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The Constitutionality of California's Proposition 187: An Equal Protection Analysis

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THE CONSTITUTIONALITY OF CALIFORNIA'S PROPOSITION 187: AN EQUAL PROTECTION ANALYSIS

On November 8, 1994, California voters approved Proposition 187[1] by a margin of 59 percent to 41 percent.[2] Labelled the "Save Our State" initiative by supporters, Prop. 187 prohibits illegal aliens[3] from receiving public education, social welfare benefits and non-emergency health care services.[4] These provisions of the initiative were enjoined from taking effect

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1. Subsequently codified at CAL. PENAL CODE § 113 (Deering Supp. 1995), CAL. PENAL CODE § 114 (Deering Supp. 1995), CAL. PENAL CODE § 834(b) (Deering Supp. 1995), CAL. WELF. & INST. CODE § 10001.5 (Deering Supp. 1995), CAL. HEALTH & SAFETY CODE § 130 (Deering Supp. 1995), CAL. EDUC. CODE § 48215 (Deering Supp. 1995), CAL. EDUC. CODE § 66010.8 (Deering Supp. 1995), CAL. GOV'T CODE § 53069.65 (Deering Supp. 1995). The terms "Proposition 187" and "Prop. 187" will be retained, however, for convenience.

2. Stuart Taylor Jr., *Popular Hysteria Makes Bad Immigration Policy*, CONN. LAW TRIB., Dec. 5, 1994, at 14. As of January, 1995, fifteen other states were considering Proposition 187-style anti-immigration initiatives. Lourdes M. Leslie, *Group Seeks to Give State a Prop. 187; Wants Coast-Style Law on Illegals*, ARIZ. REP., Jan. 23, 1995, at B1. *See, e.g.*, John Kennedy, *Closing the Door; Growing Number of Floridians Want to Deny Benefits to Illegal Immigrants*, ORLANDO SENTINEL (Tallahassee), Aug. 27, 1995, at G1; *Immigration's a National Issue*, TIMES UNION (Albany, NY), Apr. 28, 1995, at A12.

3. The terms "illegal alien," "undocumented alien," "illegal immigrant," and "undocumented immigrant" will be used interchangeably throughout this Note to refer to those individuals whose presence in the United States is a federal crime under 8 U.S.C. § 1325 (1994) (criminalizing entry or attempted entry into the U.S. by any alien who (1) does so at any time or place other than as designated by immigration officers; (2) eludes examination or inspection by immigration officers; (3) conceals or renders false or misleading information; or (4) uses marriage or commercial enterprise to purposefully evade immigration laws). In 1992, there were an estimated 4.8 million illegal aliens in the U.S. Center for Immigration Studies, *Illegal Immigrants Burden the U.S. Educational System*, *in* ILLEGAL IMMIGRATION 93, 95 (Bruno Leone et al. eds., 1994). This figure varies, however, between 3.5 million and 8 million depending on the study consulted. Marc Lacey, *Immigrant Costs Defy Analysis*, L.A. TIMES, Aug. 14, 1995, at B1. Approximately 1.5 to 3 million illegal aliens reside in California. U.S. GEN. ACCOUNTING OFFICE, ILLEGAL ALIENS: ASSESSING ESTIMATES OF FINANCIAL BURDEN ON CALIFORNIA 8-10 (1994) [hereinafter ASSESSING ESTIMATES]; S.J. Res. 3, Cal. 1995-96 Reg. Sess. (Dec. 6, 1994). Roughly 250,000 to 300,000 illegal immigrants enter the U.S. each year. Daniel James, *Illegal Immigrants Drain U.S. Social Services*, *in* ILLEGAL IMMIGRATION, *supra*, at 80, 86. All of these figures are extremely speculative because, as the General Accounting Office points out, "persons residing in the country illegally have an incentive to keep their status hidden from government officials." U.S. GEN. ACCOUNTING OFFICE, ILLEGAL ALIENS: NATIONAL NET COST ESTIMATES VARY WIDELY 19-20 (1995) [hereinafter NATIONAL NET COST].

4. The mandates of Proposition 187 which will be discussed in this Note are those codified at CAL. WELF. & INST. CODE § 10001.5 (Deering Supp. 1995) and CAL. HEALTH & SAFETY CODE § 130 (Deering Supp. 1995) [hereinafter Sections 5 and 6]. Section 5 provides:

> (b) A person shall not receive any public social services to which he or she may be otherwise entitled until the legal status of that person has been verified as one of the following: (1) A citizen of the United States. (2) An alien lawfully admitted as a permanent resident. (3) An alien lawfully admitted for a temporary period of time.
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> (c) If any public entity in this state to whom a person has applied for public social services determines or reasonably suspects . . . that the person is an alien in the United States in violation of federal law . . . (1) The entity shall not provide the person with benefits or services.

by U.S. District Judge Mariana R. Pfaelzer on December 14, 1994, pending the resolution of constitutional issues at trial.[5]

The sentiment of Proposition 187's proponents can be summed up using the words of Justice Stevens in *Mathews v. Diaz*:[6] "Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests."[7] Proponents argue that these words have never been so compelling as today when economic recession has intensified California's fiscal woes. Opponents of the proposition assert that the United States is a land of immigrants, and these immigrants, both documented and undocumented, pay more in taxes than they receive in

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CAL. WELF. & INST. CODE § 10001.5 (Deering Supp. 1995). Section 6 provides:

> (b) A person shall not receive any health care services from a publicly-funded health care facility, to which he or she is otherwise entitled until the legal status of that person has been verified as one of the following: (1) A citizen of the United States. (2) An alien lawfully admitted as a permanent resident. (3) An alien lawfully admitted for a temporary period of time.
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> (c) If any publicly-funded health care facility in this state from whom a person seeks health care services, other than emergency medical care as required by federal law, determines or reasonably suspects . . . that the person is an alien in the United States in violation of federal law . . . (1) The facility shall not provide the person with services.

CAL. HEALTH & SAFETY CODE § 130 (Deering Supp. 1995).

For a concise summary of all the mandates of Proposition 187 see *Provisions of 187*, DENV. POST, Nov. 13, 1994, at A33; *187: Denies Services to Illegal Immigrants*, L.A. TIMES, Oct. 30, 1994, (Part W), at 9.

5. Sections 5 and 6 were enjoined on preemption and due process grounds. Judge Pfaelzer also justified injunctive relief as to Section 6 on the ground that "the loss of medical services for illegal aliens could result in greater health risks for the general population." Reporter's Transcript of Proceedings, League of United Latin American Citizens v. Wilson, No. CV. 94-7569 MRP, (S.D. Cal. Dec. 14, 1994), *available in* LEXIS, Immig. Library, Extra File. The exclusion of illegal aliens from public elementary and secondary schools was enjoined on equal protection grounds. *Id. See generally* Paul Feldman & Patrick J. McDonnell, *U.S. Judge Blocks Most Sections of Prop. 187; Courts: Jurist Cites Significant Constitutional Questions*, L.A. TIMES, Dec. 15, 1994, at A1. On November 20, 1995, Judge Pfaelzer ruled, pursuant to plaintiffs' summary judgment motions, that Prop. 187's education exclusion was preempted by federal immigration law. Thom Mrozek, *Judge Issues Mixed Ruling on Prop. 187*, L.A. DAILY J., Nov. 21, 1995, at 1; Reynolds Holding, *Prop. 187 Ruled Mostly Illegal*, S.F. CHRON., Nov. 21, 1995, at A1. Judge Pfaelzer also ruled that Sections 5 and 6 were preempted in regard to the targeting of welfare programs which receive any federal funding. Mrozek, *supra*, at 1. As a general critique of Proposition 187, University of Southern California Law Center Professor Erwin Chemerinsky states that Proposition 187 "is pre-empted by federal immigration laws[,] . . . violates due process by terminating benefits without notice or a hearing . . . [and] denies equal protection by discriminating against undocumented aliens in their receipt of public health benefits such as education and medical care." Erwin Chemerinsky, *Arguing Proposition 187: Will It Stand up in Court? NO: 187 Is Unconstitutional*, CAL. B.J., Jan. 1995, at 1,1 [hereinafter Chemerinsky]. *But see* Michael J. Brady, *Arguing Proposition 187: Will It Stand up in Court? YES: No Rights Are Violated*, CAL. B.J., Jan. 1995, at 1.

6. 426 U.S. 67 (1976).

7. *Id.* at 80.

government benefits.[8] Additionally, opponents state that implementation of Prop. 187 "would create irreparable harm to those denied benefits such as medical care and to the public which is [thereby] at greater risk from untreated communicable disease."[9]

This Note will address solely the Fourteenth Amendment equal protection issues[10] facing Proposition 187's denial of health care and social services benefits.[11] In Part I, this Note briefly presents the history of equal protection doctrine as applied to lawfully resident aliens. Part II chronicles the evolution of equal protection standards. In Part III, modern alienage equal protection doctrine is set forth. The importance of the Supreme Court's ruling in *Plyler v. Doe* to the equal protection analysis of Prop. 187 is discussed in Part IV. Part V analyzes the various means by which Prop. 187 could be viewed with intermediate scrutiny. Finally, Part VI applies the various constitutional tests and principles gleaned from the preceding parts to determine the validity of Sections 5 and 6 of Prop. 187. In summary, that analysis reveals that Sections 5 and 6 are clearly constitutionally infirm only as to illegal alien children.

I. HISTORICAL OVERVIEW OF THE EQUAL PROTECTION CLAUSE AS APPLIED TO LAWFULLY RESIDENT ALIENS[12]

State legislation that causes aliens to be treated differently simply because they lack United States citizenship is judicially reviewable under the Equal

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8. *Prepared Testimony of Norman Matloff University of California at Davis to the House Judiciary Committee Subcommittee on Immigration the Adverse Impacts of Immigration on Minorities*, FED. NEWS SERV., Apr. 5, 1995, at ¶ 7.2.A.4.

9. Chemerinsky, *supra* note 5, at 16.

10. The Fourteenth Amendment states: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

11. This Note will not address the possibility that the Supreme Court will reverse its decision in Plyler v. Doe, 457 U.S. 202 (1982), which is directly on point as to the constitutionality of Prop. 187's exclusion of undocumented alien children from public elementary and secondary schools. It is worth noting, however, that according to Professor Laurence H. Tribe, "a majority of the justices are likely to 'dig in their heels against what looks like a nativist, racist and hysterical action. Rather than being swept up in the tide, they would see it as theirs to stop.'" Joan Biskupic, *Courts Walk Fine Line on Immigration Issues Raised by California Law*, WASH. POST, Nov. 13, 1994, at A21. *See also* Herman Schwartz, *Entitlements for Undocumented Aliens: Is California's Proposition 187 Constitutional? No: The Law Is Clear, Only the Court Has Changed*, A.B.A. J., Feb. 1995, at 43. For an argument that the time is ripe for a reversal of *Plyler* see generally Dan Stein, *Entitlements for Undocumented Aliens: Is California's Proposition 187 Constitutional? Yes: The Supreme Court Must Re-Evaluate Existing Law*, A.B.A. J., Feb. 1995, at 42. For a Supreme Court case which to an extent undermines *Plyler*, see Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450 (1988) (holding that a school district's refusal to allow an indigent child who lives 16 miles from the nearest school to use a school bus service for free does not violate the Equal Protection Clause).

12. An "alien" is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (1994).

Protection Clause of the Fourteenth Amendment.[13] It was not until 1886, however, in the case of *Yick Wo v. Hopkins*,[14] that the U.S. Supreme Court held that aliens were "persons" eligible for the protection afforded by the Equal Protection Clause. In that case the San Francisco Board of Supervisors, pursuant to a city ordinance, withheld laundry operating permits from resident Chinese applicants.[15] The Court stated that the Equal Protection Clause was violated because no reason for the disparate treatment existed "except hostility to the race and nationality to which petitioners belong."[16] Subsequent to the *Yick Wo* decision, the Court did not continue in the development of meaningful equal protection for aliens since states were permitted to apply disparate treatment if the alienage classification related to a "special public interest."[17] In *Patsone v. Pennsylvania*[18] and *McCready v. Virginia*[19] the Supreme Court held that states had a significant public interest in reserving natural resources for their citizens and therefore could prohibit aliens from taking possession of those resources. Further, the Court in 1923 went so far as to uphold California and Washington statutes which denied to aliens the right to own land for purposes of farming, on the ground that a state's interest in regulating the use of its land was a "special interest."[20]

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13. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.12, at 741 (5th ed. 1995). Similar legislation on the federal level is judicially reviewable under the equal protection component of the Fifth Amendment's Due Process Clause. *Id.* at 741-42. *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (federal policy barring noncitizens from civil service positions invalidated under a blend of equal protection and due process theories); Alcarez v. Block, 746 F.2d 593 (9th Cir. 1984) (upholding the implementation of the Omnibus Reconciliation Act of 1981 which prevented children of families consisting of illegal aliens from participating in federally subsidized school meal programs).

14. 118 U.S. 356 (1886).

15. *Id.* at 368.

16. *Id.* at 374.

17. 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 18.12, at 221 (2d ed. 1992). The rationale behind the "special public interest" doctrine was succinctly stated by Judge Cardozo in People v. Crane, 108 N.E. 427 (N.Y. 1915):

> To disqualify aliens is discrimination indeed, but not arbitrary discrimination; for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state.
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> . . . .
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> . . . The state, in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens, rather than that of aliens. Whatever is a privilege, rather than a right, may be made dependent upon citizenship. In its war against poverty, the state is not required to dedicate its own resources to citizens and aliens alike.

Id. at 429, 430.

18. 232 U.S. 138 (1914).

19. 94 U.S. 391 (1876).

