handicapping effect of a lack of education upon an individual, and "the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." 102 S. Ct. at 2397. The Court stated that a denial of education also afforded the equal protection clause by "presenting unreasonable obstacles to advancement on the basis of individual merit." Id. The Court concluded that "education is perhaps the most important function of state and local governments." Id. at 2398 (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)). Thus, the majority viewed education to be an important, though not a fundamental right. Id. For discussions of fundamental and important rights in equal protection analysis, see notes 33 & 57 supra.
the special status of these plaintiffs, led the Court to adopt a heightened level of review; the Texas statute would be upheld only if it furthered "some substantial goal of the State." 

In reviewing the challenged statute under this test, the Plyler Court first rejected the argument of the State that the illegality of the plaintiffs' entry into this country established "a sufficient rational basis" for denying educational benefits. The state argued that its education law was in harmony with federal policy in the treatment of illegal aliens, but the Court found that it was not. Setting aside this argument, the Court discerned "three colorable state interests" that might arguably be advanced by the legislation. First, the Court stated that the statute could not be supported by an assertion that it protected the state from an influx of illegal immigrants because there was no evidence presented which showed that illegal aliens actually imposed a substantial

83. 102 S. Ct. at 2396-98. For a discussion of the special status of these plaintiffs, see notes 77-78 and accompanying text supra.

84. 102 S. Ct. at 2398. For the majority's discussion of the different levels of scrutiny possible in equal protection cases, see note 72 supra. For a review of the standards generally used by the Court in this context, see notes 19-35 & 56-66 and accompanying text supra.

85. 102 S. Ct. at 2398-99. In a footnote, the majority conceded that the State's argument would have been virtually unanswerable if the "guarantee of equal protection was available only to those upon whom Congress affirmatively granted its benefit." Id. at 2398 n.21. Having found that it was not, the Court determined whether Congress' disapproval of the presence of these children in the United States aided the state in the defense of its statute. Id. at 2398-99.

86. Id. at 2398-99. The Court indicated that a state's power to act with respect to illegal aliens was limited to situations in which "such action mirrors federal objectives and furthers a legitimate state goal." Id. at 2399 (citing DeCanas v. Bica, 424 U.S. 351 (1976)). The Court stated that Congress had made it possible to deport illegal aliens and to grant them relief from deportation through legal alien status or citizenship. Id. However, the Court was "reluctant to impute to Congress the intention to withhold from these children, so long as they are present in this country through no fault of their own, access to a basic education." Id. For a discussion of the doctrine of preemption as applied to alienage classifications, see note 55 supra.

In addition, the Court likewise rejected the state's argument that the statute furthered fiscal conservation of the state's resources for lawful residents. 102 S. Ct. at 2400. The majority stated that "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." Id. (citing Graham v. Richardson, 403 U.S. 365, 374-75 (1971). For a discussion of Graham and state interests that are not considered compelling for the purposes of equal protection analysis, see note 92 supra.

87. 102 S. Ct. at 2400. For the Court's treatment of these three interests, see notes 88-92 and accompanying text infra.

88. 102 S. Ct. at 2400. The Court conceded that a state might, in certain circumstances have a legitimate interest in protecting itself from the "potentially harsh economic effects of sudden shifts of population." However, such interests must conform with Congressional intent. Id. at n.23 (citing DeCanas v. Bica, 424 U.S. 351, 354-56 (1976)).
burden on the state's economy. The Court reasoned further that, even if this were the case, charging tuition to illegal alien children was an ineffective means to carry out this purpose. Secondly, the Court rejected the argument that these children were properly singled out for exclusion because of the extra costs and burdens they impose on the educational system. Finally, the Court similarly rejected the notion that illegal alien children were appropriate for exclusion because their unlawful status made them less likely than other children to remain within the state or to put their education to productive use within the state. The Court thus concluded that to deny to this "discrete group of innocent children" the public educational opportunities available to other children in the state was not justified by any substantial state interest, and that the challenged statute, therefore, violated the equal protection clause.

Justice Marshall, in a concurrence, stated that he joined the opinion of the Court. "without in any way retreating" from his assertion in his Rodriguez dissent that education is a fundamental interest. In

89. 102 S. Ct. at 2401. The Court noted that, to the contrary, illegal aliens pay taxes and contribute their labor to the local economy, while usually underutilizing public services. Id.

90. Id. The Court agreed with the findings of the lower courts, that illegal aliens enter the United States seeking work, not to get a free public education for their children, and that the unavailability of education would be ineffective in curtailing the entry of undocumented aliens. Id. at 2401 n.24. For a discussion of the district court and circuit court opinions, see notes 13-14 and accompanying text supra.

91. 102 S. Ct. at 2401. The Court noted that there was no evidence in the record that the exclusion of these children would be "likely to improve the overall quality of education in the state." Id. (citing Plyler v. Doe, 458 F. Supp. at 577). Further, even if there was such evidence presented, the Court stated that "the State must support its selection of this group as the appropriate target for exclusion. In terms of educational cost and need, however, undocumented children are 'basically indistinguishable' from legally resident alien children." Id. (citing Plyler v. Doe, 458 F. Supp. at 589).

92. 102 S. Ct. at 2401. The Court noted that the state had no guarantee that any child would use his education productively within state borders, and that, in any event, many of these children will remain inside this country, some even becoming citizens of the United States. Id. at 2401-02.

93. Id. at 2402.

94. Id. The Court concluded as follows: It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.

Id. The Supreme Court thus affirmed the judgment of the Court of Appeals.

95. 102 S. Ct. at 2402 (Marshall, J., concurring).

96. Id. For a discussion of Justice Marshall's dissent in Rodriguez, see note 99 supra.
addition, he continued to recommend that the Court do away with its "rigidified approach to equal protection analysis" in favor of a "sliding scale" approach that would allow for different levels of judicial scrutiny, depending upon the importance of the interest affected, and the "invidiousness" of the classification.98

Justice Blackmun wrote separately to discuss the special nature of the interest involved—education.99 While noting that he continued to agree with the rule in Rodriguez that fundamental interests are those "explicitly or implicitly guaranteed by the Constitution,"100 Justice Blackmun asserted that this rule would not satisfactorily settle every fundamental rights issue arising under the equal protection clause.101 He likened the right to education to the right to vote,102 which has been afforded stringent constitutional protection by the Court, stating that a complete denial of education must be justified by "more than a rational basis."103 Justice Blackmun therefore concluded that the Texas


99. 102 S. Ct. at 2402 (Blackmun, J., concurring).

100. Id. at 2402 (Blackmun, J., concurring) (quoting Rodriguez, 411 U.S. at 33-34). For a discussion of Rodriguez, see notes 36-39 and accompanying text supra.

101. 102 S. Ct. at 2403 (Blackmun, J., concurring). Blackmun maintained that his position was consistent with Rodriguez, stating that Rodriguez did not hold that there are no meaningful distinctions to be made "among the multitude of social and political interests regulated by the States," but rather that "Rodriguez implicitly acknowledged that certain interests, though not constitutionally guaranteed, must be accorded a special place in equal protection analysis." Id.

102. Id. Justice Blackmun noted that, like the right to education, the right to vote is not specifically enumerated in the Constitution. Id. See note 33 supra. He stated that, nevertheless, a denial of the right to vote relegates an individual to "second-class social status," just as a denial of an education similarly places an individual at a "permanent political disadvantage." 102 S. Ct. at 2404 (Blackmun, J., concurring). Therefore, the denial of education, like the denial of the right to vote, "creates class distinctions of a type fundamentally inconsistent" with the purposes of the equal protection clause. Id.

103. 102 S. Ct. at 2403 (Blackmun, J., concurring) (citing Dunn v. Blumstein, 405 U.S. 330 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966)). For a review of those fundamental rights and interests protected by the Court, which are not explicitly guaranteed by the constitution, see note 33 supra.