20. Porterfield v. Webb, 263 U.S. 225, 233 (1923) ("In the matter of classification, the States have wide discretion. Each has its own problems, depending on circumstances existing there."); Terrace v. Thompson, 263 U.S. 197, 221 (1923) ("The quality and allegiance of those who own, occupy and use farm lands within . . . [the State] are matters of highest importance and affect the safety and power of the State itself."). *See also* Clarke v. Deckebach, 274 U.S.

Significant change to equal protection alienage doctrine occurred in the 1948 Supreme Court decisions of *Takahashi v. Fish & Game Commission*[21] and *Oyama v. California*.[22] In *Takahashi,* the Court struck down a California statute which made aliens who were ineligible for citizenship under federal law, ineligible for state commercial fishing licenses.[23] The Court held that state laws which impose discriminatory burdens on the entrance or residence of aliens are violative of equal protection because "all persons lawfully in this country shall abide in any state on an equality of legal privileges with all citizens under non-discriminatory laws."[24] In *Oyama*, the Court invalidated a California law which prohibited aliens who were ineligible for U.S. citizenship from owning or transferring agricultural land.[25] The Court found that the State's classification was based solely on racial descent.[26] *Takahashi, Oyama* and other subsequent decisions[27] greatly reduced the scope of the "special public interest" doctrine because (1) the Court had begun to give a broader interpretation to Congress' plenary power in the realm of alienage legislation; and (2) classifications based upon alienage were increasingly being viewed as suspect.[28]

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392 (1927) (equal protection not violated by city ordinance prohibiting aliens from operating pool and billiard rooms because city's view that an alien's associations, experiences and interests render him less qualified to operate such a business was not unreasonable); Webb v. O'Brien, 263 U.S. 313 (1923) (state law upheld which prohibited the making of food crop contracts with aliens because a state's strength and safety could be jeopardized by aliens living on and cultivating its farmlands); Heim v. McCall, 239 U.S. 175 (1915) (state requirement that public contractors employ only U.S. citizens upheld because states have considerable authority to prescribe the conditions under which public works are done).

21. 334 U.S. 410 (1948).

22. 332 U.S. 633 (1948).

23. *Takahashi*, 334 U.S. at 412.

24. *Id.* at 420.

25. *Oyama*, 332 U.S. at 636.

26. *Id.* at 640.

27. *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (equal protection violated by state statutes denying welfare benefits to resident aliens).

28. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-23, at 1547 (2d ed. 1988). The term "suspect" denotes the presence of "prejudice against discrete and insular minorities." United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). A suspect class can be defined as a group which has historically been relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). *See also* JOHN H. ELY, DEMOCRACY & DISTRUST 150 (1980) ("[T]he doctrine of suspect classifications is a roundabout way of uncovering official attempts to inflict inequality for its own sake—to treat a group worse not in the service of some overriding social goal but largely for the sake of simply disadvantaging its members."). Suspect classifications (race, national origin and alienage in certain instances) require a court to strictly scrutinize such legislated classifications to ensure that they are narrowly tailored to promote a compelling interest. NOWAK & ROTUNDA, *supra* note 13, § 14.3, at 602.

II. EVOLUTION OF EQUAL PROTECTION ANALYSIS—STANDARDS OF REVIEW

Prior to the Warren era,[29] equal protection analysis supported only minimal judicial intervention.[30] Equal protection merely required that the legislative differentiation have some practical relation to the object of the legislation.[31] Occasionally, however, the Court veered to the more exacting standard enunciated in *F.S. Royster Guano Co. v. Virginia*:[32] "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a *fair and substantial* relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[33]

The arrival of the Warren era heralded a new approach to equal protection doctrine. Although the deferential style of older equal protection[34] was maintained in the context of economic and social welfare legislation,[35] equal protection issues were now being decided within a rigid, two-tiered analytic framework:[36] (1) strict scrutiny of legislative classifications which discriminated against suspect classes[37] or that encroached upon fundamental rights;[38] and (2) rational basis review of legislative classifica-

29. Chief Justice Earl Warren presided over the Court from 1953 to 1969.

30. GERALD GUNTHER, CONSTITUTIONAL LAW 602 (12th ed. 1991).

31. *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106, 110 (1949).

32. 253 U.S. 412 (1920).

33. *Id.* at 415 (emphasis added). *See also* Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U.S. 459 (1937); Colgate v. Harvey, 296 U.S. 404 (1935); Frost v. Corp. Comm'n. of Oklahoma, 278 U.S. 515 (1929); Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32 (1928). *See generally* GUNTHER, *supra* note 30, at 609.

34. "[A] distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it . . . ." Rast v. Van Deman & Lewis Co., 240 U.S. 342, 357 (1916). "A classification having some reasonable basis does not offend . . . [equal protection] merely because it is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). "[T]he rule of equality permits many practical inequalities." Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283, 296 (1898).

35. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955).

36. *See* GUNTHER, *supra* note 30, at 603.

37. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (legal alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); Hernandez v. Texas, 347 U.S. 475 (1954) (national origin).

38. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Chicago Police Dep't v. Mosley, 408 U.S. 92 (1972) (First Amendment rights); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel); Williams v. Rhodes, 393 U.S. 23 (1968) (right of political association); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote); Sherbert v. Verner, 374 U.S. 398 (1963) (right to free exercise of religion); Douglas v. California, 372 U.S. 353 (1963) (right to criminal appeals); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to purchase contraceptives–privacy); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate).

tions not involving suspect classes or fundamental rights.[39]

Under the strict scrutiny standard the Court posed the question whether the statutory scheme was necessary to promote a compelling governmental interest.[40] In reality, as Gerald Gunther remarked, strict scrutiny was "'strict' in theory and fatal in fact."[41]

Its polar opposite, rationality review, was as deferential as strict scrutiny was strict: "A statutory discrimination will not be set aside if any state of facts reasonably may be *conceived* to justify it."[42]

Discontent with this rigid review scheme surfaced in the 1970s and was evidenced by Justice Marshall's dissent in *San Antonio Indep. Sch. Dist. v. Rodriguez*:[43] "The Court apparently seeks to establish that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review . . . . But this Court's decisions defy such easy categorization."[44] Indeed, "the [two-tiered] model offered no gradations for rights of intermediate importance."[45] The *Royster Guano Co.* rationality standard thus was resurrected by the Burger Court[46] to serve as the predicate for an intermediate standard of review.[47]

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39. *See* McGinnis v. Royster, 410 U.S. 263, 276 (1973) ("When classifications do not call for strict judicial scrutiny, . . . [rationality review] is the only approach consistent with proper judicial regard for the judgments of the Legislative Branch."). *See, e.g.*, McDonald v. Bd. of Election, 394 U.S. 802 (1969) (state statute which restricted inmates' right to receive absentee ballots with which to vote judged constitutional under deferential standard because right to vote, per se, not at stake).

40. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 627 (1969).

41. Gerald Gunther, *The Supreme Court 1971 Term–Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Whether modern strict scrutiny retains this fatalistic quality is uncertain, at least in the realm of race-based classifications. *See* Adarand Constructors, Inc. v. Pena, 132 L. Ed. 2d 158, 188 (1995) (holding that federal affirmative action program entitled to strict scrutiny with the following caveat: "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring))).

42. McGowan v. Maryland, 366 U.S. 420, 426 (1961) (emphasis added). Rationality review has survived in this basic form to the present day. *See, e.g.*, Heller v. Doe, 113 S. Ct. 2637, 2643 (1993) ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."); F.C.C. v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993) ("[A]ny reasonably conceivable state of facts . . . could provide a rational basis for the classification."); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981) (stating that so long as a legislature "could rationally have decided" that a statute would fulfill its purpose, it would survive); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) ("[T]he drawing of lines that create distinctions is peculiarly a legislative task . . . . Perfection in making the necessary classifications is neither possible nor necessary.").

43. 411 U.S. 1 (1973).

44. *Id.* at 98.

45. Coburn v. Agustin, 627 F. Supp. 983, 987 (D. Kan. 1985).

46. Chief Justice Warren E. Burger presided over the Court from 1969 to 1986.

47. Note, *Refining the Methods of Middle-Tier Scrutiny: A New Proposal for Equal Protection*, 61 TEX. L. REV. 1501, 1507 (1983). When the *Royster Guano Co.* standard was resurrected in the early 1970's it masqueraded initially as rationality review, only with "bite." *See* GUNTHER, *supra* note 30, at 605 n.10, 620 n.6. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971) (Idaho intestacy statute which mandated preference of males over females as estate administrators struck down under purported rational relation standard as an "arbitrary legislative

The intermediate standard of equal protection review was first clearly established in the gender-based classifications cases.[48] Gender classifications pass constitutional muster only when the government can demonstrate that it has employed a classification which is *substantially* related to an *important* governmental objective.[49] This emerging standard was next applied in the illegitimacy classification cases.[50]

According to Professor Gunther, modern equal protection analysis is in flux: "[T]wo-tiered analysis has not been formally abandoned, but the intensity of review under the lower tier has occasionally been sharpened,[51] and varieties of intermediate levels of scrutiny[52] have surfaced."[53] Besides making for murky doctrine, legal scholars have suggested that the Supreme Court's failure to clearly define an intermediate standard of review creates the potential for indiscriminate exercise of independent judicial review of all

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choice forbidden by the Equal Protection Clause").

48. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 14.3, at 532 (3d ed. 1986). *E.g.*, Mississippi Univ. For Women v. Hogan, 458 U.S. 718 (1982) (statute excluding males from state school nursing program invalidated); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (equal protection violated by Louisiana statute which permitted only the husband to unilaterally dispose of community property); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (Missouri statute invalidated which entitled a widower to death benefits upon a showing of either incapacitation or dependency on his wife's earnings whereas widows were entitled to such benefits only upon a showing of spousal dependency); Craig v. Boren, 429 U.S. 190 (1976) (Oklahoma statute which required males to be 21, but females only 18, to purchase 3.2% beer ruled violative of equal protection).

49. *Wengler*, 446 U.S. at 150. *But see* Harris v. Forklift Systems, 114 S. Ct. 367, 373 (1993) (Ginsburg, J., concurring) (stating that whether gender classifications are inherently suspect and hence subject to strict scrutiny is an open question).

50. *E.g.*, Trimble v. Gordon, 430 U.S. 762 (1977). *Trimble* involved an Illinois intestate succession statute which provided that illegitimate children could inherit only from their mothers. *Id.* at 763. The statute was found to violate equal protection because penalizing children in an attempt to influence adult behavior was ineffectual and unjust. *Id.* at 769-70. The Court did not expressly state that it was applying intermediate scrutiny. Rather, Justice Powell referred to the applicable level of scrutiny as "not toothless" and something more than rational relationship. *Id.* at 766-67. *See also* Clark v. Jeter, 486 U.S. 456 (1988) (six year statute of limitations on paternity suit claims not substantially related to Pennsylvania's interest of preventing prosecution of fraudulent claims because under certain circumstances the state permits paternity issues to be litigated more than six years after the child's birth); Pickett v. Brown, 462 U.S. 1 (1983) (two year statute of limitations on paternity and child support claims not substantially related to Tennessee's interest in preventing stale and fraudulent claims because problems of proof were not substantial and the state tolled most other actions brought by a minor). *See generally* NOWAK & ROTUNDA, *supra* note 13, § 14.14, at 758.

51. *See, e.g.*, James v. Strange, 407 U.S. 128 (1972) (Kansas statute which provided for the recoupment of legal defense fees from indigent criminal defendants without regard to the protective exemptions available to civil judgment debtors held violative of equal protection); Stanley v. Illinois, 405 U.S. 645 (1972) (statute which made children of unwed fathers wards of the state without a hearing to establish parental fitness held violative of equal protection).

52. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (city ordinance which required special use permit for operation of group homes for the mentally retarded invalidated); USDA v. Moreno, 413 U.S. 528 (1973) (amendment to Food Stamp Act invalidated which made households containing unrelated individuals ineligible for benefits).

53. GUNTHER, *supra* note 30, at 606.

legislative classifications under the guise of a rational basis test.[54]

III. ALIENAGE AND MODERN EQUAL PROTECTION DOCTRINE

The Supreme Court has opted to analyze alienage cases under a different standard of review depending upon the interests involved and the level of invidious discrimination present.[55] Alienage cases can be divided into three categories.[56] The category deserving of strict scrutiny, state legislative decisions which classify persons on the basis of alienage in order to deny them economic benefits or limit their opportunity to engage in private sector economic activity, is based on the premise enunciated in *U.S. v. Carolene Products Co.*[57] There, the Court stated that the central judicial concern is to root out any governmental action which is tainted by a prejudice against discrete and insular minorities[58] which tends to curtail the operation of those political processes that ordinarily would be relied on to protect minorities.[59]

Alienage classifications which relate to the allocation of power or positions in a state's political process will be upheld under the traditional rational basis test.[60] In *Sugarman v. Dougall*,[61] the Court explained that state government officers "perform functions that go to the heart of representative government"[62] and since aliens are ineligible to vote and thereby participate in a state's democratic political institutions, they could be excluded from positions in that representative government.[63] Rational basis scrutiny is also appropriate in circumstances where Congress employs alienage

54. NOWAK & ROTUNDA, *supra* note 13, § 14.3, at 608; TRIBE, *supra* note 28, § 16.3, at 1445.

55. This is the so-called "sliding scale" approach to equal protection analysis endorsed by Justice Marshall in San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting). *See* NOWAK & ROTUNDA, *supra* note 13, § 14.12, at 742-44; GUNTHER, *supra* note 30, at 680. As used in this section, "alienage," unless otherwise stated, does not encompass "illegal" alienage.

56. *See generally* 3 ROTUNDA & NOWAK, *supra* note 17, § 18.12, at 218.

57. 304 U.S. 144 (1938).