In addition, Justice Blackmun noted that in Rodriguez the Court "reserved judgment on the constitutionality of a state system that 'occasioned an absolute denial of educational opportunities to any of its children.'" 102 S. Ct. at 2404
statute was “unconstitutional as well as unwise.” 104

Justice Powell also joined the Court, and wrote a concurring opinion, in which he admonished the federal government for its poor control over immigration,106 but stated nonetheless that these illegal alien children “should not be left on the streets uneducated.” 106 Justice Powell emphasized that the use of heightened scrutiny was proper in cases such as this, in which the affected parties were classified on the basis of a characteristic over which they had no control.107 He concluded that the Texas statute bore “no substantial relation to any substantial state interest” and must, therefore, be overturned.108

(Blackmun, J., concurring). For a discussion of this aspect of Rodriguez, see note 39 supra. He chose not to label education a fundamental right, but stated in a footnote that: “[s]ince the statute fails to survive [the majority’s] level of scrutiny . . . there is no need to determine whether a more probing level of review would be appropriate.” 102 S. Ct. at 2404 n.3 (Blackmun, J., concurring).

Justice Blackmun also emphasized the preemption issue, noting the inconsistency between the Texas statute’s absolute ban on education and the fact that the statute affected “children who will in fact, and who may well be entitled to, remain in the United States.” Id. at 2405 (Blackmun, J., concurring).

104. 102 S. Ct. at 2405 (Blackmun, J., concurring).
105. Id. at 2405-08 (Powell, J., concurring). Justice Powell criticized Congress for failing to provide “effective leadership in dealing with this problem.” Id. at 2405 (Powell, J., concurring) (footnote omitted). As a result, he expressed sympathy for the “exasperation of responsible citizens and government authorities in Texas and other states similarly situated. Their responsibility, if any, for the influx of aliens is slight compared to that imposed by the Constitution on the federal government.” Id. at 2407 (Powell, J., concurring) (footnote omitted). Justice Powell further suggested that the federal government be held responsible for the added costs incurred in educating these children, stating that “[s]o long as the ease of entry remains inviting, and the power to deport is exercised infrequently by the federal government, the additional expense of admitting these children to public schools might fairly be shared by the federal and state governments.” Id. at 2407-08 (Powell, J., concurring).

106. Id. at 2406 (Powell, J., concurring). Justice Powell stated that despite Texas’ conceded problem with illegal immigration, “it can hardly be argued rationally that anyone benefits from the creation within our borders of a subclass of illiterate persons many of whom will remain in the State, adding to the problems and costs of both State and National Governments attendant upon unemployment, welfare and crime.” Id. at 2408 (Powell, J., concurring).

107. Id. at 2406 (Powell, J., concurring). Justice Powell stated, as follows:
The classification at issue deprives a group of children of the opportunity for education afforded all other children simply because they have been assigned a legal status due to a violation of law by their parents. These children thus have been singled out for a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment.

Id. (emphasis added). However, Justice Powell emphasized that he agreed with the Court’s holding, that strict scrutiny was not appropriate in cases which did not involve a “fundamental constitutional right or a suspect classification.” Id. at n.2 (Powell, J., concurring).

108. Id. at 2406-07 (Powell, J., concurring).
A strong dissent, written by Chief Justice Burger, criticized the majority for overstepping the Court's constitutional bounds and departing from settled constitutional principles in an attempt to "make amends for the default of others." The dissent accused the majority of taking a "result-oriented" approach and creating a "custom-tailored" theory of review which "applies only when illegal alien children are deprived of public education." Chief Justice Burger stated that neither the lack of culpability on the part of the children nor the importance of education were sufficient to warrant heightened scrutiny of this statute. The dissent would have required only that the Texas statute bear "a rational relationship to a legitimate state purpose," and found that the statute should, on that basis, be upheld.