58. "Discrete" and "insular minorities" have been defined as referring to groups "held at arm's length by the group or groups that possess dominant political and economic power." Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM L. REV. 1093, 1105 n.72 (1982).

59. *Carolene Products Co.*, 304 U.S. at 152-53 n.4.

60. *See* 3 ROTUNDA & NOWAK, *supra* note 17, § 18.12, at 218.

61. 413 U.S. 634 (1973).

62. *Id.* at 647 (dictum).

63. *Id.* at 647-49 (dictum). *See also* 3 ROTUNDA & NOWAK, *supra* note 17, § 18.12, at 218 ("The state clearly has a legitimate interest in reserving positions in the self-governance process for U.S. citizens."). *See, e.g.*, Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (prohibiting aliens from becoming probation officers); Ambach v. Norwick, 441 U.S. 68 (1979) (prohibiting aliens from becoming public school teachers); Foley v. Connelie, 435 U.S. 291 (1978) (prohibiting aliens from becoming state troopers). *Cf.* Bernal v. Fainter, 467 U.S. 216 (1984) (holding that aliens may hold positions as notary publics because only ministerial and clerical duties are involved).

classifications affecting the dispensation of economic benefits.[64]

Finally, the category of alienage cases which qualifies for intermediate scrutiny appears to be limited to a state's legislation which attempts to deny tuition-free public education to undocumented alien children.[65]

IV. *PLYLER V. DOE*

In *Plyler v. Doe*, after determining that illegal aliens were protected by the Equal Protection Clause,[66] the Supreme Court[67] held that a Texas statute which denied free public education to undocumented school-age children was violative of the Equal Protection Clause because such a denial did not further a substantial state interest.[68] The Court refused to subject the Texas statute to strict scrutiny because education was not a fundamental right[69] and illegal aliens were not a suspect class.[70] The Court declined to apply the rubber-stamp rational relation test and opted instead for an intermediate level of judicial scrutiny. Intermediate scrutiny was used primarily because the children against whom the statute was directed were being punished for their parents' misconduct and were powerless to change their own immigration status.[71]

Further, although the majority believed that education was not a fundamental right,[72] Justice Brennan explained that "neither . . . [is education] some governmental 'benefit' indistinguishable from other forms of

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64. NOWAK & ROTUNDA, *supra* note 13, § 14.12, at 754; *see, e.g.*, Mathews v. Diaz, 426 U.S. 67 (1976) (upholding congressional requirement that aliens live in the U.S. for five years and be admitted for permanent residence before becoming eligible for benefits provided by federal medical insurance program).

65. *See* Plyler v. Doe, 457 U.S. 202 (1982). Professors Nowak and Rotunda are of the view, however, that "*[a]ll* of the Court's [alienage] decisions since 1970 . . . would appear to be consistent if the Court were using an intermediate standard of review . . . ." (emphasis added). NOWAK & ROTUNDA, *supra* note 13, § 14.12, at 742.

66. "Use of the phrase 'within its jurisdiction' . . . confirms . . . the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who *is* subject to the laws of . . . [the] State." *Plyler*, 457 U.S. at 215.

67. Justice Brennan delivered the Court's opinion and was joined by Justices Marshall, Blackman, Powell and Stevens. Chief Justice Burger filed a dissenting opinion and was joined by Justices White, Rehnquist and O'Connor.

68. *Plyler*, 457 U.S. at 230. For an exhaustive treatment of the *Plyler* decision see Scott D. Livingston, Note, *Illegal Aliens and the Misguided Search for Equal Protection*, 11 HASTINGS CONST. L.Q. 599 (1984); John F. Casey, Note, *The Quasi Fundamental Right Emerges in Equal Protection Analysis*, 19 NEW ENG. L. REV. 151 (1983); Mary J. Moltenbrey, Note, *Alternative Models of Equal Protection Analysis*, 24 B.C. L. REV. 1363 (1983).

69. *Plyler*, 457 U.S. at 223. *See also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1972) (stating that the key to discovering whether a right is fundamental lies in assessing whether the right is explicitly or implicitly guaranteed by the Constitution).

70. *Plyler*, 457 U.S. at 219 n.19 (suspect status does not exist where entry into the class is the product of voluntary illegal action). For a complete definition of "suspect," see sources cited *supra* note 28.

71. *Plyler*, 457 U.S. at 220.

72. Justice Marshall filed a concurring opinion, however, to stress his belief that education was indeed a fundamental right. *Id.* at 230 (Marshall, J., concurring).

social welfare legislation. Both 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."[73] This emphasis on unaccountability for their undocumented status and the importance of education led the Court to conclude that Texas' desire to conserve limited state educational resources,[74] standing alone, was not a substantial state interest which would justify denial of the benefit at issue.[75]

The Court went on to list three colorable state interests (which were practically synonymous with Texas' fiscal preservation interest) that might be supported by the Texas statute: (1) "mitigating the potentially harsh economic effects of sudden shifts in population";[76] (2) "improv[][ing] the overall quality of education";[77] and (3) maintaining within the State the social and political benefits derived from education.[78] These discerned interests, however, were not substantially effectuated by the exclusion of illegal immigrant children from public education.[79]

The Court did indicate that it was not prohibiting states entirely from according preferential treatment to U.S. citizens and lawfully resident aliens in the disbursement of government benefits.[80] Indeed, Justice Brennan stated that "[p]ersuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United

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73. *Id.* at 221. In his dissent, Chief Justice Burger characterized the majority's analysis as creating a "quasi-fundamental" right. *Id.* at 244 (Burger, C.J., dissenting).

74. The proponents of Proposition 187 likewise claim a desire to stop the drain on California's treasury: "The People of California . . . have suffered and are suffering economic hardship caused by the presence of illegal aliens in this state." Proposition 187 § 1, *available in* LEXIS, Immig. Library, Extra File.

75. *Plyler*, 457 U.S. at 220-21.

76. *Id.* at 228. Justice Brennan elaborated, stating that "unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service." *Id.* at 228 n.23.

77. *Id.* at 229.

78. *Id.* at 230.

79. As to the first interest, the Court stated:

> [E]ven making the doubtful assumption that the net impact of illegal aliens on the economy of the State is negative, . . . "[charging] [sic] tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration," at least when compared with the alternative of prohibiting the employment of illegal aliens.

Id. at 228-29 (second alteration in original) (quoting Doe v. Plyler, 458 F. Supp. 569, 585 (E.D. Tex. 1978)).

As to the second interest, the Court explained that even if improvement in the quality of education were a likely result of barring undocumented children from the schools of the State, undocumented children were an inappropriate target for exclusion because they were indistinguishable from legally resident alien children in terms of educational cost and need. *Id.* at 229.

The third interest was not effectuated by the denial simply because the Court believed that undocumented children were just as likely to employ the education provided by the State within the State's borders as they were elsewhere. *Id.* at 230.

80. NOWAK & ROTUNDA, *supra* note 13, at 755.

States is the product of their *own* unlawful conduct."[81] In this regard he explained that "the States are [not] without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns."[82] Indeed, according to the Court, such state behavior would be more likely to withstand equal protection scrutiny if the state were following the lead of some federally prescribed rule.[83] Justice Brennan stated that "[f]aced with an equal protection challenge respecting the treatment of aliens, we agree that the courts must be attentive to congressional policy; the exercise of congressional power might well affect the State's prerogatives to afford differential treatment to a particular class of aliens."[84]

V. IS INTERMEDIATE REVIEW THE APPROPRIATE JUDICIAL STANDARD WITH WHICH TO SCRUTINIZE SECTIONS 5 AND 6 OF PROPOSITION 187?

Intermediate review of the pertinent sections of Proposition 187 would clearly be appropriate in either of two instances: (1) the direct involvement of a quasi-fundamental right coupled with the presence of a pseudo quasi-suspect class;[85] or (2) the presence of a quasi-suspect class.[86] Intermediate scrutiny might arguably be appropriate in a third instance: the incidental burdening of a quasi-fundamental right.[87] If none of these three instances

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81. *Plyler*, 457 U.S. at 219 (emphasis added).

82. *Id.* at 228 n.23. Traditional state concerns include education, U.S. v. Lopez, 115 S. Ct. 1624, 1640 (1995) (Kennedy, J., concurring); child welfare, Maryland v. Craig, 497 U.S. 836, 855 (1990); the terms and procedures for divorce, Att'y Gen. of New York v. Soto-Lopez, 476 U.S. 898, 906 n.5 (1986); the plight of indigents, Jefferson County Pharm. Assn. v. Abbott Labs., 460 U.S. 150, 154 n.7 (1983); family relations, Moore v. Sims, 442 U.S. 415, 435 (1979); the licensing of oil terminal facilities, Askew v. American Waterways Operators, Inc., 411 U.S. 325, 337 (1972); the maintenance of high legal standards, Mine Workers v. Illinois Bar Assn., 389 U.S. 217, 225 (1967) (Harlan, J., dissenting); and creating and defining property interests, U.S. v. First Natl. City Bank, 379 U.S. 378, 407 (1965).

83. *Plyler*, 457 U.S. at 224-25. *See also id.* at 251 (Burger, C.J., dissenting). *See* De Canas v. Bica, 424 U.S. 351 (1976) (California law prohibiting the knowing employment of illegal aliens not preempted under the Supremacy Clause). Whether California, through Prop. 187, is following the lead of a federally prescribed rule is discussed *infra* at part V.D.

84. *Plyler*, 457 U.S. at 224. As to Texas' denial of free public education, the Court explained: "[W]e are unable to find in the congressional immigration scheme any statement of policy that might weigh significantly in arriving at an equal protection balance concerning the State's authority to deprive these children of an education." *Id.* at 224-25.

85. *See* discussion *infra* part V.A. This was the situation presented in *Plyler*. I have coined the term, "pseudo quasi-suspect" to mean a class which (1) the Supreme Court has analogized to an existing quasi-suspect class; and (2) meets only a majority of the quasi-suspect criteria (*see* discussion *infra* part V.B.). Undocumented alien children most likely constitute a pseudo quasi-suspect class.

86. *See* discussion *infra* part V.B.

87. "Incidental burdening" of a quasi-fundamental right is distinguishable from "direct involvement" of a quasi-fundamental right in that the former involves a statute which targets a "right" which in turn causes the burdening of a quasi-fundamental right (*see* discussion *infra* part V.C.). "Direct involvement" of a quasi-fundamental right occurs when a statute explicitly targets a quasi-fundamental right.

are present, then some level of scrutiny below intermediate review is appropriate. Moreover, if one of these instances is present, but to an uncertain degree, the fact that the operation of Sections 5 and 6 may be consistent with a federal mandate might weigh in favor of applying some level of scrutiny below intermediate review.[88]

A. Are Quasi-Fundamental Rights Directly Involved?

As defined in *Plyler*, a quasi-fundamental right is one which is important to maintaining basic institutions and whose deprivation has a lasting impact on the life of the denied recipient.[89] The *Plyler* Court stated that the right to a free public education met the first prong of this test because education is essential to maintaining our democratic political system, productive economy and cultural heritage.[90] As to the second prong, the Court found that the deprivation of education forecloses the means by which a child can achieve self-reliance and self-sufficient participation in society.[91]

Whether any of the welfare programs targeted by Prop. 187 dispense aid that is quasi-fundamental in nature can be determined by application of the *Plyer* two-pronged test. The social welfare programs from which Proposition 187 seeks to exclude illegal aliens include[92] Aid to Families with Dependent

88. *See* discussion *infra* part V.D.

89. *Plyler*, 457 U.S. at 221. Justice Brennan may have answered this analysis as to the receipt of welfare benefits before he was even able to state the rule: "[N]either is . . . [education] *merely* some governmental 'benefit' *indistinguishable* from other forms of *social welfare* legislation." *Id.* (emphasis added). Chief Justice Burger points out this distinction in his dissent: "Is the Court suggesting that education is more 'fundamental' than food, shelter, or medical care?" *Id.* at 248 (Burger, C.J., dissenting). Plaintiffs Gregorio T., et al., in their class action suit against Proposition 187, assert that "[t]he benefits and services denied by Proposition 187 are fundamental or quasi-fundamental rights." Gregorio T. v. Wilson, No. 94-7652, ¶ 55 (C.D. Cal. Nov. 10, 1994) (complaint for declaratory and injunctive relief). Note, however, that the Supreme Court has never ruled that there is *any* right, let alone a fundamental right, to receive welfare benefits or services. NOWAK & ROTUNDA, *supra* note 13, § 14.43, at 947.

90. *Plyler*, 457 U.S. at 221.

91. *Id.* at 222.

92. Undocumented immigrants are already ineligible to participate in most federal public assistance programs: Aid to Families with Dependant Children, Supplemental Security Income, Unemployment Insurance, Refugee Assistance (unless national of Cuba or Haiti), Food Stamps, Title IV Federal Loans, and Job Training Partnership Act (JTPA). They are eligible however for Medicaid (emergency services), Special Supplemental Food Program for Women, Infants and Children (WIC), School Lunch & Breakfast Program, Headstart Education Program, and Federal Housing. INFORMATION PLUS, IMMIGRATION AND ILLEGAL ALIENS: BURDEN OR BLESSING? 107 (Alison Landes et al. eds., 1993); NATIONAL NET COSTS, *supra* note 3, at 4-5. Data collected by David S. North and Marian F. Houstoun indicate that illegal immigrants do receive some forms of welfare to which they are not entitled (food stamps, unemployment insurance, job training). Julian L. Simon, *Illegal Immigrants Do Not Drain U.S. Social Services, in* ILLEGAL IMMIGRATION, *supra* note 3, at 113, 114. Further, because "illegal aliens may apply for AFDC and food stamps on behalf of their U.S. citizen children . . . [these] benefits help support [undocumented members of] the child's family." ASSESSING ESTIMATES, *supra* note 3, at 3-4. *See, e.g.*, Darces v. Woods, 679 P.2d 458 (Cal. 1984).

Children (AFDC),[93] food stamps,[94] general relief,[95] Supplemental Security Income/State Supplementary Program (SSI/SSP),[96] Child Welfare Services (CWS) and Adult Protective Services (APS).[97] The primary publicly funded health care service which is targeted is the Medi-Cal/Medicaid program.[98]

1. Is the Right to Receive Subsistence Welfare Benefits[99] Quasi-Fundamental?

As to the "maintenance of basic institutions" prong of the *Plyler* quasi-fundamental rights test, there seemingly is no clear causal connection between the receipt of subsistence welfare benefits and the maintenance of this country's political, economic and cultural heritage. Unlike education,

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93. AFDC is a joint federal and state assistance program codified at 42 U.S.C.S §§ 601-617 (Law. Co-op. 1985 & Supp. 1995) and CAL. WELF. & INST. CODE §§ 11200-11523 (Deering 1994 & Supp. 1995), respectively. The program "provides cash grants to children and their parents or guardians if a family's income is insufficient to meet their basic needs." CAL. DEP'T OF ECONOMIC OPPORTUNITY, FACING THE CHALLENGE: A PROFILE OF POVERTY IN CALIFORNIA 18 (1988) [hereinafter FACING THE CHALLENGE]. The State and its counties share the program's financing and administration costs with the federal government. ASSEMBLY OFFICE OF RESEARCH, REALIGNING STATE & COUNTY RESPONSIBILITIES 29 (1983) [hereinafter REALIGNING RESPONSIBILITIES].

94. California's participation in the federal food stamp program (7 U.S.C. §§ 2011-2032 (1994)) is governed by CAL. WELF. & INST. CODE §§ 18900-18923 (Deering 1994 & Supp. 1995). The federal government funds and controls the program. REALIGNING RESPONSIBILITIES, *supra* note 93, at 29. Like AFDC, California counties pay a portion of the program's administration costs. *Id.* Instead of cash assistance, qualified individuals receive coupons which may be redeemed for food. ASSEMBLY OFFICE OF RESEARCH, LOW-INCOME SINGLE MOTHERS AND PUBLIC ASSISTANCE PROGRAMS 27 (1980) [hereinafter LOW-INCOME].

95. Codified at CAL. WELF. & INST. CODE §§ 17000-17608 (Deering 1994 & Supp. 1995), the general relief program provides support to indigent individuals who do not otherwise qualify for cash assistance programs. LOW-INCOME, *supra* note 94, at 31. The program is funded entirely by California counties. *Id.* at 32.

96. SSI/SSP is a joint federal and state assistance program codified at 42 U.S.C.S. §§ 1381-1383d (Law. Co-op. 1993 & Supp. 1995) and CAL. WELF. & INST. CODE §§ 12000-12700 (Deering 1994 & 1995 Supp.), respectively. The program "provides cash grant assistance to aged, blind or disabled persons who meet . . . income and resource requirements." FACING THE CHALLENGE, *supra* note 93, at 18. California's SSP augments the federal SSI in amounts set forth at CAL. WELF. & INST. CODE § 12200 (Deering 1995).

97. These two programs are jointly funded by the State and federal government and are administered by county welfare departments. LOW-INCOME, *supra* note 94, at 34. CWS (CAL. WELF. & INST. CODE §§ 16500-16521 (Deering 1994 & Supp. 1995)) encompasses a variety of programs intended to prevent or remedy the neglect, abuse, exploitation and delinquency of children. CAL. WELF. & INST. CODE § 16501 (Deering Supp. 1995). APS (CAL. WELF. & INST. CODE §§ 15600-15755 (Deering 1994 & Supp. 1995)) comprises preventive and remedial activities designed to protect adults incapable of protecting themselves. CAL. WELF. & INST. CODE § 15610.10 (Deering Supp. 1995).

98. Medi-Cal is the State counterpart to the federal Medicaid program (42 U.S.C.S. §§ 1396-1396u (Law. Co-op. 1993 & Supp 1995)) and is codified at CAL. WELF. & INST. CODE §§ 14000-14685 (Deering 1994 & Supp. 1995). The State/federal program offers services such as physician office visits, prescriptions, dental services, hospitalization, laboratory services and nursing home care. LOW-INCOME, *supra* note 94, at 33. The program is jointly financed by the State and federal government and is administered by the State under broad federal guidelines. 42 C.F.R. § 430.0 (1994).

99. *E.g.*, AFDC, the food stamp and general relief programs and SSI/SSP.

subsistence welfare is neither a "'vital civic institution'"[100] responsible for the preservation of our democratic form of government, nor is it a "'primary vehicle'"[101] for the transmittal of important societal values. Indeed, this country's democratic form of government has endured unfettered for nearly 150 years without any significant federal welfare legislation in place.[102] Further, to say that subsistence welfare is not a primary vehicle for the transmittal of important societal values merely states the obvious: welfare was never designed to transmit anything other than the means with which to attain "the enjoyment of health and common blessings of life."[103] Nevertheless, while subsistence welfare may not maintain this country's basic institutions in the same sense as education, the Supreme Court has stated that "welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity."[104] Such a "malaise" could theoretically undermine this country's political, economic and social institutions.[105] However, the mechanism of operation is simply too indirect and the extent of any "undermining" too uncertain to satisfy the *Plyler* test.[106] Clearly, the receipt of subsistence welfare benefits does not rise to the same level as the receipt of education, as the latter relates to the direct and certain maintenance of this country's political, economic and cultural heritage.

In the event that the *Plyler* quasi-fundamental rights test may be deemed applicable in the disjunctive sense, the second prong of the test will also be applied. The importance to the recipient of certain types of welfare was thoroughly discussed in *Goldberg v. Kelly.* The issue before the Supreme

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100. Plyler v. Doe, 457 U.S. 202, 221 (1982) (quoting Abington School District v. Schempp, 374 U.S. 203, 230 (1963)).

101. *Id.* (quoting Ambach v. Norwick, 441 U.S. 68, 76 (1979)).

102. "For much of America's history, social welfare needs were addressed exclusively through the family, voluntary organizations, and local governments." FORD FOUNDATION, THE COMMON GOOD 2 (1989). "[T]he New Deal was the great transformation. It brought the nation into the mainstream of welfare state developments from which it had consciously been standing aside up to then." DANIEL LEVINE, POVERTY AND SOCIETY 241 (1988).

103. BLACK'S LAW DICTIONARY 1594 (6th ed. 1990). *See* SCOTT D. GERBER, TO SECURE THESE RIGHTS 194 (1995) (stating that the concepts of liberty and equality underlying the Declaration of Independence and the political philosophy present at the country's founding prohibited an expansive role of welfare beyond preserving opportunities for the pursuit of happiness); MORTIMER J. ADLER & WILLIAM GORMAN, THE AMERICAN TESTAMENT 39-40 (1975) (explaining that the right to the possession of property or its economic equivalents was deliberately omitted from the Declaration of Independence and thereby relegated to the role of facilitating the pursuit of happiness).

104. Goldberg v. Kelly, 397 U.S. 254, 265 (1970).

105. JOEL F. HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY 27-28 (1991) (identifying as a driving force behind welfare policy "the belief that the poor pose silent, insidious threats to dominant ideologies" and the economic and social order). *But cf.* LEVINE, *supra* note 102, at 270-71 (stating that prior to the Great Depression, social welfare legislation "was not [considered] a legitimate tool at all" for ameliorating class conflict in order to avoid national disunity).

106. *See* RICHARD A. EPSTEIN, TAKINGS 316 (1985) (contrasting the causal connections between providing public assistance to a town ravaged by natural disaster to prevent looting and providing food stamps to the nation to prevent revolution).

Court was whether the Due Process Clause of the Fourteenth Amendment required the recipient of AFDC or Home Relief aid[107] to be afforded an evidentiary hearing before the termination of such aid.[108] In holding that due process requires an adequate hearing before termination of welfare benefits, the Court declared that the justified desire to protect public funds did not outweigh "'the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance.'"[109] The Court reasoned that "[w]elfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to *participate* meaningfully in the life of the community."[110]

The *Goldberg* Court's enunciation of the critical importance of subsistence welfare to the needy recipient[111] would seem to satisfy the "lasting impact" prong of the *Plyler* quasi-fundamental rights test. This is especially apparent when the denial of subsistence welfare affects indigent children given the distinct economic and social disadvantages they face as a consequence of poverty.[112] As to indigent adults, they too require a minimum amount of life's basic necessities in order to be productive members of society.[113] Both subsistence welfare and free public education can thus be seen as prerequisites to self-reliance and meaningful participation within the community.[114]

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107. Home Relief aid is financed entirely by New York state and local governments and assists any person unable to secure support from other sources. *Goldberg*, 397 U.S. at 256 n.1. In this regard, New York's Home Relief assistance program is similar to California's general relief program. *See supra* note 95.

108. *Goldberg*, 397 U.S. at 260.

109. *Id.* at 261 (quoting Kelly v. Wyman, 294 F. Supp. 893, 901 (1968)).

110. *Id.* at 265 (emphasis added).

111. *See also* Lyng v. Castillo, 477 U.S. 635, 644 (1986) (Marshall, J., dissenting) (stating that food stamp benefits are necessary to an indigent family's very survival); Shapiro v. Thompson, 394 U.S. 618, 627 (1969) (stating that a family's ability to subsist may depend upon their receipt of welfare).

112. SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS 212 (1984). Poverty places children "at greater risk of hunger, homelessness, sickness, physical or mental disability, violence, educational failure, teen parenthood, and family stress" which in turn effects their long-term prospects for achievement. ARLOC SHERMAN, CHILDREN'S DEFENSE FUND, WASTING AMERICA'S FUTURE xvii (1994). *See also* Norman Garmezy, *Resiliency and Vulnerability to Adverse Developmental Outcomes Associated with Poverty, in* SAVING CHILDREN AT RISK 45, 48 (Travis Thompson & Susan C. Hupp eds., 1992).

113. NOWAK & ROTUNDA, *supra* note 13, § 14.42, at 946.

114. Although it may be asserted that paltry sums of public assistance disbursed to the poor hardly provide a means with which to meaningfully participate in society, the fact remains that "'those who receive public aid, including financial assistance and social services, are more fortunate than some others in similar economic circumstances who receive no financial aid or other services.'" U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, GROWING UP POOR 19 (1966) (citation omitted).

2. Is the Receipt of Medical Welfare Services[115] a Quasi-Fundamental Right?

Under the first prong of the *Plyler* quasi-fundamental rights test, the right to receive medical welfare services suffers from the same infirmities as does the right to receive subsistence welfare benefits. The receipt of both of these two forms of public assistance is neither directly nor certainly related to the maintenance of this country's basic institutions.[116]

However, like the deprivation of subsistence welfare benefits, the deprivation of medical welfare services has been determined by the Supreme Court to result in a lasting impact on the life of the denied recipient. In *Memorial Hosp. v. Maricopa Cty.*,[117] the Court determined that an Arizona statute which conditioned the receipt of free non-emergency medical care on the applicant's residency within a county for one year was repugnant to equal protection.[118] The case was decided using strict scrutiny analysis because the denial of the welfare service at issue impinged upon the fundamental right of interstate travel.[119] The Court reasoned that a seriously ill indigent would be inhibited from migrating to a state which denied him or her access to medical care for a full year.[120] In that regard, the Court stated that "medical care is as much a 'basic necessity of life' to an indigent as welfare assistance."[121]

Like the receipt of public education, the receipt of non-emergency medical care can be seen as a necessary condition to the attainment of self-reliance and self-sufficient participation within the community. The deprivation of non-emergency medical care clearly has a profound inhibitory effect upon the ability of an indigent adult to seek and retain gainful employment.[122] The deprivation of non-emergency medical care likewise

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115. *E.g.*, Medi-Cal/Medicaid.

116. *See* discussion *supra* part V.A.1.

117. 415 U.S. 250 (1974).

118. *Id.* at 269.

119. *Id.* at 261-62. *See generally* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) ("[I]n moving from State to State . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.").

120. *Memorial Hosp.*, 415 U.S. at 257.

121. *Id.* at 259 (citation omitted). The Court further stated that "governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements." *Id. See also In re* Marriage of Benjamins, 31 Cal. Rptr. 2d 313, 316 (Cal. Ct. App. 1994) ("Next to food, clothing and shelter, the necessity for proper medical care is at least as much a fundamental requisite of everyday living as is transportation or education.").

122. CAL. DEP'T OF ECONOMIC OPPORTUNITY ADVISORY COMM'N, CALIFORNIA'S UNFINISHED BATTLE: THE WAR ON POVERTY 48 (1989) [hereinafter CALIFORNIA'S UNFINISHED BATTLE]. It may seem incongruous to assert that the denial of medical welfare services to illegal alien adults restricts their ability to achieve and sustain employment when federal law already prohibits such employment (*see infra* note 193). Nonetheless, the fact remains that California relies to a great extent on undocumented workers as a source of cheap labor. Phil Reeves,

serves as an impediment to an indigent child's chances for future development and achievement.[123] The obstacles imposed by the deprivation of this "basic necessity of life" indicate that the receipt of medical welfare services satisfies the second prong of the *Plyler* quasi-fundamental rights test.

3. Is the Right to Receive Miscellaneous Welfare Services[124] Quasi-Fundamental?

Rights to miscellaneous welfare services such as CWS and APS are unlikely to be accorded quasi-fundamental status. These services probably occupy the netherland which exists for "mere[] . . . governmental 'benefit[s]' indistinguishable from other forms of social welfare legislation."[125] This can be seen by the Supreme Court's treatment of an individual's right to receive non-subsistence welfare benefits.