109. *Id.* at 2408-09 (Burger, C.J., dissenting). Justices White, Rehnquist and O'Connor joined the Chief Justice in dissent. For a discussion of the Court's traditional analysis in equal protection cases, see notes 19-35 & 56-66 and accompanying text *supra*. Although he stated that he personally did not favor the statute, Chief Justice Burger claimed that it was not the province of the Court to invalidate laws under the equal protection clause simply "because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense'" or because another branch of government, the legislature, has acted slowly and inefficiently. 102 S. Ct. at 2408 (Burger, C.J., dissenting). Chief Justice Burger stated that "[t]he dispositive issue in these cases, simply put, is whether, for purposes of allocating its finite resources, a State has a legitimate reason to differentiate between persons who are lawfully within the State and those who are unlawfully there." *Id.* at 2409 (Burger, C.J., dissenting).

110. 102 S. Ct. at 2409 (Burger, C.J., dissenting). Chief Justice Burger called the Court's analysis, "quasi-suspect-class and quasi-fundamental-rights." *Id.* For a discussion of suspect classes, fundamental rights, and the Court's traditional standards of equal protection review, see notes 19-35 & 56-66 and accompanying text *supra*.

111. 102 S. Ct. at 2410 (Burger, C.J., dissenting). Chief Justice Burger claimed 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,'" such as "ill health, need for public assistance, or place of residence." *Id.* at 2409 (Burger, C.J., dissenting). Chief Justice Burger also distinguished this classification from illegitimacy, stating that membership in an illegal alien classification was not due to the member's "status of birth," but rather to his continuing illegal presence in this country. *Id.* at 2410 (Burger, C.J., dissenting).

112. *Id.* at 2411 (Burger, C.J., dissenting) (citing San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973)). The dissent stated that education, despite its importance, is not a "'fundamental right' for purposes of equal protection analysis." *Id.* Chief Justice Burger queried whether education is more fundamental than other governmental benefits, such as "food, shelter, or medical care," and, if so, how it is to be distinguished from those other government entitlements. *Id.*

113. *Id.* For a discussion of the majority's standard of review, see notes 72-84 and accompanying text *supra*.

114. 102 S. Ct. at 2411 (Burger, C.J., dissenting) (citations omitted). For a discussion of the traditional rational basis test applied in equal protection analysis, see notes 24-29 and accompanying text *supra*.

115. 102 S. Ct. at 2411-14 (Burger, C.J., dissenting). The dissenters claimed that conservation of state revenues was not "per se an illegitimate goal," and stated "it simply is not 'irrational' for a State to conclude that it does not have the same responsibility to provide benefits for persons whose very presence
Reviewing the Court's decision, it is submitted that although the Court's holding was, in the words of the dissent, "custom-tailored" to the facts of this case, it was nevertheless an appropriate application of heightened equal protection scrutiny. First, the Court properly construed the equal protection clause as extending to all persons, illegal aliens or otherwise. Secondly, the interest here affected—education—is so vitally important to the role of an individual in a democracy and to the success of a democratic society as a whole that it deserves the Court's utmost protection. Finally, the nature of the class involved in Plyler also warrants a heightened level of scrutiny. This classification affects children who are both involuntary and illegal residents of the United States. As such, state legislation aimed at this "underclass" should be afforded a blend of the scrutiny traditionally utilized in alienage classifications and the intermediate level of scrutiny applied to classifica-

in the State and this country is illegal as it does to provide for persons lawfully present." Id. at 2412 (Burger, C.J., dissenting). The dissent drew support from the fact that "the federal government has seen fit to exclude illegal aliens from numerous social welfare programs," such as food stamps and medicaid. Id. at 2413 (Burger, C.J., dissenting). The dissent also criticized the majority for apparently requiring the state to show that barring these children from public schools would "improve the quality of education provided in those schools," stating that a similar showing is not required in laws barring medicaid to illegal aliens. Id.

The dissent concluded by stating that the Court's decision threatened separation of powers principles. Id. at 2414 (Burger, C.J., dissenting). Chief Justice Burger concluded that "the Court seeks to do Congress' job for it, compensating for congressional inaction. It is not unreasonable to think that this encourages the political branches to pass their problems to the judiciary." Id.


117. For the standard enunciated by the Court, see notes 83-84 and accompanying text supra. Although the Court labeled its review intermediate scrutiny, it is submitted that the Court's review was very close to strict scrutiny. The unrelenting language of the Court in its evaluation of the state's interests, indicates that the State of Texas could not have made any showing which would have satisfied the Court that § 21.031 furthered a substantial state interest. For a discussion of the Court's rejection of the purposes advanced by the state, see notes 85-92 and accompanying text supra.

118. See 102 S. Ct. at 2392. In so doing, the Court has simply ruled that equal protection and due process clauses are coextensive. For a discussion of the Court's treatment of the term "person" in equal protection and due process clause cases, see notes 17 & 69-71 and accompanying text supra.

119. See 102 S. Ct. at 2397-98; id. at 2402 (Marshall, J., concurring); id. at 2404 (Blackmun, J., concurring). For a review of the treatment of education by the Supreme Court, see notes 37-39 and accompanying text supra. For a discussion of the treatment of education in the Plyler majority and concurring opinions, see notes 79-82 & 95-104 and accompanying text supra.

120. For a further discussion of the proper treatment to be afforded education in equal protection analysis, see notes 126-28 and accompanying text infra.

121. For a discussion of the Court's treatment of alienage classifications in equal protection analysis, see notes 40-54 and accompanying text supra.
tions, such as gender\textsuperscript{122} and illegitimacy,\textsuperscript{123} whose members can exercise no control over their membership in the class.\textsuperscript{124}

An examination of the Court's analysis, however, reveals that there is no clear indication as to which aspect, the interest affected or the class involved, carried the most weight with the majority.\textsuperscript{125} It is submitted that the primary reason for the Court's use of heightened intermediate scrutiny in this case was the total deprivation of education occasioned by the statute.\textsuperscript{126} The majority and the three concurring opinions all placed heavy emphasis upon the importance of education in our society.\textsuperscript{127} In fact, Justices Marshall and Blackmun, although

\begin{itemize}
  \item \textsuperscript{122} For a discussion of the Court's treatment of gender based classifications in equal protection analysis, see notes 60-62 and accompanying text supra.
  \item \textsuperscript{123} For a discussion of the Court's treatment of classifications based on illegitimacy, see notes 63-66 and accompanying text supra.
  \item \textsuperscript{124} See 102 S. Ct. at 2396-97. For a further discussion of the majority's treatment of this "underclass," see notes 77-78 and accompanying text supra. Curiously, the Court never mentions that it has ever given aliens strict scrutiny; the Court simply states that the plaintiffs' illegal status is not a "constitutional irrelevancy." 102 S. Ct. at 2396 n.19. Instead the Court refers to illegal aliens as an underclass, and these plaintiffs as "children who are special members of this underclass," who are blameless with respect to being in this country illegally. \textit{id.} at 2396. Thus, their status is similar to that of illegitimates, for which the Court has applied the intermediate standard of review. \textit{Id.} Whether or not this indicates a heightened intermediate scrutiny for all classifications which affect children, is unclear. For a further discussion of the Court's treatment of classifications based on illegitimacy, see notes 63-66 and accompanying text supra.
  \item \textsuperscript{125} It is submitted that the Court's decision leaves some important questions unanswered with regard to its choice of the level of review. Was the use of intermediate scrutiny based entirely on the interest involved? If so, what does the discussion about the class affected add? Or, does the Court's analysis turn on the class of illegal alien children who are classified on the basis of a status over which they have no control? For a discussion of these questions, see notes 126-28 and accompanying textinfra.
  \item \textsuperscript{126} For the text of the challenged statute, and a discussion of its effect, see notes 1-4 and accompanying text supra. The Court declined the opportunity to declare education a fundamental interest, a question arguably left open by the Court in Rodriguez. For a discussion of the Rodriguez decision, see notes 36-39 and accompanying text supra. For a discussion of the Plyler Court's treatment of the interest in education, see notes 79-82 and accompanying text supra. It is submitted that the Court's refusal to label education fundamental, actually reflects a desire to avoid future litigation involving what quantum, quality, or degree of education is required under the equal protection clause, rather than a belief that education is not a fundamental interest. However, now having accorded heightened scrutiny to what is labeled an "important" interest, the Court will soon face the chore of differentiating education from various other "important" interests, such as food, housing or medical care. This is due, in part, to the Court's failure to clearly indicate the degree of influence exerted by the class, or the interest, or both, on its holding. For a discussion of the Court's analysis on this aspect, see note 125 and accompanying text supra.
  \item \textsuperscript{127} For a review of the treatment of education in the majority and concurring opinions, see notes 79-82 & 95-104 and accompanying text supra.
\end{itemize}
joining in the majority opinion, both wrote separately to discuss the "special place in equal protection analysis" to be accorded education.128