In *Mathews v. Eldridge*,[126] the Court held that Fifth Amendment due process did not require that an evidentiary hearing be held prior to the termination of Social Security disability benefits.[127] The Court distinguished its prior due process subsistence welfare case, *Goldberg*, by noting that the potential deprivation an individual suffers by way of termination of disability payments is less than that suffered when subsistence welfare is denied to individuals on the very margin of subsistence.[128] The Court

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California Puts Squeeze on Illegal Latin Laborers, OTTAWA CITIZEN, Oct. 5, 1994, at A6; *Testimony April 05, 1995 Donald L. Huddle Professor Emeritus of Economics*, FED. DOC. CLEARING HOUSE CONG. TESTIMONY, Apr. 5, 1995, at ¶ I.5; Ronald Brownstein & Richard Simon, *Hospitality Turns into Hostility; California Has a Long History of Welcoming Newcomers for Their Cheap Labor–until Times Turn Rough*, L.A. TIMES, Nov. 14, 1993, at A1. Thus, using the second prong of the *Plyler* quasi-fundamental rights test to deny medical care to indigent illegal aliens while the State reaps the benefits of their cheap labor may not be in accordance with notions of fairness implicit within the concept of equal protection. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("[T]he concept[] of equal protection . . . [arises] from our American ideal of fairness . . . ."); BARBER, *supra* note 112, at 212 ("The right to feasible levels of . . . [public assistance] benefits results from the nation's aspiration to a state of affairs in which all can reaffirm the Constitution as equally protective of everyone . . . .").

123. Garmezy, *supra* note 112, at 48. As noted in *supra* note 122, of equal impediment to the attainment of self-reliance and self-sufficient participation within the community is the federal government's prohibition on the employment of undocumented aliens. However, a status-based deprivation which serves as an obstacle to individual achievement is irreconcilable with the Equal Protection Clause. Plyler v. Doe, 457 U.S. 202, 222 (1982). Considering that the "'benefits of education are not reserved to those whose productive utilization of them is a certainty,'" *Id.* at 222 n.20 (citation omitted), the fact that federal law poses a barrier to an illegal alien child's realization of the benefits inhering from the receipt of public medical assistance should have no bearing on the *Plyler* quasi-fundamental rights test.

124. *E.g.*, Child Welfare Services and Adult Protective Services.

125. *Plyler*, 457 U.S. at 221. See *supra* note 89 for the potential significance of this statement as to the right to receive any governmental benefit other than free public education.

126. 424 U.S. 319 (1976).

127. *Id.* at 349.

128. *Id.* at 340-42. Professor Tribe notes that the distinction drawn by the Court is belied by its statement that "the degree of difference [between the two cases] can be overstated" and the fact that the Eldridges' home and furniture had been repossessed, forcing the family to sleep in one bed. TRIBE, *supra* note 28, § 16-56, at 1662. Professor Tribe also notes the significance

reasoned that a disabled individual's need is likely to be less than that of a subsistence welfare recipient's because (1) a disabled individual's eligibility for disability benefits is not based upon financial need; and (2) a disabled individual's access to private resources and other forms of government assistance becomes available when the termination of disability benefits places such an individual below the subsistence level.[129]

Like the eligibility requirement for receipt of the disability benefits at issue in *Mathews*, eligibility for the services provided by CWS and APS is not determined by financial need.[130] Further, an individual receiving assistance from CWS or APS is also eligible for various other public assistance programs if his or her financial circumstances so dictate.[131] Thus, given the similarities between disability benefits and CWS and APS, the Supreme Court's finding that the deprivation of non-subsistence welfare benefits does not have a significant detrimental impact on the denied recipient's life, is fatal to the "lasting impact" prong of the *Plyler* quasi-fundamental rights test. That fact, coupled with the difficulty in establishing the existence of the first prong of the test,[132] relegates the right to receive miscellaneous welfare services to non-quasi-fundamental status.

As to the appropriateness of labelling the right to receive subsistence welfare benefits and medical welfare services "quasi-fundamental," questions regarding the precise nature of the *Plyler* test need to be resolved. The primary question is whether the test is to be applied in the conjunctive or disjunctive sense? Also, how much of a direct and certain connection is required to meet the "maintaining basic institutions" prong? Are there other "basic institutions" which the Court would be willing to consider that were not listed in *Plyler*? Unfortunately, the Court has not revisited the quasi-fundamental rights analysis espoused in *Plyler*. This not only leaves these questions unanswered, but also casts doubt as to the propriety of considering rights other than free public education to be quasi-fundamental and thus deserving of intermediate scrutiny when coupled with the presence of a pseudo quasi-suspect class.

The Court's failure to expound on the *Plyler* quasi-fundamental rights

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which the *Mathews* decision may have on the Court's scrutiny of welfare legislation: "Plainly, *Mathews* signalled a retreat from the *Goldberg* approach, that both justice and self-preservation required from an affluent society exacting standards of fairness and liberality toward its economically marginal members." *Id.*

129. *Mathews*, 424 U.S. at 340-42. The Court also indicated that the public's interest in conserving scarce fiscal resources was a factor in its decision. *Id.* at 348.

130. CWS eligibility accrues upon notification to the county that a child is "endangered by abuse, neglect or exploitation." CAL. WELF. & INST. CODE § 16504 (Deering 1994). Individuals 18 years or older qualify for the services provided by APS if they are unable to protect their own interests, are threatened with harm, suffer physical or mental injury due to ignorance, illiteracy, incompetency or poor health, lack adequate food, shelter or clothing or suffer exploitation or deprivation. CAL. WELF. & INST. CODE § 15752 (Deering 1994).

131. *See generally* FACING THE CHALLENGE, *supra* note 93, at 17-19; LOW-INCOME, *supra* note 94, at 22-38.

132. *See* discussion *supra* part V.A.1.

analysis may be due to the Court's penchant for rational basis review of all economic and social welfare legislation.[133] The presumptive legitimacy for such legislation in the post-Warren era is demonstrated by a line of cases beginning with *Dandridge v. Williams*.[134]

In *Dandridge*, the Court upheld Maryland's administration of AFDC grants which placed a cap on the amount of aid available to a family regardless of the number of individuals in that family.[135] The Court stated that in the area of economics and social welfare, a state does not violate the Equal Protection Clause so long as the classification has some rational basis and is free from invidious discrimination.[136] The Court applied the deferential *McGowan v. Maryland* rationality standard[137] even while taking into account the fact that the "administration of public welfare assistance . . . involves the most basic needs of impoverished human beings."[138]

Next in line after *Dandridge* was *Jefferson v. Hackney*.[139] The issue before the Court was whether Texas' system of calculating allocatable federal funds, which applied a larger reduction factor to AFDC recipients than to recipients of aid to the aged, disabled and the blind, violated equal protection.[140] In upholding the disparate treatment, the Court stated that a "legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket."[141] Applying the deferential rational review standard employed in *Dandridge*, the Court reasoned that it was not irrational for Texas to believe that recipients of AFDC were more able to bear the hardships of indigency than were the sick and elderly.[142] The majority was not swayed to increase the scrutiny of Texas' benefit allotment scheme even though there were allegations of racism and the record before the Court contained evidence that AFDC was a politically unpopular program whose recipients bore a stigma not associated with the recipients from other programs.[143]

The final case of this deferential line is *Lyng v. Castillo*.[144] There, using Fifth Amendment due process, the Court upheld a congressional amendment to the federal food stamp program which favored individuals living together as parents-children-siblings over groups of more distant

133. *See* NOWAK & ROTUNDA, *supra* note 13, § 14.43, at 947-48; TRIBE, *supra* note 28, § 16-57, at 1663.
134. 397 U.S. 471 (1970).
135. *Id.* at 472.
136. *Id.* at 485, 487.
137. *See supra* text accompanying note 42.
138. *Dandridge*, 397 U.S. at 485.
139. 406 U.S. 535 (1972).
140. *Id.* at 545-46.
141. *Id.* at 546.
142. *Id.* at 549.
143. *Id.* at 575 (Marshall, J., dissenting). *See also* TRIBE, *supra* note 28, § 16-57, at 1664.
144. 477 U.S. 635 (1986).

relatives and unrelated persons living together.[145] The Court opted for the deferential rational relation test[146] simply because (1) the group consisting of distant relatives and unrelated persons did not have the characteristics of a suspect or quasi-suspect class; and (2) the fundamental right associated with family living arrangements was not burdened.[147] The Court reasoned that Congress had a rational basis for its differential treatment because the amendment made it more difficult to defraud the food stamp program and it minimized unnecessary governmental expenditures.[148]

The *Dandridge*, *Jefferson* and *Lyng* line of cases seems to stand for the proposition that even though welfare may be important to an indigent individual's very survival, and even though invidious discrimination may be an ingredient in the legislated denial, unless there is a "pure" quasi-suspect classification or a fundamental right involved, the Court will not afford the right to receive welfare benefits any special constitutional significance. Thus, even assuming that quasi-fundamental rights analysis is applicable beyond the right to receive free public education, one would expect that in order for the right to receive welfare to qualify as a quasi-fundamental right, *both* elements of the *Plyler* test would conclusively need to be established to rebut the presumption of permissible disparity advanced by *Dandridge*, *Jefferson* and *Lyng*. As discussed *supra*, the receipt of subsistence, medical and miscellaneous welfare benefits and services does not fully satisfy the *Plyler* two-pronged test to the same extent as education. Therefore, given the Supreme Court's bent at only minimal review of social welfare and economic legislation, it is highly improbable that the right to receive welfare benefits and services is a quasi-fundamental right. Any argument then, that sections 5 and 6 of Prop. 187 should be subjected to intermediate scrutiny because they burden a quasi-fundamental right, will likely be summarily discarded by the Court.

B. Is A Quasi-Suspect Class Involved?

State legislation, such as Prop. 187, which discriminates against illegal aliens will be viewed with intermediate scrutiny if illegal aliens are considered a quasi-suspect class.[149] The test to determine whether a group

145. *Id.* at 636-38.

146. Equal protection claims under the Fifth Amendment are treated just as they are under the Fourteenth Amendment. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

147. *Lyng*, 477 U.S. at 638. *See also* Bowen v. Gilliard, 483 U.S. 587 (1987) (rational basis review of AFDC amendment which provided less aid to families who received child support appropriate because no fundamental right impinged).

148. *Lyng*, 477 U.S. at 640.

149. Equality Found. of Greater Cincinnati v. City of Cincinnati, 54 F.3d 261, 266 (6th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3122 (U.S. Aug. 10, 1995) (No. 95-239). Thus far, the Supreme Court has only extended quasi-suspect status to gender and illegitimacy classifications. *Id. See also* Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990). Plaintiffs Gregorio T., et al., in their class action suit against

qualifies as quasi-suspect usually involves four criteria: (1) a history of invidious discrimination; (2) an immutable characteristic that is beyond the members' control and which defines them as a discrete group; (3) lack of political power; and (4) a characterization that bears no relation to the actual ability of the members to perform or contribute to society.[150]

Courts will often apply these same or similar criteria when determining whether a group is suspect.[151] The difference however lies in the intensity of the analysis of each element. Since intermediate scrutiny is not as exacting a standard as strict scrutiny, it follows that the criteria defining a quasi-suspect class are equally less demanding.[152]

1. History of Invidious Discrimination

This element is derived from the gender classification cases.[153] The appropriate inquiry is whether the class which the State seeks to legislate has been historically treated by the public with "an evil eye and an unequal hand."[154] It is indisputable that throughout U.S. history, immigrants in general[155] have been viewed with suspicion and treated with contempt. Indeed, "no less a founding father than Benjamin Franklin was demanding to know why German immigrants should 'be suffered to swarm into our Settlements, and by herding together, establish their Language and Manners, to the Exclusion of ours?'"[156]

In the 1840s, immigrants began to encounter real opposition to their arrival as "'[o]ld Americans who traced their lineage back several generations, lamented the 'dilution of the native stock.'"[157] Nativists began to organize politically and target Irish immigrants for hate campaigns "because

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Proposition 187, assert that "[t]he classification created by Proposition 187 is suspect or quasi-suspect." Gregorio T. v. Wilson, No. 94-7652, ¶ 55 (C.D. Cal. Nov. 10, 1994) (complaint for declaratory and injunctive relief). Recall, however, that the Supreme Court has ruled that illegal alienage is not a suspect classification. Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982).

150. *See Lyng*, 477 U.S. at 638; City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442-45 (1985); Frontiero v. Richardson, 411 U.S. 677, 685-87 (1973) (plurality opinion).

151. *See, e.g.*, Watkins v. United States Army, 875 F.2d 699, 724 (9th Cir. 1989) (Norris, J., concurring), *cert denied*, 498 U.S. 957 (1990).

152. Any other conclusion would render the Supreme Court's distinction between the two categories meaningless.

153. *See, e.g., Frontiero*, 411 U.S. at 685 (plurality opinion) (comparing the discrimination faced by women to that of African-Americans during slavery).

154. Yick Wo v. Hopkins, 118 U.S. 356, 373-74. *See also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (asking whether the class defined by the discrimination has been "subjected to such a history of purposeful unequal treatment . . . as to command extraordinary protection from the majoritarian political process").

155. "In the early years of the U.S., illegal aliens did not exist . . . [because there were] no restrictions whatsoever on immigration." PIERRE N. HAUSER, ILLEGAL ALIENS 21 (1990).

156. BRENT ASHABRANNER, STILL A NATION OF IMMIGRANTS 18 (1993) (citation omitted in original).

157. HAUSER, *supra* note 155, at 24 (citation omitted in original).

of their abundance, their poverty and their Catholicism."[158] Common in the Eastern U.S. were employment signs decrying, "No Irish need apply."[159]

The next immigrants to suffer hostile sentiment were Chinese Americans.[160] There was fear of a "Yellow Peril," cheap labor and strange customs and religions.[161] The California legislature prohibited Chinese Americans from enrolling their children in public schools, marrying whites or testifying against whites in courts of law.[162] Inevitably, the prejudice led to bloodshed; the worst incident occurring in 1885 when white rioters killed 28 Chinese miners in Wyoming.[163]

Southern and Eastern European immigrants were not immune to the nativists' fear and contempt.[164] There was concern that this "'darker race' would 'taint the purity of the national bloodstream.'"[165] As a result of this bigotry, new political groups evolved and lobbied Congress to exclude all immigrants who were not from Western Europe.[166] Quotas on the number of immigrants from Southern and Eastern Europe were eventually established in favor of peoples with Northern and Western European blood.[167]

In more recent years, Mexican illegal immigrants have been blamed for disease, crime and increasing welfare costs.[168] They have been characterized as "'poor, sinister . . . shadowy beings who skulked across the border in the dead of night in order to deprive [citizens] of their jobs and livelihood.'"[169] In 1990, a gang of vigilante racists routinely dressed in camouflage fatigues and shot illegal aliens with paint guns as they attempted to cross the Mexican-American border in San Diego.[170] In 1992, the White Aryan Resistance organized an anti-illegal immigration demonstration at the San Diego-Mexico border which was advertised by leaflets proclaiming that millions of pregnant illegal aliens were lining up at the border.[171]

Quite clearly, the historical record is replete with instances of racial

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158. *Id.* at 26-27.
159. *Id.* at 27.
160. *See id.*
161. ASHABRANNER, *supra* note 156, at 19.
162. HAUSER, *supra* note 155, at 30.
163. *Id.* at 31.
164. *Id.* at 39.
165. *Id.* at 40 (citation omitted in original).
166. *Id.*
167. ASHABRANNER, *supra* note 156, at 21.
168. HAUSER, *supra* note 155, at 62.
169. *Id.* at 63 (citation omitted in original).
170. John Anner, *Racism Exaggerated the Problem of Illegal Immigration, in* ILLEGAL IMMIGRATION, *supra* note 3, at 62, 63.
171. Sara Diamond, *Illegal Immigrants Are Unfairly Blamed for U.S. Problems, in* ILLEGAL IMMIGRATION, *supra* note 3, at 97, 99.

prejudice amounting to invidious discrimination against immigrants.[172] The assertion that undocumented aliens meet this element of the quasi-suspect class analysis is mandated by the Supreme Court's development of equal protection to jealously safeguard against racial discrimination.[173]

2. Immutability

As used by the Supreme Court, immutability is not an absolute term in that members of the class need not be entirely unable to change the trait defining their class.[174] All that is required is great difficulty in altering the trait, such as "requiring a major physical change or a traumatic change of identity."[175]

Immutability is the criteria primarily responsible for the consensus among the federal appellate courts that homosexuals do not constitute a quasi-suspect class.[176] The appellate courts have stated that homosexuality is not immutable because it is the product of conscious behavior, and it is on the basis of this behavior that the class is defined.[177] Gender and illegitimacy on the other hand, are not defined by their members' behavior.

Undocumented status, like homosexuality (as viewed by the judiciary), is the direct result of conscious, voluntary behavior (entering the U.S. in violation of federal law) and thus cannot be considered immutable.[178] A

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172. Whether minor immigrants have endured invidious discrimination to a different degree than their adult counterparts is really an unnecessary determination. Any such discrimination targeted against adult immigrants certainly affected their immigrant children. Thus, if not the direct targets of invidious discrimination, immigrant children were nonetheless its indirect victims. *Cf.* Hale v. Hale, 429 N.E. 2d 340, 345 n.8 (Mass. App. Ct. 1981) (observing that in the context of death or divorce, "'the well-being of the child appear[s] . . . closely related to the well-being of the . . . [remaining] parent'" (citation omitted)); Stevens v. Dillard, Nos. 262, 1993 and 276, 1993 consolidated, 1994 Del. LEXIS 329, at *19 (Del. Oct. 27, 1994) ("Our society daily witnesses children in deprived situations, attributable to the economic or cultural disadvantages of their custodial parents . . . ."), *withdrawn, In re* Stevens, 652 A.2d 18 (Del. 1995).

173. *See generally* TRIBE, *supra* note 28, § 16-23, at 1544.

174. Watkins v. United States Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring), *cert. denied*, 498 U.S. 957 (1990).

175. *Id.* (stating that strict immutability is not required for quasi-suspect status because gender can surgically be changed and illegitimate children can be legitimized by a marriage ceremony).

176. Equality Found. of Greater Cincinnati v. City of Cincinnati, 54 F.3d 261, 266 (6th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3122 (U.S. Aug. 10, 1995) (No. 95-239).

177. *See* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990). *See, e.g., Equality Found.*, 54 F.3d at 267 ("Those persons who fall within the orbit of legislation concerning sexual orientation are so affected . . . by their conduct . . . ."); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("[H]omosexuality is primarily behavioral in nature and as such is not immutable."), *cert. denied*, 494 U.S. 1003 (1990). *But see Watkins*, 875 F.2d at 726, 728 (Norris, J., concurring) (concluding that homosexuals constitute a suspect class); TRIBE, *supra* note 28, § 1633, at 1616.

178. Plyler v. Doe, 457 U.S. 202, 220 (1982). One may argue that an alien's undocumented status is immutable because such an alien is ineligible for citizenship. *See* 8 U.S.C. § 1427(a) (1994) ("No person . . . shall . . . [become a U.S. citizen by being] naturalized unless . . . [he or she has been] lawfully admitted for permanent residence . . . ."). However, this argument

distinction must be drawn however as to undocumented alien children brought into this country by their undocumented parents. Such a differentiation is supported by *Plyler v. Doe*.[179] There, the Court compared undocumented children of illegal entrants to illegitimate children stating that neither class could affect their parents' conduct nor their own status.[180] Indeed, the decision in *Plyler* can be better understood by recognizing that the Court's application of intermediate scrutiny was due in part to its implicit finding that illegal alien children constitute a class deserving of "special [judicial] solicitude."[181]

3. Lack of Political Power

To satisfy this component, the class discriminated against must be "politically powerless in the sense that [the members] have *no* ability to attract the attention of the lawmakers."[182] In finding that the mentally retarded as a class are not politically powerless, the Court, in *City of Cleburne v. Cleburne Living Ctr., Inc.*, reasoned that the legislative response to the plight of the retarded in general demonstrated their ability to attract the attention of lawmakers.[183]

"That [illegal] aliens . . . [can]not vote[184] might be seen as demonstrating their lack of political power . . . ."[185] Indeed, unlike the legislative record pertaining to homosexuals[186] and the mentally retarded, the legislative record as to illegal aliens is nearly barren of publicly supported responses to their plight. However, the immediate enjoinment of Proposition 187 belies the notion that illegal immigrants as a class are *completely* politically powerless. Groups like the Mexican-American Legal Defense and Education Fund actively seek the fair treatment of illegal aliens.[187]

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ignores the fact that ineligibility results solely from the alien's own conscious, voluntary behavior. It seems rather disingenuous then to argue that immutability is "achievable."

179. *See generally supra* part IV.

180. *Plyler*, 457 U.S. at 220.

181. *Id.* at 244 (Burger, C.J., dissenting).

182. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 445 (1985) (emphasis added).

183. *Id.* at 443-45 (listing the Disabilities Assistance and Bill of Rights Act, the Education of the Handicapped Act and the Rehabilitation Act of 1973).

184. Sugarman v. Dougall, 413 U.S. 634, 648 (1973); THOMAS A. ALEINIKOFF, IMMIGRATION: PROCESS AND POLICY 1085 (3d ed. 1995).

185. TRIBE, *supra* note 28, § 16-23, at 1545.

186. *See* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 574 (9th Cir. 1990) ("[L]egislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation."). *But see* Watkins v. United States Army, 875 F.2d 699, 727 (9th Cir. 1989) (Norris, J., concurring) ("The very fact that homosexuals have historically been underepresented in and victimized by political bodies is itself strong evidence that they lack the political power necessary to ensure fair treatment at the hands of government."), *cert. denied*, 498 U.S. 957 (1990).

187. *See* HAUSER, *supra* note 155, at 101.

A finding of political powerlessness is mandated, however, by the Court's conclusion that women as a class are considered politically powerless because of their prolonged exclusion from the franchise and their subsequent absence from decisionmaking councils.[188] Considering the fact that "women do not constitute a small and powerless minority"[189] yet still meet the political powerless element, undocumented immigrants, who do constitute a small and comparatively less powerful minority, must surely meet this element.

4. Inaccurate Stereotypical Characterizations

The proper inquiry as to this element is whether the characteristic which forms the basis of the discriminatory classification "bears no relation to the ability to perform or contribute to society."[190] The central concern is that a legislated classification may be relegating a class to inferior legal status without regard to the actual capabilities of the class members.[191] Illegitimacy, gender and sexual orientation are examples of characteristics which have no bearing on an individual's ability to perform or contribute to society.[192]

Undocumented status, however, unlike the characteristics of illegitimacy, gender and sexual orientation, directly affects an individual's ability to perform and contribute to society because that individual can neither vote nor be employed.[193] Proposition 187 thus relegates undocumented aliens to a position of inferior legal status by denying them benefits available to legal aliens and citizens, but it does so *with* regard to their limited ability to perform and contribute to society.

Tallying up the results of the quasi-suspect class analysis indicates that adult undocumented immigrants meet only two of the necessary elements: invidious discrimination and political powerlessness. Undocumented minor children seem to meet three of the four necessary elements: invidious discrimination, immutability and political powerlessness. Given these results, the *Plyler* Court's emphasis on the mode of entry into the undocumented

188. Frontiero v. Richardson, 411 U.S. 677, 685, 686 n.17 (1973) (plurality opinion).

189. *Id.* at 686 n.17 (plurality opinion).

190. *Id.* at 686 (plurality opinion).

191. *Id.* at 687 (plurality opinion).

192. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 505 (1976) ("[I]llegitimacy . . . bears no relation to the individual's ability to participate in and contribute to society."); *Frontiero*, 411 U.S. at 686-87 (plurality opinion) ("Statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."); Watkins v. United States Army, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring) ("Sexual orientation plainly has no relevance to a person's ability to perform or contribute to society."), *cert. denied* 498 U.S. 957 (1990).

193. The Immigration Reform and Control Act of 1986 prohibits the employment of illegal aliens. 8 U.S.C. § 1324a(a) (1994). This prohibition, however, has not actively been enforced. Linda Valdez, *A Long, 'Shameful' History*, ARIZ. REPUBLIC, Oct. 1, 1995, at G1; Karen Brandon, *Most Illegal Immigrants Cross into U.S. on Visas; Papers Expire, but Visitors Stay*, TIMES-PICAYUNE, Aug. 6, 1995, at A3.

class[194] and the Court's disdain for punishing children for the transgressions of the parent, it would appear appropriate to label as quasi-suspect, only undocumented alien children. Whether undocumented alien children qualify as a "pure" quasi-suspect class, however, is debatable considering (1) the *Plyler* Court's failure to explicitly recognize them as such;[195] and (2) the fact that one of the quasi-suspect criteria is unsatisfied (inaccurate stereotypical characteristic). These two considerations might compel the conclusion that undocumented alien children constitute at most a "pseudo" quasi-suspect class: i.e., a class which the Court has only analogized to an existing quasi-suspect class and which only meets a majority of the quasi-suspect criteria. Such a class would reasonably be entitled to heightened equal protection review but to some uncertain degree less than intermediate review. Conceivably, courts applying a pseudo quasi-suspect analysis could "simply" loosen the requisite causal nexus between the legislated means and ends. The appropriate inquiry for such an "inferior" intermediate scrutiny might be whether the legislated classification is *moderately* related to an important governmental objective.[196] A pseudo quasi-suspect class could qualify for "full" intermediate scrutiny, though, only in situations such as *Plyler*, where the burdening of a quasi-fundamental right is also present.

As to undocumented immigrant adults, an additional factor warrants not awarding the class quasi-suspect status: it would be inequitable to reward intermediate equal protection review to individuals who consciously and voluntarily violate the law while denying such review to groups like the mentally retarded[197] and the elderly[198] whose character is not defined by illegal conduct.[199] Further, granting the same level of equal protection review enjoyed by gender classes and illegitimate children to adult illegal aliens could not rest on any definable, justifiable principles considering the fundamental distinction between the manner of the groups' entry into their classes.

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194. Conscious, voluntary behavior on the part of undocumented adults. Plyler v. Doe, 457 U.S. 202, 219 n.19, 219-20.

195. The Court merely compared undocumented alien children to illegitimate children in the context of immutability. *Plyler*, 457 U.S. at 220. Nowhere did the majority apply any of the other quasi-suspect criteria, mention that it was pursuing a quasi-suspect analysis or conclude that a new quasi-suspect class had been discovered.

196. The tenability of such an analysis might be questionable given the already amorphous nature of equal protection review. *See supra* text accompanying notes 51-54.

197. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

198. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

199. *See* State v. Cosio, 858 P.2d 621, 627 (Alaska 1993) (holding that illegal aliens are ineligible to receive dividends from the state's natural resources fund because "'giving dividends to illegal aliens would . . . contravene public policy by rewarding individuals for illegal acts'" (citation omitted in original)).