It is suggested that the Court's failure to articulate a precise basis for its holding stems from the obvious difficulty that arises from attempting to force a spectrum of facts, rights, and interests into discrete and rigid standards of review.129 The language used by the Justices in their opinions reveals confusion over just what these standards entail.130 It is submitted that with at least three, and possibly more, different standards of equal protection review,131 the Court's use of Justice Marshall's "sliding scale" is now apparent, and should be formally acknowledged.132

128. 102 S. Ct. at 2403 (Blackmun, J., concurring). Justice Marshall's concurrence dealt explicitly with his belief that education is a fundamental interest. Id. at 2402 (Marshall, J., concurring). He did not discuss the status of class affected. Id. Justice Blackmun emphasized that it was the importance of education which allowed the Court to apply a heightened review, likening education to the right to vote, and finding this consistent with Rodriguez. Id. at 2402-05 (Blackmun, J., concurring). For a further discussion of these concurrences, see notes 95-104 and accompanying text supra. For a discussion of Rodriguez, see notes 36-39 and accompanying text supra.

Despite the great deal of emphasis placed on the "underclass" plaintiffs by the rest of the majority, it is submitted that the Court would be unwilling to apply a heightened level of scrutiny to legislation affecting other non-fundamental rights, since the four member dissent refused to engage in heightened scrutiny and two members of the majority wrote separately to emphasize the special nature of education. See 102 S. Ct. at 2402 (Marshall, J., concurring); id. at 2402-05 (Blackmun, J., concurring); id. at 2410-11 (Burger, C.J., dissenting). See also Dandridge v. Williams, 397 U.S. 471, 483-87 (1970).

129. See 102 S. Ct. at 2403 (Blackmun, J., concurring). Justice Blackmun stated, "I believe the Court's experience has demonstrated that the Rodriguez formulation does not settle every issue of 'fundamental rights' arising under the Equal Protection Clause." Id. For a discussion of Justice Blackmun's concurrence opinion, see notes 99-104 and accompanying text supra. See also 102 S. Ct. at 2402 (Marshall, J., concurring). For a discussion of Justice Marshall's concurrence opinion, see notes 95-98 and accompanying text supra. For a discussion of Rodriguez, see notes 36-39 and accompanying text supra.

130. For Justice Powell, the statute must bear a "substantial relation," while the majority opinion required only that the statute further a substantial state interest. 102 S. Ct. at 2398; id. at 2406 (Powell, J., concurring). While both opinions conclude that § 21.031 failed to meet their respective tests, it appears Justice Powell would have required a stronger showing of the relationship between the statute and the state interest. Justice Blackmun concludes that Texas "must offer something more than a rational basis for its classification," finding no need to be more specific since the statute failed the majority's test. Id. at 2404, & n.5 (Blackmun, J., concurring). Justice Marshall continued to adhere to his "sliding scale" approach. For a discussion of Justice Marshall's "sliding scale," see note 39 supra and note 132 infra. For a discussion of the majority and concurring opinions, see notes 67-108 and accompanying text supra.