C. *Is A Quasi-Fundamental Right Being Incidentally Burdened?*[200]

Welfare legislation which impinges upon a fundamental right is subject to strict judicial scrutiny.[201] By way of analogy then, it is possible to assert that welfare legislation which impinges upon a quasi-fundamental right should be reviewed under intermediate scrutiny.[202] Sections 5 and 6 of Prop. 187, which would have the effect of incidentally burdening a child's access to public education, should thus be subject to intermediate equal protection review.[203]

An indigent undocumented child who is denied welfare benefits and services is dramatically less capable of exploiting his or her access to public education than is an indigent child who receives such assistance.[204] Further, such a child is obviously more susceptible to illness, malnourishment, homelessness and crime.[205] Unquestionably, these deleterious conditions would interfere with a child's attempt to exercise his or her quasi-fundamental right to receive a public education.[206] In fact, to a child afflicted with any one or more of these conditions, obtaining a public education would be a lower priority than would remedying the deleterious condition(s).[207] Thus, like the indigent individuals in *Shapiro v. Thompson*[208] and *Memorial Hosp.*

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200. *See supra* note 87 for the distinction applied in this Note between the "incidental burdening" of a quasi-fundamental right and the "direct involvement" of a quasi-fundamental right.

201. NOWAK & ROTUNDA, *supra* note 13, § 14.43, at 948. *See, e.g.*, Memorial Hosp. v. Maricopa Cty., 415 U.S. 250 (1974) (one year residency requirement for non-emergency hospitalization and medical care invalidated because of interference with fundamental right of interstate travel); Shapiro v. Thompson, 394 U.S. 618 (1969) (one year residency requirement for welfare assistance impermissibly interfered with fundamental right of interstate travel).

202. "[A]lthough welfare is not a free-standing and independent claim within the U.S. constitutional framework, specific welfare provisions may enjoy a kind of derivative status as the means needed to carry into practice the rights that are guaranteed explicitly or by clear implication." WOODROW WILSON INT'L CTR. FOR SCHOLARS, A CULTURE OF RIGHTS 262 (Michael J. Lacey & Knud Haakonssen eds., 1991).

203. Note that undocumented alien adults are not included within this analysis because they are disqualified by age from receiving the quasi-fundamental right discussed.

204. *See* SHERMAN, *supra* note 112, at 26-27. Poverty inhibits the quality and quantity of education by placing necessary learning resources such as academic and supplementary texts, school supplies, eyeglasses and hearing aids out of reach. *Id.*

205. *Id.* at 12.

206. The effects of illness and disease on an indigent child decrease the frequency and quality of school attendance. *Id.* at 78. "[N]utritional problems . . . [create] future learning problems such as learning disabilities, low educational achievement, and subsequent school failure." *Id.* at 61-63. Homelessness both directly and indirectly interferes with a child's access to and exploitation of public education by creating enrollment and attendance difficulties, CALIFORNIA'S UNFINISHED BATTLE, *supra* note 122, at 40-41, and inadequate living conditions in which to learn, SHERMAN, *supra* note 112, at 11, 18. The emotional and psychological stress resulting from exposure to crime hampers a child's ability to succeed in school. *See* SHERMAN, *supra* note 112, at 38-39.

207. *See* Plyler v. Doe, 457 U.S. 202, 234 (1982) (Marshall, J., concurring) ("[T]o an individual in immediate need, . . . [public welfare benefits] may be more desirable than the right to be educated.").

208. 394 U.S. 618 (1969).

v. Maricopa Cty.[209] who were effectively precluded from exercising the fundamental right of interstate travel because of state legislation denying public assistance, the indigent undocumented child would likewise be effectively precluded from exercising the quasi-fundamental right of free public education.

Equal protection therefore requires that the right of a free public education to both the legal and illegal child alike, be viewed as insuring to indigent undocumented children the same right to vital government welfare benefits and privileges as are enjoyed by legally resident and citizen indigent children.[210] Such a requirement thereby compels the application of intermediate scrutiny to state legislation such as Sections 5 and 6 of Prop. 187 which seeks to burden an undocumented child's quasi-fundamental right of access to free public education.

D. Do Sections 5 And 6 Comport With Some Federal Mandate?

"[I]f the Federal government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction."[211] This principle was employed by the Ninth Circuit Court of Appeals in *Sudomir v. McMahon.*[212] There, the court held that California's denial of AFDC benefits to illegal aliens was subject to only rational basis review.[213] Judge Sneed, quoting the above referenced language of Justice Brennan, concluded that heightened review of the denial was inappropriate because California was following Congress' mandate set forth at 42 U.S.C. § 602(a)(33) regarding participation in the AFDC program.[214] Section 602(a)(33) requires that states condition eligibility for benefits on an individual being "either (A) a citizen, or (B) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law . . . ."[215] The court interpreted this statute to require that "states not only . . . grant benefits to eligible aliens but also . . . *deny* benefits to aliens who do not satisfy" section 602(a)(33)'s criteria.[216] As to the validity of California's action, the court stated that "[i]t would make no sense to say that Congress has plenary power in the area of immigration and naturalization and then hold that . . . [equal protection] impels the states to refrain from

209. 415 U.S. 250 (1974).

210. The same proposition is stated by Justice Marshall in *Memorial Hosp.*, 415 U.S. at 261, but in the context of interstate travel.

211. *Plyler*, 457 U.S. at 219 n.19. *See also supra* text accompanying notes 80-84.

212. 767 F.2d 1456 (1985).

213. *Id.* at 1465-66.

214. *Id.* at 1466.

215. *Id.* at 1457 (emphasis omitted).

216. *Id.* at 1466.

adhering to the federal guidelines."[217]

California's position with respect to Sections 5 and 6 of Prop. 187 (i.e., denying welfare benefits and services to illegal aliens) is analogous to its position in *Sudomir* under section 602(a)(33). The only distinction is that the denials asserted by Prop. 187 are state-based whereas the denial asserted in *Sudomir* was federal-based. The distinction hardly seems of great import though considering that the primary focus of the *Plyler-Sudomir* test is on "'follow[ing] the federal direction'"[218] and "'mirror[][ing] federal objectives.'"[219] Sections 5 and 6 of Prop. 187 seek such a parallel course with the overall federal policy of denying welfare benefits and services to illegal aliens. Not only is Prop. 187's denial of AFDC benefits in line with congressional policy, but so too its denial of food stamp assistance,[220] Medi-Cal coverage,[221] aid to the aged, blind and disabled,[222] and general relief coverage.[223] Given that Prop. 187's denial of benefits to illegal aliens so closely mirrors congressional policy, *Plyler* and *Sudomir* indicate that the appropriate standard of equal protection review for Sections 5 and 6 is something less than intermediate scrutiny. This conclusion is especially compelling in regard to adult illegal immigrants considering that other factors such as pseudo quasi-suspect status, quasi-suspect status, the direct involvement of a quasi-fundamental right or the incidental burdening of a quasi-fundamental right are absent.

VI. APPLICATION OF EQUAL PROTECTION STANDARDS

A. Intermediate Scrutiny

In reviewing the constitutionality of Sections 5 and 6 of Prop. 187 on equal protection grounds, intermediate scrutiny could be triggered by either the incidental burdening of a quasi-fundamental right (an indigent undocu-

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217. *Id.*

218. *Sudomir*, 767 F.2d at 1466 (emphasis omitted) (quoting Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982)).

219. *Id.* at 1466 n.15 (quoting *Plyler*, 457 U.S. at 225).

220. "No individual . . . shall be eligible to participate in the food stamp program . . . unless he or she is (1) a resident of the United States and (2) either (A) a citizen or (B) an alien lawfully admitted for permanent residence . . . ." 7 U.S.C. § 2015(f) (1994).

221. "[N]o payment may be made to a State . . . for medical assistance [other than emergency care] furnished to an alien who is not lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law." 42 U.S.C. § 1396b(v) (1988).

222. An "aged, blind, or disabled individual [is one] who . . . is a resident of the United States, and is either (I) a citizen or (II) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law . . . . " 42 U.S.C. § 1382c(a)(1)(B)(i) (Supp. V 1993).

223. California's general relief program has no federal counterpart but is consistent with the federal policy of denying aid to illegal aliens: "Every county and every city and county shall relieve and support all . . . indigent persons . . . lawfully resident therein . . . ." CAL. WELF. & INST. CODE § 17000 (Deering 1994).

mented child's access to public education)[224] or the presence of a quasi-suspect class (undocumented alien children.)[225] The appropriate inquiry then is whether Prop. 187's denial of subsistence, non-emergency medical and miscellaneous welfare benefits and services is *substantially* related to the achievement of an *important* governmental interest.[226]

California's interest in denying social welfare and health care benefits and services to undocumented aliens is to preserve those limited benefits and services for legally resident aliens and natural citizens.[227] The Supreme Court has indicated that "'[A] State has a valid interest in preserving the fiscal integrity of its programs.'"[228] Whether such an interest is "important" per se for purposes of intermediate scrutiny is doubtful, however, given the Court's disdain for such articulated interests in situations where invidious discrimination is present in the legislative scheme.[229] In the face of *Plyler v. Doe*, it is difficult to argue that a statute which distinguishes between classes composed of legally resident children and citizen children on the one hand and undocumented alien children on the other in the allocation of public assistance is not invidious. Neither class is responsible for the status upon which such a statute would operate, yet one is singled out for disparate treatment solely on the basis of a third party's conduct.[230] The invidious nature of such discrimination is evidenced by Justice Brennan's statement in *Plyler* that "legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[231] Thus, not even the mandate of permissible disparity advanced by the *Dandridge*, *Jefferson*, and *Lyng* line of cases could serve to validate California's interest in the discrimination created by Prop. 187.

Further, even if the State's interest in preserving its limited welfare resources is requisitely "important," denying such benefits to illegal alien children may not "substantially" effectuate the preservation of the State's

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224. *See supra* part V.C. Note that based on the analysis presented in *supra* part V.A., the right to receive subsistence, medical and miscellaneous welfare benefits and services is not quasi-fundamental.

225. *See supra* part V.B. The possibility that undocumented immigrant children constitute only a pseudo quasi-suspect class and the resulting ramifications thereby imposed on the level of scrutiny will be discussed *infra* under this heading.

226. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

227. *See supra* note 74.

228. Graham v. Richardson, 403 U.S. 365, 375 (1971) (alteration in original) (quoting Shapiro v. Thompson, 394 U.S. 618, 633 (1969)). *See also* USDA v. Moreno, 413 U.S. 528, 543 (1973).

229. *See* Plyler v. Doe, 457 U.S. 202, 227 (1982); *Moreno*, 413 U.S. at 543; *Graham*, 403 U.S. at 375; *Shapiro*, 394 U.S. at 633.

230. This argument assumes that a child becomes "undocumented" by being brought into the U.S. by his or her parents rather than by entering on his or her own. Under this assumption, the character of a child's relation to this country is determined exclusively by parental conduct. *Plyler*, 457 U.S. at 220.

231. *Id.*

limited welfare resources. *Mississippi Univ. for Women v. Hogan*[232] is instructive as to the degree of causation required. There, the Court struck down a statute which excluded males from enrolling in a state-funded nursing program.[233] The State's justification for its exclusionary policy was to compensate women for the discrimination traditionally asserted against them.[234] Men, however, whose presence supposedly adversely affected the women students, were allowed to audit the classes.[235] The Court found that the State's exclusionary policy was not substantially related to the legitimate interest of educational affirmative action because the audit program rendered the exclusionary mechanism ineffective.[236]

Such an attenuated causal connection also plagues Proposition 187. Although "the literature on the public fiscal impact of illegal aliens reflects considerable agreement among researchers that illegal aliens are a net cost,"[237] any fiscal savings obtained by denying public assistance to illegal alien children may be offset by a resulting increase in crime, disease, disability and serious illness.[238] Moreover, given the correlation between factors such as crime, disease, disability and illness and the quantity and quality of a child's education,[239] a considerable increase in education costs would likely result as well because such poverty-related factors increase the likelihood of grade level repetition and the need for special education services.[240] Also, illegal alien children may simply substitute free emergency medical care (which is not proscribed by Prop. 187) in place of any subsidized non-emergency medical care they may have previously received. Thus, Proposition 187, like Mississippi's legislation in *Hogan*, provides for an exception to the sought-after result, thereby undercutting the causal connection between the method employed to preserve state funds and the actual preservation of those funds.

The Supreme Court's decisions indicate that intermediate equal protection review requires that states present quantifiable relationships between the means of the challenged classification and the ends. Considering that (1)

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232. 458 U.S. 718 (1982).

233. *Id.* at 730.

234. *Id.* at 727.

235. *Id.* at 730.

236. *Id.* at 730-31.

237. NATIONAL NET COST, *supra* note 3, at 6 (noting that twelve of thirteen studies conducted since 1984 "concluded that illegal aliens generate more in public costs than they contribute in revenues to government"). As to the specific drain on California's economy, one study identified by the GAO put the figure at $2.7 billion dollars for the 1994-1995 fiscal year. *Id.* at 28. Of that figure, $395 million dollars was expected to be paid in the form of emergency medical welfare services. PHILIP J. ROMERO ET AL., GOVENOR'S OFFICE OF PLANNING AND RESEARCH, SHIFTING THE COSTS OF A FAILED FEDERAL POLICY 6 (1994). As to subsistence welfare benefits in the form of AFDC, approximately $260 million dollars was expected to be spent on the citizen children of illegal aliens. *Id.* at 7.

238. *See* SHERMAN, *supra* note 112, at 64-77, 87-93, 114.

239. *See supra* text accompanying notes 204-07.

240. SHERMAN, *supra* note 112, at 114.

uncertain costs will likely arise from a denial of subsistence, medical and miscellaneous welfare benefits and services to illegal alien children;[241] and (2) an alternative means of obtaining medical welfare services exists which could undermine any fiscal savings achieved, the Court is likely to find that a substantial relationship is missing between the means utilized by Prop. 187 and the ends sought. Even if the causation requirement is relaxed on the ground that undocumented immigrant children constitute a pseudo quasi-suspect class, the connection between the denial of public assistance and fiscal savings would still be too tenuous. Indeed, the causation requirement would almost have to be relaxed to the degree occupied by the rational relation test of *McGowan v. Maryland*[242] to sufficiently connect the means to the ends. Thus, regardless of whether undocumented immigrant children constitute a psuedo quasi-suspect or a quasi-suspect class, the result is the same for causation purposes.

It is doubtful that sections 5 and 6 of Prop. 187, as they apply to illegal immigrant children, can withstand any form of intermediate judicial scrutiny. Both an "important" governmental objective and the means by which to definitively achieve that objective are missing.

B. Covertly Heightened Rational Relation Review

Failure to find that undocumented alien adults constitute a pseudo quasi-suspect or quasi-suspect class, or that the right to receive subsistence, medical and miscellaneous welfare benefits and services is quasi-fundamental does not leave this class entirely defenseless if it can be established that invidious discrimination pervades Prop. 187.

In *City of Cleburne v. Cleburne Living Ctr., Inc.*,[243] the Supreme Court struck down a Texas city ordinance which required a special use permit for homes for the mentally retarded. The city's insistence on a permit rested on several factors including the negative attitude of property owners located near the intended facility and the fears of neighboring elderly residents.[244] Since the Court believed that the requirement of the city permit reflected irrational fears and prejudice against the mentally retarded, it declined to defer to the city's discretion.[245]

The Court claimed to be utilizing the mere rational relation test in which "legislation is presumed to be valid and will be sustained if the classification

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241. The costs associated with creating a subclass of poverty stricken children within California are uncertain considering: (1) poverty merely increases the likelihood that a given individual will generate costs associated with disease, illness, injury and anti-social behavior, SHERMAN, *supra* note 112, at 61; and (2) the inherent difficulties in determining the population size of undocumented immigrant children, NATIONAL NET COST, *supra* note 3, at 3.

242. 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

243. 473 U.S. 432 (1985).

244. Id. at 448.

245. *Id.* at 450.

drawn by the statute is rationally related to a legitimate state interest."[246] However, the Court was clearly applying some form of covertly heightened review.[247] Under this heightened form of rationality review "there is no place for judicial imagination or hypothesizing about possible legislative purposes."[248] If the Court believes that the legislation might be grounded in prejudice, it will adjust the traditional rational relation standard to take into account the possibility that the classification is the result of a "bare . . . desire to harm a politically unpopular group."[249] Covertly heightened scrutiny thus increases the government's task in justifying the challenged classification.[250]

To be afforded *Cleburne*-style heightened equal protection review, those challenging Sections 5 and 6 of Prop. 187 must show that the motivation behind the initiative's enactment was discriminatory in character with the sole purpose being a desire to injure undocumented immigrants.[251] The pre-enactment statement of a Prop. 187 co-founder to the effect that supporters of Prop. 187 are "the posse" and the initiative is "the rope" evinces such a malevolent motivation.[252] Under *Cleburne*, such unsubstantiated fears and irrational prejudice are simply irrational grounds on which to base California's interest in preserving its limited welfare resources. The State then, in order to avoid the heavy burden of justifying its classification,[253] must be able to *demonstrate* that its classification is based on a sincere, independent desire to preserve the financial integrity of its treasury.[254] Given the animosity which has historically plagued immigrants of color, however,[255] California faces an uphill battle.

The State might be able to avoid the result obtained in *Cleburne,* though,

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246. *Id.* at 440 (citations omitted).

247. *See id.* at 456 (Marshall, J., dissenting) ("Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation."); *See also* TRIBE, *supra* note 28, § 16-3, at 1444.

248. Coburn v. Agustin, 627 F. Supp. 983, 990 (D. Kan. 1985).

249. USDA v. Moreno, 413 U.S. 528, 534 (1973).

250. State v. Cosio, 858 P.2d 621, 626 (Alaska 1993).

251. *See* Steffan v. Perry, 41 F.3d 677, 708 (D.C. Cir. 1994) (Wald, J., dissenting) (citing *Cleburne*, 473 U.S. at 450); Griffin High School v. Ill. High School, 822 F.2d 671, 675-76 (7th Cir. 1987); Cammermeyer v. Aspin, 850 F. Supp. 910, 917 (W.D. Wash. 1994).

252. Patrick J. McDonnel, *Prop. 187 Turns Up Heat in U.S. Immigration Debate,* L.A. TIMES, Aug. 10, 1994, at A1.

253. According to the Ninth Circuit, upon a showing of discrimination, the burden shifts to the government to establish that its classification has a rational basis. Pruitt v. Cheney, 963 F.2d 1160, 1166 (9th Cir. 1992), *cert. denied,* 113 S. Ct. 655 (1992). *But cf.* Jefferson v. Hackney, 406 U.S. 535, 575 (1972) (Marshall, J., dissenting) ("I am not at all certain who should bear the burden of proof on the question of racial discrimination.").

254. *Jefferson* demonstrates the importance of this proposition. In that case, the Court accepted Texas' version of the evidence to the effect that its AFDC reduction scheme was not racially or ethnically motivated. *Id.* at 547. The Court therefore applied deferential rationality review. *Id.* at 549. Had the scheme's challengers been able to support their allegations of a racial and ethnic impetus, the Court would have deviated from rational basis review. *Id.* at 547.

255. Tyrone Beason, *Diversity Forum Takes Look at Life on Margins,* SEATTLE TIMES, Feb. 12, 1995, at B1. *See also supra* text accompanying notes 160-71.

by arguing that the Ninth Circuit Court of Appeals, when applying *Cleburne*-style heightened rationality review to cases involving the federal government's disparate treatment of homosexuals, has indicated a willingness to accept less exacting justifications for discriminatory classifications even in the presence of hostile motivations.[256] Using *Cleburne* rational basis review, the Ninth Circuit, in *High Tech Gays v. Defense Indus. Sec. Clearance Office,* upheld the Department of Defense's (DoD) policy of subjecting homosexual applicants for security clearances to expanded investigations.[257] It did so even after finding that the challenged policy may have been tinged with prejudice.[258] The court examined the government's "inexact"[259] evidence showing that homosexuals are *sometimes* targeted by foreign espionage agencies because of their susceptibility to coercion[260] and concluded that the DoD had established a rational relationship between the expanded investigations and increased security risks posed by homosexuals.[261]

Arguing that it would be inequitable to require precise justifications for legislation burdening undocumented alien adults when homosexuals, whose status appears more immutable, receive less favorable treatment, California might be able to withstand the inference that Proposition 187 was enacted on a tide of irrational fear and prejudice. If such an argument is accepted, the fiscal savings which would accrue by denying subsistence, medical and miscellaneous welfare benefits and services to undocumented immigrant adults would not need to be the most efficient and logical means of preserving limited public funds.

Opponents of Prop. 187 can distinguish cases such as *High Tech Gays* on the ground that the country's national security is a much more compelling interest than a state's preservation of limited welfare funds. Therefore, potentially invidious classifications that involve the former interest are entitled to greater judicial deference.[262] The *High Tech Gays* comparison argument is fraught with a greater infirmity, though, as it could lead California down the *USDA v. Moreno*[263] avenue of defeat. In *Moreno*, the Court was faced with the constitutionality of an amendment to the Food Stamp Act of 1964

256. *See Pruitt*; High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990).

257. *High Tech Gays*, 895 F.2d at 575. Although the *High Tech Gays* court did not expressly state that it was applying *Cleburne* rational basis review, this fact was confirmed two years later in *Pruitt*: "[I]t is clear that we applied the type of 'active' rational basis review employed by the Supreme Court in *City of Cleburne* . . . ." *Pruitt*, 963 F.2d at 1165-66.

258. *High Tech Gays*, 895 F.2d at 578 n.14.

259. *Id.* at 578 ("'[T]he attempt to define not only the individual's future actions, but those of outside and unknown influences renders the "grant or denial of security clearance . . . an inexact science at best."'" (citations omitted)).

260. *Id.* at 576-77.

261. *Id.* at 578.

262. "The special deference we owe the military's judgment necessarily affects the scope of the court's inquiry into the rationality of the military's policy." Steffan v. Perry, 41 F.3d 677, 686 (D.C. Cir. 1994).

263. 413 U.S. 528 (1973).

which "was intended to prevent so called 'hippies' and 'hippie communes' from participating in the food stamp program."[264] The Court invalidated the statute as amended, not by requiring a more precise fit between the means and ends (i.e., the *Cleburne* approach), but rather, simply by decreeing the asserted goal "illegitimate."[265] Justice Brennan, writing for the majority, explained that political unpopularity alone, without reference to independent considerations in the public interest, can not serve as a legitimate governmental interest.[266] Thus, if California attempts to invoke the protection of *High Tech Gays* by admitting that Prop. 187 may have malicious underpinnings, it automatically opens itself up to a *Moreno* attack.

C. Rational Basis Review

In the event that the State can rebut the inference that the enactment of Prop. 187 was maliciously motivated or alternatively, that the *High Tech Gays* exception applies, rational basis review of Sections 5 and 6 is appropriate. The proper inquiry then is whether the denial of welfare benefits and services to undocumented alien adults[267] is rationally related to California's interest in preserving its limited welfare resources.[268] In describing the obligatory causal nexus between means and ends, the Court has stated that it is "'constitutionally irrelevant whether [the legislature's] . . . reasoning in fact [supports] . . . the legislative decision . . .' because this Court has never insisted [in the area of social welfare legislation] that a legislative body articulate its reasons for enacting a statute."[269]

Since mathematical precision between means and ends is not required to withstand rational basis scrutiny, the denial of subsistence, medical and miscellaneous welfare benefits and services to undocumented alien adults could conceivably preserve *some* of the limited funds in the State's treasury. Under mere rationality review, California would have "no obligation to produce evidence to sustain the rationality of . . . [its] classification . . . [since] '[A] legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data.'"[270] Proposition 187's denial of public assistance to undocumented alien adults would thus be deemed rationally related to the State's interest of preserving limited public funds notwithstanding the effectiveness of such a

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264. *Id.* at 534.

265. *Id.* The Court used the formulation of the rational basis test which requires that "the challenged classification . . . rationally further some legitimate governmental interest." *Id.*

266. *Id.* at 534-35.

267. Undocumented alien children most likely qualify for some type of intermediate judicial scrutiny. *See* discussion *supra* part V.B-C.

268. *See* Heller v. Doe, 113 S. Ct. 2637, 2648 (1993).

269. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)).

270. *Heller*, 113 S. Ct. at 2643 (third alteration in original) (quoting F.C.C. Beach Communications, Inc., 113 S. Ct. 2096, 2098 (1993)).

denial. Most certainly, the *Dandridge, Jefferson* and *Lyng* line of cases mandates such an outcome.[271]

CONCLUSION

Sections 5 and 6 of Proposition 187 should be invalidated to the extent that they discriminate against the class consisting of undocumented alien children. Such a class should be deemed quasi-suspect or pseudo quasi-suspect because of the history of invidious discrimination displayed against it, its immutable character and its lack of political power. As a quasi-suspect or pseudo quasi-suspect class, undocumented alien children are entitled to intermediate scrutiny or inferior intermediate scrutiny. However, even if undocumented alien children do not constitute a quasi-suspect or pseudo quasi-suspect class, they should still be entitled to intermediate scrutiny because Sections 5 and 6 burden the class' access to, and utilization of a quasi-fundamental right: free public education.

The right to receive subsistence, medical and miscellaneous welfare benefits and services is not quasi-fundamental as that term is defined in *Plyler v. Doe*. While the denial of subsistence welfare benefits and medical welfare services has a lasting impact on an indigent's ability to participate within the community, the requisite causal connection between their receipt and the maintenance of the political, economic and social institutions of this country is absent. Miscellaneous welfare services fail to conclusively establish either such requirement.

To the extent that Sections 5 and 6 discriminate against undocumented alien adults, the means by which the State is attempting to conserve its limited welfare resources may not be sufficiently related to the actual achievement of that goal to survive the covertly heightened rational relation review espoused in *City of Cleburne v. Cleburne Living Ctr., Inc.* Such review could be triggered by the animosity historically displayed toward this class and the likelihood that the initiative was enacted on a tide of irrational fear and prejudice. Further, California's interest in preserving its limited welfare resources is probably not sufficient enough to allow it to opt out of the *Cleburne*-style heightened rationality review. Alternatively, using the same trigger mechanism necessary for heightened rationality review, the Court could invalidate Sections 5 and 6 simply based on the presence of an illegitimate goal.

Strong arguments exist however which urge the review of Sections 5 and 6 as they apply to illegal immigrant adults under the deferential rational basis test traditionally employed in the area of social welfare and economic legislation. Paramount of which is the argument that individuals should not be rewarded for conscious, voluntary illegal conduct. Additionally, the fact

271. This line of cases stands for the proposition that all social welfare and economic legislation must be given great judicial deference. *See supra* text accompanying notes 133-48.

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that the federal government has seen fit to deny welfare benefits and services to illegal aliens suggests that the states may follow suit so long as the requirements of minimal equal protection are satisfied.

The equal protection challenge to Sections 5 and 6 is of national importance as other states are considering measures to deal with the effects of large populations of illegal immigrants. The resolution of this challenge can be expected to shed light on constitutionally important related issues such as the continued propriety of the *Plyler* quasi-fundamental rights analysis and *Cleburne*-style heightened rationality review, and the determination of the proper standard of review with which to scrutinize legislation burdening homosexuals. Thus, regardless of the outcome, the constitutional determination of Sections 5 and 6 of Proposition 187 will have profound and far reaching effects.

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