131. For a discussion of the standards of review that have been recognized by the Court, see notes 19-35 & 56-66 and accompanying text supra.

132. Applying the "sliding scale," the "importance of the interest adversely affected, [education], and the recognized invidiousness of the basis upon which
It is additionally submitted, that the Court has now created another exception to the already varied treatment accorded to classifications of non-citizens, by labeling the children of illegal aliens special members of an underclass, and asserting that state legislation affecting them be accorded intermediate scrutiny.

As a result of the unique facts of this case, and the Court's dual reliance on both the class affected and the interest involved, it is difficult to discern how its holding will apply beyond these facts. Nevertheless, it cannot be disputed that the Court has extended the equal protection of the laws to illegal aliens and that it has elevated


For a further discussion of Justice Marshall's sliding scale analysis in equal protection analysis, see note 89 and accompanying text supra. However, since the four dissenting justices (Chief Justice Burger, Justice White, Justice Rehnquist, and Justice O'Connor) adhere to rigid two-tier scrutiny, with no possibility for variation no matter how meritorious the claim, this does not appear to be imminent. See 102 S. Ct. at 2408-14 (Burger, C.J., dissenting). Still, it is becoming increasingly difficult to place the Court's decisions into separate and neat standards of review.

133. See 102 S. Ct. at 2395-98. Previously, a statute which classified persons on the basis of legal alienage received strict scrutiny, unless the challenged law was construed as an exercise of the state's prerogative under the political function exception, or was preempted by federal law. In these latter cases, the appropriate standard of review is the rational basis test. The Court has also applied this deferential standard of review to federal legislation affecting aliens. For a discussion of the treatment of alienage classifications under equal protection analysis, see notes 40-54 and accompanying text supra. Plyler has proven to be an interesting counterpoint to the Court's decision in Ambach. In Ambach, the Court determined that a State's regulation of public school teachers on the basis of nationality came within the ambit of the political function exception first articulated in Dougall. The Plyler decision points out that, although the state has great latitude in determining who may teach, it may not exercise the same discretion in determining who may be taught. This result was presaged by the Court's decision in Nyquist, which similarly rejected an attempt by a State to regulate its students' eligibility for financial aid, based on alienage. For a discussion of Ambach, see note 58 supra. For a discussion of Dougall, see notes 47-50 and accompanying text supra. For a discussion of Nyquist, see note 50 supra.

134. 102 S. Ct. at 2396. For a discussion of this special "underclass", see notes 77-78 and accompanying text supra. For a review of the Court's treatment of these children plaintiffs, see notes 72-78 and accompanying text supra.

135. For a discussion of this aspect of the Court's analysis, see notes 72-84 and accompanying text supra.

136. For a review of the facts involved in Plyler, see notes 1-12 and accompanying text supra.

137. 102 S. Ct. at 2391-94. For a discussion of the Court's interpretation of the equal protection clause as protecting illegal aliens, see notes 67-71 and accompanying text supra.
education to a new height in equal protection scrutiny. However, so long as disagreement among the justices persists with respect to the proper level of scrutiny to be afforded, practitioners will find it difficult to frame equal protection arguments for the Court.

Michael P. Gallagher

138. For a review of the Plyler Court's treatment of education, see notes 79-82 and accompanying text supra.

This elevated treatment, however, may be limited to absolute deprivations of education, since the Court still embraces its holding in Rodriguez. See 102 S. Ct. at 2397. See also 102 S. Ct. at 2403-04 (Blackmun, J., concurring).

139. For a discussion of the various levels of scrutiny applied by the Court in equal protection analysis, see notes 19-35 & 56-66 and accompanying text supra. In addition to the uncertainty in equal protection analysis, there is still the specter of the preemption issue haunting the Court. Although the majority stated that it did not reach this issue, it did deal with it, and Justices Powell and Blackmun also treated it in their concurrences. For a discussion of preemption in the majority and concurring opinions, see notes 85-86 & 105 and accompanying text supra, and note 103 supra. For a discussion of preemption generally, see note 55 and accompanying text supra.